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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF KLAMATH

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, A Tributary of the Pacific Ocean

In Re	Case No. WA1300001
WATERS OF THE KLAMATH RIVER BASIN.	ORDER ON MOTIONS TO RESOLVE REMAINING EXCEPTIONS TO WALTON AND KLAMATH TERMINATION ACT CLAIMS (PHASE 3, PART 3, GROUP A)
	ORS 20.140 - State fees deferred at filing

This matter came before the Court on January 29 and 31, 2025, for hearing on the parties' motions to resolve the remaining exceptions to *Walton* and Klamath Termination Act ("KTA") claims (Phase 3, Part 3, Group A).[1] *See* CMO #61 at 1-2 (describing this phase and part, and setting deadline to file motions), CMO #63 (setting deadlines to file response and reply briefs). Various parties filed motions seeking final determination of their exceptions regarding 22 claims. *See* Corrected CMO #65 at 2-3 (inventory of motions to be addressed at the January 2025 hearings). Motions regarding exceptions to nine claims (Claims 4, 11, 19, 34, 74, 95, 97, 114,

[1] The Court and the parties have, thus far, used "Phase 3, Part 3" to broadly refer to the motions to resolve the remaining exceptions to the *Walton* and KTA claims. *See e.g.*, CMO #65 titled "Setting Hearing on Motions to Resolve Remaining Exceptions to *Walton* and Klamath Termination Act Claims (Phase 3, Part 3)." However, consistent with the Court's prior practice in the Adjudication wherein related motions are categorized in "groups," this Proposed Order retroactively refers to those motions as "Phase 3, Part 3, Group A." *See e.g.*, Order on OWRD's Revised Proposed Order on Phase 3, Part 1, Group C Motions, dated Jan. 7, 2022; Order on Phase 3, Part 2, Group C Motions, dated July 6, 2023. Future motions to resolve the remaining exceptions to other claim types will be identified accordingly to continue this practice.

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and 676) and a portion of a tenth claim (Claim 124) were unopposed, joint, or joint stipulated motions. *See id.* at 4 (inventory of unopposed motions). The motions regarding exceptions to the remaining twelve claims (Claims 9, 18, 21, 105, 301-307, and 703) and a portion of Claim 124 were disputed. *See id.* at 5-7 (listing disputed claims). On January 29, 2025, the Court heard oral argument on the unopposed, joint, and joint stipulated motions, as well as motions on disputed Claims 9, 18, and 105. On January 31, 2025, the Court heard oral argument on the remaining motions on disputed Claims 301–307, 703, and the disputed portion of Claim 124.

The Court issued its original letter opinion on February 25, 2025, a copy of which is attached hereto as **Exhibit A** and incorporated herein. On April 24, 2025, the Court issued a supplement to its February 25, 2025, opinion to address the omission of Claim 304. A copy of the April 24, 2025, Supplement to the Court's February 25, 2025, Opinion is attached hereto as **Exhibit B** and incorporated herein.

The Court, having considered the briefing and heard the arguments of the parties, and being otherwise fully informed, issued its rulings in **Exhibit A and Exhibit B.** For the reasons set forth in **Exhibit A and Exhibit B,**

NOW THEREFORE, IT IS HEREBY ORDERED that

1. The Phase 3, Part 3, Group A unopposed, joint, or joint stipulated motions are granted as set forth in, and for the reasons set forth in **Exhibit A.** The chart below identifies the individual claim numbers, the corresponding attached exhibits reflecting redline modifications in accordance with the Court's opinion, and the page range of the Partial (or Corrected Partial) Orders of Determination (PFOD) wherein the modifications shall be made. Except as set forth in the chart below and in the attached exhibits, the Court's ruling on the motions does not require modification to the text of the ACFFOD.

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Unopposed, Joint, or Joint Stipulated Motions		
Claim Nos.	**Exhibit**	**ACFFOD Page Range (PFOD)**
Claim 4	**Exhibit C**	KBA_ACFFOD_00105 KBA_ACFFOD_00110
Claim 11	**Exhibit D**	KBA_ACFFOD_00230 KBA_ACFFOD_00232
Claim 19	**Exhibit E**	KBA_ACFFOD_00345 KBA_ACFFOD_00359
Claim 34	**Exhibit F**	KBA_ACFFOD_00605 KBA_ACFFOD_00659
Claim 74	**Exhibit G**	KBA_ACFFOD_01119 KBA_ACFFOD_01134
Claim 95	**Exhibit H**	KBA_ACFFOD_01364 KBA_ACFFOD_01385
Claim 97	**Exhibit I**	KBA_ACFFOD_01409 KBA_ACFFOD_01425
Claim 114	**Exhibit J**	KBA_ACFFOD_01734 KBA_ACFFOD_01761
Claim 124 (Disputed and Undisputed Portions)	**Exhibit K**	KBA_ACFFOD_01874 KBA_ACFFOD_01895
Claim 676	**Exhibit L**	KBA_ACFFOD_05493 KBA_ACFFOD_05496

2. The Phase 3, Part 3, Group A disputed motions are granted and/or denied in whole or in part as set forth in, and for the reasons set forth in **Exhibit A and Exhibit B**. The chart below identifies the individual claim numbers, the corresponding attached exhibits reflecting redline modifications in accordance with the Court's opinion, and the page range of the PFOD wherein the modifications shall be made. Except as set forth in the chart below and in the attached exhibits, the Court's ruling on the motions does not require modification to the text of the ACFFOD.

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Disputed Motions		
Claim Nos.	**Exhibit**	**ACFFOD Page Range (PFOD)**
Claim 9	**Exhibit M**	KBA_ACFFOD_00143 KBA_ACFFOD_00186
Claim 18	**Exhibit N**	KBA_ACFFOD_00283 KBA_ACFFOD_00323
Claim 21	**Exhibit O**	KBA_ACFFOD_00393 KBA_ACFFOD_00397
Claim 105	**Exhibit P**	KBA_ACFFOD_01607 KBA_ACFFOD_01609
Claim 124 (Disputed and Undisputed Portions)	**Exhibit K**	KBA_ACFFOD_01874 KBA_ACFFOD_01895
Claims 301-307	**Exhibit Q**	KBA_ACFFOD_03602 KBA_ACFFOD_03641
Claim 703	**Exhibit R**	KBA_ACFFOD_05792 KBA_ACFFOD_05800

3. The Court further ORDERS that the modifications ordered herein are subject to all necessary clerical or housekeeping changes to the PFODS, including without limitation re-numbering paragraphs, footnotes, page numbers, and cross-references; changes which shall be incorporated in the Court's final entry of judgment or decree pursuant to ORS 539.150 and ORS 539.160.

It is so ORDERED.

Dated May 12, 2026.

Stephen K. Bushong
Klamath County Circuit Court Judge *pro tem*

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF KLAMATH

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, A Tributary of the Pacific Ocean

In Re:	)	Case No. WA1300001
	)	
WATERS OF THE KLAMATH RIVER BASIN	)	OPINION RE MOTIONS TO RESOLVE REMAINING EXCEPTIONS TO *WALTON* AND KLAMATH TERMINATION ACT CLAIMS (PHASE 3, PART 3)
	)	

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INTRODUCTION

This matter came before the court on January 29 and 31, 2025, for hearing on motions to resolve the remaining exceptions to *Walton* and Klamath Termination Act (KTA) claims. *Walton* and KTA claims are water rights claims made by the owners of lands that were formerly part of the Klamath Indian Reservation. Under the General Allotment Act of 1887, 24 Stat 388, lands that had been part of that reservation could be "allotted" to individual members of the Klamath Tribe. Title to about 25% of the reservation lands passed from tribal to individual Indian ownership under the General Allotment Act. *See Baley v. United States*, 942 F3d 1312, 1322-23 (Fed Cir 2019) (summarizing history of land within Klamath Indian Reservation). The Klamath Tribes sold some of the lands that were not allotted to individual members of the Tribe -- referred to as "unallotted parcels" -- pursuant to the provisions of the KTA, which was enacted in 1954, 68 Stat 718. *See Or Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 US 753, 761-62 (1985) (describing KTA). Over time, many of the allotted and unallotted parcels have been conveyed to non-Indian owners.

Walton claims -- so named based on a series of federal court cases[1] -- are claims made by owners of previously allotted parcels. KTA claims are those made by owners of previously unallotted parcels. *Walton* and KTA water rights are especially valuable because the priority date for those rights is the date that the reservation was established -- in this case, October 14, 1864. *See Walton II*, 647 F2d at 51 (stating that the holder of such a right "has a priority as of the date the reservation was created[,] [which] is the principal aspect of the right that renders it

[1] *See Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I); Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981) (*Walton II); Colville Confederated Tribes v. Walton* 752 F2d 397 (9th Cir 1985) (*Walton III*); *Colville Confederated Tribes v. Walton*, 758 F2d 1324 (9th Cir 1985) (*Walton IV*).

more valuable than the rights of competing water users"). Because the KTA did not "abrogate any water rights of the tribe and its members," 25 USC § 564m(a), the legal standards that apply to *Walton* and KTA water rights claims are similar, and the claims have been addressed together as part of this adjudication.

BACKGROUND

I. Overview of Water Rights under Oregon Law

The determination of water rights under Oregon law has a long and complicated history. Before 1905, Oregon courts had applied the common-law doctrine of "prior appropriation" of water rights. *See Klamath Irrigation Dist v. United States*, 348 Or 15, 23-35, 227 P3d 1145 (2010) (summarizing the common-law and statutory history of water rights determinations in Oregon); *Fort Vannoy Irrigation v. Water Res Comm.*, 345 Or 56, 64-67, 188 P3d 277 (2008) (describing the history of the prior appropriation doctrine in Oregon). Under that doctrine, to encourage the beneficial use of water, Oregon courts recognized that a person who puts surface water to a beneficial use acquires a right to use that water that takes precedence over subsequent users. *Id.* The Oregon legislature "codified the doctrine of prior appropriation" when it adopted a "Water Rights Act" effective February 24, 1909. *Klamath Irrigation District*, 348 Or at 23.

Under that Act, water rights appropriated for beneficial uses *after* its effective date are generally governed by ORS chapter 537, while rights to water that had been appropriated *before* that date were not superseded but were required to be determined through the process codified in ORS chapter 539. *See Klamath Irrigation Dist. v. Or Water Res Dep't*, 321 Or App 581, 584, 518 P3d 970 (2022) (describing the effect of the Water Rights Act); *Warner Valley Stock Co. v. Lynch*, 215 Or 523, 548 (1959) (noting the division in Oregon law "between the procedure set out in [ORS] Ch 539 for the determination of water rights initiated before the adoption of the

water code on February 24, 1909, and the procedure incident to the granting, denying and cancellation of [water rights] permits after that date.").

This case involves determining claims to water rights that are governed by ORS chapter 539. Under that statute, the Director of the Oregon Water Resources Department (OWRD) is required to give the public notice that it is initiating the process for "a determination of the relative rights of the various claimants to the use of the waters" of a river and its tributaries. ORS 539.030. That notice begins the process for receiving and investigating claims to water rights and resolving any contests to those claims, culminating in "findings of fact and an order of determination determining and establishing the several rights to the waters" of the river at issue. ORS 539.130. OWRD's final determination is subject to judicial review in the circuit court pursuant to ORS 539.150.

That statute describes the process by which parties may file "exceptions" to OWRD's findings and order of determination. ORS 539.150(1). If no exceptions are filed, the court is required to "enter a judgment affirming the determination" of OWRD. ORS 539.150(3). If exceptions are filed, the court is required to set a time "when a hearing will be had upon the exceptions." *Id.* After the final hearing, the court "shall enter a judgment affirming or modifying the order of the [OWRD] director as the court considers proper[.]" ORS 539.150(4).

II. Agency Proceedings to Determine Klamath Basin Water Rights

On December 23, 1975, OWRD's Director issued a "Notice to Water Users, Klamath River and Its Tributaries" pursuant to ORS 539.020 stating that OWRD planned to begin the process for investigating the flow and uses of the waters of the Klamath River and its Tributaries. *See Klamath Irrigation Dist.*, 321 Or App at 585 (describing administrative process). After completing its preliminary investigation, in September 1990, OWRD issued a "Notice to File

Claims" of water rights in the Klamath River Basin.[2] That notice began the decades-long adjudication proceedings known as the Klamath Basin Adjudication (KBA). The process involved receiving claims for pre-1909 beneficial uses and federally reserved water rights and contests to those claims, gathering evidence, conducting hearings, and developing a record of the proceedings by which OWRD's final determination was made.[3] OWRD ultimately addressed over 730 claims and 5,600 contests as part of the KBA.[4] Pursuant to ORS chapter 539, OWRD made findings of fact and published an order of determination establishing the water rights of those competing interests. As noted above, the agency's final rulings are contained in the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD).

III. Court Proceedings

Pursuant to Oregon law, various parties filed exceptions in this court to OWRD's final order of determination. The exceptions raised a myriad of disputed legal and factual issues. The court appointed a Case Management Committee and -- based on recommendations from that committee -- established a process to resolve the disputed issues in a series of phases with briefing and court hearings at each phase. Most of the disputed legal issues have been decided at earlier phases of these proceedings, and some of the exceptions to claims have been resolved.

Two of the court's legal rulings are particularly relevant to the issues currently before the court. First, the court established the applicable standard of review in a letter opinion dated August 1, 2017, on phase 1B motions. That opinion concluded that "questions of law and findings of fact will both be reviewed *de novo*," which means that the court does not defer to

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[2] *See* Klamath Basin Adjudication, Amended and Corrected Findings of Fact and Order of Determination (KBA_ACFFOD) (Feb 28, 2014).

[3] KBA_ACFFOD_00002.

[4] KBA_ACFFOD_00007.

factual findings made during the agency proceedings. The opinion further stated that, "[a]s always, the court may give greater weight to certain evidence, but it is not required to do so." Second, many of the legal standards that apply to *Walton* and KTA claims were resolved in the court's Opinion and Conclusions of Law, Phase 3, Part 1, Group B, Motions dated February 18, 2020, as incorporated in the court's Order dated July 22, 2020 (hereafter referred to as the 2020 Legal Ruling).[5]

The 2020 Legal Ruling described the elements of a *Walton* right as follows:

"1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian Tribe;

"2. The allotted land was transferred from the original allotee, or a direct Indian successor to the original allottee, to a non-Indian successor;

"3. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of the transfer from Indian ownership; except that:

"4. The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water use was developed by the first purchaser of land from an Indian owner.

"5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors."

The 2020 Legal Ruling further provides that, if those elements are proven, the claim is assigned a priority date of October 14, 1864 -- the date that the Klamath Reservation was established -- and that the amount of water claimed for irrigation is "limited to that amount appropriated with reasonable diligence after the passage of title from the original Indian allottees (or their heirs), and maintained by continued use by each subsequent successor." *Walton III*, 752 F2d at 402 (internal citations omitted). The 2020 Legal Ruling further provides that some

[5] The February 18, 2020, Opinion and Conclusions of Law on Phase 3, Part 1, Group B Motions sets out the court's rulings on motions that had been filed by various parties. The Order signed on July 22, 2020, incorporated that Opinion in a court order and ordered specific modifications to the ACFFOD consistent with the court's rulings.

artificial diversion of the natural flow of a stream is necessary for a valid appropriation sufficient to support a *Walton* claim.

The 2020 Legal Ruling described the elements of a KTA right in similar but slightly different terms, as follows:

> "1. The claim is for water use on unallotted lands that were formerly part of the Klamath Indian Reservation.
>
> "2. The unallotted lands were transferred from the Klamath Tribes to a non-Indian purchaser pursuant to the express language of the Klamath Termination Act, and the claimant is the non-Indian purchaser or a successor in interest to the non-Indian purchaser;
>
> "3. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except that:
>
> "4. The claim may include water use based on undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first purchaser of land from an Indian owner.
>
> "5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors."

This opinion applies those rulings in deciding the remaining unresolved exceptions to *Walton* and KTA claims. Various parties have filed motions seeking final determinations of their exceptions regarding twenty-two separate claims. Motions regarding ten of those claims are stipulated, joint motions or are otherwise unopposed, as summarized in Section I below. Exceptions to the remaining twelve claims were disputed and are resolved in Section II below.

DISCUSSION

I. Unopposed, Joint, or Joint Stipulated Motions

A. Claim 4

Thomas J. Shaw (Shaw) filed Claim 4, asserting a *Walton* right to water for irrigation and watering livestock on his land. Shaw ultimately stipulated during the agency proceedings that "[t]here is no actual physical diversion of water from its natural source; rather Claim 4 relies

upon natural overflow."[6] In the ACFFOD, OWRD approved Claim 4 for the irrigation of 54.0 acres and for livestock watering of 100 head of cattle incidental to irrigation, concluding that a *Walton* right can be based on natural overflow in the absence of a diversion. The United States, the Klamath Project Water Users (KPWU),[7] and the Klamath Tribes filed exceptions to Claim 4, contending that the ACFFOD should be modified to disallow Claim 4 in its entirety because this court ruled in the 2020 Legal Ruling that "[s]ome diversion of the natural flow of a stream is necessary to effect a valid appropriation to support a *Walton* claim." The United States, KPWU, and the Klamath Tribes subsequently moved for a final determination on their exceptions to Claim 4, seeking a denial of that claim in its entirety based on the court's legal ruling and the factual stipulation that had been filed during the agency proceedings. Shaw did not file a response to those motions.

The motions filed by the United States, KPWU, and the Klamath Tribes are granted. The ACFFOD is modified as to Claim 4 consistent with this opinion.

B. Claim 11

Shaw filed Claim 11, which -- like Claim 4 -- asserted a *Walton* right to water for irrigation and watering livestock. Shaw again stipulated during the agency proceedings that "[t]here is no actual physical diversion of water from its natural source; rather Claim 11 relies

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[6] OWRD0264312-13, Stipulation at 4-5.

[7] KPWU is a group of separate water users and districts within the Klamath Basin who have filed joint contests and exceptions in the KBA proceedings. KPWU is composed of the following: Ady District Improvement Company; Collins Products LLC; Enterprise Irrigation District; Inter-County Properties Co., which acquired title as Inter-County Title Co.; Randy and Jane Walthall; Klamath Drainage District; Klamath Irrigation District; Malin Irrigation District; Midland District Improvement Company; Pioneer District Improvement Company; Plevna District Improvement Company; Shasta View Irrigation District; Klamath Basin Improvement District; Poe Valley Improvement District; Sunnyside Irrigation District; Tulelake Irrigation District; and Van Brimmer Ditch Company.

upon nature overflow and subirrigation."[8] OWRD approved Claim 11 for the irrigation of 6.7 acres and for livestock watering of 100 head of cattle, again based on its determination that natural overflow was sufficient to support a *Walton* right. As with Claim 4, the United States, KPWU, and the Klamath Tribes filed exceptions to Claim 11, and, as noted above, this court has already ruled that some diversion of the natural flow of a stream is necessary to effect a valid appropriation to support a *Walton* claim. The United States, KPWU, and the Klamath Tribes filed motions for a final determination of their exceptions, seeking to modify the ACFFOD to deny Claim 11 in its entirety. Shaw did not file a response to those motions.

The motions filed by the United States, KPWU, and the Klamath Tribes are granted. The ACFFOD is modified as to Claim 11 consistent with this opinion.

C. Claim 19

Scott and Margie Runnels (collectively, "the Runnels") filed Claim 19, asserting a *Walton* right to water for irrigation. In the ACFFOD, OWRD approved Claim 19 as a *Walton* right for the irrigation of 476.7 acres with a priority date of October 14, 1864. The United States and the Klamath Tribes filed exceptions on Claim 19 which concerned the claimed water rights of a non-tribal member who acquired land within the former Klamath Reservation that was either allotted to a tribal member or owned by the Klamath Tribes. The United States, the Klamath Tribes, and the Runnels subsequently moved for a final determination on the exceptions to Claim 19. The Runnels acknowledge that the evidentiary record most likely will not support a *Walton* claim under the standards established by the 2020 Legal Ruling for 178.7 acres awarded by OWRD. The Runnels elected to waive the opportunity to argue the evidentiary record and stipulated to a recognition of 298.0 acres for Claim 19.

[8] OWRD0270111, Stipulation at 2.

The joint motion filed by the United States, the Klamath Tribes, and the Runnels is granted. The ACFFOD is modified as to Claim 19 consistent with this opinion.

D. Claim 34

The Nature Conservatory filed Claim 34, asserting a *Walton* right to water for irrigation and incidental livestock watering. In the ACFFOD, OWRD approved Claim 24 as a *Walton* right for the irrigation of 8,985.2 acres and for livestock watering of 4,540 cow/calf pairs incidental to irrigation with a priority date of October 14, 1864, for a majority of the place of use, and a priority date of February 25, 1901, for 8.1 contiguous acres later added to Claim 34. The United States, the Klamath Tribes, and the Nature Conservatory filed one exception asserting that the ACFFOD erred in adopting and incorporating the Appendix Agreement because the document contains legal defects. The United States, the Klamath Tribes, and the Nature Conservatory subsequently moved for a final determination on their exception to Claim 34, requesting that the incorporation of the Settlement Agreement in the Partial Order of Determination (POD) be modified to exclude the Appendix Agreement.

The joint motion filed by the United States, the Klamath Tribes, and the Nature Conservatory is granted. The ACFFOD is modified as to Claim 34 consistent with this opinion.

E. Claim 74

Wayne Ranch, LLC filed Claim 74, asserting a *Walton* right to water for irrigation and incidental livestock watering. In the ACFFOD, OWRD approved Claim 74 as a *Walton* right for the irrigation of 589.7 acres and for livestock watering of 250 pair with a priority date of October 14, 1864. The United States, the Klamath Tribes, and KPWU filed exceptions on Claim 74 which concerned the claimed water rights of a non-tribal member who acquired land within the former Klamath Reservation that was either allotted to a tribal member or owned by the Klamath

Tribes. The United States, the Klamath Tribes, KPWU and Wayne Ranch subsequently moved for a final determination on the exceptions to Claim 74. Wayne Ranch acknowledges that the evidentiary record most likely will not support a *Walton* claim under the standards established by the 2020 Legal Ruling for the acreage awarded by OWRD. Wayne Ranch elected to waive the opportunity to argue the evidentiary record and stipulated to a recognition of 213.7 acres for Claim 74.

The joint motion filed by the United States, the Klamath Tribes, KPWU, and Wayne Ranch is granted. The ACFFOD is modified as to Claim 74 consistent with this opinion.

F. Claim 95

Clifford C. Rabe and Mary A. Rabe (collectively, "the Rabes") filed Claim 95, asserting a *Walton* right to water for irrigation and livestock watering. In the ACFFOD, OWRD approved Claim 24 as a *Walton* right for the irrigation of 220.3 acres and for livestock watering of 225 head with a priority date of October 14, 1864. The United States, the Klamath Tribes, and KPWU filed exceptions on Claim 95 which concerned the claimed water rights of a non-tribal member who acquired land within the former Klamath Reservation that was either allotted to a tribal member or owned by the Klamath Tribes. The United States, the Klamath Tribes, and KPWU subsequently moved for a final determination on the exceptions to Claim 95. The Rabes acknowledge that the evidentiary record most likely will not support a *Walton* claim under the standards established by the 2020 Legal Ruling for the acreage awarded by OWRD. The Rabes elected to waive the opportunity to argue the evidentiary record and stipulated to a recognition of 0.0 acres for Claim 95. As a result, the United States, the Klamath Tribes, KPWU, and the Rabes filed a joint motion to reverse and modify the POD.

The joint motion filed by the United States, the Klamath Tribes, KPWU, and the Rabes is granted. The ACFFOD is modified as to Claim 95 consistent with this opinion.

G. Claim 97

The Estate of Tony Pierce (Pierce Estate), successor to the original claimants Donald Lawless, Marlene Lawless, and Lewis Lawless, filed Claim 97 asserting a *Walton* right for irrigation and incidental livestock watering. In the ACFFOD, OWRD approved Claim 97 as a *Walton* right for the irrigation of 269.7 acres and for livestock watering of 150 head of cattle with a priority date of October 14, 1864. The United States, the Klamath Tribes, and KPWU filed exceptions to OWRD's determination on Claim 97 contending that the ACFFOD should be modified to partially disallow Claim 97 because this court determined in the 2020 Legal Ruling that "[s]ome diversion of the natural flow of a stream is necessary to effect a valid appropriation to support a *Walton* claim." The United States, the Klamath Tribes, and KPWU subsequently moved for a final determination on their exceptions to Claim 97, seeking a modification of that claim to recognize only 263.5 acres for irrigation. The Pierce Estate did not file a response to those motions.

The motions filed by the United States, the Klamath Tribes, and KPWU are granted. The ACFFOD is modified as to Claim 97 consistent with this opinion.

H. Claim 114

Duane Martin (Martin) filed Claim 114 asserting a *Walton* right for irrigation. In the ACFFOD, OWRD approved Claim 114 as a *Walton* right for the irrigation of 72.1 acres with a priority date of October 14, 1864. The United States, Klamath Tribes, and KPWU filed exceptions on Claim 114 which concerned the claimed water rights of a non-tribal member who acquired land within the former Klamath Reservation that was either allotted to a tribal member

or owned by the Klamath Tribes. Martin acknowledges that the evidentiary record most likely will not support a *Walton* claim under the standards established by the 2020 Legal Ruling for the acreage awarded by OWRD other than 27.1 acres. Martin elected to waive the opportunity to argue the evidentiary record and stipulated to a recognition of 27.1 acres for Claim 114. As a result, KPWU, the United States, the Klamath Tribes, and Martin filed a joint motion to reverse and modify the POD.

The joint motion filed by the United States, the Klamath Tribes, KPWU, and Martin is granted. The ACFFOD is modified as to Claim 114 consistent with this opinion.

I. Claim 124

Sprague River Cattle Company (SRCC) filed Claim 124, asserting a *Walton* right for irrigation. In the ACFFOD, OWRD approved Claim 124 as a *Walton* right for the irrigation of 684.0 acres with a priority date of October 14, 1864. Of the 684.0 acres recognized by OWRD, SRCC owns 376.7 acres. The United States, Klamath Tribes, and KPWU filed exceptions on Claim 124 which concerned the claimed water rights of a non-tribal member who acquired land within the former Klamath Reservation that was either allotted to a tribal member or owned by the Klamath Tribes. SRCC acknowledges that the evidentiary record most likely will not support a *Walton* claim under the standards established by the 2020 Legal Ruling for a portion of the 376.7 acres owned by SRCC that was awarded by OWRD. SRCC elected to waive the opportunity to argue the evidentiary record and stipulated to a recognition of 366.4 acres for Claim 124. As a result, the United States, the Klamath Tribes, KPWU, and SRCC filed a joint motion to reverse and modify the POD.[9]

[9] The other Claimant for Claim 124, Richard Duarte, did not join this stipulated motion, but he did not object or file a response to the stipulated motion.

The joint motion filed by the United States, the Klamath Tribes, KPWU, and SRCC is granted. The ACFFOD is modified as to Claim 124 consistent with this opinion.

J. Claim 676

Cecil R. Sommers and Mildred R. Sommers (collectively, "the Sommers") filed Claim 676 asserting a *Walton* right for irrigation. In the ACFFOD, OWRD approved Claim 676 as a *Walton* right for the irrigation of 60.0 acres with a priority date of October 14, 1864. KPWU filed exceptions to OWRD's determination on Claim 676 contending that the ACFFOD should be modified to partially disallow Claim 676 because this court determined in the 2020 Legal Ruling that "[s]ome diversion of the natural flow of a stream is necessary to effect a valid appropriation to support a *Walton* claim." Specifically, KPWU states that Claim 676 should be modified because the Sommers failed to prove the existence of a diversion and instead rely on natural overflow as the basis for Claim 676. KPWU subsequently moved for a final determination on their exceptions to Claim 676, seeking a modification of that claim. The Sommers did not file a response.

The motion filed by KPWU is granted. The ACFFOD is modified as to Claim 676 consistent with this opinion.

II. Disputed Motions

A. Claim 21

Edward D. and Merrie L. Tompkins, as trustees of the Don and Merri L. Tompkins Family Revocable Trust, along with Willis Stanley Tompkins (collectively, "the Tompkins") filed Claim 21, asserting a *Walton* right to water for irrigation, incidental watering of livestock, and wildlife use on 1964.6 acres. OWRD approved that claim in the ACFFOD based on its conclusions that (1) a *Walton* right may be based on natural overflow; and (2) the right did not

have to be developed by the *first* non-Indian purchaser so long as it was developed with reasonable diligence from the time of the initial transfer to a non-Indian purchaser.

The United States and the Klamath Tribes filed exceptions to OWRD's determination on Claim 21 and have now filed motions for a final ruling on those exceptions. In those exceptions, the United States and the Klamath Tribes contend that Claim 21 should be denied in its entirety because there was no diversion of the natural flow, as required to support a valid *Walton* right under this court's 2020 Legal Ruling. Alternatively, the United States and the Klamath Tribes contend that, if there is sufficient evidence to support a finding of a diversion, the ACFFOD should be modified to reduce the acreage from 1964.6 acres to 1325.2 acres because the first non-Indian owners of 639.4 acres did not develop a water right for that land.

In response to the motions filed by the United States and the Klamath Tribes, the Tompkins restate their objections to this court's prior determination that a diversion is required to support a valid *Walton* right. The Tompkins do not dispute that the first non-Indian owners of 639.4 acres did not develop a water right to irrigate that land. As to the remaining 1325.2 acres, the Tomkins contend that the first non-Indian owners -- Henry and Mabel Tompkins (the parents of some of the claimants) -- took steps to divert the natural flow sufficient to support a valid *Walton* right. Specifically, they contend that the record contains evidence that they used drainage ditches and "check dams" to raise the water table and provide irrigation, as the ACFFOD concluded.[10]

In response, the United States and Klamath Tribes contend that the Tompkins may have used drainage ditches and "check dams" to manipulate the natural overflow, but that is insufficient to support a *Walton* right because this court's prior ruling requires diversion "of the

[10] *See* KBA_ACFFOD_00401-405; OWRD0275993, OWRD0275998, OWRD0277691.

natural flow of a stream" to support a *Walton* right. At the January 29, 2025, hearing, counsel for the Tompkins conceded that their claim as to the remaining 1325.2 acres would fail under the standard adopted in the 2020 Legal Ruling, which required a diversion "of the natural flow of a stream" to support a *Walton* right, though the Tompkins wanted to reserve the right to challenge that ruling on appeal. Accordingly, because this court is applying the standard adopted in the 2020 Legal Ruling, the court concludes that the Tompkins' claimed water right as to the remaining 1325.2 acres fails.

The motions filed by the United States and the Klamath Tribes are granted. The ACFFOD is modified as to Claim 21 consistent with this opinion.

B. Claim 9

The original claimants of Claim 9 sought a *Walton* right for irrigation and livestock watering on 2,333.8 acres of land.[11] OWRD approved Claim 9 in part, approving a *Walton* right for the irrigation of 1,470.3 acres and livestock watering of 2,400 head of cattle, based in part on its conclusion that a *Walton* right may be based on natural overflow. The United States and Klamath Tribes filed exceptions to OWRD's determination on Claim 9; both have now filed motions to resolve the exceptions that remain in dispute. As owner of much of the land covered by Claim 9, the United States withdrew some of its exceptions and now opposes the Klamath Tribes' exceptions in part. The Trustees of the RJ Sanford Family Trust did not file a response to any of the motions asserting exceptions to OWRD's determination regarding the water right affecting the land owned by that Trust.

[11] The ownership of the lands covered by Claim 9 has changed; most of those lands are now owned by the United States. Some land covered by Claim 9 is owned by Richard C. Sanford and Jennifer L. Sanford as Trustees for the RJ Sanford Family Trust.

The United States and Klamath Tribes agree that (1) the RJ Sanford Family Trust is not entitled to a *Walton* water right for 157.5 acres (allotments 264 and 152) because that right was based on natural overflow, contrary to the 2020 Legal Ruling; and (2) the United States is not entitled to a *Walton* right for 419.9 acres (allotments 52, 78, 25, and 173) because there is no evidence of diligent development of water usage by the first non-Indian owner of that land. As noted above, the Trust did not file a response to the United States'/Klamath Tribes' motions. Those motions are granted as to the acreage described in this paragraph, and the ACFFOD is modified consistent with this opinion.

The portion of Claim 9 that remains in dispute involves OWRD's determination of a *Walton* right for 728.3 acres located within seven allotments (allotments 18, 20, 21, 24, 53, 77, and 174). The parties agree that the first non-Indian owner of that land was William Kittredge (William), who acquired the land during the period 1917-1924. The property was part of what has been referred to as the Kittredge Ranch. In 1938, William was granted a state Water Rights Certificate with a priority date of 1930 for much of the Kittredge Ranch. The record includes two affidavits signed by William's son, Oscar Kittredge (Oscar), that address in part William's efforts to irrigate the Kittredge Ranch.[12]

The parties disagree on whether William's actions amounted to an appropriation of water with reasonable diligence, as required to support a *Walton* right under the 2020 Legal Ruling, from the time he acquired the allotments until the 1930 water right reflected in the 1938 certificate. The Tribes contend that William did not act with reasonable diligence because (1) reasonable diligence required him to complete the development within five years of acquiring the land, absent a showing of exceptional circumstances constituting good cause; (2) William

[12] Oscar's 1979 affidavit is at OWRD0268240-241. His 1977 affidavit is at OWRD0268243-252.

completed the irrigation system in 1930, which was six to thirteen years after he had acquired the land; and (3) there was no evidence of exceptional circumstances constituting good cause to extend the five-year period for development with reasonable diligence.

The United States responds that (1) the 2020 Legal Ruling requiring "reasonable diligence" does not require completing the development within five years after acquiring the land, subject only to good cause extension based on exceptional circumstances; and (2) there was sufficient evidence of development with reasonable diligence to support a *Walton* right. Specifically, the United States contends that the evidence establishes that, although William *completed* the irrigation system in 1930 when he filed his water rights application, he *began* constructing the irrigation system in 1918, and that his actions to build a complex irrigation system from 1918 to 1930 constituted "reasonable diligence" sufficient to support a *Walton* right under the circumstances.

The Tribes respond that *Walton* rights are based on state law, that Oregon law recognizes a five-year rule of reasonable diligence, and that treating the irrigation system that William had completed by 1930 as one unified system that applied to all seven allotments at issue is incorrect because *Walton* rights must be conveyed through individual allotments. Here, according to the Tribes, there is insufficient evidence of development with reasonable diligence on each of the seven allotments at issue.

The court agrees with the Tribes in part and with the United States in part. With respect to the "five-year rule" of reasonable diligence advocated by the Tribes, the court agrees that, because there are no specific federal guidelines for determining what constitutes "reasonable diligence," it is appropriate to look to state law for guidance. *Walton III*, 752 F2d at 400. However, the state law cited by the Tribes, ORS 537.230(2), is not directly applicable because

that statute applies to water rights claimed *after* the effective date of the 1909 Water Rights Act. Accordingly, the court agrees with the United States that that statute does not state a governing rule of law, though it does provide a useful rule of thumb.

An administrative rule that applies to the determination of water rights based on beneficial uses *before* 1909, OAR 690-028-0045(2), states that reasonable diligence

> "is that which is usual and ordinary with persons performing similar projects. The water user must demonstrate a genuine intent to complete the appropriation in a timely manner. The question is one of fact, to be determined from the circumstances on a case-by-case basis."

The court further agrees with the Tribes that determining a *Walton* right must be assessed on an allotment-by-allotment basis, with the determination of reasonable diligence to be assessed based on the circumstances that apply to each allotment.

The land subject to Claim 9 was, and still is, used for pasture and hay. As noted above, the record includes two affidavits from William's son, Oscar, signed in 1977 and 1979. According to those affidavits, Oscar was 12 years old when he came to the Klamath Marsh area in 1912, and he had first-hand knowledge of many of the events relating to the irrigation of land within Claim 9. Oscar indicated that, beginning in 1912, his father began leasing properties that had been part of the Klamath Reservation and allotted to individual Klamath Indians, and that he had eventually purchased several of those allotments, including the allotments at issue. Oscar explained in one affidavit that, "in the earlier years of development of the Klamath Marsh valley," water from excessive flooding of the wetlands was diverted to provide irrigation over the dryer lands so that cattle could graze on hay grown throughout the valley.

Oscar explained that his father began developing drainage and irrigation systems throughout his properties in 1917. In 1918, he built a diversion dam, known as the Big Wire Dam, across the Williamson River. He then built "smaller ditches and dikes" to "spread the

water over that land." As a result of those diversions and ditches, by 1921, hay was being cut from three fields known as Big Wire, Little Wire, and Timothy. Oscar indicated that "the water development had been instigated on many of the allotments prior to the date of actual acquisition of title" when the properties were "under lease."

All the allotments at issue were irrigated with water from the Williamson River based on a Certificate of Water Right issued in 1938. That certificate confirmed a priority date of April 16, 1930, for the claimed lands. The United States' expert considered the 1930 water right granted by that certificate "the best evidence" of the date that those allotments were first irrigated.[13] That expert concluded, based on his review of the claim and additional evidence, that nothing established that these lands were being irrigated as of the date of transfer from the last Indian owner of each allotment, "or that the claimed lands were irrigated by the first non-Indian owner of each allotment."[14] However, it does not appear from the expert's testimony that he reviewed Oscar's affidavits, though he did review a field inspection report that included statements that Oscar had made to the field inspector.[15] The information submitted in support of William's application for the 1938 water rights certificate indicated that, by 1930, an additional dam had been built downstream from the Big Wire Dam on the Williamson River. That application also included a map that purported to show the location of the irrigation ditches that William had constructed. The map includes a note indicating that some parts of the property had been "under water since year 1922," and that other parts had been "irrigated prior to 1893." The parties dispute the significance of this "Ditches Map" and the notations made thereon. *See*

[13] Affidavit and Testimony of Ross Waples at OWRD0266547.

[14] *Id.* at OWRD0266549.

[15] *Id.* at OWRD0266543 to 544. According to the filed inspector's report, Oscar had stated that the canals build by his father were used more for drainage than for irrigation. OWRD0265214.

OWRD0265273 (map); OWRD0001238 (reproduction of map with Engineer's Certificate stating that the map "was made from notes taken during an actual survey" under the Engineer's supervision in April 1930).

The 1938 Water Rights Certificate is strong evidence that each of the allotments within Claim 9 that are at issue were irrigated as of the 1930 priority date. Oscar's affidavits provide direct evidence that William began developing drainage and irrigation systems for the Kittredge Ranch in 1917. The record establishes the dates that William acquired title to each allotment during the period 1917 to 1924. Whether he acted with "reasonable diligence" to irrigate those lands after acquiring them requires the court to make some reasonable inferences from the evidence in the record. There is no evidence in the record from which the court could analyze whether William's actions were comparable to actions that would be "usual and ordinary with persons performing similar projects" at the time, consistent with the definition of reasonable diligence in OAR 690-028-0045(2). But there is evidence from which the court can infer whether William had demonstrated "a genuine intent to complete the appropriation in a timely manner," as required for reasonable diligence under that rule. As noted above, William built the Big Wire Dam in 1918, though he did not acquire title to allotment 18 (the land appurtenant to the Big Wire Dam) until 1923. The court infers from this evidence that William likely leased the land from an Indian owner before acquiring it. As noted above, Oscar's affidavit states that William started some of the water developments before acquiring title, while the allotment was "under lease."

The court further infers from the evidence that William intended to irrigate the allotted lands that he acquired during this period as needed to use as much of that land as possible for hay and cattle grazing, though he may not have had a unified irrigation plan in mind. At the very

least, the court concludes from the record that, in general, William was engaged in acquiring allotments and constructing drainage and irrigation ditches during the period 1917 through 1930, and that he intended to complete the appropriation no later than 1930, when he submitted his water rights application. The evidence and the court's findings and conclusions relating to each allotment in dispute is discussed in more detail below.

1. Allotment 18.

William, the first non-Indian owner of allotment 18, acquired title to the property -- which was adjacent to the Williamson River -- in 1923. William signed an affidavit on November 24, 1922, stating that he had purchased 160 acres of allotment 18, and acknowledging that "any private irrigation or drainage project" for this property was subject to the authority of the United States.[16] As noted above, he had built the Big Wire Dam on the Williamson River in 1918, and he constructed a series of irrigation ditches shortly thereafter, though allotment 18 was not included in the legal description of the lands shown on the Ditches Map. By 1922, hay was being harvested from the Big Wire, Little Wire, and Timothy fields within allotment 18. An Indian Service Appraisal Report for allotment 18 dated December 13, 1922, states that the land was "within the proposed Klamath Marsh Unit."[17] One inference from that report could be that the land was naturally marshy and had not been irrigated as of the date of that report, though irrigation of that area was "proposed." The court could also infer, based on the 1930 priority date for the Water Rights Certificate, that William did not develop the beneficial use of water for that land until 1930 or shortly before that date, which was seven years after he acquired title to the land. However, after considering all the evidence, the court concludes that a more reasonable

[16] OWRD0266572.

[17] OWRD0266571.

inference is that William had diverted water from the Williamson River and had put it to beneficial use in allotment 18 by 1922, even before he had acquired title to that land, that he intended to complete that development in a timely manner, and that he in fact completed the irrigation system for the property by 1930. That was sufficient to establish that he acted with "reasonable diligence" under the circumstances. Accordingly, the court affirms the ACFFOD's conclusion allowing a *Walton* right in 101.2 acres irrigated from the Williamson River.

2. Allotment 20.

William, as the first non-Indian owner, acquired title to this allotment -- which was about a half mile south of the Williamson River -- in 1921. A certificate of appraisement dated April 13, 1921, describes the land as "good pasture land on [a] big marsh." This allotment was not within the legal description of the property on the Ditches Map. By 1930, this allotment was among the properties that were being irrigated, according to the 1938 Water Rights Certificate. Because the record is unclear regarding when William started building the irrigation system that served this part of Kittredge Ranch, one possible inference is that William did not begin developing the irrigation system for this property until shortly before 1930, or about 9 years after he acquired title to it. However, after considering all the evidence, this court concludes that a more reasonable inference was that William intended to irrigate this property -- along with the other properties that became part of Kittredge Ranch -- after he acquired it in 1921, and that he was in the process of constructing his system to irrigate the land within this allotment, along with all the other properties that were ultimately included in the 1938 water rights certificate, from that point until he completed the irrigation system in 1930. Thus, the court concludes that he acted with reasonable diligence under the circumstances. Accordingly, the court affirms the ACFFOD's conclusion allowing a *Walton* water right in 128.1 acres in allotment 20.

3. Allotment 21.

William became the first non-Indian owner of allotment 21 when he acquired title to it on January 23, 1924. The Williamson River is about a mile south of allotment 21, and the land was not within the legal description of the properties listed on the Ditches Map. By 1930, this allotment was one of the properties that was being irrigated, according to the 1938 water rights certificate. As with allotment 20, one possible inference is that William did not begin developing the irrigation system for this property until shortly before 1930, or six years after he had acquired it. Similar to the court's conclusions as to allotment 20, this court concludes after considering all the evidence, that a more reasonable inference was that William intended to irrigate the property after he acquired it in 1924, and that he was in the process of developing this allotment, along with the other properties that were ultimately included in the 1938 water rights certificate, from that point until he completed the irrigation system in 1930. Thus, the court concludes that he acted with reasonable diligence under the circumstances. Accordingly, the court affirms the ACFFOD's conclusion allowing a *Walton* water right in 66.5 acres in allotment 21.

4. Allotment 24.

William became the first non-Indian purchaser of allotment 24 when he acquired title to it on April 29, 1921. The Williamson River is immediately north of allotment 24, and the property is within the legal description of the properties listed on the Ditches Map. Part of the acreage in this allotment included the Timothy Field that was irrigated after William built the Big Wire dam in 1918. By 1930, this allotment was one of the properties that was being irrigated, according to the 1938 water rights certificate. As with allotments 20 and 21, one possible inference is that William did not begin developing the irrigation system for this property until shortly before

1930, or nine years after he had acquired it. Similar to the court's conclusions as to allotments 18, 20, and 21, this court concludes after considering all the evidence that a more reasonable inference was that William intended to irrigate the property after he acquired it in 1921, and that he was in the process of developing this allotment, along with the other properties that were ultimately included in the 1938 water rights certificate, from that point until he completed the irrigation system in 1930. Thus, the court concludes that he acted with reasonable diligence under the circumstances. Accordingly, the court affirms the ACFFOD's conclusion allowing a *Walton* water right in 52.7 acres in allotment 24.

5. Allotment 53.

William acquired title to allotment 53 in 1920. A Certificate of Appraisement dated November 4, 1919, describes the land as "marsh land." The property includes the Timothy and Little Wire fields that, according to Oscar, were irrigated for hay that was available for grazing in 1921, after William built the Big Wire Dam. This property is included in the property description covered by the Ditches Map. The 1938 state water right certificate gave William a right to irrigate 160 acres, with a priority date of 1930. The court concludes that William acted with reasonable diligence to make beneficial use of water from the Williamson River to irrigate this property. Accordingly, the court affirms the ACFFOD's conclusion allowing a *Walton* water right in 154.4 acres in allotment 53.

6. Allotment 77.

William acquired title to allotment 77 in 1921. A Certificate of Appraisement dated February 11, 1924, describes the property as "marsh land." Like allotment 53, part of this allotment includes the Little Wire and Timothy fields that, according to Oscar, were irrigated for hay that was available for grazing in 1921, and the property is included on the Ditches Map. The

1938 certificate gave William a state water permit to irrigate 71.3 acres, with a priority date of 1930. The court concludes that, as with allotment 53, William acted with reasonable diligence to make beneficial use of water from the Williamson River to irrigate this property. Accordingly, the court affirms the ACFFOD's conclusion allowing a *Walton* water right in 65.6 acres in allotment 77.

7. Allotment 174.

William acquired title to allotment 174 in 1917. An Indian Service Appraisal Report for this allotment dated December 29, 1916, indicates that the land was included in the "proposed Klamath Marsh Drainage Project." The allotment includes part of the Big Wire field that was irrigated after William built the Big Wire dam in 1918, and, according to Oscar, hay was being cut from that field beginning in 1921. The 1938 certificate gave William a state water permit to irrigate 160 acres with a priority date of 1930. The court concludes that, as with other allotments, William acted with reasonable diligence to make beneficial use of water from the Williamson River to irrigate this property. Accordingly, the court affirms the ACFFOD's conclusion allowing a *Walton* water right in 159.8 acres in allotment 174.

C. Claim 18

This claim, originally filed by John and Marilyn Mosby and now held by the Mosby Family Trust (Mosby), sought to establish *Walton* and KTA water rights to irrigate 5,376.7 acres of land. OWRD approved the claim in part, allowing a *Walton* right to irrigate a total of 1,110.6 acres and a KTA right to irrigate 95.1 acres within unallotted parcels C-1 and C-2, based in part on OWRD's determination that irrigation from natural overflow and subirrigation was sufficient to establish a *Walton* or KTA right. The United States, Klamath Tribes, and KPWU filed

exceptions to portions of the allowed water rights, and Mosby filed exceptions to a portion of the claim that OWRD had not allowed, seeking a *Walton* right to irrigate an additional 680 acres.

In response to the other parties' exceptions, Mosby conceded that, under this court's 2020 Legal Ruling, OWRD erred in granting a *Walton* right to irrigate 155.9 acres in allotment 95; in granting a KTA right to irrigate 39.6 acres in parcel C-1; and in granting a KTA right to irrigate 55.5 acres in parcel C-2. Accordingly, the motions approving the exceptions filed to the water rights allowed in allotment 95, parcel C-1, and parcel C-2 are granted. The ACFFOD is modified in accordance with this ruling.

Six allotments within Claim 18 -- allotments 39, 123, 38, 133, 94, and 168 -- remain in dispute by the United States, Klamath Tribes, and by KPWU in part.[18] In general, the United States, Klamath Tribes, and KPWU contend that OWRD erroneously approved claims that were based on natural overflow or subirrigation, and/or in some instances, approved claims based on development *after* property had been conveyed by the first non-Indian owner. In addition, Mosby filed exceptions to OWRD's denial of a *Walton* right to irrigate 565.6 acres in allotments 84, 91, 168, 184, and 267, contending that the denial was erroneously based on aerial photographs.

The allotments at issue are generally located on both sides of the Williamson River, west of the Klamath Marsh. Irrigation systems for part of this property, known as the Sand Creek Unit, began around 1918 and was completed in 1920. Although this project was designed to irrigate 3,614 acres in the area, it was difficult and expensive to maintain irrigation for that entire area. In 1939, the area irrigated from the Sand Creek Unit was reduced to 1,150 acres. In 1965,

[18] KPWU's exceptions were narrower than those asserted by the United States and the Klamath Tribes. The only allotments still at issue with respect to KPWU's exceptions are allotments 38, 133, and 168.

the owners of that land were assessed government charges pursuant to a contract between the United States and the landowners -- referred to in the ACFFOD as the Sand Creek Unit Irrigation Project 1965 Contract ("the 1965 Contract") -- based on the total acres under contract within each allotment.

1. Allotments 39 and 123.

OWRD approved a *Walton* right to irrigate 156 acres in allotment 39 and 160 acres in allotment 123, based on the completion of an irrigation system for land within the Sand Creek Unit in 1920, a 1957 state water permit, and the 1965 Contract. The United States and Klamath Tribes contend that part of that allowance -- 22 acres in allotment 39 and 41 acres in allotment 123 -- should be disallowed because there was no evidence that that land had been irrigated when title to those parcels passed from the first non-Indian owners, there was no evidence that the water right was initially developed with reasonable diligence by the first non-Indian owners, nor was there evidence of continuous beneficial use of water after that right was initially developed. The United States and Klamath Tribes further contend that aerial photographs show that some of the acres approved by OWRD were not historically and continuously irrigated.

The ACFFOD does not identify when ownership passed *from the first non-Indian ownership*, stating only that the allotments were transferred *from Indian ownership* in (or "as early as") 1917. In approving a *Walton* right for these allotments, OWRD appears to have assumed that the first non-Indian owner did not transfer the allotments to another non-Indian owner before the Sand Creek Unit irrigation project was completed in 1920. Absent any evidence to the contrary, that assumption is reasonable. However, OWRD approved a *Walton* right based on its conclusion that the party contesting a claim -- here, the United States and the Klamath Tribes -- had the burden to prove that the claimant abandoned the right after it had been

initially developed, and the evidence here was insufficient to show that the right had been abandoned during the period 1920 to 1957, when the state water permit was issued.[19] The 2020 Legal Ruling clarified that the contestant did not need to prove abandonment; rather, the claimant had the burden to establish continuous use.

Mosby contends that there is evidence in the record establishing continuous use after the Sand Creek Unit irrigation project was completed in 1920. Mosby points out that the 1965 Contract assessed landowners for construction, operation, and maintenance costs associated with irrigating that property, and the 1965 Contract assessed the landowner at that time -- D.O. Williams -- for such costs associated with 160 acres on allotment 39 and 160 acres on allotment 123.[20] Mosby reasons that the landowner would not have paid that assessment if he was not irrigating that acreage. That may be true, but that does not establish a continuous beneficial use of the water to irrigate all those acres. The aerial photographs cited by the United States -- taken on eleven separate days from 1952 to 2000 -- show that some of those acres were not being irrigated continuously during that period. Accordingly, Mosby has not established the continuous beneficial use element of a *Walton* right to those acres. The motions filed by the United States and the Klamath Tribes in support of their exceptions to Claim 18, allotments 39 and 123, are granted. The ACFFOD is modified consistent with this opinion.

2. Allotments 38 and 133.

OWRD approved a *Walton* right to 140 acres in allotment 38 and 160 acres in allotment 133, based on the 1920 completion of the irrigation projects for the Sand Creek Unit and the 1965 Contract. The first non-Indian owner of these allotments, Grover Neil, acquired title to

[19] KBA_ACFFOD_00306 to 307.

[20] OWRD0272887-888.

them in 1915, and Neil transferred title to the property to another non-Indian owner on August 23, 1915, about three years *before* construction began on the irrigation systems within the Sand Creek Unit. OWRD's conclusion was based on its determination that an Indian allottee's unexercised right to appropriate water to put to a beneficial use -- commonly referred to as the inchoate portion of an allottee's right -- could be transferred to non-Indian successors who obtained title after the first non-Indian owner if the inchoate right was developed with reasonable diligence from the date of the initial transfer from an allottee to a non-Indian owner.

In the 2020 Legal Ruling, this court rejected OWRD's interpretation, concluding that the inchoate portion of an allottee's right had to be developed with reasonable diligence by the *first* non-Indian owner, meaning that development by subsequent non-Indian owners would not be sufficient to establish a *Walton* right, even if that development occurred within a reasonable time after the first conveyance to a non-Indian owner. That determination is fatal to Mosby's claim to *Walton* rights in allotments 38 and 133.[21] The inchoate portion of the allottee's right was not developed by Neil, the first non-Indian owner of those allotments. Instead, Neil transferred title to those allotments in 1915, before the development of the irrigation systems in the Sand Creek Unit. Accordingly, the motions filed by the United States, Klamath Tribes, and KPWU in support of their exceptions to Claim 18, allotments 38 and 133 are granted. The ACFFOD is modified consistent with this opinion.

3. Allotments 94 and 168.

OWRD approved a *Walton* right to irrigate 156.9 acres in allotment 94 and 71.8 acres in allotment 168. Allotment 94 was transferred to B.B. Grigsby, a non-Indian, in 1927, and

[21] That conclusion is consistent with the *reason* this court concluded that development by the *first* non-Indian owner is required to support a *Walton* right, as explained more fully below in connection with claim 124, allotment 449.

allotment 168 was transferred to D.O. Williams, a non-Indian, in 1937. OWRD concluded that beneficial use of water was made on allotment 94 *before* it was transferred to non-Indian ownership in 1927. OWRD further concluded that beneficial use of water from Sand Creek "by the method of natural overflow" occurred on allotment 168 *before* it was transferred to non-Indian ownership.[22]

With respect to allotment 94, OWRD cited a Farming and Grazing Lease dated 1920 -- in which the lessee agreed to "clean out the ditch" -- and a 1927 Certificate of Appraisement that characterized the allotment as "grazing land." OWRD cited a state water permit with a priority date of February 7, 1951, as evidence of continued irrigation.[23] The United States and Klamath Tribes contend that this evidence is insufficient to establish a *Walton* right, because (1) land can be suitable for grazing through natural overflow; and (2) the reference to a "ditch" can refer to a drainage ditch as well as an irrigation ditch. Mosby contends that the 1920 grazing lease's reference to a "ditch" was shown in a 1952 aerial photograph and referred to the same "old ditch" shown in a Final Proof Survey map dated 1962. Mosby further contends that there is evidence that this "old ditch" was used by the Indians before allotment 94 was transferred to Grigsby in 1927 because the Superintendent had stated in a letter dated 1914 that "The Indians tell me that the waters of Sand Creek have been used by them for irrigation purposes and for livestock for more than 20 years." OWRD found that evidence to be persuasive with respect to allotment 94.[24]

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[22] KBA_ACFFOD_00292.

[23] *Id.* at 00292-93.

[24] KBA_AC36FFOD_00309-310.

On *de novo* review, this court agrees with the United States and Klamath Tribes that the evidence in the record is insufficient to establish a *Walton* right to irrigate 156.9 acres in allotment 94. It is possible that that the ditch shown in the 1962 map is the same ditch shown in the 1952 aerial photograph and referred to in the 1914 letter.[25] But that possibility is insufficient to establish Mosby's claim by a preponderance of the evidence. It is equally possible that the ditch was a drainage ditch, and that the only irrigation occurring on this allotment was through natural overflow.

With respect to allotment 168, OWRD allowed the claim with respect to 71.8 acres based solely on natural overflow. This court determined in the 2020 Legal Ruling that natural overflow was insufficient to establish a *Walton* right. Accordingly, the motions filed by the United States and the Klamath Tribes on their exceptions to Claim 18, allotments 94 and 168, are granted. The ACFFOD is modified consistent with this opinion.

4. Mosby exceptions -- allotments 84, 91, 168, 184, and 267

Mosby contends that OWRD erred in denying a *Walton* right to 565.6 acres in those five allotments. Mosby contends that the first four allotments were irrigated out of Sand Creek before they passed out of Indian ownership. As discussed above, Mosby contends that a ditch listed in a 1920 grazing lease for allotment 94 is the same "old ditch" that is shown on a 1962 Final Proof Survey map and a 1952 aerial photograph and that was referenced in the 1914 letter from the Superintendent discussed above in connection with allotment 94. Mosby contends that this evidence, taken together, establishes that the ditch was used for irrigation by the Indians prior to 1900, and that the irrigation applied to allotments 84, 91, 168, and 184 in addition to allotment 94. However, as discussed above, the court has concluded that that evidence is

[25] The Superintendent's 1914 letter referenced allotments 133 and 38, not allotment 94.

insufficient to establish a *Walton* right regarding allotment 94. The same is true of allotments 84, 91, 168, and 184. Accordingly, the ACFFOD is affirmed with respect to Mosby's exceptions as to those allotments.

Mosby's contention is different with respect to allotment 267. That allotment was acquired by D.P. McAuliffe, the first non-Indian owner in 1926. There is conflicting evidence in the record regarding allotment 267. A Certificate of Appraisement dated March 11, 1921, describes allotment 267 as "level marsh land, some Jack Pine, fair grass" and concludes that it is best adapted for grazing.[26] A Form Agreement dated February 8, 1926, states that it is "to be executed by purchaser to pay the construction and operation and maintenance charges assessed against the irrigable lands purchased under Indian irrigation projects."[27] That document states as part of the form that allotment 267 "contain[s] irrigable lands now under constructed ditch, being part of the irrigation system on the Klamath Indian Reservation." In that agreement, D.P. McAulliffe appears to have agreed to pay on a per acre basis all irrigation charges assessed or to be assessed against the land in allotment 267, though the copy in the record is unsigned and, as noted, appears to be incomplete. A Certificate of Appraisement dated November 5, 1926, describes the "character" of the land, stating that "all" acres in the allotment were suitable for grazing; no acres in the allotment were described as irrigated or "irrigable."[28]

Taken together, the court concludes on *de novo* review that the evidence was insufficient to establish a *Walton* right to allotment 267. The February 8, 1926, form agreement certainly suggests that allotment 267 was being irrigated by the "constructed ditch," but that description of

[26] OWRD0273652.

[27] OWRD0273654-655. The copy of that form agreement in the record appears to be incomplete, missing at least a signature page.

[28] OWRD0273656.

the land in allotment 267 conflicts with Certificates of Appraisement dated before and after February 1926. The court finds no other evidence in the record establishing that water was appropriated for beneficial use of the land in allotment 267 when it was transferred to the first non-Indian purchaser in 1926 or with reasonable diligence thereafter. The ACFFOD is affirmed with respect to Mosby's exception as to allotment 267.

D. Claim 105

The predecessor of current claimant Five Mile Ranch, LLC (Five Mile) asserted in claim 105 a *Walton* and a KTA right to irrigate 72.6 acres within two allotments and one unallotted parcel. OWRD approved the claim in part, approving the irrigation of 69.7 acres with incidental livestock watering of 200 head of cattle. The United States, Klamath Tribes, and KPWU filed exceptions, and Five Mile conceded that 32.4 acres within the unallotted parcel does not qualify for a KTA right under the standards adopted by the court in the 2020 Legal Ruling. The remaining dispute involves the claimed *Walton* right regarding 37.7 acres of land within allotment 1461. The United States and Klamath Tribes contend that the right should be approved for only 34.74 acres because the remaining 2.56 acres were not continuously irrigated after the beneficial use was developed by the first non-Indian owner.

Allotment 1461 was conveyed to the first non-Indian owners, W.V. and Doris C. Meade and Percy and Marcella Murray, in 1960. The record contains evidence that these owners obtained a water right certificate for this land with a priority date of October 4, 1962.[29] According to expert testimony, the owners constructed an irrigation ditch in 1963, installed a pump in 1965, and installed another pump in 1967.[30] The United States and Klamath Tribes rely

[29] *See* OWRD0324485 (certificate).

[30] OWRD0324674 (expert testimony regarding ditch and pump).

on testimony from an expert, who concluded, based on aerial photographs, that 2.56 acres were not continuously irrigated. OWRD disagreed, concluding that the United States and Klamath Tribes had not established that the water right had been "abandoned." In the 2020 Legal Ruling, this court determined that the abandonment standard applied by OWRD was incorrect, and that the claimant had the burden to establish continuous use of the water right.

On *de novo* review, the court agrees with Five Mile that it has met its burden to establish continuous use. The water right certificate approved for allotment 1461 has a priority date of October 4, 1962; the final proof survey for that certificate is dated May 21, 1970. That certainly suggests that continuous irrigation of the land in allotment 1461 from 1962 through 1970. In 2003, the owners stated in response to a discovery request that they have "continuously irrigated this property" since they purchased it. The expert testimony that the United States and Klamath Tribes rely upon states, with respect to allotment 1461, that "only 34.74 acres out of 37.3 acres claimed *appear* irrigated in the 1994 and 2000 aerial photos."[31] That may be how the land appeared in those aerial photos, but that does not mean that the land was not continuously irrigated given fluctuations in rainfall from year to year. Accordingly, the court denies the motions filed by the United States and Klamath Tribes on their exceptions to the *Walton* right awarded regarding allotment 1461. The ACFFOD is affirmed as to allotment 1461,[32] and, as noted above, modified consistent with this opinion as to the unallotted parcel within claim 105.

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[31] *Id.*

[32] Five Mile contends that there is an error and that the total acreage in allotment 1461 should be 37.5 acres, not 37.3 acres. The court directs the parties to confer and verify the correct acreage for this allotment.

E. Claim 124

Claimants' predecessor (John House) filed claim 124, seeking *Walton* and KTA rights regarding 695.1 acres of land. OWRD awarded the current claimants, Richard Duarte (Duarte) and Sprague River Cattle Company (SRCC) water rights to irrigate a total of 684 acres.[33] The United States, Klamath Tribes, and KPWU filed exceptions.[34] The remaining dispute centers on the award to Duarte for the north portion of claim 124, which includes allotments 449, 1126, and 314N, and 8.2 acres of an unallotted parcel.

1. Allotment 449.

This land was allotted to Thomas G. Smith, a Klamath Indian, in 1920. In 1927, Klamath County filed a foreclosure action against Smith for failure to pay taxes. That action went to judgment and Klamath County purchased the land at the foreclosure sale, acquiring title through a Sheriff's Deed in 1930. Klamath County then sold the property to a Klamath Indian in 1935, and it remained in Indian ownership until 1966. It is undisputed that the land was irrigated only through natural overflow until developed for irrigation in 1967. The United States, Klamath Tribes, and KPWU contend that there is no valid *Walton* right as to allotment 449 because the water was not appropriated for beneficial use by the first non-Indian owner -- Klamath County. OWRD granted a *Walton* right to irrigate 152.3 acres in allotment 449, based in part on its conclusion that development by the *first* non-Indian owner was not required.

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[33] The water rights allowed by OWRD consisted of 307.3 acres north of the Sprague River (Duarte land) and 376.7 acres south of the river (SRCC land) across 8 parcels of land. KBA_ACFFOD_01894.

[34] The exceptions filed by the United States and Klamath Tribes are similar, but not identical. KPWU's exceptions have a narrower focus.

As noted above, this court disagreed with OWRD on that issue in the 2020 Legal Ruling. Duarte contends that, despite the court's 2020 Legal Ruling, OWRD's award should be affirmed because Klamath County's ownership through foreclosure sale should be disregarded. Thus, Duarte contends, it has a valid *Walton* right with respect to allotment 449 because, aside from the brief period of Klamath County's ownership, the allotment was owned by Klamath Indians from the initial allotment until 1966, and the right was promptly developed by the first non-Indian owner in 1967. The court disagrees.

The 2020 Legal Ruling made it clear that prompt development by the *first* non-Indian owner is required to support a valid *Walton* right. The *reason* the right requires development by the *first* non-Indian owner was explained in *Walton II.* There, the Ninth Circuit explained that this aspect of a *Walton* right -- the ability of an Indian allottee to convey the inchoate (that is, not yet developed) portion of the water right to a non-Indian -- is designed to protect the Indian allottee, not subsequent non-Indian landowners. As the court explained, when Congress passed the General Allotment Act of 1887, it intended "to protect Indians by preventing transfer of those lands" and that any diminution of Indian rights required some clear evidence of Congressional intent. 647 F2d at 50. That principle supported the proposition "that an Indian allottee may sell his right to reserved water" without any diminution in the value of that right. *Id.* As the court explained:

> "[T]he Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continuous use, it is lost to the non-Indian successor.

> "*The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right that the Indian may convey.* We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-à-vis other water users, may not retain the right to that quantity of water despite non-use." 647 F2d at 51 (emphasis added).

Applying that principle here, a valid *Walton* right protects the right of the original Indian allottee -- Smith -- to sell his water right without any diminution in value. But Smith lost that right when Klamath County foreclosed on the property. As a result, that right is lost to all subsequent successors. Accordingly, the motions filed by the United States, Klamath Tribes, and KPWU regarding their exceptions to claim 124, allotment 449 are granted. The ACFFOD is modified consistent with this opinion.

2. Allotment 314N.

An Indian, Margaret David Johnson, received a fee simple patent to this land in 1958. In 1962, the first non-Indians, Paul and Ann Fairclo (Fairclo), purchased the land. OWRD allowed a *Walton* right to 48.3 acres in allotment 314N, based in part on beneficial use of water before transfer from Indian ownership from natural overflow of the Sprague River, and in part on actions taken by Paul Fairclo when he attempted to irrigate the land.[35]

The Klamath Tribes contend that the claim for a *Walton* right fails because natural overflow cannot support a *Walton* tight under the 2020 Legal Ruling and Fairclo had acknowledged that his efforts to irrigate this land were unsuccessful. Duarte contends that Fairclo installed an irrigation system with reasonable diligence after acquiring the north portion of the property covered by claim 124, that the irrigation system reached allotment 314N, and that Fairclo irrigated the land continuously using the irrigation system supported at times by natural

[35] KBA_ACFFOD_01879 to 880.

overflow. The Klamath Tribes contend in response that Fairclo's efforts were insufficient to meet the continuous use element, citing the expert testimony of Dale Book and other evidence, including Paul Fairclo's testimony that "we didn't always irrigate it."[36]

On *de novo* review, the court agrees with the Klamath Tribes that Duarte has not established by a preponderance of the evidence that the full measure of the Indian's reserved water right that Fairclo acquired and put to beneficial use was maintained by continuous use, as required for a *Walton* right. *Walton II*, 647 F2d at 51; 2020 Legal Ruling ("once perfected, the water right must be maintained by continued use or it is lost" (quoting *Walton III*, 752 F2d at 402)). This requires an analysis of the extent to which non-Indian successors "continued to use the water appropriated." *Walton III*, 752 F2d at 402.

Although Fairclo had a state water certificate that gave him the *right* to irrigate the land in allotment 314N and he described in his direct testimony the steps he took to irrigate that land,[37] there is evidence in the record that he and successor owners did not continuously exercise that right. For example, Book's testimony summarizes Fairclo's deposition testimony, and is supported by aerial photographs and field inspection reports. According to Fairclo's deposition testimony, the ditch that supplied some water to this tract was severed, and a 1968 aerial photograph showed that it terminated at the southwest corner of allotment 449. Fairclo further testified that a small pipeline that he had laid from the pond at the northwest corner of allotment 449 did not work to provide water to allotment 314N. A 1986 field inspection report noted that this land was subject to springtime overflow and that there was no means of irrigation to this

[36] *See* KBA_ACFFOD_ 01880 (summarizing Fairclo's testimony); OWRD0334532 (Book testimony summarizing Fairclo's deposition testimony).

[37] *See* OWRD0334176-178 (certificate); OWRD0334716-17 (Fairclo testimony).

land. Book noted that the area did not appear to be irrigated in any of the aerial photographs. Based on his review of the evidence, Book concluded that allotment 314N has not been actively irrigated since Fairclo developed a diversion from the Sprague River that he used to irrigate allotment 449 and the northern portion of allotment 1126 (but not allotment 314N).[38]

Although Fairclo, the first non-Indian owner of allotment 314N, may have put the reserved water right to beneficial use shortly after he acquired it, the court concludes based on its review of the record that the evidence is insufficient to establish that Fairclo and successor owners maintained that use continuously, as required to support a *Walton* right. Accordingly, the Klamath Tribes' motion regarding the exceptions to claim 124, allotment 314N is granted. The ACFFOD is modified consistent with this opinion.

3. Allotment 1126 and 8.2 acres of unallotted parcel.

Fairclo, the first non-Indian owner of this land, acquired it in 1966. OWRD approved a *Walton* right to irrigate 98.5 acres in allotment 1126, and a KTA right to irrigate 8.2 acres in the unallotted parcel. The Klamath Tribes filed exceptions, contending that the claim should be denied as to 40.4 acres in allotment 1126, and 7.9 acres on the unallotted parcel.[39] The Tribes contend that (1) 24.5 acres in allotment 1126 did not qualify for a *Walton* right because the land was irrigated by groundwater from a well; (2) 15.9 acres in allotment 1126 were located above the functioning ditch and thus, were not being irrigated; and (3) only 0.3 acres of the land on the

[38] OWRD0334531-532 (Book testimony); *see also* OWRD0334873-876 (Fairclo deposition testimony).

[39] The Tribes do not take exception to OWRD's award of 58.1 acres in allotment 1126 and 0.3 acres in the unallotted parcel.

unallotted parcel received water from the Sprague River.[40] Duarte responds that OWRD correctly found that water diverted from the Sprague River reached all of this land.[41]

On *de novo* review, the court agrees with the Klamath Tribes. OWRD acknowledged that much of the allotment was irrigated by groundwater from a well as authorized by a state water rights certificate with a priority date of 1966, but it concluded that the groundwater irrigation was supplemental to irrigation from the Sprague River.[42] But as noted above, those state water certificates establish a *right* to irrigate using water from the Sprague River; they do not establish that actual irrigation from the river continuously occurred. Testimony from expert Book stated, based on a 1986 field inspection report and aerial photographs that the groundwater well "is the only source of irrigation" for 24.5 acres in allotment 1126.[43] Book also testified that 15.9 acres in allotment 1126 "are located above the functioning ditch and have not been continuously irrigated."[44]

OWRD reached a similar conclusion regarding the 8.2 acres of unallotted lands within claim 124 again based primarily on the water rights certificate that authorized irrigation from the Sprague River for that land. The Klamath Tribes contend, based on expert Book's testimony, that 7.9 acres were served by well water or have not been continuously irrigated.[45] As with

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[40] *See* Klamath Tribes' Reply at 33-34 (citing Book testimony, OWRD0334531-538).

[41] *See* Duarte's Response at 15 (citing KBA_ACFFOD_01890-891).

[42] *See* KBA_ACFFOD_01890 (describing certificates); OWRD0334180-81 (certificate authorizing irrigation from the Sprague River); OWRD0334184 (certificate authorizing irrigation from a well).

[43] OWRD0334531.

[44] OWRD0334537.

[45] OWRD0334538.

allotment 1126, the court concludes based on its review of the record that Duarte has not established that those 7.9 acres were continuously irrigated by water from the Sprague River as required for a KTA right. Accordingly, the Klamath Tribes' motion regarding the exceptions to claim 124, allotment 1126 (40.4 acres) and 7.9 acres in the unallotted parcel is granted. The ACFFOD is modified consistent with this opinion.

F. Claims 301-307

The lands covered by claims 301-307 are associated with the Klamath Marsh National Wildlife Refuge. OWRD granted the United States vested *Walton* and KTA rights for roughly 12,000 acres covered by those claims. KPWU filed exceptions, and the United States has conceded the exceptions to claim 303 (69.4 acres); claim 305 (320 acres); and claim 306 (319 acres). Accordingly, KPWU's motions regarding exceptions to claims 303, 305, and 306 are granted, and the ACFFOD is modified as to those claims consistent with this opinion.

Claims 301, 302, and 307 remain in dispute. With respect to claim 302, KPWU contends that the claim should be denied in its entirety because the beneficial use of the water was not developed by the first non-Indian owner. With respect to claims 301 and 307, KPWU contends that there is insufficient evidence of continuous use after the water was appropriated for beneficial use. The United States contends that the beneficial use of the water irrigating the lands within claim 302 *was* developed by the first non-Indian owner because the individuals who owned the lands and developed the beneficial use of the water were partners in the partnership that was the first non-Indian owner of the land. With respect to claims 301 and 307, the United States contends that the lands involved were all part of the Kittredge Ranch, and that the first non-Indian owner of those lands, William Kittredge, appropriated the beneficial use and that use was continuously maintained thereafter sufficient to support a *Walton* right.

1. Claim 302.

Claim 302 encompasses 5,677.7 acres, almost all of which were transferred from the Klamath Tribes in 1976 to the first non-Indian owner, an Oregon partnership doing business as Nicol Land and Cattle Co. (NLCC).[46] NLCC had three partners, Donovan L. Nicol (Donovan), Mark Edward Nicol (Mark), and Dana Marie Nicol (Dana). In 1977, those three partners executed a deed that stated that NLCC was conveying the lands to the individual partners, with Donovan receiving a 55% interest, and Mark and Dana each receiving a 22.5% interest.[47] A second deed purported to convey Donovan's interest in the land to Mark and Dana, with each receiving a 27.5% interest.[48] The net result of those conveyances appeared to leave title to the property in Mark and Dana, with each owning a 50% interest.

In 1979, consistent with their apparent ownership of the property, Mark and Dana applied for a state water use permit for this land; a Notice of Completion associated with this permit stated that "all works as described in the permit have been completed" as of July 1, 1979.[49] OWRD made a factual finding with respect to claim 302 that "[w]ater was not beneficially applied to the property prior to transfer to the second non-Indian owner."[50] KPWU contends that, because the United States did not file an exception to this factual finding, it cannot contest

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[46] One 80-acre parcel was not transferred directly from the Tribes to NLCC. Instead, that parcel was allotted to an individual Indian owner, who conveyed the land to other Indian owners, who then transferred the land to NLCC, the first non-Indian owner. *See* OWRD0358726. As a result, the claimed water right for that parcel is a *Walton* right, while the claimed right for the remainder of the lands within claim 302 is a KTA right.

[47] OWRS0356982-83.

[48] OWRD0356989.

[49] *See* OWRD0356949-57(permit application); OWRD0356958 (permit); OWRD0356959 (notice of completion).

[50] KBA_ACFFOD_03610.

it. KPWU also contends that, even if the United States is not bound by that factual finding, the evidence in the record does not support a finding that the first non-Indian owner, NLCC, appropriated water for beneficial use before it conveyed the land to the individual partners. The United States contends that (1) under Oregon law, NLCC's conveyance of title to the land to the individual partners did not eliminate the partnership's interest in the land; and (2) there was evidence in the record that the NLCC partnership maintained an interest in the land because it was listed as a "grantor" when it conveyed to property by warranty deed to the United States in 1989-90.[51]

The court agrees with KPWU. Because the United States did not take exception to OWRD's factual finding, it cannot dispute that water "was not beneficially applied to the property prior to transfer to the second non-Indian owner." In any event, under Oregon law, the deeds conveying title from the first non-Indian owner -- the NLCC partnership -- to the individual partners had some legal effect. *See* ORS 67.060 ("Property acquired by a partnership is property of the partnership and not of the partners individually."); *In re Pittock's Estate*, 102 Or 47, 52 (1921) ("A partnership is a separate and distinct entity and holds the partnership property in trust for the payment of its debts. The property does not belong separately to the individual partners but to the distinct entity."); *see also Bingham v. Weber*, 197 Or 501, 514 (1953) ("The delivery of a deed which has been knowingly executed with the intention of transferring title completes the transaction so far as title is concerned and vests the title in the grantee."); *Hildebrand v. Carter*, 175 Or App 335, 340 (2001) ("When a deed is recorded, there is a presumption that the grantor intended the deed to take effect and to pass title to the grantees."). The fact that NLCC is listed as a grantor on the later deeds to the United States does

[51] *See* United States' Response at 19-20 (citing OWRD0356992, 994-95 (warranty deeds)).

not matter because NLCC, having previously conveyed title to the individual partners, had nothing to convey to the United States. *See Bigelow v. Wiley Mt., Inc.*, 174 Or App 538, 542 (2001) ("One cannot, however, grant or transfer an interest in land that one does not own.").

Even if the United States is correct that, after conveying title to the individual partners, NLCC intended to maintain some beneficial interest in the property, that intent is irrelevant to determining whether the United States has a valid *Walton* or KTA right with priority to the date the reservation was established. As explained above in connection with claim 124, allotment 449, the *reason* appropriation by the *first* non-Indian owner is required by the 2020 Legal Ruling, as explained in *Walton II*, is to protect the rights of the Indian allottee (or the Tribe regarding unallotted land) to receive full value for the land and any associated inchoate water right -- with an 1864 priority date -- when the land is conveyed from Indian ownership. Presumably, the Tribe received that value when it sold the land to NLCC, but NLCC lost that right when it conveyed title to the land to the individual partners instead of developing the inchoate water right itself.

Accordingly, KPWU's motion regarding exceptions to claim 302 is granted, and the ACFFOD is modified as to that claim consistent with this opinion.

2. Claims 301 and 307.

As noted above, the land subject to claim 301 is composed of 4,859.3 acres in about 40 allotments that became part of the large Kittredge Ranch after William Kittredge acquired the properties during the period of about 1918 to 1929. The land subject to claim 307 is composed of 813 acres in about 9 allotments, most of which became part of the Kittredge Ranch. OWRD awarded a *Walton* right for all the acreage in claim 301 and 521 acres in claim 307. KPWU contends that OWRD did not find that the "continuous use" element of a valid *Walton* right had

been met because OWRD erroneously focused on "abandonment," not "continuous use," as required by this court's 2020 Legal Ruling. The court agrees.

As a result, the issue on *de novo* review is whether there was sufficient evidence of continuous use of the appropriated water in the record to support a *Walton* right. KPWU argues that there is not, contending that there was no direct evidence of continuous use during the period 1929 to 1981. In response, the United States cites to testimony from expert witness Paul Rauch, historical records in the record, and the affidavits of William Kittredge's children, Oscar Kittredge (Oscar) and Violet Gouldin (Violet).[52] Among other things, Rauch testified that his review of aerial photographs from 1952, 1982, 1987, and 1991, revealed that the lands covered by claims 301 and 307 "were being irrigated as of the dates of the photos."[53] He further testified that the United States Fish and Wildlife Service continued to maintain and improve the irrigation systems, and "continued to irrigate these lands in support of wildlife and the Refuge's haying and grazing operations."[54] He concluded that, in his opinion, the claimed lands "have been irrigated on a regular basis since water use was first established on those lands."[55]

KPWU contends that that evidence is insufficient to establish "continuous" use under the test established by the court, and it objects to any consideration being given to the affidavits of Oscar and Violet because, although they are in the record, they were not offered and received into evidence in the portion of the administrative hearing that was conducted on this claim.

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[52] *See* OWRD0358432-458 and OWRD0358726-27 (Rauch testimony); OWRD0356684-86 (state water permit granted to William Kittredge); OWRD0356687 (Kittredge Ditches Map); OWRD0356929; OWRD0357683-693 (field inspection reports); OWRD035677-681; OWRD0267392-393 (Oscar's affidavits); OWRD0267404-406 (Violet's affidavits).

[53] OWRD0358442.

[54] *Id.*

[55] OWRD0358445.

The court, having reviewed the evidence *de novo*, agrees with the United States that, taken as a whole, a preponderance of the evidence establishes a continuous use of water appropriated from the Williamson River to irrigate the Kittredge Ranch sufficient to support a *Walton* right. In reaching that conclusion, the court notes that, although the affidavits of Oscar and Violet were not admitted into evidence during the portion of the administrative hearing that addressed this claim, they are part of the administrative record that the court is reviewing *de novo*. As summarized above, the statute governing the administrative process describes a hearing, at which time OWRD "shall begin taking testimony and shall continue until complete." ORS 539.070. The statute further requires OWRD to compile evidence that it must file with the court. ORS 539.130(1). Ultimately, the process results in findings of fact and "an order of determination determining and establishing the several rights to the waters" of the Klamath River basin. *Id.*

Thus, the statute describes a single administrative process, with a single administrative record that is filed with the court. That entire record is also available to KPWU in support of its exceptions to OWRD's findings and conclusions on claims 301 and 307. The court sees no legal impediment to considering the affidavits in the administrative record of two people with first-hand knowledge regarding the irrigation of the Kittredge Ranch in determining whether KPWU's exceptions are well taken.

For all the foregoing reasons, KPWU's motion to approve exceptions to claims 301 and 307 is denied. The ACFFOD is affirmed as to those claims.

G. Claim 703

The parties agree that claim 703 seeks a *Walton* right to irrigate land that is now owned by Bonanza Conservation, LLC (Bonanza). Most of the land covered by claim 703 was part of a

ranch pieced together by Hiram Robbins, a Klamath Indian. Robbins obtained some parcels from allotees or their Indian successors, and other parcels from non-Indian purchasers. After Robbins died, his heirs conveyed their interests in the property to Hi Robbins Corporation, an Oregon corporation.[56] The significance of that transfer as to the claimed *Walton* rights in claim 703 is in dispute, as explained below.

OWRD approved a *Walton* right for the irrigation of 810.1 acres, based in part on natural overflow from the Sprague River.[57] The United States, Klamath Tribes, and KPWU have filed exceptions to the right approved by OWRD.[58] In response, Bonanza concedes that OWRD's order regarding 167.4 acres within claim 703 was based on natural overflow and thus does not qualify for a *Walton* right under the 2020 Legal Ruling. Bonanza contends, however, that the remaining 642.7 acres based on artificial diversion should be affirmed.

Bonanza also filed exceptions to OWRD's determination. Bonanza contends that OWRD erroneously failed to consider 100.6 acres in an area known as Riddle Field and 20.5 acres for a storage right. Bonanza further contends that OWRD wrongly considered a conveyance of property within claim 703 to the Hi Robbins Corporation as a conveyance to the first non-Indian purchaser because that corporation was owned and controlled by Klamath Indians. Those issues are addressed more fully below.

1. OWRD award -- remaining acreage in dispute.

The United States and Klamath Tribes concede that OWRD properly awarded a *Walton* right to irrigate 188.5 acres in claim 703. The United States and Klamath Tribes contend,

[56] *See* KBA_ACFFOD_05855 (describing history).

[57] KBA_ACFFOD_05797.

[58] KPWU challenges OWRD's determination as to the 167.4 acres irrigated by natural overflow but did not join in the other exceptions asserted by the United States and the Klamath Tribes.

however, that a *Walton* right should be denied as to 453.9 acres in allotments 216, 699, 835, 1016, 565, and 465. The United States and Klamath Tribes contend that there is insufficient evidence to meet the reasonable diligence and/or continuous use elements required to establish a *Walton* right for any of the challenged acreage in those allotments. The Klamath Tribes further contend that a *Walton* right should be denied as to an additional 87.4 acres in allotments 441, 836, 837, and 795 because the evidence of irrigation of those acres is insufficient to support a *Walton* right, and because the chain of title on allotment 795 from the initial allotment to the conveyance to the first non-Indian owner is incomplete. In addition, the United States and Klamath Tribes both contend that, the period of use should be shortened by two months -- from March 1 through October 16 to May 1 through October 16 -- for any *Walton* irrigation rights allowed for the land covered by claim 703.

Bonanza disagrees with the United States and the Klamath Tribes on all those issues. The court will address the issues in dispute on an allotment-by-allotment basis, beginning with the six allotments identified by both the United States and Klamath Tribes before addressing the four allotments identified by the Klamath Tribes only and Bonanza's exceptions.[59]

[59] In some of the allotments, the United States and Klamath Tribes challenged acreage that Bonanza concedes were irrigated by natural overflow. That acreage, totaling 167.4 acres, was addressed earlier in this opinion and is not included in the allotment-by-allotment discussion of the remaining acreage in dispute.

2. Allotments disputed by the United States and Klamath Tribes[60]

(a) Allotment 216.

The United States challenges the *Walton* water right determined by OWRD with respect to the 11.1 acres within this allotment that are south of the Sprague River. OWRD concluded that the allotment was transferred to the first non-Indian owner in 1924, was conveyed to and held by another non-Indian owner by 1943, and that the area in dispute was irrigated by water backed up from a dam known as the Panky-Skeen dam, which was built in the 1920s.[61] The United States argued that such irrigation was impossible given the geography of the property -- which is located in the NE¼ NW¼, Section 9, Township 36 South, Range 10 East -- citing evidence showing that allotment 216 abuts the Sprague River to the west, while the Panky-Skeen dam backed up water to the east.[62] The United States supports that argument with the 2006 sworn testimony from Phil Tupper -- who worked on the ranch that encompassed allotment 216 from 1946 through 1991 -- that "we did not irrigate the land in [allotment 216] south of the Sprague River."[63] In addition, the United States cites testimony from its expert, Dale Book, demonstrating that it was hydrologically and topographically impossible for the Panky-Skeen dam to back up water to irrigate the lands at issue within Section 9.[64]

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[60] The Klamath Tribes adopted and incorporated the arguments made by the United States regarding these allotments. Klamath Tribes' Motion at 6. For ease of reference, this opinion describes the arguments and supporting evidence as arguments of the United States, recognizing that the Klamath Tribes join in those arguments.

[61] *See* KBA_ACFFOD_05807 (describing ownership); KBA_ACFFOD_05809 (describing construction of Panky-Skeen dam and subsequent irrigation using water backed up from that dam).

[62] *See* OWRD0348255; OWRD0347794.

[63] OWRD0347269 (Tupper testimony).

[64] *See* OWRD0348450-455 and OWRD0347507-508 (Book testimony); OWRD0347881 (map).

Bonanza contends that there is evidence in the record supporting a finding of continuous irrigation of this area using water backed up from the Panky-Skeen dam, citing testimony of James Goold; a 1940 aerial photograph; and an unsworn statement that Phil Tupper made to a claims examiner in 1986 that irrigation began in this area "very early" and that "there was a box pump in a Sprague River channel at least back in the 1940s."[65]

The court concludes, on *de novo* review, that the preponderance of the evidence in the record does not establish that water was appropriated for beneficial use to irrigate the part of allotment 216 in dispute by the first non-Indian owner and continuously thereafter sufficient to support a *Walton* right. Accordingly, the motions filed by the United States and Klamath Tribes regarding this allotment are granted, and the ACFFOD is modified consistent with this opinion.

(b) Allotment 699.

The United States challenges OWRD's allowance of a *Walton* right regarding 128.1 acres within this allotment. OWRD determined that the land within allotment 699 was conveyed to the first non-Indian owner in 1920, conveyed again to another non-Indian owner prior to 1943, and that the acreage in dispute was irrigated in the 1920s by water backed up from the Panky-Skeen dam.[66] Like allotment 216, the land within this allotment that is in dispute is generally in the Northeast quarter of Section 9, Township 36 South, Range 10 East (Section 9), and the United States similarly contends that it could not have been irrigated with water backed up from the

[65] *See* OWRD0347794-795 (Goold testimony); OWES0347682 (1940 aerial photograph); OWRD0344637 (field report with Tupper's statement)

[66] *See* KBA_ACFFOD_05815 (describing ownership history); KBA_ACFFOD_ 05816 (describing irrigation history).

Panky-Skeen dam, which was located in the Southwest quarter of Section 3, Township 36, Range 10 East.[67]

The United States contends that the first evidence of irrigation in the area was the installation of a box pump around 1946, more than 25 years after the lands were conveyed to the first non-Indian owner.[68] The United States also cites evidence from its expert, Dale Book, who testified that it was hydrologically and topographically unrealistic that the dam could have backed up water sufficiently to reach these lands. Book explained that most of the land in Section 9 "is higher [in elevation] than the level of the water backed up at the dam."[69] Book found documentary evidence of irrigation of *other* lands from infrastructure related to the Panky-Skeen dam, but he found no such evidence relating to the lands in Section 9.[70]

Bonanza relies primarily on the testimony of James Goold, a rancher who worked or owned land in the area sometime after 1973; the testimony of Phil Tupper, who worked on ranches in the area from 1946 to 1991, as described above with respect to allotment 216; and a 1940 aerial photograph showing the location of an old ditch that flowed into Section 9, consistent with Goold's testimony.[71] In response, the United States points out that Goold does not have first-hand knowledge of what occurred in the 1940s, and that his explanation about "how flat"

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[67] *See* OWRD0347552; OWRD0347881 (maps).

[68] *See* OWRD0347269 (Tupper testimony); OWRD0348155 (Goold testimony).

[69] *See* OWRD0348450-455 (Book testimony).

[70] *See* OWRD0347507-511.

[71] *See* OWRD0347794-795 (Goold testimony); OWRD0347269 (Tupper testimony). OWES0347682 (1940 aerial photograph). *See also* OWRD0348507 (Goold rebuttal testimony).

this land is was refuted by Book's testimony, which relied on topographical maps showing the elevation contours in the area.[72]

As with allotment 216, the court concludes, on *de novo* review, that a preponderance of the evidence in the record does not establish that water was appropriated for beneficial use to irrigate the part of allotment 699 in dispute by the first non-Indian owner and continuously thereafter sufficient to support a *Walton* right. The motions filed by the United States and Klamath Tribes regarding this allotment are granted, and the ACFFOD is modified consistent with this opinion.

(c) Allotment 835.

This allotment was conveyed to Manuel Vieira, a non-Indian, in 1920, and was conveyed to Hiram Robbins, a Klamath Indian, in 1947.[73] OWRD granted a *Walton* right for irrigation of 99.3 acres from water backed up behind the Panky-Skeen dam.[74] The United States contends that there is insufficient evidence in the record to establish an appropriation of the beneficial use of water with reasonable diligence after the 1920 conveyance to the first non-Indian purchaser, or to establish continuous use thereafter. The United States again relies on the evidence -- discussed above in connection with allotments 216 and 699 -- to show that water backed up from the Panky-Skeen dam could not have irrigated this property, which is also located in Section 9. In addition, the United States cites testimony from Phil Tupper that parts of allotments 216 and 699 were "the only land that was irrigated by pumps or ditches" when he came to this area in

[72] *See* OWRD0348254 (topographical map).

[73] KBA_ACFFOD_05821 (describing ownership history).

[74] KBA_ACFFOD_05822.

1946, and that Hiram Robbins began irrigating parts of allotment 835 from a pump installed in the 1960s.[75]

In response, Bonanza relies on the same evidence it cited in connection with allotments 216 and 699. As with allotments 216 and 699, the court concludes, on *de novo* review, that a preponderance of the evidence in the record does not establish that water was appropriated for beneficial use to irrigate the part of allotment 835 in dispute by the first non-Indian owner and continuously thereafter sufficient to support a *Walton* right. The motions filed by the United States and Klamath Tribes regarding this allotment are granted, and the ACFFOD is modified consistent with this opinion.

(d) Allotment 1016.

OWRD determined that the land in this allotment, located in Section 9, was conveyed to Manuel Vieira, a non-Indian, in 1920, and conveyed again to James and Joseph Vieira, also non-Indians, on or before December 8, 1943.[76] OWRD granted a *Walton* water right to irrigate 100.4 acres, concluding that the land had been irrigated from water backed up by the Panky-Skeen dam, and by a box pump installed by Phil Tupper.[77] The United States contends that there is no evidence that the first non-Indian owner appropriated water to beneficial use with reasonable diligence or continuously thereafter, citing the same evidence that it cited with respect to allotments 216, 699, and 835.[78]

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[75] *See* OWRD0347269 (Tupper testimony).

[76] KBA_ACFFOD_05828.

[77] KBA_ACFFOD_05829-30.

[78] United States' Motion at 24-25. The United States also contends that there is no basis at all to find development of irrigation for 16.4 acres of this allotment located south of the East Ditch. *Id.* at 26.

In response, Bonanza relies on the same evidence it cited in connection with allotments 216, 699, and 835. As with those allotments, the court concludes, on *de novo* review, that a preponderance of the evidence in the record does not establish that water was appropriated for beneficial use to irrigate the part of allotment 1016 in dispute by the first non-Indian owner and continuously thereafter sufficient to support a *Walton* right. The motions filed by the United States and Klamath Tribes regarding this allotment are granted, and the ACFFOD is modified consistent with this opinion.

(e) Allotment 565.

OWRD determined that this land was allotted to a Klamath Indian in 1920, and conveyed to the Hi Robbins Corporation, an Oregon corporation, in 1978, and conveyed again to Alan B. Tyler, a non-Indian, in 1991.[79] OWRD awarded a *Walton* right to irrigate 72.9 acres of this allotment based on evidence of irrigation beginning in the 1960s.[80] The United States contends, however, that the evidence does not establish a continuous use, as required to support a *Walton* right, because the evidence demonstrates a lack of irrigation from about 1981 to 1995.

The United States relies on aerial photos from 1981, 1982, 1987, and 1994, which according to expert witness Dale Book did not show evidence of irrigation, as contrasted with aerial photographs taken in 1968 and 1969, which *did* demonstrate irrigation.[81] That evidence, according to the United States, is corroborated by a statement that Rayson Tupper -- Hiram Robbins' grandson -- made to a claims examiner that this land had been irrigated by a tenant at

[79] KBA_ACFFOD_05814.

[80] KBA_ACFFOD_05814-15.

[81] *See* OWRD0347520-21; OWRD034858-59.

one time, but that "the last irrigation was in 1981."[82] The United States also cites a field report dated September 1986, in which the claims examiner stated that a check dam used to divert water into the ditch servicing this allotment had been breached, "and water cannot enter the ditch." That same report also noted that the ditch "has sagebrush growing in its bottom" and that it "does not appear to have been used for several years."[83]

In response, Bonanza cites to the original claim filed by Phil Tupper in 1991, in which he stated that allotment 565 was "presently irrigated."[84] In addition, Bonanza contends that the aerial photographs show, at most, that irrigation may not have occurred between 1981 and 1987, and that short period did not show a lack of continuous use.[85]

The court, reviewing the evidence *de novo,* concludes that the preponderance of the evidence is insufficient to establish a continuous beneficial use of water to irrigate the portion of allotment 565 that is in dispute. The motions filed by the United States and Klamath Tribes regarding this allotment are granted, and the ACCFOD is modified consistent with this opinion.

(f) Allotment 465.

OWRD determined that the land in this allotment was allotted to a Klamath Indian in 1926, conveyed to Hi Robbins Corporation, an Oregon corporation, in 1978, and conveyed again to Alan B. Tyler, a non-Indian, in 1991.[86] OWRD awarded a *Walton* right to irrigate 42.4 acres

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[82] OWRD0344637.

[83] OWRD0344660.

[84] OWRD0344478.

[85] Bonanza's Response at 8-9.

[86] KBA_ACFFOD_05812.

of this land, based on check dams built by Phil Tupper in the 1960s and evidence showing that lands appurtenant to allotment 465 had been irrigated in the 1970s.[87]

The United States contends that the evidence does not support a finding that any water diversion structures had been constructed before 1991. The United States cites written testimony from Phil Tupper indicating that water below the check dams flowed in its natural course, not through any pipes, ditches or other infrastructure.[88] The United States also cites testimony from its expert, Dale Book, indicating that none of the check dams had any operable outlet pipes or other infrastructure to deliver water to allotment 465.[89] In response, Bonanza relies on the evidence of irrigation described by OWRD.[90]

The court, reviewing the evidence *de novo,* concludes that the preponderance of the evidence is insufficient to establish the appropriation of beneficial use of water before 1991 to irrigate the portion of allotment 465 that is in dispute. The motions filed by the United States and Klamath Tribes regarding this allotment are granted, and the ACFFOD is modified consistent with this opinion.

3. Allotments disputed by Klamath Tribes--additional 87.4 acres

(a) Allotment 441.

OWRD determined that this land was allotted to a Klamath Indian in 1910, conveyed to Hi Robbins Corporation, an Oregon corporation, in 1978, and conveyed again to Alan B. Tyler, a

[87] KBA_ACFFOD_05813-14.

[88] *See* OWRD0347270-271 (Tupper testimony).

[89] *See* OWRD0348449 (Book rebuttal testimony).

[90] Bonanza's Response at 9.

non-Indian, in 1991.[91] OWRD awarded a *Walton* right to irrigate 32.7 acres, based on evidence that the land was being irrigated before it was transferred out of Indian ownership.[92] The Klamath Tribes contend that the evidence shows that the irrigation system established in the 1960s and 1970s served only 3.3 acres in allotment 441, the approximate acreage inundated at high water levels behind the check dam for the water storage feature in the area known as Riddle Field, citing testimony from expert Dale Book.[93] The Tribes contend that the other 29.4 acres should be denied because the evidence did not established that those acres were irrigated by a diversion system.

The Tribes cite to evidence that the "check dams" described by OWRD "washed out with some regularity"; a memo from an OWRD claims examiner that "raised questions" about the irrigation of lands in allotment 441; field inspection reports suggesting that the Riddle Field area was not irrigated but appeared to be used to store water for wildlife; and Book's expert testimony on rebuttal that "further raised concerns" about the irrigated acreage in Riddle Field.[94]

In response, Bonanza relies on the evidence cited by OWRD and notes that the United States and KPWU did not contest these additional acres in allotment 441. OWRD concluded that water that backed up from a check dam on an unnamed stream (a tributary of the Sprague River)

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[91] KBA_ACFFOD_05810.

[92] *Id.* at 05811.

[93] *See* Klamath Tribes' Motion at 11 (citing Book testimony at OWRD0347524).

[94] *See* Klamath Tribes' Motion at 8-10 (citing OWRD0347270 (Tupper declaration); OWRD0344636 (OWRD memo); OWRD0344637-642 (field inspection reports); OWRD038448-449 (Book rebuttal testimony)).

would irrigate the area, citing Phil Tupper's declaration, evidence supporting a 1973 water right permit, and a 1979 aerial photograph.[95]

The court, on *de novo* review, agrees with the Klamath Tribes that the factual record on the number of acres irrigated in allotment 441 "is light," but the court agrees with Bonanza that it is reasonable to infer from the evidence that 32.7 acres in that allotment were irrigated before the land was transferred to non-Indian ownership. Accordingly, the Klamath Tribes' motion for a further reduction of 29.4 acres is denied.

(b) Allotment 836.

OWRD determined that this land was allotted to a Klamath Indian in 1910; conveyed to Hi Robbins Corporation, an Oregon corporation, in 1978; and conveyed again to Alan B. Tyler, a non-Indian in 1991.[96] OWRD awarded a *Walton* right to irrigate 45.6 acres of this allotment based on much of the same evidence of irrigation that it cited with respect to allotment 441, above.[97]

The Klamath Tribes contend that 16.7 acres approved by OWRD is not supported by evidence in the record. Specifically, the Tribes contend that water diverted from the point of diversion #2 -- a check dam on an unnamed tributary of the Sprague River -- only served about 10 acres in allotment 836, and that the remaining 16.7 acres were not irrigated by that diversion system. The area in dispute is located just northwest of Riddle Field, discussed above in connection with allotment 441, and the Tribes cite to much of the same evidence that they cited

[95] KBA_ACFFOD_05810-11

[96] KBA_ACFFOD_05822-23.

[97] *Id.* at 23-24 (describing evidence of irrigation).

in connection with allotment 441.[98] In response, Bonanza again relies on the evidence cited by OWRD and the fact that the United States and KPWU did not contest this acreage.

As with allotment 441, the court on *de novo* review agrees with the Klamath Tribes that the factual record on the number of acres irrigated in allotment 836 is questionable, but the court agrees with Bonanza that it is reasonable to infer from the evidence that 45.6 acres in that allotment were irrigated before the land was transferred to non-Indian ownership. Accordingly, the Klamath Tribes' motion for a further reduction of 16.7 acres is denied.

(c) Allotment 837.

OWRD determined that this land was allotted to a Klamath Indian in 1924; conveyed to Hi Robbins Corporation, an Oregon corporation, in 1978; and conveyed to Alan B. Tyler, a non-Indian, in 1991.[99] OWRD granted a *Walton* right to irrigate 29.1 acres in allotment 837, based on the same evidence and diversion points identified in connection with allotments 441 and 836.[100]

The Klamath Tribes contend that the award should be reduced by 18.5 acres because the evidence in the record does not establish that those acres were irrigated by a diversion system. The Tribes rely on the evidence they also cited regarding allotments 441 and 836, discussed above, and Bonanza again relies on the evidence cited by OWRD and the fact that the United States and KPWU did not contest those acres.[101]

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[98] *See* Klamath Tribes' Motion at 11-13.

[99] KBA_ACFFOD_05824.

[100] *Id.* at 24-25.

[101] *See* Klamath Tribes' Motion at 13-14; Bonanza's Response at 9-10.

As with allotments 441 and 836, the court on *de novo* review agrees with the Klamath Tribes that the factual record on the number of acres irrigated in allotment 837 is questionable, but the court agrees with Bonanza that it is reasonable to infer from the evidence that 29.1 acres in that allotment were irrigated before the land was transferred to non-Indian ownership. Accordingly, the Klamath Tribes' motion for a further reduction of 18.5 acres is denied.

(d) Allotment 795.

OWRD originally determined that this land was allotted to a Klamath Indian in 1921; that it was "apparently conveyed" to Hiram Robbins, also a Klamath Indian, at "some time before 1978"; that it was conveyed by Robbins' heirs to the Hi Robbins Corporation, an Oregon corporation, in 1978; and that it was conveyed to Alan B. Tyler, a non-Indian, in 1991.[102] OWRD then modified that determination to state that this allotment "was conveyed" to Klamath Indian Hiram Robbins in 1940; that it was transferred by other Klamath Indians (likely Hiram Robbins' heirs) to Hi Robbins Corporation in 1978; and then transferred to Tyler in 1991.[103] OWRD approved a *Walton* right to irrigate 22.8 acres, based on diversion of water backed up behind check dams installed on Cherry Creek and on an unnamed tributary of Cherry Creek in the 1960s or early 1970s.[104]

The Tribes contend that all 22.8 acres should be denied because of the "incomplete" chain of title and because the evidence establishes that irrigation system installed on two small streams in the 1960s and 1970s does not irrigate any of those acres.[105] The Tribes cite expert testimony

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[102] KBA_ACFFOD_05819.

[103] *Id.* at 05793.

[104] *Id.* at 05819-20.

[105] Klamath Tribes Motion at 14-16.

from Dale Book and the fact that a 1973 water permit that covered allotment 795 (and allotment 441) was cancelled in 1983 for lack of proof of appropriation.[106]

In response, Bonanza relies on the fact that the United States and KPWU did not object to the *Walton* right awarded regarding allotment 795. It acknowledges that the chain of title evidence is not crystal clear, but it relies on evidence cited by OWRD that (1) title to property appurtenant to allotment 795 was conveyed to Klamath Indian Hiram Robbins in 1940; and (2) the evidence showed "more likely than not that the property did not pass out of Indian ownership prior to 1940."[107] As to evidence of diversion, Bonanza relies on the evidence cited by OWRD in support of its conclusion that artificial diversion occurred when Phil Tupper installed check dams that flood irrigated the area.[108]

The court concludes on *de novo* review that, despite problems in documenting the chain of title, it is reasonable to infer from all the evidence that the land within allotment 795 was not conveyed to the first non-Indian owner before 1978 at the earliest, when it was conveyed to the Hi Robbins Corporation.[109] The court agrees with the Klamath Tribes that the factual record on whether the water from the check dams installed by Phil Tupper was actually used to irrigate the land in allotment 795 is questionable, but the court agrees with Bonanza that it is reasonable to infer from the evidence that 22.8 acres in that allotment were irrigated before the land was transferred to non-Indian ownership. Accordingly, the Klamath Tribes' motion to deny a *Walton* right to irrigate those acres is denied.

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[106] *Id.* at 16 (citing OWRD0347526-527 (Book testimony)).

[107] Bonanza's Response at 10 (citing KBA_ACFFOD_05794, 796).

[108] *Id.* (citing KBA_ACFFOD_05861).

[109] Whether that conveyance counts as a conveyance to a non-Indian owner is discussed more fully below in connection with Bonanza's exceptions.

4. Period of Use.

OWRD concluded that the appropriate period of using water for the areas within claim 703 that it approved should be March 1 through October 16. The United States contends that that period should be reduced by two months because the evidence shows that irrigation in this area actually begins on May 1, not March 1, and it further contends that that rate of use and place of use should be modified to account for the reduction in acreage within claim 703 approved by the court.[110] The United States cites testimony from witnesses who have recent experience irrigating these lands that the irrigation season commences in May.[111]

In response, Bonanza relies on OWRD's finding and contends that the May 1 date would fail to encompass much of the springtime overflow, citing *Campbell v. Walker*, 137 Or 375, 378-79 (1931).[112] On *de novo* review, the court agrees with the United States that the evidence supports a May 1 beginning date, and that OWRD will need to calculate and adjust the rates and places of use for the lands in claim 703 consistent with this opinion.

5. Bonanza's exceptions.

(a) The 1999 Amendment.

Bonanza contends that OWRD erroneously failed to consider as part of claim 703 about 100.6 acres in the area known as Riddle Field and 20.5 acres for a storage right. OWRD treated the request to consider those acres as a request to amend the original claim and denied the request as untimely.[113] Bonanza contends that the request was not an untimely amendment

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[110] United States' Motion at 30.

[111] *Id.* (citing OWRD0348173 (Goold testimony) and OWRD0348274 (Cummins testimony)).

[112] Bonanza's Response at 10-11.

[113] KBA_ACFFOD_05856.

because those acres were included as part of the original claim filed by Phil Tupper, a Klamath Indian, seeking a *Walton* right for 3,100 acres and thus should have been considered.[114]

In response, the United States and Klamath Tribes contend that OWRD correctly excluded those acres because (1) Tupper's original claim for 3,100 acres included land used for fish and wildlife, which is not transferrable by the Tribe or its members under *United States v. Adair*, 723 F2d 1394, 1418 (9th Cir 1983); (2) the Riddle Field and storage acreage were not included in the acreage claimed for irrigation in the original claim (for which the appropriate claim fees were paid); (3) after Tupper filed bankruptcy and lost the property, he withdrew claim 703 (and OWRD refunded his fees); (4) the subsequent owners -- TJ Lindbloom and Tim Cummins -- were allowed to resubmit claim 703 and pay the appropriate fee (which they ultimately did); (5) Lindbloom and Cummins also sought to "amend" the claim to include the Riddle Field and storage acreage as part of the irrigation acreage (but did not pay the required fee); and (6) OWRD thus correctly rejected the "amendment" as untimely and did not include the Riddle Field and storage area to be within the acreage included in claim 703.[115]

As noted above, Bonanza responds that inclusion of that acreage was not an untimely "amendment" because that acreage was included within the 3,100 acre claim that Tupper filed, and that, regardless of the fees assessed and paid, the fact that this acreage was originally claimed for fish and wildlife, not irrigation, does not matter.

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[114] Bonanza's Closing Brief at 6-7.

[115] Klamath Tribes' and United States' Joint Response at 9-15.

On *de novo* review, the court finds no error. Although the original claim covered 3,100 acres, most of that claim was for land used for wildlife purposes.[116] The claimant, Phil Tupper, paid the required fee for 889.6 acres of irrigation in claim 703; that did not include the additional Riddle Field acreage because Tupper was not claiming that that land was being irrigated. Tupper did not seek to amend the claim to add additional acreage claimed to be irrigated before the claim period closed on November 2, 1992. Nearly seven years later, in 1999, after Tupper had filed for bankruptcy and lost the property, OWRD notified the new owners, Lindbloom and Cummins, that they would be allowed to continue pursuing the claim (after paying the required fee, because OWRD had refunded the original fee to Tupper) and providing additional information requested by OWRD.[117]

The attorney for Lindbloom and Cummins responded in a letter dated July 31, 1979, indicating that his clients wanted to pursue claim 703 and stated that they were "still in the process of assembling the data" that OWRD had requested, but "in the interim" provided the information in the letter.[118] That letter stated that, although the maps referenced by OWRD and its list of irrigated acres did not identify the Riddle Field area as irrigated, "Riddle Field is irrigated and is also used to store water" and further stated that those "additional lands should be

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[116] *See* OWRD0344473-482 (Statement and Proof of Claim); OWRD0344518 (letter confirming that the non-irrigation use was for wildlife purposes).

[117] *See* OWRD0344514-515 (OWRD letter to Lindbloom & Cummins). The letter states that "[i]f additional acreage is claimed, or if additional uses are claimed, additional fees would be necessary." That certainly suggests that OWRD might consider additional acreage even though the claim period had long expired.

[118] OWRD0344518-521 (letter dated July 31, 1979).

included as irrigated lands."[119] The letter identified the points of diversion as further stated: "Please advise of the additional fees required for these lands."[120]

Although if appears from the record that there was some miscommunication regarding the fees, it is clear from the July 31, 1999, letter that Lindbloom and Cummins were requesting to add the additional Riddle Field acreage to the lands within claim 703 that were being irrigated. That was effectively a request to amend the original claim, which, as noted above, did not include that acreage within the lands covered by claim 703 that were claimed to be irrigated. OWRD did not make any formal decision on the request to amend claim 703 to include that acreage until March 2007, when it concluded that the additional acreage described in the July 31, 1999, letter "will be denied as outside the claim."[121] The court finds no error in treating the July 31, 1999, letter as a request to amend the claim, nor does it find any error in denying that request. *See* ORS 539.210 (stating that a claim must be filed "at the time and in the manner required by law" and that if a claim is not so filed, the claimant "is barred and estopped from subsequently asserting" any additional rights); OAR 690-030-0085 (prohibiting OWRD from permitting any alteration or amendment of the claim after the commencement of the period of open inspection). Accordingly, Bonanza's motion on this issue is denied.

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[119] *Id.*

[120] *Id.*

[121] KBA_ACFFOD_06202.

(b) Conveyance to Hi Robbins Corporation.

Bonanza contends that OWRD erred in concluding that the Hi Robbins Corporation was a non-Indian owner in assessing the *Walton* rights in claim 703.[122] As noted above, OWRD acknowledged that the land covered by claim 703 had been "pieced together" by Hiram Robbins, a Klamath Indian, over a period of years, and that when Robbins died, his heirs transferred their interests to Hi Robbins Corporation.[123] The record does not include the Articles of Incorporation or any evidence from the Oregon Secretary of State's office regarding the incorporation of this entity, but OWRD noted that the quit-claim deeds from the heirs to the corporation describe it as "an Oregon corporation."[124]

Thus, OWRD treated the Hi Robbins Corporation as an entity that had been incorporated under Oregon law, not tribal law. Based on that factual finding, OWRD concluded as a matter of law that "the fact that a corporation has been formed by, or held exclusively by, Klamath Indians, does not make it an Indian owner" for purposes of evaluating a *Walton* right.[125] OWRD cited *Amfac v. International Systems*, 294 Or 94, 108 (1982), and ORS 60.151, for the basic proposition that, under Oregon law, a corporation is a legally separate entity from its shareholders.

Bonanza claims that OWRD's conclusion was legally erroneous, citing *New Mexico v. Mescalero Appache Tribe*, 462 US 324, 335 (1983), and *McClanahan v. Arizona State Tax*

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[122] Bonanza does not identify the allotments and acreage within claim 703 that could be affected if this issue is decided in its favor, stating that it will do so if it prevails. Bonanza's Closing Brief at 9 n 6.

[123] KBA_ACFFOD_05855.

[124] *Id.*

[125] *Id.*

Commission, 411 US 164 (1973). In response, the Klamath Tribes and United States point out that neither of the cases cited by Bonanza address *Walton* rights, water law, or the Indian status of a corporation, and that the principle cited by OWRD "is not a unique principle of Oregon law."[126] In its reply brief and at the hearing, Bonanza acknowledged that there is no case directly on point, but contended that *Wash. State Dep't of Licensing v. Couger Den, Inc.*, 586 US 347 (2019), "is perhaps most instructive."[127]

In *Couger Den*, the Supreme Court held that an 1855 treaty between the United States and the Yakama Nation preempted the state's fuel tax as applied to Couger Den, Inc.'s importation of fuel by public highway. But the corporate entity in that case was "a wholesale fuel importer owned by a member of the Yakama Nation, *incorporated under Yakama law*, and designated by the Yakama Nation as its agent to obtain fuel for members of the Tribe. 586 US at 352 (emphasis added). Here, there is no evidence that Hi Robbins Corporation was incorporated under tribal law, and the deeds cited by OWRD suggest that it was incorporated under Oregon law. Bonanza cites no evidence to the contrary.

The issue, then -- apparently one of first impression -- is whether conveyance of lands that had been owned by a Klamath Indian by his heirs upon his death to an Oregon corporation that is owned and controlled by Klamath Indians, counts as a conveyance to the first non-Indian owner for purposes of determining whether a subsequent owner has a valid *Walton* right. The court agrees with OWRD, the Klamath Tribes, and the United States that the conveyance by

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[126] Klamath Tribes' and the United States' Joint Response at 23 (addressing cases cited by Bonanza); at 21 (citing *Dole Food Co. v. Patrickson*, 538 US 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities")).

[127] Bonanza's Reply at 6.

Hiram Robbins' heirs to the Hi Robbins Corporation, an Oregon corporation, should be treated as a conveyance to a non-Indian owner for the purpose of assessing *Walton* rights.

That conclusion follows from the principles regarding corporate entities and protection of corporate shareholders discussed above and the nature of the rights identified in *Walton II.* There, the court traced the rights back to the General Allotment Act of 1887, which provided that land on reservations "could be allotted for the exclusive use of individual Indians." 647 F2d at 49. The Act "was designed to encourage Indians to become self-supporting citizens by making them landowners." *Id.* Although at the time of the General Allotment Act of 1887 it was unlikely that many Indians were forming corporations under state law, the purpose of the Act was to protect *individual* Indians, not any corporate entities that they might incorporate under state law. Moreover, as discussed earlier in this opinion, the purpose of allowing an individual Indian allottee to convey the inchoate part of a water right to a non-Indian successor was to protect the right of the Indian allottee to convey the right without any "diminution in the right the Indian may convey." *Id.* at 51. But if "the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor." *Id.*

Here, the incorporators of Hi Robbins Corporation formed it as an Oregon corporation, obtained the benefits of Oregon law, including its treatment of corporations as separate entities and the protection of corporate shareholders from the corporation's debts. Assuming that Hiram Robbins had a valid, inchoate *Walton* water right at the time of his death, his heirs would have acquired that right. By conveying their interest in the land to an Oregon corporation, thereby invoking the protections afforded under Oregon law, they conveyed the land without any diminution in value of the inchoate water right. If the corporation did not put that right to

beneficial use with reasonable diligence and maintain it by continuous use thereafter, the right is properly lost. Accordingly, the court concludes that the conveyance of title to an Oregon corporation counts as a conveyance to a non-Indian successor, even if that corporation was formed, owned, and operated by members of the tribe. Bonanza's motion on that issue is denied.

CONCLUSION

This opinion sets forth the court's rulings on the motions to resolve the remaining exceptions to *Walton* and KTA (Phase 3, Part 3) claims. OWRD's counsel shall submit an appropriate form of order consistent with this opinion.

Dated this 25th day of February, 2025.

Stephen K. Bushong
Klamath County Circuit Court Judge *pro tem*

Verified Correct Copy of Original 4/24/2025.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF KLAMATH

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, A Tributary of the Pacific Ocean

In Re:	) Case No. WA1300001
	)
WATERS OF THE KLAMATH RIVER BASIN	) SUPPLEMENT TO OPINION RE MOTIONS) TO RESOLVE REMAINING EXCEPTIONS) TO *WALTON* AND KLAMATH) TERMINATION ACT CLAIMS (PHASE 3,) PART 3)

The Opinion dated February 25, 2025, that addressed the remaining exceptions to *Walton* and Klamath Termination Act claims (Opinion) addressed Claims 301-307 without specifically mentioning claim 304. As noted in that Opinion, KPWU filed exceptions to those claims and a motion to approve those exceptions. In response, the United States conceded the exceptions to claim 304 (160 acres). Accordingly, KPWU's motion regarding the exceptions to claim 304 is granted, and the ACFFOD is modified as to that claim consistent with this Supplemental Opinion.

Dated April 24, 2025.

Stephen K. Bushong
Klamath County Circuit Court Judge *pro tem*

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of THOMAS J. SHAW	)	PARTIAL ORDER OF DETERMINATION
	)	Water Right Claim 4

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE AMENDED PROPOSED ORDER

1. Claim 4 (Claimant: THOMAS J. SHAW) and its associated contests (2039, 3430, 3710, and 4506) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 157.

2. The Office of Administrative Hearings conducted contested case proceedings and issued an AMENDED[1] PROPOSED ORDER ON UNITED STATES' MOTION FOR RECONSIDERATION OF RULING ON LEGAL ISSUES AND DISMISSAL OF CLAIMANT'S CLAIM for Claim 4 on December 10, 2004. Exceptions were filed to this amended proposed order by Thomas J. Shaw.

3. OWRD referred Claim 4 back to the Office of Administrative Hearings for further proceedings in order to take further evidence in support of or in opposition to the Claimant's claim to a Walton right based on beneficial use of water by the method of natural overflow. The Office of Administrative Hearings conducted further proceedings and ultimately issued an AMENDED PROPOSED ORDER AFTER FURTHER PROCEEDINGS (Amended Proposed Order) for Claim 4 on September 11, 2009.

4. The STIPULATION OF FACTS AMONG CLAIMANT AND ALL CONTESTANTS for Claim 4 executed on May 7, 2009 is incorporated in its entirety as if set forth fully herein.

5. Exceptions were filed to the Amended Proposed Order within the exception filing deadline by (1) Thomas J. Shaw, and (2) OWRD.

[1] An earlier Proposed Order was issued on November 8, 2004. This Proposed Order was amended because it was mailed out without the ALJ's signature. No other changes were made to the Proposed Order.

6. The exceptions filed to the Amended Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 4. The exceptions are not found to be persuasive~~, and therefore, modifications are made to the Amended Proposed Order as described in Sections A.10, A.11 and A.12, below~~. Accordingly, changes were not made to the Amended Proposed Order to accommodate any exceptions

7. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted with modifications, as set forth in Section A.8, below.
   b. The "Evidentiary Rulings" is adopted in its entirety.
   c. The "Issue" is adopted in its entirety.
   d. The "Stipulated Facts" is adopted in its entirety.
   e. The "Findings of Fact" is adopted in its entirety. In addition, Finding of Fact #4 and is added as set forth in Section A.9, below.
   ~~f. A new section entitled "Conclusions of Law" is added to the Amended Proposed Order as set forth in Section A.10, below.~~
   ~~g.~~f. The "Opinion" is ~~replaced~~ adopted in its entirety~~ as set forth under Section A.11, below~~.
   ~~h.~~g. The section titled "Amended Proposed Order" is ~~replaced~~ adopted in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 4, ~~which also incorporates any modifications made under Section A.12, below. Consistent with Sections A.9, A.10, A.11, and A.12, below, the outcome of the Order has been modified to recognize a right for irrigation with incidental livestock watering on 54.0 acres~~.

8. **History of the Case.** Within the section titled "History of the Case" of the Amended Proposed Order, the first sentence within the fifth Paragraph is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

> On September 13, ~~2007~~ 2004, the United States filed a Motion for Reconsideration of Ruling on Legal Issues.

Reason for Modification: To correct a scrivener's error.

9. **Findings of Fact.** Amended Proposed Order Finding of Fact #4 is added as follows (additions are shown in "underline" text):

> 4. The Claimant claimed 100 head of livestock for livestock watering. (OWRD Ex. 1 at 1.)

Reason for Additional Finding of Fact #4: The facts in the ALJ's Amended Proposed Order failed to fully set forth the evidence on the record.

10. **Conclusions of Law.** The entire section titled "Conclusions of Law" with Conclusions of Law #1-4 is added to the Amended Proposed Order as follows:

Conclusions of Law

1. There is sufficient title information to establish a *Walton* right on the claimed place of use.

2. Beneficial use of water for irrigation with incidental livestock watering (for 100 head) by the method of natural overflow was made on 54 acres within Allotment 550 with reasonable diligence after transfer of the property from Indian ownership to non-Indian ownership.

3. Beneficial use of water for irrigation by the method of natural overflow is a valid basis for a *Walton* water right.

4. Wildlife is not a valid purpose of a *Walton* right derived from the 1864 Klamath Treaty.

Reason for Addition of Conclusions of Law Section: Conclusions of Law were not specified in the ALJ's Amended Proposed Order; the evidence on the record as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports these conclusions.

11. **Opinion.** The Amended Proposed Order's "Opinion" section is replaced in its entirety as follows:

OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

In addition, OWRD incorporates into the Opinion section all the paragraphs below which follow after the heading labeled "Application of Walton Elements to the Modified Amended Proposed Order Findings of Fact."

Application of Walton Elements to the Modified Amended Proposed Order Findings of Fact

The pertinent facts are not in dispute. Allotment 550 was formerly part of the Klamath Indian Reservation and remained under Indian ownership until 1957. During this time, Allotment 550 was seasonally irrigated by natural overflow from the Williamson River. In late fall of each year, Allotment 550 becomes submerged as the waters of the Williamson River rise. As the waters recede in about April, Allotment 550 becomes suitable for cattle grazing.

In 1957, Allotment 550 was transferred to Modoc Lumber Company, the first non-Indian owner. Modoc Lumber Company held the property until 1965. During this approximately eight year period, the property remained irrigated by natural overflow, and Modoc Lumber Company leased Allotment 500 to the members of the Klamath tribes for grazing purposes.

In 1965, Modoc Lumber Company conveyed Allotment 550 to Claimant. Claimant became the second non-Indian owner of Allotment 550. Allotment 550 remains irrigated solely by means of natural overflow from the Williamson River. Claimant continued to lease Allotment 550 for grazing purposes until at least 1991. Claimant stipulates that at this time there is no actual physical diversion of water from its natural source onto Allotment 550.

Claimant seeks a *Walton* right based upon natural overflow from the Williamson River. *Walton* rights require beneficial use of water be made with reasonable diligence after transfer of property from Indian ownership to non-Indian ownership. Claimant has demonstrated beneficial use of water for irrigation with incidental livestock watering by means of natural overflow from the Williamson River onto Allotment 550.

The elements necessary for a *Walton* claim for 54.0 acres in Allotment 550 have been established. Water rights should be granted for irrigation of 54.0 acres with incidental livestock watering for 100 head (the number of head claimed), on the basis of beneficial use of water by the method of natural overflow from the Williamson River.

Reasons for Modification: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining beneficial use of water by the method of natural overflow being made with reasonable diligence; to apply the appropriate legal bases to the Proposed Order's findings of fact.

12. **Amended Proposed Order.** The entire section titled "Amended Proposed Order" is replaced as follows:

1. Beneficial use of water for irrigation by the method of natural overflow is a valid basis for a *Walton* right;

2. Claim 4 is approved for irrigation of 54 acres with incidental livestock watering for 100 head, the number of head claimed.

Reason for Modifications: (1) To provide consistency with Sections A.9, A.10 and A.11.

B. DETERMINATION

1. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted with modifications, as set forth in Section A.8, above.
   b. The "Evidentiary Rulings" is adopted in its entirety.
   c. The "Issue" is adopted in its entirety.
   d. The "Stipulated Facts" is adopted in its entirety.
   e. The "Findings of Fact" is adopted in its entirety. In addition, Findings of Fact #4 is added under Section A.9, above.

~~f. A new section entitled "Conclusions of Law" is added to the Amended Proposed Order as set forth in Section A.10, above.~~

~~g.~~f. The "Opinion" is ~~replaced~~ adopted in its entirety ~~as set forth in Section A.11, above~~.

~~h.~~g. The section titled "Amended Proposed Order" is ~~replaced~~ adopted in its entirety ~~by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 4, which also incorporates any modifications made under Section A.12, below. Consistent with Sections A.9, A.10, A.11, and A.12, above, the outcome of the Order has been modified to recognize a right for irrigation with incidental livestock watering on 54.0 acres~~.

2. The elements of a Walton claim are not established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

~~3. Beneficial use of water by the method of natural overflow is established for 54.0 acres.~~

~~4.~~3. Based on the file and record herein, IT IS ORDERED that Claim 4 is ~~approved as set forth in the following Water Right Claim Description~~denied.

~~[Beginning of Water Right Claim Description]~~

~~**CLAIM NO.** 4~~

~~**CLAIM MAP REFERENCE:** OWRD INVESTIGATION MAP – T 29 S, R 30~~
~~**CLAIMANT:** THOMAS J. SHAW~~
~~PO BOX 257~~
~~KLAMATH FALLS, OR 97601~~
~~**SOURCE OF WATER**: WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE~~

~~**PURPOSE OR USE:**~~
~~IRRIGATION OF 54.0 ACRES BY NATURAL OVERFLOW; LIVESTOCK WATERING OF 100 HEAD INCIDENTAL TO IRRIGATION.~~

~~**DATE OF PRIORITY:** OCTOBER 14, 1864~~

~~**THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:**~~
~~NO SPECIFIC POINT OF DIVERSION, NATURAL OVERFLOW FROM THE WILLIAMSON RIVER~~

~~**THE PLACE OF USE IS LOCATED AS FOLLOWS:**~~

~~IRRIGATION BY NATURAL OVERLFOW WITH INCIDIENTAL LIVESTOCK WATERING~~					
~~Twp~~	~~Rng~~	~~Mer~~	~~Sec~~	~~Q-Q~~	~~Acres~~
~~30 S~~	~~9 E~~	~~WM~~	~~5~~	~~NW NE~~	~~38.8~~
~~30 S~~	~~9 E~~	~~WM~~	~~5~~	~~NE NW~~	~~15.2~~

~~**FURTHER LIMITATIONS TO THE RIGHT TO USE OF WATER BY NATURAL OVERFLOW:**~~

~~BENEFICIAL USE OF WATER MADE FROM THE METHOD OF NATURAL OVERFLOW IS A PRIVILEGE ONLY. AS LONG AS BENEFICIAL USE OF WATER BY NATURAL OVERFLOW CONTINUES, THE HOLDER OF THIS VESTED WATER RIGHT CANNOT MAKE A CALL ON WATER APPROPRIATED UNDER ANY OTHER WATER RIGHTS.~~

~~ANY CONVERSION FROM BENEFICIAL USE OF WATER BY NATURAL OVERFLOW TO BENEFICIAL USE OF THE SAME WATER FROM A SYSTEM RELYING ON A POINT(S) OF DIVERSION WILL BE CONSIDERED A CHANGE IN POINT OF DIVERSION SUBJECT TO APPROVAL OF A TRANSFER OF WATER RIGHT IN COMPLIANCE WITH THE PROVISIONS OF ORS 540.505 TO 540.587. NOTWITHSTANDING APPROVAL OF A CHANGE IN POINT OF DIVERSION, THE FOLLOWING CONDITIONS WILL APPLY TO ANY APPROVED POINT OF DIVERSION TRANSFER: DUTY FOR IRRIGATION MAY NOT EXCEED 3.0 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR. THE SEASON OF USE MAY NOT EXCEED DECEMBER 1 TO JULY 1.~~

~~[End of Water Right Claim Description]~~

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of THOMAS J. SHAW	)	PARTIAL ORDER OF DETERMINATION
	)	Water Right Claim 11

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE AMENDED PROPOSED ORDER

1. Claim 11 (Claimant: THOMAS SHAW) and its associated contests (2040, 3433, 3717 and 4073) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 162.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER ON STIPULATION BY PARTICIPANTS FOR RULING ON LEGAL ISSUES AND DISMISSAL OF CLAIMANT'S CLAIM (Proposed Order) for Claim 11 on April 15, 2005.

3. No exceptions were filed to the Proposed Order within the exceptions filing deadline.

4. On July 31, 2012, the Adjudicator issued an AMENDED PROPOSED ORDER (Amended Proposed Order) recognizing~~e~~ a right based on beneficial use of water by the method of natural overflow. The Amended Proposed Order replaced the 2005 Proposed Order in its entirety.

5. Exceptions were jointly filed to the Amended Proposed Order within the exception filing deadline by the United States of America and the Klamath Tribes.

6. The exceptions filed to the Amended Proposed Order have been reviewed and considered in conjunction with the entire record for Claim 11, and are found to be ~~un~~persuasive. Accordingly, changes were ~~not~~ made to the Amended Proposed Order to accommodate any exceptions.

7. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows: ~~in its entirety as if set forth fully herein.~~

a. The first sentence of the second paragraph of the Amended Proposed Order is replaced as set forth in Section A.8, below.
b. The "Findings of Fact" is adopted, with modifications, as set forth in Section A.9, below.
c. The "Conclusions of Law" is adopted, with modifications, as set forth in Section A.10, below.
d. The "Opinion" is adopted, with modifications, as set forth in Section A.11, below.
e. The "Order" is adopted, with modifications, as set forth in Section A.12, below.

8. The first sentence of the second paragraph of the Amended Proposed Order is replaced as follows:

This Amended Proposed Order accepts the Proposed Order's conclusion that an irrigation claim based on natural overflow and sub-irrigation is not entitled as a matter of law to a *Walton* water right, and denies that portion of the claim ~~concludes that natural overflow may form the basis for a valid Walton right claim and includes findings of fact and an opinion pertaining to that conclusion of law~~.

9. The Amended Proposed Order's "Findings of Fact" is retitled "**MODIFIED AMENDED PROPOSED ORDER FINDINGS OF FACT**" and is adopted with the following modifications to paragraph 11:

11. On February 21, 2005, the Claimant, Klamath Project Water Users, the United States of America, and the Klamath Tribes executed a STIPULATION OF FACTS (attached) whereby the parties agreed to and stipulated to undisputed facts for Claim 11. The stipulated facts outlined in Paragraph 1 (a-j) are incorporated as if set forth fully herein. ~~The stipulated facts substantiate the following findings:~~

~~a. The claimed water use for irrigation with incidental livestock watering is on former Klamath Indian Reservation Land.~~
~~b. The claimed water use for irrigation with incidental livestock watering is on land that was transferred from Indian ownership.~~
~~c. The claimed water use for irrigation with incidental livestock watering was fully developed at the time of transfer from Indian ownership.~~
~~d. The claimed use of natural overflow from the Williamson River for irrigation with incidental livestock watering on lands appurtenant to Claim 11 has been demonstrated.~~

10. The first, second, and fourth paragraphs of the Amended Proposed Order's "Conclusions of Law" are adopted, with modifications, as follows:

1. The elements of a *Walton* claim for irrigation and incidental livestock use ~~based on natural overflow are~~ are not established. ~~The season of use is based on the Stipulation of Facts. The duty for water use is limited to the amount claimed: 3.0 acre-feet per acre.~~

2. An irrigation claim based on natural overflow ~~may~~ may not form the basis of a valid *Walton* right claim.

4. The portion of Claim 11 for a separate right of use for livestock watering has been voluntarily withdrawn by the Claimant, and is therefore denied. ~~Livestock watering approved under Claim 11 must be limited to incidental livestock watering during the irrigation season.~~

11. The Amended Proposed Order's "Opinion" is modified as described herein:

The Adjudicator's discussions regarding the elements of a *Walton* claim, including the first non-Indian ~~purchaser~~ owner or successor rule, and regarding natural overflow and subirrigation of water as a basis for a *Walton* claim are rejected in their entirety. The deleted paragraphs are noted below as "*****". In their place, the GENERAL CONCLUSIONS OF LAW CONCERNING *WALTON* CLAIMS are incorporated into the Opinion section in their entirety.

The entire section entitled "**Use of Natural Overflow as the Basis of a *Walton* Right**" is removed in its entirety. The deleted paragraphs are noted below as "***."

The remaining portions of the Opinion section of the Amended Proposed Order have been modified as set forth below. Modifications are shown through tracked changes.

C. OPINION

The burden of proof to establish a claim is on the claimant. ORS 539.110; ORS 183.450(2); ~~OAR 690-028- 0040. All facts must be shown to be true by a preponderance of the evidence.~~*Gallant v. Board of Medical Examiners*, ~~159 Or App 175 (1999);~~ *see also, Cook v. Employment Division*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is a preponderance of the evidence).~~;~~ ~~*Metcalf v. AFSD*, 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 rev den 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.~~ Proof by a preponderance of the evidence means the fact-finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

As discussed in the Conclusions of Law, above, the portions of the claim for wildlife use and for a separate livestock watering use are denied. The remaining claim for irrigation use is based on the *Walton* doctrine~~, which provides for the establishment of water rights for successors in interest to Indian allottees of land within a federal Indian reservation~~. *****

The pertinent facts are not in dispute. The Stipulation of Facts establishes that the claimed place of use is within the former Klamath Indian Reservation, that the claimed place of use was allotted to a member of the Klamath Tribes (Allotment 63), and that the claimed place of use was transferred from Indian ownership to a non-Indian successor (the Modoc Lumber Company) without becoming part of the public domain. The property was conveyed from Indian ownership to the first non-Indian owner, the Modoc Lumber company, on March 1, 1956. The property was conveyed to the second non-Indian owner, L.L. Shaw, on April 18, 1958. The Stipulation of Facts also establishes that the claimed place of use has been leased as livestock pasture since 1957, prior to transfer from Indian ownership. The Stipulation of Facts further states that there is no actual physical diversion of water from its natural source; rather, Claim 11 relies upon natural overflow and sub-irrigation. Based on the Stipulation of Facts, the Claimant ~~has~~ has not established a *Walton* right for irrigation and incidental livestock watering on the claimed place of use.

The Contestants have argued that the claimed place of use is ineligible for a *Walton* right because it is undisputed that there is no physical diversion of water from its natural source; rather, Claim 11 relies upon natural overflow and subirrigation. The Contestants argue that a *Walton* right requires a physical diversion of water from its natural source, and that beneficial use of natural overflow or subirrigation are insufficient to establish a *Walton* right. For the reasons discussed ~~As described~~ above~~ more fully below~~, OWRD concludes that beneficial use of natural overflow and beneficial use of subirrigation may not ~~may~~ form the basis of a valid *Walton* right~~, but beneficial use of subirrigation may not~~.

***

12. The Amended Proposed Order's "Order" is adopted as modified below:

The "**Water Right Claim Description**" set forth by the Adjudicator is rejected in its entirety. The deleted portions are noted below as "***."

The modifications to the remaining portions of the "Order" section of the Amended Proposed Order are shown through tracked changes.

1. An irrigation claim based on natural overflow and sub-irrigation is not entitled as a matter of law to *Walton* water right. ~~A water right for Claim 11 should be confirmed as set forth in the following Water Right Claim Description.~~

2. A claim for wildlife purpose of use is not entitled as a matter of law to a *Walton* water right. ~~OWRD requests that the claimant submit, within 60 days of the service date of this Amended Proposed Order, a map that depicts the allowed place of use and that meets OWRD's standards as described in OAR 690-310-0050.~~

3. Claimant's Claim No 11 is ~~dismissed~~denied.

~~***~~

B. DETERMINATION

1. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows: ~~in its entirety as if set forth fully herein.~~
   a. The first sentence of the second paragraph of the Amended Proposed Order is replaced as set forth in Section A.8, above.
   b. The "Findings of Fact" is adopted, with modifications, as set forth in Section A.9, above.
   c. The "Conclusions of Law" is adopted, with modifications, as set forth in Section A.10, above.
   d. The "Opinion" is adopted, with modifications, as set forth in Section A.11, above.
   e. The "Order" is adopted, with modifications, as set forth in Section A.12, above.

2. The elements of a *Walton* claim are not established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

~~3. Beneficial use of water by the method of natural overflow is shown to be established for a portion of this claim.~~

4.3. Based on the file and record herein, IT IS ORDERED that Claim 11 is ~~approved as set~~ denied. ~~forth in the following Water Right Claim Description.~~

~~[Beginning of Water Right Claim Description]~~

~~**CLAIM NO.** 11~~
~~FOR A VESTED WATER RIGHT~~

~~**CLAIM MAP REFERENCE:** CLAIM # 11 MAP (01-03-2012)~~

~~**CLAIMANTS:** THOMAS J. SHAW~~
~~PO BOX 257~~
~~KLAMATH FALLS, OR 97624~~

SOURCE OF WATER: The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE:

IRRIGATION OF 6.7 ACRES BY NATURAL OVERFLOW WITH INCIDENTAL LIVESTOCK WATERING OF 100 HEAD

DATE OF PRIORITY: OCTOBER 14, 1864

NO SPECIFIC POINT OF DIVERSION:

NATURAL OVERFLOW FROM THE WILLIAMSON RIVER

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION BY NATURAL OVERFLOW WITH INCIDENTAL LIVESTOCK WATERING					
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**Acres**
30 S	10 E	WM	14	NE SW	5.6
30 S	10 E	WM	14	SE SW	1.1

FURTHER LIMITATIONS TO THE RIGHT TO USE OF WATER BY NATURAL OVERFLOW:

BENEFICIAL USE OF WATER MADE FROM THE METHOD OF NATURAL OVERFLOW IS A PRIVILEGE ONLY. AS LONG AS BENEFICIAL USE OF WATER BY NATURAL OVERFLOW CONTINUES, THE HOLDER OF THIS VESTED WATER RIGHT CANNOT MAKE A CALL ON WATER APPROPRIATED UNDER ANY OTHER WATER RIGHTS.

ANY CONVERSION FROM BENEFICIAL USE OF WATER BY NATURAL OVERFLOW TO BENEFICIAL USE OF THE SAME WATER FROM A SYSTEM RELYING ON A POINT(S) OF DIVERSION WILL BE CONSIDERED A CHANGE IN POINT OF DIVERSION SUBJECT TO APPROVAL OF A TRANSFER OF WATER RIGHT IN COMPLIANCE WITH THE PROVISIONS OF ORS 540.505 TO 540.587. NOTWITHSTANDING APPROVAL OF A CHANGE IN POINT OF DIVERSION, THE FOLLOWING CONDITIONS WILL APPLY TO ANY APPROVED POINT OF DIVERSION TRANSFER: DUTY FOR IRRIGATION MAY NOT EXCEED 20.1 ACRE FEET PER YEAR. THE SEASON OF USE MAY NOT EXCEED DECEMBER 1 TO JULY 1.

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of SCOTT AND MARGIE RUNELS	)))	PARTIAL ORDER OF DETERMINATION
_____	)	Water Right Claim 19

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE PROPOSED ORDER

1. Claim 19 (Claimants: SCOTT AND MARGIE RUNELS) and its associated contests (2787, 2819, 3437, and 4077) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 166.

2. The Office of Administrative Hearings conducted contested case proceedings and issued a PROPOSED ORDER for Claim 19 on November 18, 2004. The record was reopened at the request of OWRD to identify the points of diversion and the number of irrigated acres by quarter-quarter. An AMENDED PROPOSED ORDER (First Amended Proposed Order) was issued on February 22, 2005. Claimant Margie Runels filed exceptions to both orders within the exception filing deadlines.

3. On June 20, 2007, OWRD filed a second request to reopen the record to allow further testimony and cross examination. A second AMENDED PROPOSED ORDER (Second Proposed Order) was issued on August 14, 2008. The First Amended Proposed Order was adopted and incorporated by reference into the Second Amended Proposed Order. (Second Amended Proposed Order at 4.) No exceptions were filed to the Second Proposed Order.

4. The exceptions filed have been reviewed and considered in conjunction with the entire record for Claim 19. The exceptions are found to be persuasive in part. In response to the persuasive exceptions, modifications to the First Amended Proposed Order are made as described in Section A.7.~~,~~and A.8~~, and A.9~~, below.

Note on Modifications

~~This Partial Order of Determination modifies certain parts of the Second Amended Proposed Order.~~ This Partial Order of Determination ~~also~~ modifies certain parts of the First Amended Proposed Order. Modification of the First Amended Proposed Order is necessary because the Second Amended Proposed Order incorporates the First Amended Proposed Order by reference only. The Administrative Law Judge did not reprint the entirety of the First Amended Proposed Order in his Second Amended Proposed Order. The Second Amended Proposed Order is adopted and incorporated in its entirety as if set forth fully herein.

Modifications to the First Amended Proposed Order

5. The First Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, below.
   c. The "Issues" is adopted in its entirety.
   d. The "Findings of Fact," is adopted with modifications, as set forth in Section A.7. below.
   e. The "Opinion" is adopted with modifications, as set forth in Section A.8, below.
   f. The section titled "Amended Proposed Order" is adopted in its entirety.~~with modifications, as set forth in Section A.9, below. Consistent with Sections A.7, A.8, and A.9, below, the outcome of the Order has been modified as to recognize a right for irrigation on an additional 177.8 acres.~~

6. **Evidentiary Rulings.** Within the section titled "Evidentiary Rulings" of the Proposed Order, the third to last sentence within the first Paragraph is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

   The United States also moved to amend a reference in Exhibit 166 E 00040022 to read "R ~~9~~ 7 E," instead of "R ~~7~~ 9 E," to correct a typographical error.

   Reason for Modification: To correct a scrivener's error.

7. **Findings of Fact.**
   a. The Proposed Order's Finding of Facts #2, 3, 4, 5, and 6 are modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

   (2) Allotment Nos. 11 and 13 were transferred to non-Indians in 1924 and 1920, respectively. (Clements Testimony at 52, ¶ 61.) ~~There was almost no irrigation of Allotments Nos. 11 or 13 prior to the mid-1970s. (*Id.*)~~ The first evidence of beneficial use of water on these two allotments is water right Permit S-37118 which was issued for irrigation from Sand Creek and has a priority date

of 1973 (OWRD Ex. 1 at 80-84.) A photograph of Allotment 11 taken in 1976 shows approximately three acres of irrigation or spilling from the ditch along the western boundary of that allotment. (*Id*.) The first irrigation on Allotment 13 appears in photographs taken in 1974, 1976 and 1979, in which one to two acres received water. (*Id*.)

(3) Allotment No. 12 was transferred to the first non-Indian in 1918. There is no evidence of development of irrigation near the time of transfer, except a letter in which the owner requested water for use on a few acres of irrigable land in about 1919. (*Id*. at 53, ¶ 61) The issue in the letter is the landowner's improper maintenance of a flume. The flume was constructed to convey water to his land which crossed over onto his neighbors land. Leakage from the flume caused damage to his neighbor's crop. (Clements Direct Ex. 40032.) ~~There~~ Although this is ~~no~~ evidence that the requested water was delivered, the letter gives no indication as to the location of the land to which the flume was conveying water. ~~and no evidence of any irrigation of Allotment No. 12 from 1918 to 1952. (*Id*.)~~ The ~~earliest~~ evidence does show natural overflow without a diversion ~~of irrigation~~ on this allotment that dates to sometime after 1930 when natural overflow from Sand Creek was spread across Sections 18 and 19 for irrigation using single plow furrow ditches, and continued into the 1940s and 1950s. (Runels Ex. S-3 [Affidavit of Lee Hunsaker].) Water right Permit S-37118 was issued for irrigation from Sand Creek covering lands within this allotment, and has a priority date of 1973 (OWRD Ex. 1 at 80-84.) A final proof survey map dated May 27, 1994, depicts the acreage under irrigation. (OWRD Ex. 1 at 85). Aerial photographs between 1952 and 1979 show different areas of between 8 and 23 acres receiving water. (~~*Id.*~~ Clements Testimony at 53, ¶ 61.) Photographs taken between 1987 and 1994 show no irrigation on Allotment No. 12. (*Id*.)

(4) Allotment Nos. 530 and 534 were transferred to non-Indian ownership in 1960-1961. (*Id*.) An aerial photograph from 1961 shows 14 acres and 41 acres being irrigated on Allotment Nos. 530 and 534, respectively. (*Id*.) Allotment No.

533 was transferred to the first non-Indian in 1921 and owned by that first non-Indian until 1928. There is no evidence of any irrigation of that allotment (533) during that period of ownership. (*Id.*) ~~There is no evidence of any irrigation of Allotment No. 533 from 1928 to 1952. (*Id.*) Evidence shows a significant period of non-use of water on these three allotments, from 1976 to 1994 for Allotment No. 530, and at least 1979 to 1994 for Allotment Nos. 534 and 533. (*Id.* at 53-54, ¶ 61.)~~ There is no evidence of any irrigation of Allotment No. 533 from 1928 to 1952. (*Id.*) Evidence shows a significant period of non use of water on these three allotments, from 1976 to 1994 for Allotment No. 530, and at least 1979 to 1994 for Allotment Nos. 534 and 533. (*Id.* at 53-54, ¶ 61.) The ~~earliest~~ evidence ~~of irrigation~~ does show natural overflow without a diversion on Allotment Nos. 530, 534 and 533 dates to sometime after 1930 when natural overflow from Sand Creek was spread across Sections 18 and 19 for irrigation using single plow furrow ditches, and continued into the 1940s and 1950s. (Runels Ex. S-3 [Affidavit of Lee Hunsaker].) Mr. Clements' testimony establishes that a 1952 aerial photograph indicates substantial portions of Allotment Nos. 530 and 534 were flooded that year, and that the channel of Sand Creek flows onto and through these allotments from which the high flows would spread over the lands adjacent to the stream channel. (Clements Testimony at 24, 25, 29) Water right Permit S-37118 was issued for irrigation from Sand Creek covering lands appurtenant to these three allotments, and has a priority date of 1973 (OWRD Ex. 1 at 80-84.) A final proof survey map dated May 27, 1994 shows irrigation on the lands claimed within these three allotments. (OWRD Ex. 1 at 85). However, beneficial use of water from Sand Creek was not made on Allotments 530 and 534 during Indian ownership or with reasonable diligence on the majority of the lands within these two allotments following their transfer to the first non-Indian owner. Though an aerial photograph from 1961 shows 14 acres and 41 acres being irrigated on Allotment Nos. 530 and 534, respectively, no irrigation was shown on the remainder of the lands within these two allotments during the period of first non-Indian ownership, and continuous use of water for irrigation was not shown on the entirety of Allotments 530 (~~1.4.4~~104.4 acres) and 534 (74.3 acres)

from 1976 to 1994. Beneficial use of water also did not occur for at least 9 years after transfer from Indian ownership on Allotment No. 533. ~~Beneficial use of water from Sand Creek was made with reasonable diligence on 104.4 acres on Allotment No. 530 and 74.3 acres on Allotment No. 534.~~

(5) Allotment No. 1442 was transferred out of Indian ownership in 1918 and conveyed to the next owner in 1924. (*Id*. at 54, ¶ 61.) There is no evidence of water use on Allotment No. 1442 from 1918 to sometime after 1930. ~~1924, nor any evidence of irrigation on the parcel from 1924 to 1952. (*Id*.)~~ The ~~earliest~~ evidence does show natural overflow without a diversion on ~~of irrigation~~ this allotment ~~dates to~~ sometime after 1930 when natural overflow from Sand Creek was spread across Sections 18 and 19 for irrigation using single plow furrow ditches, and continued into the 1940s and 1950s. (Runels Ex. S-3 [Affidavit of Lee Hunsaker].) Aerial photographs show no irrigation of the land from 1976 to 1987. (~~*Id.*~~ Clements Testimony at 54, ¶ 61.) However, water right Permit S-37118 was issued for irrigation from Sand Creek covering lands appurtenant to this allotment, and has a priority date of 1973 (OWRD Ex. 1 at 80-84.) A final proof survey map dated May 27, 1994 shows irrigation on the lands claimed within this allotment. (OWRD Ex. 1 at 85). Beneficial use of water did not occur for at least twelve years after transfer from Indian ownership on Allotment No. 1442.

Reasons for Modifications: The Adjudicator has determined that certain of the ALJ's original findings were not supported by a preponderance of evidence in the record; to provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by non-Indian successors after transfer from Indian ownership; to provide evidence from the record to substantiate continued use of water by non-Indian successors after transfer from Indian ownership; to add clarification using evidence on the record.

(6) Allotment Nos. 120, 121, 208 and 1122 were transferred out of Indian ownership between 1920 and 1924. They were conveyed to the next owner between 1928 and 1936. (~~*Id.*~~ Clements Testimony at 54, ¶ 61.) All four allotments were within the boundaries of the Sand Creek Irrigation Project as it

was initially completed in about 1920. (*Id*.) The lands within Allotment Nos. 120 and 121 were withdrawn from the project in 1939. (*Id*. at 54-55, ¶ 61.) Although the lands may have been irrigated under the project between 1920 and 1939, there is no evidence of ~~continuous~~ continued irrigation of the lands in Allotments 120 and 121 for a period of thirty-four years from 1939 to 1973, after they were withdrawn from the project in 1939. (*Id*. at 55, ¶ 61.) A letter dated 1955, from counsel of the current land owner (Dixon) protesting operation and maintenance assessments of irrigation of Sections 8, 18, 9 and 5, being the "old Woodruff property," states that "this property derives no beneficial use from the waters of the Sand Creek Project." (Clements Direct Ex. 40042.) Allotments 120 and 121 are located in Section 18. Aerial photographs of the allotments show that water uses since 1952 have consisted of minor ditch spillage, stock watering or sub-irrigation with long periods of non-use in between. (~~*Id.*~~ Clements Testimony at 55, ¶ 61.) Beneficial use of water resumed after 1973 as evidenced by water right Permit S-37118 which was issued for irrigation from Sand Creek covering lands appurtenant to Allotment Nos. 120 and 121. (OWRD Ex. 1 at 80-84.)

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

b. The last sentence in Finding of Fact # 7 is replaced as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

~~Claimants presented no evidence that the period of use should be outside of March 1 – October 31.~~ Although Claimants claimed a period of use March 15 through November 15 (OWRD Ex. 1 at 5), a season of use of March 1 through October 31 is a permissible amendment.

Reasons for Modification: The Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record; to add clarification using evidence on the record. In addition, OWRD finds that the shift in the season of use irrigation from that which was originally claimed (March 15 through November 15), to March 1 through October 31, as proposed by the ALJ in the First Amended Proposed Order is a permissible amendment because (1) it is not an enlargement to the length of the irrigation season, (2) the ALJ relied on the same standard season of use as stated in the Preliminary Evaluation for Claim 19, whose publication preceded the October 1, 1999 deadline to make amendments that do not enlarge the

original claim, and (3) no exceptions were filed against the March 1 though October 31 season of use proposed in the First Amended Proposed Order.

8. **Opinion.** The Proposed Order's "Opinion" section is modified as described herein.

OWRD removed the ALJ's discussions regarding the elements of a *Walton* Claim, including the first non-Indian ~~purchaser~~ owner rule as a basis for a *Walton* claim. The deleted paragraphs are noted below as "*****" In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

The remaining portions of the Opinion section of ALJ's Proposed Order have been labeled "Application of Walton Elements to the Modified Proposed Order Findings of Fact." Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text.

Application of Walton Elements to the Modified Proposed Order Findings of Fact

Claim 19 is a claim for water rights for lands purportedly within the boundaries of the former Klamath Indian Reservation. Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as *"Walton"* water rights.[1]

*****

Claimants have the burden of proof to establish the claim by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); *see also*, *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-finder is persuaded that the facts asserted are more

[1] A *"Walton"* right refers to a term derived from the *Colville Confederated Tribes v. Walton* line of cases that address the issue of a claim for a water right of non-Indian successors to Indian allottees. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*). An Indian "allotment" is a parcel of land on an Indian reservation awarded to an individual member of an Indian tribe, *i.e.*, an allotee, pursuant to the General Allotment Act of 1887, 24 Stat. 388. *See, e.g.*, *Walton II*, 647 F2d at 45.

likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). Claimants have failed to meet their burden, with the exception of 138 acres of Allotment No. 208 and 160 acres of Allotment No. 1122, to which the United States has stipulated that Claimants have established a *Walton* water right.[2]

Claimants' lands were within the boundaries of the former Klamath Indian Reservation. However, Claimants failed to prove the remaining elements for a *Walton* claim with respect to ~~each of the 11~~9 Allotments 11, 12, 13, 530, 533, 534, 1442, 120 and 121. Claimants did not prove that irrigation was initiated by Indian predecessors or by ~~the first~~ the first non-Indian ~~successors~~ ~~owner of each allotment~~ owner of each allotment with diligence within a reasonable period of time after transfer of the land ~~to the first non-Indian~~to the first non Indian owner from Indian ownership, ~~and~~ or that the land ~~has~~ had been continued to be irrigated without long periods (34 years) of non-use. ~~continuously.~~ For Allotments 530 and 534, Claimants also impermissibly rely upon evidence of natural overflow.

There was no evidence of any irrigation of Allotments 11 and 13, which were transferred to non-Indians in the 1920s, before the 1970s. There was no evidence of any irrigation of Allotment 12, which was transferred to the first non-Indian in 1918, ~~until sometime after 1930.~~ ~~from 1918 to 1952~~. from 1918 to 1952. Although aerial photographs taken between 1952 and 1979 show some areas in Allotment 12 receiving water, photographs from 1987 to 1994 show no irrigation. Claimants have failed to meet the requirements for a *Walton* water claim for Allotments 11, 12 and 13.

Allotment Nos. 530 and 534 were transferred to non-Indian ownership in 1960 or 1961. Allotment No. 533 was transferred to the first non-Indian in 1921. There is no evidence of any irrigation on Allotment No 533 until sometime after 1930, ~~from 1921 to 1928, the period~~ nine years after the allotment was first owned by ~~that~~ non-Indian successors. ~~, or from 1928 to 1952.~~ Beneficial use of water on Allotment No. 533 was

[2] ~~With the exception of 138 acres of Allotment No. 208 and 160 acres of Allotment No. 1122, to which the United States has stipulated that Claimants have established a *Walton* water right.~~

not made by the Indian owner prior to transfer, nor made with reasonable diligence by non-Indian successors. Claimants failed to establish a *Walton* water right for Allotment No. 533.

¶ There is ~~sufficient~~ evidence to show that Allotments 530 and 534, ~~were irrigated~~ during the 1930s, 1940 and 1950s, received ~~by~~ natural overflow without a diversion from Sand Creek. The water was spread over the land using single plow furrow ditches. This is further substantiated in the earliest available aerial photograph, taken in 1952. However, receipt of natural overflow on these lands does not constitute ~~B~~beneficial use of water ~~was made~~ prior to the transfer from Indian ownership to the first non-Indian successors. ~~Although~~ ~~A~~Further, although a 1961 aerial photograph shows 14 acres and 41 acres being irrigated on Allotment Nos. 530 and 534, respectively, that year, there were long periods of non use of water on Allotment Nos. 530, 533, and 534 between 1976 and 1994. Claimants fail to establish a *Walton* right for Allotment Nos. 530, 533, and 534.~~.~~ ~~, there were long periods of non-use of water on Allotment Nos. 530, 533 and 534 between 1976 and 1994. Claimants failed to establish a Walton water right for Allotment Nos. 530, 533 and 534.~~ ~~Irrigation has continued on these two allotments as claimed, as evidenced by water right Permit S-37118 which has a priority date of 1973, and a corresponding final Proof Survey map dated 1974. A *Walton* water right for irrigation from Sand Creek has been established on 104.4 acres within Allotment No. 530, and for 74.3 acres within Allotment No. 534. The claimed point of diversion is located in Lot 4, SW ¼ SW ¼ , Section 18, Township 31 South, Range 8 East, W.M.~~

Allotment No. ~~1142~~ 1442 was transferred to the first non-Indian in 1918, and transferred to the next owner in 1924. There is no evidence of irrigation on the land in this allotment until sometime after 1930, twelve years after transfer from Indian ownership. ~~from 1918 to 1924, from 1924 to 1952, or from 1976 to 1987.~~ Claimants failed to establish the elements of a *Walton* water right on Allotment No. 1442.

Allotment Nos. 120, 121, 208 and 1122 were transferred out of Indian ownership between 1920 and 1924, and conveyed to the next owner between 1928 and 1936. All

four of these allotments were within the boundaries of the Sand Creek Irrigation Project, which was initially completed in about 1920. The lands within Allotment Nos. 120 and 121 were withdrawn from the project in 1939. While those lands may have been irrigated under the project between 1920 and 1939, there was no evidence of irrigation of these two allotments for a period of 34 years, being 1939 to 1973. ~~after 1939~~. Claimants failed to prove the elements of a *Walton* water right for Allotment Nos. 120 and 121, including continuous use of water for irrigation. ~~Claimants failed to prove the elements of a *Walton* water right for Allotment Nos. 120 and 121. To the extent that a *Walton* water right may have been established on these allotments, they were abandoned due to a 34-year period of nonuse. "As described in the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS, a *Walton* claimant need not establish continuous beneficial use of water following initial development of the right. Instead, a contestant has the burden to prove that a claimant has abandoned the right after development. Intent to abandon may be inferred through a sufficiently long enough period of non-use. *See, e.g., In the Matter of the Clark Fork River*, 902 P2d 1353 (Mont 1996). Under the facts in this case, 34 years is a sufficiently long period of time for an intent to abandon the water right on these allotments to be inferred."~~

Based on the stipulation of the United States of irrigation of lands within Allotment Nos. 208 and 1122, Claimants have established the elements of a Walton water right for 138 acres for Allotment No. 208 and 160 acres for Allotment No. 1122, **the legal description for the irrigated acreage and points of diversion of which are specifically described in Finding of Fact No. 7, above.** The Preliminary Evaluation done by ~~ORWD~~ OWRD found an irrigation rate of 1/40th cfs/acre, a duty of 3.5 af/acre, and a period of use of March 1 – October 31. ~~Claimants failed to establish a period of use outside of March 1 – October 31.~~

Claimants make a number of assertions in their written Closing Argument which warrant discussion.

Claimants contend that they have established a *Walton* water right for Claim 19 because of the determination made by the special water master in 1992, which was adopted by the Circuit Court. That determination established relative water rights between Claimants and Mosby, as a result of a civil lawsuit filed by Mosby against Claimants. However, the outcome of that lawsuit has no bearing on this proceeding. The determination states it is an interim resolution to the water use dispute only between Claimants and Mosby, pending final adjudication of the Klamath Basin. The purpose of this proceeding is to determine whether Claimants have presented evidence to establish a *Walton* water right. Moreover, the United States and the Klamath Tribes were not parties to the lawsuit filed in Circuit Court and are not bound by it. Claimants cannot establish a *Walton* water right in this proceeding based on the interim determination by the special water master.

Claimants also make assertions in their Closing Argument without any evidence in the record to support those assertions, or which while they may possible be true, do nothing to establish the elements of a *Walton* water right.

~~Claimants' reliance on language in the 1992 Interim Order, that files of the OWRD show continuous irrigation activity on Mosby's and their property from at least the mid-1970s to the present, does nothing to establish the initiation of irrigation by the first non-Indian owner on any of the allotments, nor does it establish continuous irrigation on the allotments.~~

Claimants' reliance on language in the 1992 Interim Order, that files of the OWRD show continuous irrigation activity on Mosby's and their property from at least the mid-1970s to the present, does nothing to establish the initiation of irrigation by the first non-Indian owner on any of the allotments, nor does it establish continuous irrigation on the allotments.

Claimants' assertions that maps or other evidence in the record show irrigation from Sand Creek, show irrigation on some sections of land, or that OWRD issued water permits out of Sand Creek during the 1950s, '60s and '70s, do not establish the elements

of a *Walton* water right for Claimants on the allotments. As discussed earlier in this decision, on certain allotments Claimants failed to establish irrigation by Indian predecessors or by ~~the first~~ the first non-Indian ~~successors~~ ~~owner~~ owner within a reasonable period of time after transfer of the land to the first non-Indian owner and/or that the land had been continuously irrigated. ~~And the evidence establishes that rights on certain allotments have been abandoned due to an extended period of non-use.~~ , ~~and that the land has been irrigated continuously.~~

Claimants charge in their Closing Argument that, "whenever someone tried to claim an Indian right * * * the neighbors would complain and the water master would try to shut them down." (Claimants' Closing at 1, ¶ 9.) There is no evidence in the record to support this assertion.[3]

Reasons for Modifications: To correct and clarify the elements of a *Walton* water right; to provide consistency with the above Modified Proposed Order Findings of Fact; to provide clarity of evidence on the record; to further substantiate approval of the claim; to apply the appropriate legal basis/bases to the proposed order's modified findings of fact; to correct scrivener's errors.

~~9. **Order.** Within the section titled "Amended Proposed Order," Section (1) is replaced in its entirety by the Water Right Claim Description as set forth in this Partial Order of Determination for Claim 19. Section (2) is modified as follows (additions are shown in "underline" text, deletions are shown in "strikethrough" text):~~

~~(2) Claimants failed to establish the elements of a *Walton* right for the remaining allotments of Claim 19 (*i.e.*, Allotment Nos. 11, 12, 13, 120, 121, 530, 533, 534 and 1442). The claim for water rights on those allotments should be denied.~~

~~**Reason for Modifications:** To provide consistency with Findings of Facts A.8 and A.9.~~

[3] The February 3, 2004 Scheduling Order informed all participants of the requirement that they file in writing their witnesses' direct testimony no later than April 23, 2004. Claimants filed no written direct testimony.

Modifications to the Second Amended Proposed Order

10. The Second Amended Proposed Order is adopted and incorporated in its entirety as if set forth fully herein, with two exceptions: (1) the "Findings of Fact and Conclusions of Law" is adopted in its entirety except as modified under Finding of Fact A.11, below, and (2) the section titled "Amended Proposed Order" is replaced in its entirety by the Water Right Claim Description as set forth in this Partial Order of Determination for Claim 19.

11. **Findings of Fact and Conclusions of Law.**

a. Section 3 pertaining to Exhibit S3 is modified as shown below. Additions are shown in "underline" text, deletions are shown in "strikethrough" text.

3. Exhibit S3, memoranda, pleadings, affidavits, and exhibits from Mosby v. Runels, 88-241CV, do not establish Walton rights on the claimed allotments.

Claimants submitted a significant number of documents filed in a civil court proceeding brought against them by a neighboring land owner. Many of these documents constitute argument rather than evidence. However, the Affidavit of Lee Hunsaker provides evidence to establish beneficial use of naturally overflowing water on certain allotments within a reasonable time period following transfer from Indian ownership. Ignoring for a moment that many of these documents constitute argument rather than evidence, I find that, even considering them in a light most favorable to Claimants, the proffered documents do not provide any information to establish *Walton* rights on the claimed lands. These court documents, many of which were in evidence at the time ALJ Betterton issued his Amended Proposed Order, do not establish irrigation of the claimed allotments by the first non-Indian owner or continuous irrigation thereafter.

b. The last paragraph in Section 6 pertaining to Exhibit S6 is modified as shown below. Additions are shown in "underline" text, deletions are shown in "strikethrough" text.

In conclusion, I find the newly submitted documents do not provide sufficient evidence to establish the claimed water rights on the claim 19 lands outside the stipulated acreage. Accordingly, I find no basis upon which to set aside or modify ALJ Betterton's Amended Proposed Order issued February 22, 2005. In conclusion, the Affidavit of Lee Hunsaker (part of the newly submitted S-3) is sufficient, in combination with other evidence in the record,

~~to establish water rights on Allotments 530 and 534. The newly submitted evidence is insufficient to establish the claimed water rights on the other allotments outside the stipulated acreage.~~

~~**Reason for Modifications:** To make the findings of fact and conclusions of law in the Second Amended Proposed Order consistent with the Adjudicator's modifications to the First Amended Proposed Order.~~

B. DETERMINATION

1. The First Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, above.
   c. The "Issues" is adopted in its entirety.
   d. The "Findings of Fact," is adopted with modifications, as set forth in Section A.7. above.
   e. The "Opinion" is adopted with modifications, as set forth in Section A.8, above.
   f. The section titled "Amended Proposed Order" is adopted in its entirety.~~with modifications, as set forth in Section A.9, above. Consistent with Sections A.7, A.8, and A.9, above, the outcome of the Order has been modified as to recognize a right for irrigation on an additional 177.8 acres.~~

2. The Second Amended Proposed Order is adopted and incorporated in its entirety as if set forth fully herein.~~, with two exceptions: (1) the "Findings of Fact and Conclusions of Law" is adopted in its entirety except as modified under Finding of Fact A.11, above, and (2) the section titled "Amended Proposed Order" is replaced in its entirety by the Water Right Claim Description as set forth in this Partial Order of Determination for Claim 19.~~

3. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

4. The shift in the season of use from irrigation from the season originally claimed (March 15 through November 15), to March 1 through October 31, constitutes a permissible amendment of the claim. The March 1 through October 31 season was first identified in the Preliminary Evaluation for Claim 19, which was issued prior to the beginning of open inspection in the Klamath Adjudication, and therefore complies with OAR 690-030-0085. In addition, the shifted season does not enlarge the overall length of the season of use, and therefore is not a "new" claim that would not be permitted pursuant to ORS 539.210.

5. Based on the file and record herein, IT IS ORDERED that Claim 19 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 19

CLAIM MAP REFERENCE: OWRD INVESTIGATION MAPS – T 31 S, R 7 E and T 31 S, R 8 E

CLAIMANT: SCOTT AND MARGIE RUNELS
PO BOX 39
FORT ROCK, OR 97735

SOURCES OF WATER:
SCOTT CREEK, tributary to SAND CREEK, and
SAND CREEK, tributary to the WILLIAMSON RIVER, and

PURPOSE OR USE:
IRRIGATION OF 298.0~~476.7~~ ACRES AS FOLLOWS:

298.0 ACRES FROM COMMINGLED WATER FROM SCOTT CREEK (POD 1) AND UPPER SAND CREEK (POD 2).~~, AND~~

~~178.7 ACRES FROM LOWER SAND CREEK (POD 3)~~

RATE OF USE:
~~11.9 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:~~

7.4 CFS OF COMMINGLED WATER FROM SCOTT CREEK (POD 1) AND UPPER SAND CREEK (POD 2), MEASURED AT THE POINTS OF DIVERSION.~~, AND~~

~~4.5 CFS FROM LOWER SAND CREEK (POD 3) MEASURED AT THE POINT OF DIVERSION, AND~~

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:
3.5 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: APRIL 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Source	Twp	Rng	Mer	Sec	Q-Q	GLot	Remarks / Measured Distance
POD 1	Scott Creek	31 S	7 E	WM	16	NW SE		COMINGLED WATER FROM SAND CREEK AND SCOTT CREEK
POD 2	Upper Sand Creek	31 S	7 E	WM	28	NW NW		
~~POD 3~~	~~Lower Sand Creek~~	~~31 S~~	~~8 E~~	~~WM~~	~~18~~	~~SW SW~~	4	~~980 FEET NORTH & 360 FEET EAST FROM SW CORNER, SECTION 18~~

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
31 S	8 E	WM	7	NE SW		40.0	POD 1 and POD 2
31 S	8 E	WM	7	NW SW	3	28.2	
31 S	8 E	WM	7	SW SW	4	29.8	
31 S	8 E	WM	7	SE SW		40.0	
31 S	8 E	WM	7	NE SE		40.0	
31 S	8 E	WM	7	NW SE		40.0	
31 S	8 E	WM	7	SW SE		40.0	
31 S	8 E	WM	7	SE SE		40.0	
~~31 S~~	~~8 E~~	~~WM~~	~~18~~	~~NE NW~~		~~34.3~~	~~POD 3~~
~~31 S~~	~~8 E~~	~~WM~~	~~18~~	~~SW SW~~	~~4~~	~~10.6~~	
~~31 S~~	~~8 E~~	~~WM~~	~~19~~	~~NE NE~~		~~37.0~~	
~~31 S~~	~~8 E~~	~~WM~~	~~19~~	~~NW NE~~		~~37.3~~	
~~31 S~~	~~8 E~~	~~WM~~	~~19~~	~~NE NW~~		~~40.0~~	
~~31 S~~	~~8 E~~	~~WM~~	~~19~~	~~NW NW~~	~~1~~	~~19.5~~	

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of THE NATURE CONSERVANCY	)	PARTIAL ORDER OF DETERMINATION
	)	Water Right Claim 34

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT

1. On January 31, 1991, THE NATURE CONSERVANCY (Claimant) timely submitted a Statement and Proof of Claim (Claim 34) to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication, as a non-Indian successor to allotted Klamath Reservation lands, claiming a vested Indian reserved water right (Walton claim) under the Treaty of October 14, 1864, 16 Stat. 707.

2. Claim 34 was submitted for a total of 413.77 cfs from the Sycan River, a tributary of the Sprague River, and Long Creek, Coyote Creek, Dry Creek, and Pole Creek, all tributaries of the Sycan River; being 413.31 cfs of water for irrigation of 9790.3 acres, and 0.46 cfs for livestock watering of 4540 head. The claimed period of use is March 1 through October 31 for irrigation, and March 1 through November 30 for livestock watering. The claimed priority date is October 14, 1864.

3. CATHERINE MACDONALD, an agent making proof for THE NATURE CONSERVANCY, signed Claim 34 attesting that the information contained in the claim is true.

4. On January 20, 1999, Claim 34 was amended to (1) lengthen the claimed irrigation season from March 1 through October 31 to year around, (2) lengthen the season of use for incidental livestock watering from March 1 through November 30 to year around, (3) shorten the season of use for consumptive livestock watering from March 1 through November 30 to May 1 to November 15, (4) change the number of livestock to be watered from 4540 head to 4500 cow/calf pairs, (5) decrease the total cfs claimed for livestock watering from 0.46 cfs to 0.23 cfs (20 gallons per day per cow/calf pair for 4500 pair), (6) add 150 cfs of water conveyance losses to the livestock portion of the claim, (7) decrease the originally claimed acreage for irrigation from 9790.3 acres to 9711.2 acres, (8) change the amount of water claimed for irrigation from a total of 413.31

cfs to a total volume of 71,033.81 acre-feet, and (9) add sources of water to also include AL Creek, Chocktoot Creek, Shake Creek, Rock Creek, Knoll Creek, Divide Creek, ZX Creek and six unnamed streams.

5. On December 21, 1998, the title to the property appurtenant to Claim 23 was transferred to THE NATURE CONSERVANCY (Claimant) from David E. Brattain, Thomas A. Brattain, Mary Jane Brattain, Thomas M. Taylor, Susan J. Taylor, Trustee of the Susan J. Taylor Trust, Ruth L. Brattain, and Brattain Bros. Inc. *See* COUNTY OF LAKE RECORDS REEL 33, FILE 887, BOOK 242, Page 701. Claim 23 had been timely submitted for a total of 77.47 cfs, being 2.48 cfs from Pole Creek, 4.68 cfs from Coyote Creek, 4.09 cfs from Long Creek, all tributaries of the Sycan River, and 66.22 cfs from the Sycan River, a tributary of the Sprague River, for irrigation of 3098.2 acres, The claimed period of use is March 1 through October 31. The claimed priority date is February 25, 1901. Claim 23 was subsequently incorporated into THE NATURE CONSERVANCY'S Claims 34 and 36.

6. On July 16, 1999, Claim 34 was further amended to include acreage from Claim 23, described above, resulting in an increase of acreage for irrigation claimed by 225.1 acres [located in the E½, Section 25, Township 31 South, Range 13 East, W.M.], to a total of 9,936.3 acres, and an increase in the volume of water claimed by 12,071.44 acre-feet to a total of 83,105.25 acre-feet.

7. On September 29, 1999, Claim 34 was further amended to increase the volume of water claimed by 2026.11 acre-feet to a total of 85,131.36 acre-feet for the refilling of ground water storage after severe drought.

8. On October 26, 1999, Claim 34 was further amended to increase the claimed rate for watering livestock from 20 gallons per day per pair to 20 gallons per day per head, and to increase the quantity of water claimed for conveyance losses under the livestock watering portion of the claim

9. On October 4, 1999, following investigation of the evidence submitted, the Adjudicator issued a Summary and Preliminary Evaluation of Claims (Preliminary Evaluation) stating the portion of the claim for livestock watering was approved, but for a smaller quantity of water than claimed and a longer season of use than claimed. The portion of the claim for irrigation was denied because the required elements for a Walton right were not established.

10. On May 8, 2000, the Claimant timely filed Contest 2799 to the Preliminary Evaluation of Claim 34.

11. On May 8, 2000, the following parties, hereinafter collectively referred to as the "Klamath Project Water Users," filed Contest 3445: Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District

Improvement Co.[1], Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Berlva Pritchard[2], Don Vincent[3], Randy Walthall, Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Co., and Collins Products, LLC.

12. On May 8, 2000, the United States of America timely filed Contest 3782 to the Claim and/or Preliminary Evaluation of Claim 34.

13. On May 8, 2000, the Klamath Tribes timely filed Contest 4090 to the Claim and/or Preliminary Evaluation of Claim 34.

14. On May 8, 2000, Thomas William Mallams timely filed Contest 4947 to the Claim and/or Preliminary Evaluation of Claim 34.

15. These matters were referred to the Office of Administrative Hearings for a contested case hearing which were designated as Case 178.

16. On May 1, 2006, Thomas William Mallams's Contest 4947 was dismissed. *See* ORDER GRANTING THE NATURE CONSERVANCY'S MOTION FOR SUMMARY DETERMINATION AND DISMISSING CONTEST NO. 4947 (May 1, 2006).

17. On November 30, 2006, The Nature Conservancy timely submitted an amendment to Claim 34 for additional or relocated points of diversion. *See* AFFIDAVIT AND REQUEST FOR ADDITIONAL OR RELOCATED POINTS(S) OF DIVERSION (Nov. 30, 2006).

18. On December 21, 2006, the Klamath Project Water Users withdrew Contest 3445 by stipulation. *See* STIPULATED WITHDRAWAL OF CONTEST NO. 3445 (Dec. 21, 2006).

19. On December 21, 2006, The Nature Conservancy, OWRD, the United States of America, and the Klamath Tribes executed a STIPULATION TO RESOLVE CONTESTS 2799, 3782, AND 4090 (Settlement Agreement), thereby resolving all remaining contests to Claim 34.

20. The Nature Conservancy, the United States of America, and the Klamath Tribes also executed an APPENDIX AGREEMENT OF ADDITIONAL TERMS IN CASE 178, CLAIM 34 (Appendix Agreement), effective the date of the Settlement Agreement.

~~19.~~21. The Settlement Agreement provides that all references to the Settlement Agreement shall include the Settlement Agreement itself, the Appendix Agreement, and all attachments to the Settlement Agreement.

[1] Klamath Hills District Improvement Company voluntarily withdrew from Contest 3445 on January 16, 2004. *See* VOLUNTARY WITHDRAWAL OF CONTEST BY KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY

[2] Berlva Pritchard voluntarily withdrew from Contest 3445 on June 24, 2002. *See* NOTICE OF WITHDRAWAL OF CLAIMANT.

[3] Don Vincent voluntarily withdrew from Contest 3445 on November 29, 2000. *See* NOTICE OF WITHDRAWAL OF CLAIMANTS.

~~20.~~22. On December 22, 2006, the Adjudicator withdrew Case 178 from the Office of Administrative Hearings.

~~21.~~23. No contests or claims of injury were filed to the Claimant's November 30, 2006 request for additional or relocated points of diversion on or prior to the filing deadline of February 21, 2007.

24. OWRD finds that the priority date, October 14, 1864, stipulated in the Settlement Agreement for the use of water on 8.1 acres located in the SE¼ Section 25, Township 31 South, Range 13 East, W.M., (4.8 acres in the NW¼SE ¼ and 3.3 acres in the SW¼SE¼), is an impermissible amendment because it is an enlargement of the original claim; the claimed priority date for use of water on these 8.1 acres which were incorporated into Claim 34 from Claim 23 as described in Findings 5 and 6 above, is February 25, 1901.

~~22.~~25. On June 29, 2016, The Nature Conservancy, the United States of America, and the Klamath Tribes entered into an ADDENDUM TO THE STIPULATION TO RESOLVE CONTESTS 2799, 3782, AND 4090 (Addendum to Stipulation) acknowledging and agreeing that the Appendix Agreement is without legal force and effect.

B. DETERMINATION

1. The Settlement Agreement executed between The Nature Conservancy, OWRD, the United States of America, and the Klamath Tribes is adopted and incorporated as if set forth fully herein, with ~~two~~three exceptions:

   a. The October 14, 1864 priority date stipulated to in the Settlement Agreement is an impermissible claim amendment as it applies to the use of water on 8.1 acres incorporated into Claim 34 from Claim 23; the priority date recognized herein for the use of water on these 8.1 acres, which are located in the SE¼ Section 25, Township 31 South, Range 13 East, W.M. (4.8 acres in the NW¼SE ¼ and 3.3 acres in the SW¼SE¼) is February 25, 1901, which is consistent with the original priority date claimed in Claim 23; and

   b. The following statement made in Paragraph B.1.c is applicable only to the portion of the place of use in the Settlement Agreement that is *not* based on a *Walton* claim (specifically, the 8.1 acres described in Paragraph B.1.a., above): "The Parties understand and agree that irrigation for the purposes hereof includes the artificial application of water to crops or plants to promote growth or nourish crops or plants, including marshlands or wetlands, with or without commercial harvest or grazing." The remainder of the place of use is subject to the definition of irrigation use applied by the Ninth Circuit to *Walton* claims: irrigation under a *Walton* right is that which is "essential to agricultural needs." *See United States v. Adair, 723 F.2d 1394, 1415* (9th Cir. 1983).

~~b.~~c. Because the Nature Conservancy, the United States of America, and the Klamath Tribes acknowledge and agree that the Appendix Agreement is without legal force and effect, the Appendix Agreement is excluded from the Settlement Agreement and this Partial Order of Determination.

2. The GENERAL CONCLUSIONS OF LAW CONCERNING AMENDMENT OF CLAIMS is incorporated as if set forth fully herein.

3. The Claimant's timely amendment made on November 30, 2006, pertaining to additional or relocated points of diversion meets the requirements of OAR 690-030-0085, and the amendment is incorporated into the Claimants' claim.

4. The following three relocated points of diversion are approved:

   a. POD 'H-1' SOUTH FORK STEP POOL 1, located within the NENW, SECTION 11, TOWNSHIP 32 SOUTH, RANGE 13 EAST, W.M., at 430 FEET SOUTH AND 2620 FEET EAST FROM NW CORNER, SECTION 11.

   b. POD 'H-2' SOUTH FORK STEP POOL 2, located within the NWSE, SECTION 11, TOWNSHIP 32 SOUTH, RANGE 13 EAST, W.M., at 2100 FEET NORTH AND 1570 FEET WEST FROM SE CORNER, SECTION 11.

   c. POD 'H-3' SECTION LINE DITCH, located within the SWSE, SECTION 11, TOWNSHIP 32 SOUTH, RANGE 13 EAST, W.M. at 1610 FEET WEST FROM SE CORNER, SECTION 11.

5. The diversion of water from the original point of diversion (POD 'H'), located within the SWNE, SECTION 4, TOWNSHIP 32 SOUTH, RANGE 13 EAST, W.M., at 1950 FEET SOUTH AND 1770 FEET WEST FROM NE CORNER, SECTION 4, is not authorized.

6. The combined quantity of water diverted at each of the three relocated points of diversion (POD 'H-1' SOUTH FORK STEP POOL 1, 'H-2' SOUTH FORK STEP POOL 2, and POD 'H-3' SECTION LINE DITCH) must not exceed the quantity of water lawfully available at the original point of diversion (POD 'H').

7. Based on the file and record herein, IT IS ORDERED that Claim 34 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 34
FOR A VESTED WATER RIGHT

CLAIM MAP REFERENCE:
SYCAN MARSH PRESERVE MAPS (Dec.13, 2006) – T 31 S, R 13 E; T 32 S, R 13 E;

T 32 S, R 14 E; and T 33 S, R 13 E

SYCAN MARSH PRESERVE MAP FOR ADDITIONAL POINTS OF DIVERSION, EXHIBIT A (Dec. 4, 2006) – T 32 S, R 13 E

CLAIMANT: THE NATURE CONSERVANCY
821 SE 14TH AVE
PORTLAND OR 97214-2537

SOURCES OF WATER:

The SYCAN RIVER, tributary to the SPRAGUE RIVER

LONG CREEK, tributary to the SYCAN RIVER,

DRY CREEK, tributary to the SYCAN RIVER,

COYOTE CREEK, tributary to the SYCAN RIVER, and

An UNNAMED STREAM (POLE CREEK), tributary to the SYCAN RIVER

PURPOSE OR USE:

IRRIGATION OF 8985.2 ACRES WITH INCIDENTAL LIVESTOCK WATERING OF 4540 COW/CALF PAIRS

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)	32 S	14 E	WM	21	SW NE	1810 FEET SOUTH AND 2040 FEET WEST FROM NE CORNER, SECTION 21
POD 'D' SYCAN RIVER WEIR 3	32 S	14 E	WM	20	NW NE	380 FEET SOUTH AND 2360 FEET WEST FROM NE CORNER, SECTION 20
POD 'E' SYCAN RIVER WEIR 6	33 S	13 E	WM	3	SE NE	2550 FEET SOUTH AND 850 FEET WEST FROM NE CORNER, SECTION 3
POD 'F' LONG CREEK WEIR 7	33 S	13 E	WM	3	NW NW	920 FEET SOUTH AND 1220 FEET EAST FROM NW CORNER, SECTION 3
POD 'G' DRY CREEK WEIR	32 S	13 E	WM	15	SE SW	1310 FEET NORTH AND 1850 FEET EAST FROM SW CORNER, SECTION 15
[a]POD 'H-1' SOUTH FORK STEP POOL 1	32 S	13 E	WM	11	NE NW	430 FEET SOUTH AND 2620 FEET EAST FROM NW CORNER, SECTION 11
[a]POD 'H-2' SOUTH FORK STEP POOL 2	32 S	13 E	WM	11	NW SE	2100 FEET NORTH AND 1570 FEET WEST FROM SE CORNER, SECTION 11
[a]POD 'H-3' SECTION LINE DITCH	32 S	13 E	WM	11	SW SE	1610 FEET WEST FROM SE CORNER, SECTION 11
POD 'H-4' SMALLS DITCH	32 S	13 E	WM	4	SW NE	1800 FEET SOUTH AND 1550 FEET WEST FROM NE CORNER, SECTION 4
POD 'H-5' NORTH FORK MAIN WEIR	32 S	13 E	WM	4	SW NE	1760 FEET SOUTH AND 1620 FEET WEST FROM NE CORNER, SECTION 4
POD 'I-1' COYOTE CREEK SOUTH DITCH	31 S	13 E	WM	27	NE SE	2100 FEET NORTH AND 1200 FEET WEST FROM SE CORNER, SECTION 27
POD 'I-2' COYOTE CREEK MAIN WEIR	31 S	13 E	WM	27	NE SE	2020 FEET NORTH AND 1300 FEET WEST FROM SE CORNER, SECTION 27
POD 'J' POLE CREEK SPREADER WEIR	31 S	13 E	WM	23	NE SE	1460 FEET NORTH AND 640 FEET WEST FROM SE CORNER, SECTION 23

[a] Relocated points of diversion; the original point of diversion is located within the SWNE, SECTION 4, TOWNSHIP 32 SOUTH, RANGE 13 EAST, W.M., at 1950 FEET SOUTH AND 1770 FEET WEST FROM NE CORNER, SECTION 4.

RATES OF USE [CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR (CFS/Acre) AND TOTAL CFS] MEASURED AT THE POINTS OF DIVERSION, OR MAXIMUM ACRE-FEET PER YEAR ALLOWED (AF/Year) ARE AS FOLLOWS:

POD Name	Source	Quantity of Water			Authorized Number of Acres
		CFS/Acre	Total CFS	AF/Year	
POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)	Sycan River	1/61	2.8		170.6
POD 'D' SYCAN RIVER WEIR 3	Sycan River	1/70	8.9		624.3
POD 'E' SYCAN RIVER WEIR 6	Sycan River			4946.0	1446.2
POD 'F' LONG CREEK WEIR 7	Long Creek			2787.0	814.8
POD 'G' DRY CREEK WEIR	Dry Creek	1/40	13.4		537.9
POD 'H-1' SOUTH FORK STEP POOL 1	Long Creek	1/42	29.0		1223.0
POD 'H-2' SOUTH FORK STEP POOL 2	Long Creek	1/42	10.8		455.5
POD 'H-3' SECTION LINE DITCH	Long Creek	1/42	40.0		1687.0
POD 'H-4' SMALLS DITCH	Long Creek	1/38	13.4		504.7
POD 'H-5' NORTH FORK MAIN WEIR	Long Creek	1/83	6.9		573.7
POD 'I-1' COYOTE CREEK SOUTH DITCH	Coyote Creek	1/36	5.4		196.1
POD 'I-2' COYOTE CREEK MAIN WEIR	Coyote Creek	1/41	16.2		665.1
POD 'J' POLE CREEK SPREADER WEIR	Unnamed Stream (Pole Creek)	1/86	1.0		86.3
TOTALS for WATER RIGHT			**147.8 CFS**	**7733.0 AC/Year**	**8985.2 Acres**

ALTERNATE POINTS OF DIVERSION ARE AUTHORIZED AS FOLLOWS:

Primary POD Name	Maximum Quantity of Water from an Alternate POD[a]		Authorized Alternate POD(s)	Authorized Number of Acres from Alternate POD(s)
	CFS/Acre	Total CFS		
POD 'D' SYCAN RIVER WEIR 3	1/104	6.0	POD 'H-5' NORTH FORK MAIN WEIR[b]	624.3
POD 'F' LONG CREEK WEIR 7	1/60	13.58	POD 'H-1' SOUTH FORK STEP POOL 1[c]	814.8

[a] ALTERNATE PODS MAY BE USED WHEN WATER IS NOT UTILIZED FROM THE PRIMARY POD

[b] USE OF WATER FROM POD 'H-5' NORTH FORK MAIN WEIR AS AN AUTHORIZED ALTERNATE POD TOGETHER WITH ANY OTHER USE OF WATER FROM THIS SAME POD MAY NOT EXCEED 6.9 CFS

Primary POD Name	Maximum Quantity of Water from an Alternate POD[a]		Authorized Alternate POD(s)	Authorized Number of Acres from Alternate POD(s)
	CFS/Acre	Total CFS		
			POD 'H-2' SOUTH FORK STEP POOL 2[d]	
			POD 'H-3' SECTION LINE DITCH[e]	
POD 'G' DRY CREEK WEIR	1/60	8.96	POD 'H-1' SOUTH FORK STEP POOL 1[f]	537.8
			POD 'H-2' SOUTH FORK STEP POOL 2[g]	
			POD 'H-3' SECTION LINE DITCH[h]	

[c] [f] USE OF WATER FROM POD 'H-1' SOUTH FORK STEP POOL 1 AS AN AUTHORIZED ALTERNATE POD TOGETHER WITH ANY OTHER USE OF WATER FROM THIS SAME POD MAY NOT EXCEED 29.0 CFS

[d] [g] USE OF WATER FROM POD 'H-2' SOUTH FORK STEP POOL 2 AS AN AUTHORIZED ALTERNATE POD TOGETHER WITH ANY OTHER USE OF WATER FROM THIS SAME POD MAY NOT EXCEED 10.8 CFS

[e] [h] USE OF WATER FROM POD 'H-3' SECTION LINE DITCH AS AN AUTHORIZED ALTERNATE POD TOGETHER WITH ANY OTHER USE OF WATER FROM THIS SAME POD MAY NOT EXCEED 40.0 CFS

[a] The use of water on these place of use locations is subject to a February 25, 1901 priority date.

DUTY:

3.42 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE:

Use	Period
Irrigation with Incidental Livestock Watering	March 1 - October 31

DATES OF PRIORITY:

OCTOBER 14, 1864 – EXCLUDING USE OF WATER WITHIN THE SE¼ SECTION 25, TOWNSHIP 31 SOUTH, RANGE 13 EAST, W.M.

FEBRUARY 25, 1901 – FOR USE OF WATER WITHIN THE SE¼ SECTION 25, TOWNSHIP 31 SOUTH, RANGE 13 EAST, W.M.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
31 S	13 E	WM	23	NE SE		2.8	POD 'J' POLE CREEK SPREADER WEIR
31 S	13 E	WM	23	SE SE		24.2	POD 'J' POLE CREEK SPREADER WEIR
31 S	13 E	WM	24	NE SW		2.4	POD 'J' POLE CREEK SPREADER WEIR
31 S	13 E	WM	24	NW SW		12.1	POD 'J' POLE CREEK SPREADER WEIR
31 S	13 E	WM	24	SW SW		35.4	POD 'J' POLE CREEK SPREADER WEIR
31 S	13 E	WM	24	SW SW		4.6	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	24	SE SW		25.8	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	24	SE SW		9.4	POD 'J' POLE CREEK SPREADER WEIR
31 S	13 E	WM	24	SW SE		31.2	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	24	SE SE	4	28.5	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	25	NE NW		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	25	NW NW		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	25	SW NW		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	25	SE NW		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	25	NE SW		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	25	NW SW		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	25	SW SW		37.1	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	25	SE SW		36.7	POD 'I-2' COYOTE CREEK MAIN WEIR
[a]31 S	13 E	WM	25	NW SE		4.8	POD 'I-2' COYOTE CREEK MAIN WEIR
[a]31 S	13 E	WM	25	SW SE		3.3	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	26	NE SW		6.9	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	26	NW SW		0.7	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	26	SW SW		12.6	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	26	SW SW		22.4	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	26	SE SW		20.4	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	26	SE SW		19.6	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	26	NE SE		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	26	NW SE		32.3	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	26	SW SE		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	26	SE SE		40.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	27	NE SE		6.4	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	27	NE SE		3.0	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	27	NW SE		2.0	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	27	SW SE		3.0	POD 'I-1' COYOTE CREEK SOUTH DITCH

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
31 S	13 E	WM	27	SE SE		36.5	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	27	SE SE		2.6	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	34	NE NE		39.6	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	34	NW NE		5.4	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	34	SW NE		23.8	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	34	SE NE		40.0	POD 'I-1' COYOTE CREEK SOUTH DITCH
31 S	13 E	WM	36	NE NE	1	22.6	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	36	NW NE		3.0	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	36	NW NE		24.7	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	SW NE		38.3	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	SE NE		3.0	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	SE NE	2	26.4	POD 'I-2' COYOTE CREEK MAIN WEIR
31 S	13 E	WM	36	NE NW		37.1	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	NW NW		37.1	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	SW NW		40.0	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	SE NW		40.0	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	NE SW		34.2	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	NW SW		39.4	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	SW SW		40.0	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	SE SW		31.8	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	NW SE		33.3	POD 'H-4' SMALLS DITCH
31 S	13 E	WM	36	SW SE		37.7	POD 'H-4' SMALLS DITCH
32 S	13 E	WM	1	NE NE	1	32.2	POD 'H-4' SMALLS DITCH
32 S	13 E	WM	1	NW NE	2	35.9	POD 'H-4' SMALLS DITCH
32 S	13 E	WM	1	SW NE		40.0	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	SE NE	5	32.3	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	NE SW		40.0	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	NW SW		40.0	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	SW SW		38.9	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	SE SW		38.7	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	NE SE	6	30.5	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	NW SE		39.5	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	SW SE		40.0	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	1	SE SE	7	32.1	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	3	NW SE		13.5	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	10	NE SE		9.2	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	10	NW SE		18.1	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	10	SW SE		39.7	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	10	SE SE		40.0	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	11	NE NE		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	NW NE		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	SW NE		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	SE NE		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	NE NW		2.9	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	SE NW		20.5	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	NE SW		10.5	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	NW SW		1.2	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	11	SW SW		35.5	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	11	SE SW		12.7	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	11	SE SW		5.9	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	SE SW		0.6	POD 'H-3' SECTION LINE DITCH

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
32 S	13 E	WM	11	NE SE		36.4	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	NE SE		3.3	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	11	NW SE		13.9	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	11	NW SE		15.9	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	SW SE		3.2	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	11	SW SE		32.6	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	11	SW SE		4.2	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	11	SE SE		2.9	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	11	SE SE		25.7	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	11	SE SE		11.4	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	NE NE	1	32.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	NW NE		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	SW NE		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	SE NE	2	32.1	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	NE NW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	NW NW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	SW NW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	SE NW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	NE SW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	NW SW		33.4	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	SW SW		34.4	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	SW SW		0.9	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	12	SW SW		0.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	12	SE SW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	NE SE	3	31.9	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	NW SE		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	SW SE		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	12	SE SE	4	31.7	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	NE NE	1	15.7	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	13	NE NE	1	15.6	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	13	NW NE		36.5	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	13	NW NE		3.5	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	13	SW NE		27.1	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	13	SW NE		12.9	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	13	SE NE	2	31.2	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	13	NE NW		8.8	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	13	NE NW		31.2	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	NW NW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	SW NW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	SE NW		33.9	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	SE NW		6.1	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	13	NE SW		0.4	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	13	NE SW		12.8	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	13	NE SW		26.8	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	NW SW		40.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	SW SW		33.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	SW SW		7.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	13	SE SW		30.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	13	SE SW		3.0	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	13	SE SW		7.0	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
32 S	13 E	WM	13	NE SE	3	32.0	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	13	NE SE	3	0.1	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	13	NW SE		2.2	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	13	NW SE		37.7	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	13	NW SE		0.1	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	13	SW SE		0.1	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	13	SW SE		39.9	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	13	SE SE	4	29.2	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	13	SE SE	4	3.5	POD 'C-2' SYCAN RIVER WEIR 2 (REEN DITCH)
32 S	13 E	WM	14	NE NE		26.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	NE NE		13.9	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	14	NW NE		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	SW NE		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	SE NE		17.7	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	SE NE		22.3	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	14	NE NW		25.3	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	NE NW		14.7	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	14	NW NW		40.0	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	14	SW NW		12.7	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	SW NW		27.3	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	14	SE NW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	NE SW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	NW SW		32.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	NW SW		7.9	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	14	SW SW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	SE SW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	NE SE		15.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	NE SE		22.9	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	14	NW SE		39.2	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	SW SE		34.6	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	14	SE SE		19.6	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	14	SE SE		14.4	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	15	NE NE		39.7	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	15	NW NE		14.3	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	15	SW NE		11.3	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	15	SE NE		36.0	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	15	NE NW		0.9	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	15	NE SW		13.1	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	15	SE SW		16.4	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	15	NE SE		13.6	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	15	NE SE		26.4	POD 'H-2' SOUTH FORK STEP POOL 2
32 S	13 E	WM	15	NW SE		35.3	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	15	NW SE		4.2	POD 'H-2' SOUTH FORK STEP POOL 2

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
32 S	13 E	WM	15	SW SE		40.0	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	15	SE SE		40.0	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	NE NE		40.0	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	NW NE		37.8	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	SW NE		38.7	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	SE NE		40.0	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	NE NW		0.6	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	SE NW		1.1	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	NE SE		40.0	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	NW SE		40.0	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	SW SE		40.0	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	22	SE SE		40.0	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	23	NE NE		16.7	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	23	NE NE		22.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	NW NE		33.3	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SW NE		32.2	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SE NE		36.9	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SE NE		0.6	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	23	SE NE		2.5	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	23	NE NW		27.2	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	NW NW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SW NW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SE NW		14.2	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	NE SW		19.7	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	NE SW		1.2	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	23	NW SW		28.5	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	23	NW SW		11.4	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SW SW		2.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SW SW		31.5	POD 'G' DRY CREEK WEIR (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	23	SE SW		0.1	POD 'G' DRY CREEK WEIR

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
32 S	13 E	WM	23	SE SW		32.7	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	NE SE		23.9	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	NE SE		16.1	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	23	NW SE		38.9	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SW SE		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SE SE		33.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	23	SE SE		7.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NE NE	1	33.5	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NW NE		40.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	SW NE		40.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	SE NE	2	34.5	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NE NW		40.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NW NW		25.6	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NW NW		14.4	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	24	SW NW		2.5	POD 'H-1' SOUTH FORK STEP POOL 1
32 S	13 E	WM	24	SW NW		36.2	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	SW NW		1.3	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	24	SE NW		40.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NE SW		40.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NW SW		40.0	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	SW SW		36.4	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	SW SW		3.6	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	24	SE SW		37.6	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	SE SW		2.4	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	24	NE SE	3	28.9	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	24	NE SE	3	6.6	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NW SE		32.5	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	NW SE		7.5	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	24	SW SE		32.6	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	24	SW SE		7.4	POD 'D' SYCAN RIVER WEIR 3 (AUTHORIZED ALTERNATE POD: POD 'H-5' NORTH FORK MAIN WEIR)
32 S	13 E	WM	24	SE SE	4	36.4	POD 'H-5' NORTH FORK MAIN WEIR
32 S	13 E	WM	25	NE NE	1	37.3	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	NW NE		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	SW NE		39.6	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	SE NE	2	34.7	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	NE NW		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	NW NW		23.9	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	NW NW		16.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	25	SW NW		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	SE NW		40.0	POD 'E' SYCAN RIVER WEIR 6

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
32 S	13 E	WM	25	NE SW		39.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	NW SW		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	SW SW		39.2	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	SE SW		28.5	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	NE SE	3	27.9	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	NW SE		30.4	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	SW SE		0.8	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	25	SE SE	4	1.6	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	NE NE		0.2	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	NE NE		39.8	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	NW NE		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	SW NE		35.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	SW NE		4.9	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	SE NE		29.8	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	SE NE		10.2	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	NE NW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	NW NW		35.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	SW NW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	SE NW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	NE SW		35.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	NE SW		4.9	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	NW SW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	SW SW		3.5	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	SW SW		32.2	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	26	SW SW		4.3	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	SE SW		34.5	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	SE SW		0.4	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	26	SE SW		5.1	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	NE SE		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	NW SE		35.2	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	NW SE		4.8	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	26	SW SE		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	26	SE SE		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	27	NE NE		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	NW NE		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	SW NE		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	SE NE		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	NE NW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	NW NW		37.8	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	SW NW		15.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	SE NW		40.0	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	NE SW		15.9	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	SE SW		0.6	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	27	NE SE		7.5	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	27	NE SE		32.5	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	27	NW SE		38.7	POD 'H-3' SECTION LINE DITCH

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
32 S	13 E	WM	27	NW SE		1.3	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	27	SW SE		35.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	27	SE SE		40.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	28	NE NE		4.8	POD 'H-3' SECTION LINE DITCH
32 S	13 E	WM	33	NE NE		36.1	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	33	SE NE		16.9	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	33	SE SE		1.9	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	NE NE		24.8	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	NE NE		15.2	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	34	NW NE		40.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	SW NE		40.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	SE NE		15.9	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	34	SE NE		20.6	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	NE NW		38.1	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	NW NW		38.4	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	SW NW		40.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	SE NW		40.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	NE SW		34.9	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	NW SW		39.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	SW SW		39.8	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	SE SW		40.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	NE SE		4.4	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	34	NE SE		33.8	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	NW SE		40.0	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)

Irrigation with Incidental Livestock Watering							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
32 S	13 E	WM	34	SW SE		37.7	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	34	SW SE		2.3	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	34	SE SE		31.6	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	34	SE SE		8.4	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	35	NE NE		37.1	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	NW NE		39.1	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	SW NE		37.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	SE NE		19.7	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	NE NW		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	NW NW		39.6	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	NW NW		0.4	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	35	SW NW		40.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	SE NW		35.4	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	NE SW		30.2	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	NW SW		39.1	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	NW SW		0.9	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
32 S	13 E	WM	35	SW SW		39.1	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	35	SE SW		12.1	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	36	NE NW		4.0	POD 'E' SYCAN RIVER WEIR 6
32 S	13 E	WM	36	NW NW		30.5	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	2	NE NW	3	2.1	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	2	NW NW	4	28.7	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	2	SW NW		11.3	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	3	NE NE	1	36.7	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	3	NW NE	2	36.7	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	3	NW NE	2	5.2	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
33 S	13 E	WM	3	SW NE		37.6	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	3	SE NE		35.3	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	3	NE NW	3	4.7	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	3	NE NW	3	32.1	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
33 S	13 E	WM	3	NW NW	4	32.7	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
33 S	13 E	WM	3	SW NW		1.8	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)
33 S	13 E	WM	3	SE NW		4.1	POD 'E' SYCAN RIVER WEIR 6
33 S	13 E	WM	3	SE NW		14.3	POD 'F' LONG CREEK WEIR 7 (AUTHORIZED ALTERNATE PODS: POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND/OR POD 'H-3' SECTION LINE DITCH)

FURTHER LIMITATIONS

THE COMBINED QUANTITY OF WATER DIVERTED AT EACH OF THE THREE RELOCATED POINTS OF DIVERSION, BEING POD 'H-1' SOUTH FORK STEP POOL 1, POD 'H-2' SOUTH FORK STEP POOL 2, AND POD 'H-3' SECTION LINE DITCH, MUST NOT EXCEED THE QUANTITY OF WATER LAWFULLY AVAILABLE AT THE ORIGINAL POINT OF DIVERSION.

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

December 21, 2006

TO ALL PARTIES

Re: Klamath Adjudication – Case No. 178, Claim No. 34, Contest Nos. 2799, 3445, 3782, 4090, and 4947
DOJ File No. 690-600-GN0149-03

Dear Parties:

Enclosed for your records is a fully executed copy of the Stipulation to Resolve Contests and Certificate of Service in the above-entitled matter. This agreement resolves all the remaining issues in this case. Accordingly, the Oregon Water Resources Department will withdraw this case from the Office of Administrative Hearings, pursuant to OAR 137-033-0515(4).

Thank you very much for your courtesies and cooperation in resolving this matter.

Sincerely,

Jesse D. Ratcliffe
Assistant Attorney General
Natural Resources Section

JDR:tmc/GENS3516
Enclosure
c: Service List

DRAFT

1162 Court Street NE, Salem, OR 97301-4096 Telephone: (503) 947-4500 Fax: (503) 378-3802 TTY: (503) 378-5938

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE STATE OF OREGON
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

United States of America; The Klamath Tribes; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady Ditch Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; Collins Products, LLC; ~~Thomas W. Mallams~~,
Contestants,

vs.

The Nature Conservancy,
Claimant/Contestant.

STIPULATION TO RESOLVE CONTESTS 2799, 3782, and 4090

Case No. 178
Claim No. 34
Contest Nos. 2799, 3445, 3782, and 4090 and ~~4947~~

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Claimant The Nature Conservancy ("TNC"), Contestants the United States of America (the "United States") and the Klamath Tribes (collectively, "Parties"), and the Oregon Water Resources Department (the "OWRD") hereby agree and stipulate and request the Adjudicator to resolve the above-captioned Claim and Contests as follows.

A. STIPULATED FACTS

1. On January 31, 1991, TNC filed Claim 34 in the Klamath Basin Adjudication.

2. On October 4, 1999, the Adjudicator issued his Preliminary Evaluation of Claim 34, preliminarily approving significant portions of the water right sought under Claim 34, subject to certain terms and conditions.

3. On May 3, 2000, Thomas W. Mallams filed contest 4947 to Claim 34. Thomas W. Mallams is not a party to this Stipulation. His contest was dismissed May 1, 2006.

4. On May 4, 2000, the United States filed Contest 3782.

5. On May 5, 2000, the Klamath Tribes filed Contest 4090.

6. On May 8, 2000, TNC filed Contest 2799 to Claim 34 contesting the Adjudicator's Preliminary Evaluation.

7. On May 8, 2000, the Klamath Project Water Users[1] (the "KPWU") filed Contest 3445 to Claim 34. KPWU are not a party to this Stipulation, their Contest 3445 being withdrawn by Stipulated Withdrawal of Contest No. 3445.

8. The Parties and OWRD agree that Contests 2799, 3782 and 4090 can be resolved without need for hearing pursuant to the terms outlined below.

9. The Parties have also agreed to the terms set forth in the "Appendix Agreement of Additional Terms in Case 178, Claim 34" attached hereto and incorporated herein by this reference and made a part hereof. All references to the Stipulation herein shall mean and include the Stipulation together with said Appendix Agreement of Additional Terms, and all Attachments to this Stipulation.

B. **TERMS OF THE AGREEMENT**

1. TNC, the United States, the Klamath Tribes, and the OWRD agree that the terms of the water right derived from Claim 34 in this Adjudication are as follows:

[1] The KPWU includes each of the Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Co., Enterprise Irrigation District, Klamath Hills District Improvement Company, Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Modoc Lumber Co., Bradley S. Luscombe, Randy Walthall and Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Company and Collins Products, LLC.

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a. POINT OF DIVERSION LOCATIONS: The points of diversion are described and located as follows:

Name of POD Structure	POD Designation on Map	Location of Point of Diversion
1- Sycan River Weir 2 - Reen Ditch	C-2	1810 feet South and 2040 feet West of the NE corner of Section 21, Township 32S, Range 14E, W.M.
2- Sycan River Weir 3	D	380 feet South and 2360 feet West of the NE corner of Section 20, Township 32S, Range 14E, W.M.
3- Sycan River Weir 6	E	2550 feet South and 850 feet West of the NE corner of Section 3, Township 33S, Range 13E, W.M.
4- Long Creek Weir 7	F	920 feet South and 1220 feet East of the NW corner of Section 3, Township 33S, Range 13E, W.M.
5- Dry Creek Weir	G	1310 feet North and 1850 feet East of the SW corner of Section 15, Township 32S, Range 13E, W.M.
6- South Fork Ditch	H	1950 feet South and 1770 feet West of the NE corner of Section 4, Township 32S, Range 13E, W.M.
7- South Fork Step Pool 1	H-1	430 feet South and 2620 feet East of the NW corner of Section 11, Township 32S, Range 13E, W.M. , Township 32S, Range 13E, W.M.
8- South Fork Step Pool 2	H-2	2100 feet North and 1570 feet West of the SE corner of Section 11, Township 32S, Range 13E, W.M.
9- Section Line Ditch	H-3	0 feet North and 1610 feet West of the SE corner of Section 11, Township 32S, Range 13E, W.M.
10- Small's Ditch	H-4	1800 feet South and 1550 feet West of the NE corner of Section 4, Township 32S, Range 13E, W.M.
11- North Fork Main Weir	H-5	1760 feet South and 1620 feet West of the NE corner of Section 4, Township 32S, Range 13E, W.M. , Township 32S, Range 13E, W.M.
12- Coyote Creek South Ditch	I-1	2100 feet North and 1200 feet West of the SE corner of Section 27, Township 31S, Range 13E, W.M.
13- Coyote Creek Main Weir	I-2	2020 feet North and 1300 feet West of the SE corner of Section 27, Township 31S, Range 13E, W.M.
14- Pole Creek Spreader Weir	J	1460 feet North and 640 feet West of the SE corner of Section 23, Township 31S, Range 13E, W.M.

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The manner of diversion at each point of diversion shall be as described in Attachment 1 annexed hereto and made a part hereof.

b. SOURCE: The source for each point of diversion is as follows:

Name of Structure	POD Designation on Map	Source
1- Sycan River Weir 2 - Reen Ditch	C-2	Sycan River
2- Sycan River Weir 3	D	Sycan River
3- Sycan River Weir 6	E	Sycan River
4- Long Creek Weir 7	F	Long Creek
5- Dry Creek Weir	G	Dry Creek
6- South Fork Ditch	H	Long Creek
7- South Fork Step Pool 1	H-1	Long Creek
8- South Fork Step Pool 2	H-2	Long Creek
9- Section Line Ditch	H-3	Long Creek
10- Small's Ditch	H-4	Long Creek
11- North Fork Main Weir	H-5	Long Creek
12- Coyote Creek South Ditch	I-1	Coyote Creek
13- Coyote Creek Main Weir	I-2	Coyote Creek
14- Pole Creek Spreader Weir	J	Pole Creek

c. USE: Irrigation of 8,985.2 acres and stockwatering incidental to irrigation. The Parties understand and agree that irrigation for the purposes hereof includes the artificial application of water to crops or plants to promote growth or nourish crops or plants, including marshlands or wetlands, with or without commercial harvest or grazing. In other contested cases in the Klamath Basin Water Rights Adjudication, OWRD has asserted a definition of "irrigation" that is inconsistent with the above definition of "irrigation" in some aspects. OWRD staff agrees to recommend the above definition of "irrigation" to the Adjudicator for the purposes of this Stipulation to Resolve Contests only, and reserves the right to assert, maintain, or promulgate a definition of "irrigation" inconsistent with the above definition with respect to any other claim or contest in the Klamath Basin Water Rights Adjudication, in any other proceeding, or by statute, regulation, or policy.

d. AMOUNT BENEFICIALLY USED: The amount of water used for the purposes above is limited to a diversion from each point of diversion not to exceed the quantities set forth below, for each acre irrigated during the irrigation season each year, as measured at the

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point of diversion, and shall not exceed 3.42 acre-feet per acre for each acre irrigated during the irrigation season of each year:

Name of POD Structure and POD Number	Map Number	Rate of Flow	
		CFS/Acre	Total CFS
1- Sycan River Weir 2 - Reen Ditch	C-2	1/61	2.8
2- Sycan River Weir 3	D	1/70	8.9
3- Sycan River Weir 6	E	Inapplicable for the manner of diversions at these weirs as described in Attachment 1. Diversion limited to 3.42 AF/A/3.42	
4- Long Creek Weir 7	F		
5- Dry Creek Weir	G	1/40	13.4
6- South Fork Ditch	H	1/42	79.8*
7- South Fork Step Pool 1	H-1	1/42	29.0*
8- South Fork Step Pool 2	H-2	1/42	10.8*
9- Section Line Ditch	H-3	1/42	40.0*
10- Small's Ditch	H-4	1/38	13.4
11- North Fork Main Weir	H-5	1/83	6.9
12- Coyote Creek South Ditch	I-1	1/36	5.4
13- Coyote Creek Main Weir	I-2	1/41	16.2
14- Pole Creek Spreader Weir	J	1/86	1.0
* The points and rate of diversion for H are in the alternative to those for H-1 through H-3 as described in the Appendix Agreement of Additional Terms attached hereto. OWRD staff's agreement to recommend to the Adjudicator points of diversion H-1 through H-3 as alternates to point of diversion H is conditioned upon TNC's successful amendment of its claimed points of diversion, pursuant to the process set forth in OAR 690-030-0085.			

Note: Applicable rate for areas served by two points of diversion:

(1) Areas Served by POD G and POD H. Acres served by POD G (Dry Creek Weir) and POD H (South Fork Ditch) are shown as Area 1 on Sycan Marsh Preserve Map for T32S, R13E attached hereto, and listed on Attachment 2 annexed hereto. That place of use is served by POD H when water from POD G is not used on such land. When POD H serves such land, its rate on all of its place of use shall be limited to $1/60^{th}$ cfs (.0167 cfs) per acre.

(2) Areas served by POD F and POD H. Areas served by POD F (Long Creek, Weir 7) and POD H (South Fork Ditch) are shown as Area 3 on Sycan Marsh Preserve Maps for T32S, R13E and T33S, R13E attached hereto, and listed on Attachment 2 annexed hereto. That place of use is served by POD H when water from POD F is not used on such land. When POD H serves such land, its rate on all of its place of use shall be limited to $1/60^{th}$ cfs (.0167cfs) per acre.

(3) Areas served by POD D and POD H-5. Areas served by POD D (Sycan River, Weir 3) and POD H-5 (North Fork, Main Weir) are shown as Area 2 on Sycan Marsh Preserve

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Map for T32S, R13E attached hereto, and listed on Attachment 2 annexed hereto. That place of use is served by POD H-5 when water from POD D is not used on such land. When POD H-5 serves such land, its rate on all of its place of use shall be limited to 1/104 cfs (.0096 cfs) per acre.

e. PERIOD OF USE: March 1 to October 31 for irrigation and stockwatering.

f. PRIORITY DATE: October 14, 1864.

g. PLACES OF USE: A description of the places of use to which this right is appurtenant is set forth in Attachment 3 annexed hereto and made a part hereof. The places of each use are also depicted on Sycan Marsh Preserve Maps for T31S, T32S and T33S, each for R13E, annexed hereto as Attachments 4, 5 and 6, respectively.

C. **RESOLUTION BASED ON TERMS OF AGREEMENT**

1. Contestant the United States agrees that, pursuant to this agreement, the United States' Contest 3782 has been satisfactorily resolved and such resolution vitiates the need for a hearing on Contest 3782 before the Office of Administrative Hearings.

2. Contestant the Klamath Tribes agree that, pursuant to this agreement, the Klamath Tribes' Contest 4090 has been satisfactorily resolved and such resolution vitiates the need for a hearing on Contest 4090 before the Office of Administrative Hearings.

3. Claimant TNC agrees that TNC's Contest 2799 has been satisfactorily resolved and such resolution vitiates the need for a hearing on Contest 2799 before the Office of Administrative Hearings.

4. OWRD staff hereby recommends to the Adjudicator that Claim 34 be approved in the Findings of Fact and Order of Determination issued by the Adjudicator in accordance with the terms of Paragraph B.1, above. OWRD staff's agreement to recommend to the Adjudicator points of diversion H-1 through H-3 as alternates to point of diversion H is conditioned upon TNC's successful amendment of its claimed points of diversion, pursuant to the process set forth in OAR 690-030-0085.

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5. If the Findings of Fact and Final Order of Determination issued by the Adjudicator for Claim 34 does not accord with the terms set forth in Paragraph B.1 above, all Parties reserve any and all rights they may have to file exceptions to the Findings of Fact and Final Order of Determination as to Claim 34 in the Circuit Court for Klamath County, and reserve all rights such Parties may have to participate in any future proceedings authorized by law.

6. The Parties and OWRD agree not to oppose or object to this Agreement or any of its terms, provisions, conditions, or covenants and to support this Agreement if it is challenged in the administrative or judicial phases of the Adjudication or any appeals thereof.

7. This Stipulation is entered into for the purpose of resolving a disputed claim. The Parties and OWRD agree that the Stipulation shall not be offered as evidence or treated as an admission regarding any matter herein and may not be used in proceedings on any other claim or contest whatsoever, except that the Stipulation may be used in any future proceeding to interpret and/or enforce the terms of this Stipulation. Further, the Parties and OWRD agree that neither the Stipulation nor any of its terms shall be used to establish precedent with respect to any other claim or contest in the Klamath Basin Water Rights Adjudication, or in any other proceeding.

8. This Stipulation shall be binding upon and shall inure to the benefit of the Parties and OWRD and their respective heirs, executors, administrators, trustors, trustees, beneficiaries, predecessors, successors, affiliated and related entities, officers, directors, principals, agents, employees, assigns, representatives and all persons, firms, associations, and/or corporations connected with them.

9. Each Party and OWRD represents, warrants, and agrees that the person who executed this Stipulation on its behalf has the full right and authority to enter into this Stipulation on behalf of that entity and bind that entity to the terms of the Stipulation.

10. The terms, provisions, conditions, and covenants of this Stipulation are not severable, except, if any term, provision, condition, or covenant of this Stipulation is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the terms, provisions, conditions, and covenants shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

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11. This Stipulation may be executed in several counterparts and all documents so executed shall constitute one Stipulation, binding on the Parties and OWRD, notwithstanding that the Parties and OWRD did not sign the same original or the same counterparts.

12. The Parties and OWRD agree and acknowledge that this Stipulation has been drafted after full and arms-length negotiations, and that the usual rule of contractual construction that all ambiguities shall be construed against the drafting party shall not apply to the interpretation of this Stipulation

13. All Parties and OWRD shall each bear their own costs and consultants' and attorneys' fees incurred in connection with this Stipulation.

14. This Stipulation shall be effective as of the date of the last signature hereto.

For Claimant The Nature Conservancy

SEPT. 18, 2006

Douglas W. MacDougal, OSB #98077 — Date
Schwabe, Williamson & Wyatt, P.C., Of Attorneys
for Claimant

For Contestants The Klamath Tribes

30 Aug 06

Carl Ullman, Oregon State Bar No. 89156 — Date

For Contestant the United States of America

Barbara Scott-Brier — Date
Special Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

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For Claimant The Nature Conservancy

_____ _____

Douglas W. MacDougal, OSB #98077
Schwabe, Williamson & Wyatt, P.C., Of Attorneys
for Claimant

Date

For Contestants The Klamath Tribes

_____ _____

Carl Ullman, Oregon State Bar No. 89156

Date

For Contestant the United States of America

Barbara Scott-Brier 9/15/06

Barbara Scott-Brier
Special Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

Date

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David W. Harder
Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

August 31, 2006
Date

For Oregon Water Resources Department

Michael Reynolds,
Agency Representative, Oregon Water Resources Department

Date

HARDY MYERS
Attorney General

Jesse Ratcliffe, OSB No. 04394
Assistant Attorney General
Of Attorneys for the Oregon Water Resources Department

Date

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David W. Harder
Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

Date

For Oregon Water Resources Department

Michael Reynolds,
Agency Representative, Oregon Water Resources Department

9-13-06
Date

HARDY MYERS
Attorney General

Jesse Ratcliffe, OSB No. 04394
Assistant Attorney General
Of Attorneys for the Oregon Water Resources Department

9/13/06
Date

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ATTACHMENT 1: MANNER OF DIVERSIONS

Name of POD Structure and POD Number	POD Designation on Map	Manner of Diversions with Reference to Map Designation of Diversion
1- Sycan River Weir 2 - Reen Ditch	C-2	Diversions occur by opening the headgates on Reen ditch. Boards will be added at Weir 2 (C-2) until a sufficient water elevation is achieved so as to distribute water into Reen and other ditches and channels. Raising the water elevation is necessary before any diversion can occur because the channel of the Sycan River has been down-cut. The placement of boards in this weir prior to reaching such a water elevation will not be considered a diversion. Boards will be gradually added and removed from this weir so as to minimize erosion and promote fish passage.
2- Sycan River Weir 3	D	Diversions occur only after a sufficient water elevation is achieved by adding boards at Weir 3 (D) so as to distribute water into ditches and other channels. Raising the water elevation is necessary before any diversion can occur because the channel of the Sycan River has been down-cut. The placement of boards in this weir prior to reaching such a water elevation will not be considered a diversion. Boards will be gradually added and removed from this weir so as to minimize erosion and promote fish passage.
3- Sycan River Weir 6	E	Diversions at Weir 6 (E) on the Sycan River and Weir 7 (F) on Long Creek occur by adding boards to the weirs and raising the water elevation so as to spread water across fields. The placement of boards in these weirs prior to reaching such a water elevation will not be considered a diversion.
4- Long Creek Weir 7	F	
5- Dry Creek Weir	G	Diversions at Dry Creek Weir (G) will occur by hummocks splitting the flows into three directions and into downstream channels and across fields.
6- South Fork Ditch	H	Diversions occur by adding boards at the North Fork Main Weir (H-5) or closing the headgate at Small's Ditch (H-4) so as to direct flows into the South Fork Ditch (H) and downstream channels. This point of diversion will be permanently removed upon adjudication of the following alternative points of diversion consisting of two step pools (H-1 and H-2) and of the Section Line Ditch diversion (H-3). At the existing point of diversion to be removed, a new channel will be created so as to allow flows to reach the first alternative point about two miles downstream without intervening diversion.

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7- South Fork Step Pool 1 8- South Fork Step Pool 2	H-1 H-2	Diversions will occur by splitting those South Fork flows with a vortex weir at the head of a step pool (H-1 and H-2) and directing them into downstream channels.
9- Section Line Ditch	H-3	Diversions will occur by closing headgates along Section Line Ditch (H-3) and distributing flows east and west, or by opening headgates and directing flows into downstream channels and across fields.
10- Small's Ditch	H-4	Diversions will occur by adding boards at the North Fork Main Weir (H-5)and opening the headgate at Small's Ditch (H-4).
11- North Fork Main Weir	H-5	Diversions will occur by removing boards at the North Fork Main Weir (H-5) so as to distribute water into downstream channels.
12- Coyote Creek South Ditch	I-1	Diversions will occur by adding boards at the Coyote Creek Main Weir (I-2) and opening the headgate for the Coyote Creek South Ditch (I-1).
13- Coyote Creek Main Weir	I-2	Diversions will occur by closing the headgate on the Coyote Creek South Ditch (I-1) and allowing flows to spill over boards, so as to control the timing of flows from Coyote Creek Main Weir (I-2) to the main channel of Coyote Creek and distribute water to downstream channels and across fields.
14- Pole Creek Spreader Weir	J	Diversions will occur by closing the headgate to distribute water around the weir (J) and into downstream channels and across fields.

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ATTACHMENT 2: PLACES OF USE SERVED BY TWO POINTS OF DIVERSION

Township 32 South, Range 13 East			
Primary Point of Diversion	**Section**	**Quarter/ Quarter**	**Overlapping POD/Acreage**
Dry Creek Weir (G)			**South Fork Ditch (H)**
	15	NESW	13.1
		SESW	16.4
		NESE	13.6
		NWSE	35.3
		SWSE	40.0
		SESE	40.0
	22	NENE	40.0
		NWNE	37.8
		SWNE	38.7
		SENE	40.0
		NENW	0.6
		SENW	1.1
		NESE	40.0
		NWSE	40.0
		SWSE	40.0
		SESE	40.0
	23	NESW	1.2
		NWSW	28.5
		SWSW	31.5
		Total Acres:	**537.8**

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Primary Point of Diversion	Section	Quarter/Quarter	Overlapping POD/Acreage
Long Creek Weir 7 (F)			South Fork Ditch (H)
	26	SWSW	32.2
		SESW	0.4
	27	SESW	0.6
		NESE	7.5
		NWSE	1.3
		SWSE	35.0
		SESE	40.0
	33	NENE	36.1
		SENE	16.9
		SESE	1.9
	34	NENE	24.8
		NWNE	40.0
		SWNE	40.0
		SENE	20.6
		NENW	38.1
		NWNW	38.4
		SWNW	40.0
		SENW	40.0
		NESW	34.9
		NWSW	39.0
		SWSW	39.8
		SESW	40.0
		NESE	33.8
		NWSE	40.0
		SWSE	37.7
		SESE	8.4
	35	NWNW	0.4
		NWSW	0.9
		Total Acres:	**728.7**

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Primary Point of Diversion	Section	Quarter/Quarter	Overlapping POD/Acreage
Sycan River Weir 3 (D)			North Fork Main Weir (H-5)
	13	SWSW	7.0
		SESW	30.0
		NESE (Lot 3)	0.1
		NWSE	2.2
		SWSE	39.9
		SESE (Lot 4)	29.2
	23	SENE	2.5
		NESE	16.1
		SESE	7.0
	24	NENE (Lot 1)	33.5
		NWNE	40.0
		SWNE	40.0
		SENE (Lot 2)	34.5
		NENW	40.0
		NWNW	25.6
		SWNW	36.2
		SENW	40.0
		NESW	40.0
		NWSW	40.0
		SWSW	36.4
		SESW	37.6
		NESE (Lot 3)	6.6
		NWSE	32.5
		SWSE	7.4
		Total Acres:	**624.3**

Township 33 South, Range 13 East

Primary Point of Diversion	Section	Quarter/ Quarter	Overlapping POD/Acreage
Long Creek Weir 7 (F)			South Fork Ditch (H)
	3	NWNE (Lot 2)	5.2
		NENW (Lot 3)	32.1
		NWNW (Lot 4)	32.7
		SWNW	1.8
		SENW	14.3
		Total Acres:	**86.1**

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ATTACHMENT 3: PLACES OF USE

Township 31 South, Range 13 East			
Point of Diversion	**Section**	**Quarter/ Quarter**	**Acres**
Coyote Creek South Ditch (I-1)	26	SWSW	22.4
		SESW	20.4
	27	NESE	3.0
		NWSE	2.0
		SWSE	3.0
		SESE	36.5
	34	NENE	39.6
		NWNE	5.4
		SWNE	23.8
		SENE	40.0
		Total Acres:	**196.1**
Coyote Creek Main Weir (I-2)	24	SWSW	4.6
		SESW	25.8
		SWSE	31.2
		SESE (Lot 4)	28.5
	25	NENW	40.0
		NWNW	40.0
		SWNW	40.0
		SENW	40.0
		NESW	40.0
		NWSW	40.0
		SWSW	37.1
		SESW	36.7
		NWSE	4.8
		SWSE	3.3
	26	NESW	6.9
		NWSW	0.7
		SWSW	12.6
		SESW	19.6
		NESE	40.0
		NWSE	32.3
		SWSE	40.0
		SESE	40.0
	27	NESE	6.4
		SESE	2.6
	36	NENE (Lot 1)	22.6
		NWNE	3.0
		SENE (Lot 2)	26.4
		Total Acres:	**665.1**

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Point of Diversion	Section	Quarter/ Quarter	Acres
Small's Ditch (H-4)	36	NWNE	24.7
		SWNE	38.3
		SENE	3.0
		NENW	37.1
		NWNW	37.1
		SWNW	40.0
		SENW	40.0
		NESW	34.2
		NWSW	39.4
		SWSW	40.0
		SESW	31.8
		NWSE	33.3
		SWSE	37.7
		Total Acres:	**436.6**
Pole Creek Spreader Weir (J)	23	NESE	2.8
		SESE	24.2
	24	NESW	2.4
		NWSW	12.1
		SWSW	35.4
		SESW	9.4
		Total Acres:	**86.3**

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Township 32 South, Range 13 East			
Point of Diversion	Section	Quarter/ Quarter	Acres
Dry Creek Weir (G)	15	NESW	13.1
		SESW	16.4
		NESE	13.6
		NWSE	35.3
		SWSE	40.0
		SESE	40.0
	22	NENE	40.0
		NWNE	37.8
		SWNE	38.7
		SENE	40.0
		NENW	0.6
		SENW	1.1
		NESE	40.0
		NWSE	40.0
		SWSE	40.0
		SESE	40.0
	23	NESW	1.2
		NWSW	28.5
		SWSW	31.5
		SESW	0.1
		Total Acres:	**537.9**

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Point of Diversion	Section	Quarter/ Quarter	Acres
North Fork Main Weir (H-5)	1	SWNE	40.0
		SENE (Lot 5)	32.3
		NESW	40.0
		NWSW	40.0
		SWSW	38.9
		SESW	38.7
		NESE (Lot 6)	30.5
		NWSE	39.5
		SWSE	40.0
		SESE (Lot 7)	32.1
	3	NWSE	13.5
	13	NENE (Lot 1)	15.6
		NWNE	36.5
		SWNE	12.9
		NENW	8.8
		SENW	6.1
		NESW	0.4
		NWSE	0.1
	24	SESW	2.4
		NESE (Lot 3)	28.9
		NWSE	7.5
		SWSE	32.6
		SESE (Lot 4)	36.4
		Total Acres:	**573.7**
Small's Ditch (H-4)	1	NENE (Lot 1)	32.2
		NWNE (Lot 2)	35.9
		Total Acres:	**68.1**

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Point of Diversion	Section	Quarter/ Quarter	Acres
South Fork Ditch (H)	10	NESE	9.2
		NWSE	18.1
		SWSE	39.7
		SESE	40.0
	11	NENE	40.0
		NWNE	40.0
		SWNE	40.0
		SENE	40.0
		NENW	2.9
		SENW	20.5
		NESW	10.5
		NWSW	1.2
		SWSW	35.5
		SESW	19.2
		NESE	39.7
		NWSE	29.8
		SWSE	40.0
		SESE	40.0
	12	NENE (Lot 1)	32.0
		NWNE	40.0
	12	SWNE	40.0
		SENE (Lot 2)	32.1
		NENW	40.0
		NWNW	40.0
		SWNW	40.0
		SENW	40.0
		NESW	40.0
		NWSW	33.4
		SWSW	35.4
		SESW	40.0
		NESE (Lot 3)	31.9
		NWSE	40.0
		SWSE	40.0
		SESE (Lot 4)	31.7
	13	NENW	31.2
		NWNW	40.0
		SWNW	40.0
		SENW	33.9
		NESW	26.8
		NWSW	40.0
		SWSW	33.0
		SESW	3.0
	14	NENE	40.0
		NWNE	40.0
		SWNE	40.0
		SENE	40.0

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Point of Diversion	Section	Quarter/ Quarter	Acres
		NENW	40.0
South Fork Ditch (H) (Continued)		NWNW	40.0
		SWNW	40.0
		SENW	40.0
		NESW	40.0
		NWSW	40.0
		SWSW	40.0
		SESW	40.0
		NESE	38.0
		NWSE	39.2
		SWSE	34.6
		SESE	34.0
	15	NENE	39.7
		NWNE	14.3
		SWNE	11.3
		SENE	36.0
		NENW	0.9
		NESE	26.4
		NWSE	4.2
	23	NENE	38.8
		NWNE	33.3
		SWNE	32.2
		SENE	37.5
		NENW	27.2
	23	NWNW	40.0
		SWNW	40.0
		SENW	14.2
		NESW	19.7
		NWSW	11.4
		SWSW	2.1
		SESW	32.7
		NESE	23.9
		NWSE	38.9
		SWSE	40.0
		SESE	33.0
	24	NWNW	14.4
		SWNW	3.8
		SWSW	3.6
	25	NWNW	16.1
	26	NENE	39.8
		NWNE	40.0
		SWNE	35.1
		SENE	10.2
		NENW	40.0
		NWNW	35.1
		SWNW	40.0

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		SENW	40.0
		NESW	35.1
		NWSW	40.0
Point of Diversion	**Section**	**Quarter/ Quarter**	**Acres**
South Fork Ditch (H) (Continued)		SWSW	3.5
		SESW	5.1
		NWSE	4.8
	27	NENE	40.0
		NWNE	40.0
		SWNE	40.0
		SENE	40.0
		NENW	40.0
		NWNW	37.8
		SWNW	15.0
		SENW	40.0
		NESW	15.9
		NESE	32.5
		NWSE	38.7
	28	NENE	4.8
		Total Acres:	**3365.5**

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Point of Diversion	Section	Quarter/ Quarter	Acres
Long Creek Weir 7 (F)	26	SWSW	32.2
		SESW	0.4
	27	SESW	0.6
		NESE	7.5
		NWSE	1.3
		SWSE	35.0
		SESE	40.0
	33	NENE	36.1
		SENE	16.9
		SESE	1.9
	34	NENE	24.8
		NWNE	40.0
		SWNE	40.0
		SENE	20.6
		NENW	38.1
		NWNW	38.4
		SWNW	40.0
		SENW	40.0
		NESW	34.9
		NWSW	39.0
		SWSW	39.8
		SESW	40.0
		NESE	33.8
		NWSE	40.0
		SWSE	37.7
		SESE	8.4
	35	NWNW	0.4
		NWSW	0.9
		Total Acres:	**728.7**
Sycan River Weir 2 - Reen Ditch (C-2)	13	NENE (Lot 1)	15.7
		NWNE	3.5
		SWNE	27.1
		SENE (Lot 2)	31.2
		NESW	12.8
		SESW	7.0
		NESE (Lot 3)	32.0
		NWSE	37.7
		SWSE	0.1
		SESE (Lot 4)	3.5
		Total Acres:	**170.6**

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Point of Diversion	Section	Quarter/ Quarter	Acres
Sycan River Weir 3 (D)	13	SWSW	7.0
		SESW	30.0
		NESE (Lot 3)	0.1
		NWSE	2.2
		SWSE	39.9
		SESE (Lot 4)	29.2
	23	SENE	2.5
		NESE	16.1
		SESE	7.0
	24	NENE (Lot 1)	33.5
		NWNE	40.0
		SWNE	40.0
		SENE (Lot 2)	34.5
		NENW	40.0
		NWNW	25.6
	24	SWNW	36.2
		SENW	40.0
		NESW	40.0
		NWSW	40.0
		SWSW	36.4
		SESW	37.6
		NESE (Lot 3)	6.6
		NWSE	32.5
		SWSE	7.4
		Total Acres:	**624.3**

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Point of Diversion	Section	Quarter/ Quarter	Acres
Sycan River Weir 6 (E)	25	NENE (Lot 1)	37.3
		NWNE	40.0
		SWNE	39.6
		SENE (Lot 2)	34.7
		NENW	40.0
		NWNW	23.9
		SWNW	40.0
		SENW	40.0
		NESW	39.0
		NWSW	40.0
		SWSW	39.2
		SESW	28.5
		NESE (Lot 3)	27.9
		NWSE	30.4
		SWSE	0.8
		SESE (Lot 4)	1.6
	26	NENE	0.2
		SWNE	4.9
		SENE	29.8
		NESW	4.9
		SWSW	4.3
		SESW	34.5
		NESE	40.0
		NWSE	35.2
		SWSE	40.0
		SESE	40.0
	34	NENE	15.2
		SENE	15.9
		NESE	4.4
		SWSE	2.3
		SESE	31.6
	35	NENE	37.1
		NWNE	39.1
		SWNE	37.0
		SENE	19.7
		NENW	40.0
		NWNW	39.6
		SWNW	40.0
		SENW	35.4

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Point of Diversion	Section	Quarter/ Quarter	Acres
Sycan River Weir 6 (E) (Continued)	35	NESW	30.2
		NWSW	39.1
		SWSW	39.1
		SESW	12.1
	36	NENW	4.0
		NWNW	30.5
		Total Acres:	**1249.0**
Township 33 South, Range 13 East			
Point of Diversion	**Section**	**Quarter/ Quarter**	**Acres**
Long Creek Weir 7 (F)	3	NWNE (Lot 2)	5.2
		NENW (Lot 3)	32.1
		NWNW (Lot 4)	32.7
		SWNW	1.8
		SENW	14.3
		Total Acres:	**86.1**
Sycan River Weir 6 (E)	2	NENW (Lot 3)	2.1
		NWNW (Lot 4)	28.7
		SWNW	11.3
	3	NENE (Lot 1)	36.7
		NWNE (Lot 2)	36.7
		SWNE	37.6
		SENE	35.3
		NENW (Lot 3)	4.7
		SENW	4.1
		Total Acres:	**197.2**

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TOWNSHIP 31 SOUTH, RANGE 13 EAST, W.M.
CLAIM 34
Sycan Marsh Preserve
The Nature Conservancy

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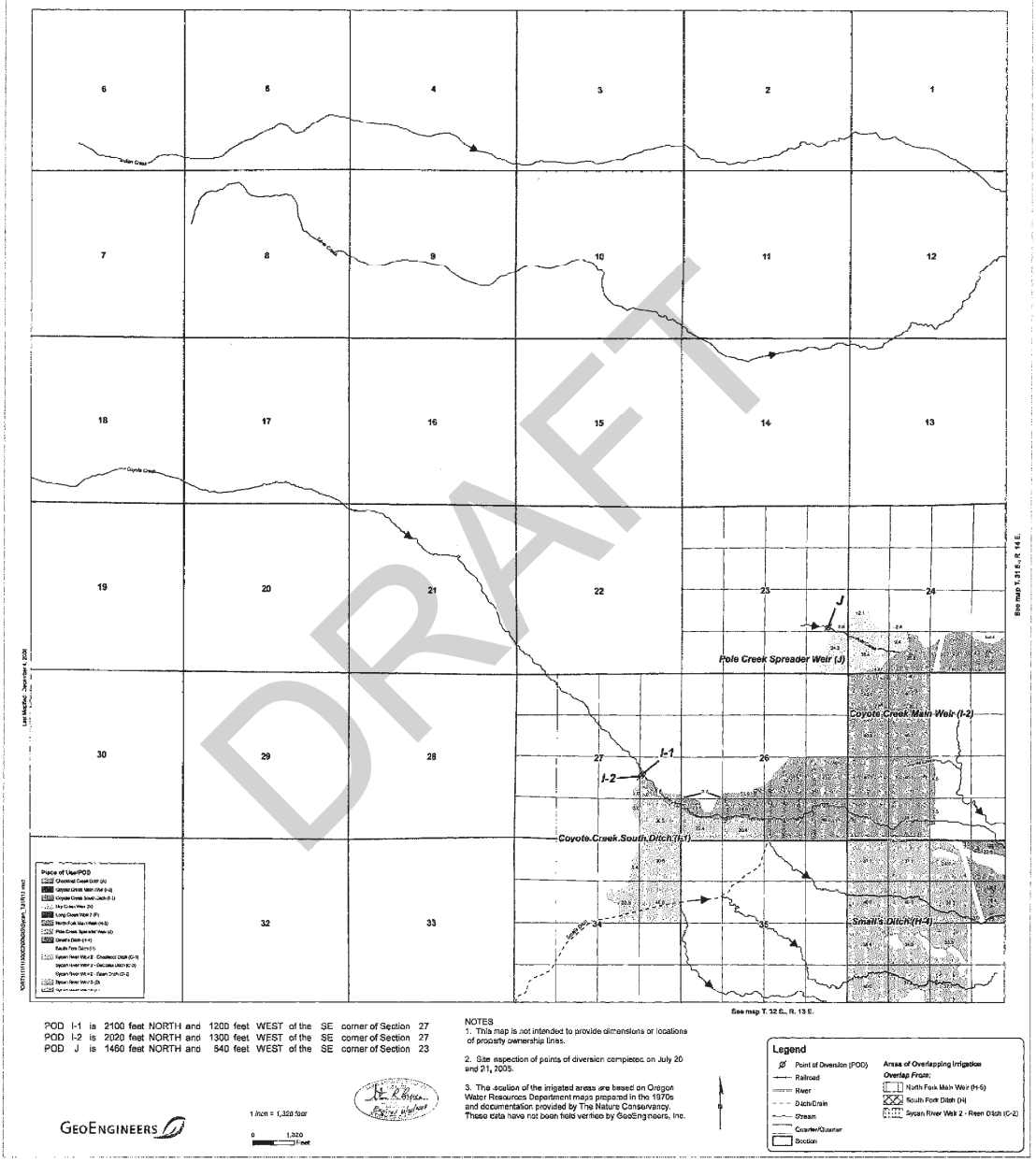
WATER RESOURCES DEPT
SALEM, OREGON



POD I-1 is 2100 feet NORTH and 1200 feet WEST of the SE corner of Section 27
POD I-2 is 2020 feet NORTH and 1300 feet WEST of the SE corner of Section 27
POD J is 1460 feet NORTH and 540 feet WEST of the SE corner of Section 23

NOTES
1. This map is not intended to provide dimensions or locations of property ownership lines.
2. Site inspection of points of diversion completed on July 20 and 21, 2005.
3. The location of the irrigated areas are based on Oregon Water Resources Department maps prepared in the 1970s and documentation provided by The Nature Conservancy. These data have not been field verified by GeoEngineers, Inc.

GeoEngineers

1 inch = 1,320 feet
0 1,320 Feet

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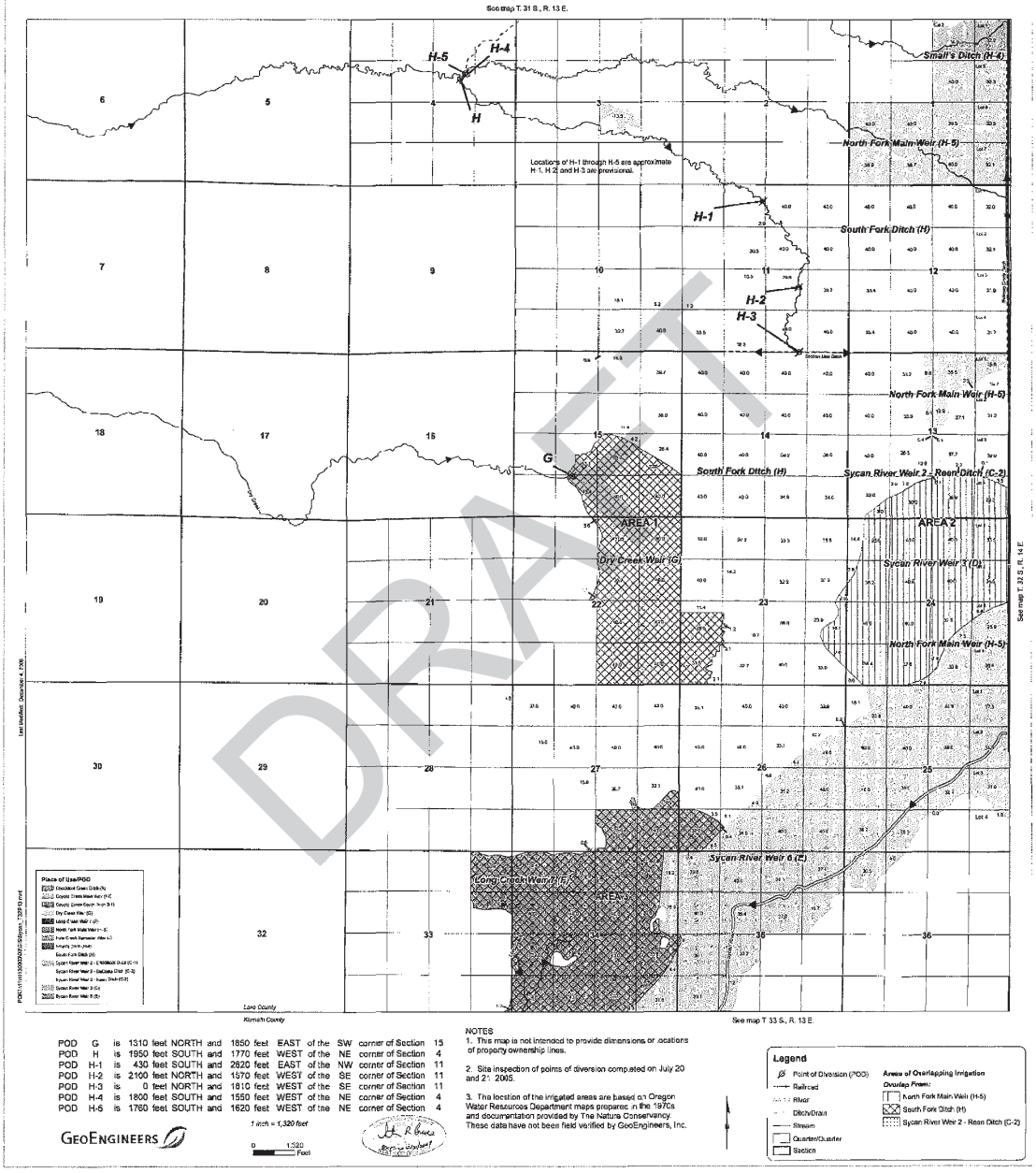
SALEM, OREGON

TOWNSHIP 32 SOUTH, RANGE 13 EAST, W.M.
CLAIM 34
Sycan Marsh Preserve
The Nature Conservancy



POD	G	is	1310	feet	NORTH	and	1850	feet	EAST of the SW corner of Section 15
POD	H	is	1950	feet	SOUTH	and	1770	feet	WEST of the NE corner of Section 4
POD	H-1	is	430	feet	SOUTH	and	2620	feet	EAST of the NW corner of Section 11
POD	H-2	is	2100	feet	NORTH	and	1570	feet	WEST of the SE corner of Section 11
POD	H-3	is	0	feet	NORTH	and	1810	feet	WEST of the SE corner of Section 11
POD	H-4	is	1800	feet	SOUTH	and	1550	feet	EAST of the NE corner of Section 4
POD	H-5	is	1760	feet	SOUTH	and	1620	feet	WEST of the NE corner of Section 4

GeoEngineers

1 inch = 1,320 feet

0 1,320 Feet

NOTES
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2. Site inspection of points of diversion completed on July 20 and 21, 2005.
3. The location of the irrigated areas are based on Oregon Water Resources Department maps prepared in the 1970s and documentation provided by The Nature Conservancy. These data have not been field verified by GeoEngineers, Inc.

Legend
- Point of Diversion (POD)
- Railroad
- River
- Ditch/Drain
- Stream
- Quarter/Quarter
- Section

Areas of Overlapping Irrigation Overlap From:
- North Fork Main Weir (H-5)
- South Fork Ditch (H)
- Sycan River Weir 2 - Reen Ditch (C-2)

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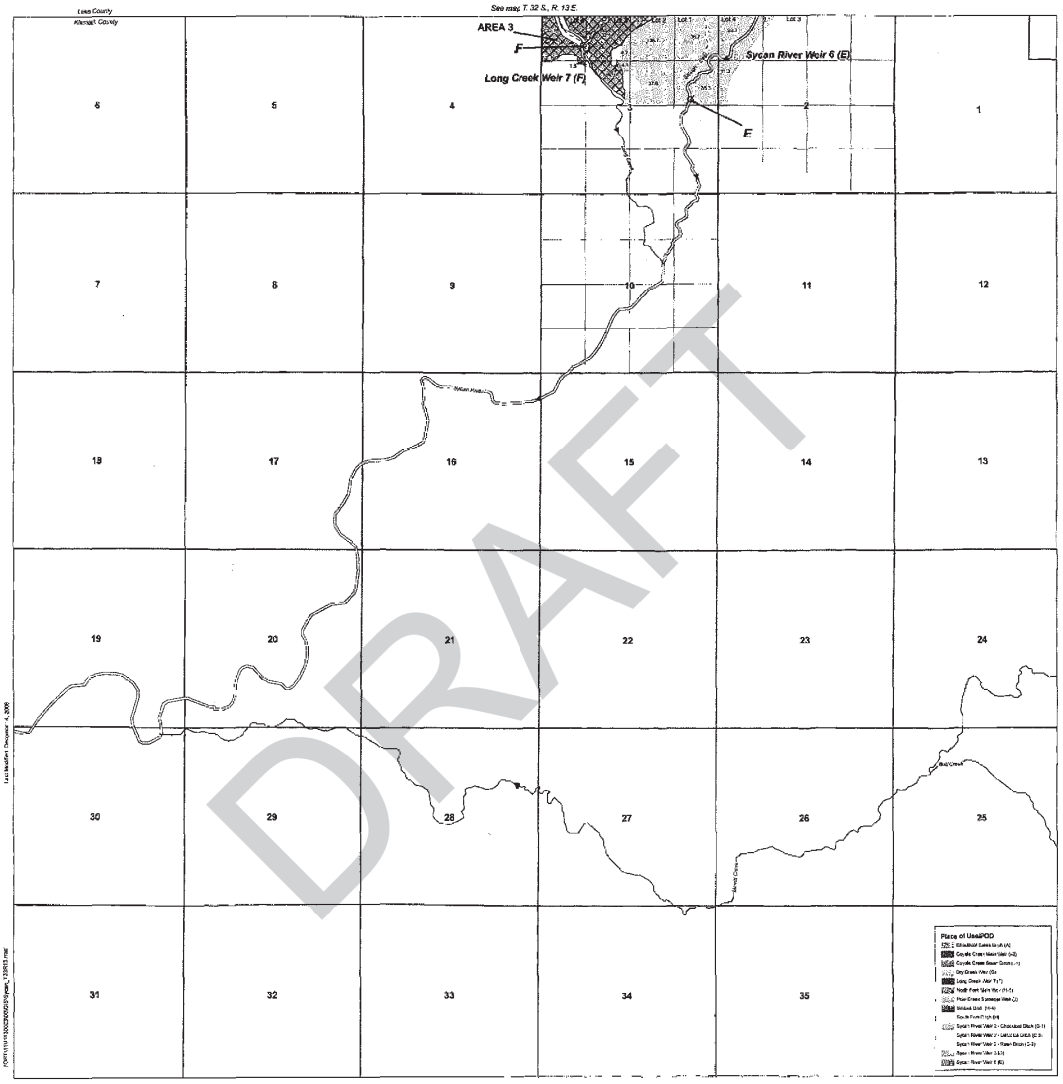
WATER RESOURCES DEPT
SALEM OREGON

TOWNSHIP 33 SOUTH, RANGE 13 EAST, W.M.
CLAIM 34
Sycan Marsh Preserve
The Nature Conservancy



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POD E is 2550 feet SOUTH and 850 feet WEST of the NE corner of Section 3.
POD F is 920 feet SOUTH and 1220 feet EAST of the NW corner of Section 3.

NOTES
1. This map is not intended to provide dimensions or locations of property ownership lines.
2. Site inspection of points of diversion completed on July 20 and 21, 2005.
3. The location of the irrigated areas are based on Oregon Water Resources Department maps prepared in the 1970s and documentation provided by The Nature Conservancy. These data have not been field verified by GeoEngineers, Inc.

Legend
- Point of Diversion (POD)
- Railroad
- River
- Ditch/Drain
- Stream
- Quarter/Quarter
- Section

Areas of Overlapping Irrigation
Overlap From:
- North Fork Main Weir (H-5)
- South Fork Ditch (H)
- Sycan River Weir 2 - Rees Ditch (C-2)

GeoEngineers

1 inch = 1,320 feet

0 1,320 Feet

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APPENDIX AGREEMENT OF ADDITIONAL TERMS IN CASE 178, CLAIM 34

The Nature Conservancy (TNC), Contestants the United States of America (the United States) and the Klamath Tribes (collectively, "Parties") hereby agree and stipulate to the following additional terms to the Stipulation to Resolve contests 2799, 3782, and 4090 ("Stipulation") to which Stipulation this agreement is attached as an appendix and incorporated by reference. The references and designations below have the same meanings as those in the Stipulation.

(1) South Fork Long Creek Points of Diversion. TNC will as soon as is practical remove its point of diversion on the South Fork of Long Creek (diversion H), and upon such removal, utilize alternative points of diversion (diversions H-1 through H-3) from the South Fork downstream starting below the Tall Jim Weir in the North ½ of Section 11. TNC will also remove its Tall Jim Weir upon establishment of these alternative points of diversion. These alternative downstream points will become the permanent points of diversion for TNC from the South Fork, and TNC may not re-establish the upstream points of diversion without the consent of the United States and the Klamath Tribes, not to be unreasonably withheld. Pending establishment and approval of these alternative downstream points of diversion, neither the United States nor the Klamath Tribes will assert that the claimed upstream point in the NE quarter of Section 4 has been abandoned or forfeited, or that establishing the downstream points of diversion constitutes an impermissible or untimely amendment of TNC's claim, or injury to existing water rights. TNC recognizes that, depending upon when the provisions of this paragraph are carried out, it may be necessary to obtain OWRD approval to change points of diversion. TNC agrees to comply with all legal requirements necessary to make such changes.

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(2) Long Creek Flows. During the irrigation season from March 1 to October 31, neither the United States nor the Klamath Tribes will make a call to satisfy any instream water rights that may be adjudicated in favor of the United States and/or the Klamath Tribes having the effect of reducing or eliminating TNC's water use on the Sycan Marsh, so long as the flow reaching the downstream terminus of the instream reach equals or exceeds 2.0 cfs or 20% of the available flow, whichever is lower, as measured at TNC's Long Creek gaging station approximately ½ mile upstream of the TNC's Main Weir.

(3) Coyote Creek Flows. During the irrigation season from March 1 to October 31, neither the United States nor the Klamath Tribes will make a call to satisfy any instream water rights that may be adjudicated in favor of the United States and/or the Klamath Tribes having the effect of reducing or eliminating TNC's water use on the Sycan Marsh, so long as the flow in the Main Channel of Coyote Creek bypassing TNC's Coyote Creek Main Weir and reaching the culvert for the U.S. Forest Service (USFS) Road 27 equals or exceeds .5 cfs as measured at TNC's gaging station approximately 0.25 miles upstream of TNC's Main Coyote Creek Weir. Such flows may be distributed by TNC for irrigation purposes below USFS Road 27. Whenever the available flow at TNC's gaging station is less than .5 cfs, TNC will not divert any flow into the Coyote Creek South Ditch.

(4) No Call of Instream Rights. Except as expressly set forth in this Stipulation, neither the United States nor the Klamath Tribes will make a call to satisfy any instream water rights that may be adjudicated in favor of the United States and/or the Klamath Tribes having the effect of reducing or eliminating TNC's water use on the Sycan Marsh. Any dispute about the instream flows provided in this Stipulation shall be a matter between the Parties and shall not be regarded as matter for resolution by the watermaster. Neither the OWRD

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nor any watermaster shall be accountable or liable for any person's interpretations or misinterpretations of this provision of the Stipulation. The Parties agree not to join the State of Oregon or any agency, commission, board, or employee thereof in any litigation concerning this provision of the Stipulation, and agree to oppose any such joinder attempts by others in litigation that may occur.

(5) Restriction on Certain TNC Transfers. Other than a change to instream use or to conform its water rights to the definition of irrigation by applicable state laws or regulations, or to conform to the requirements of the Endangered Species Act or other applicable laws, TNC will not change the type of water use or place of water use for irrigation (and incidental stockwatering) at the Sycan Marsh without the consent of the United States and the Klamath Tribes, not to be unreasonably withheld. The Parties recognize that irrigation is currently defined as the artificial application of water to crops or plants to promote growth or nourish crops or plants, and agree that the irrigation of marshlands or wetlands, with or without commercial harvest or grazing is included in this definition. Notwithstanding this covenant not to change the type or place of water use, TNC may elect to discontinue or reduce irrigation at the Sycan Marsh or to transfer points of diversion downstream within the Sycan Marsh, subject to compliance with all legal requirements, including obtaining all necessary OWRD approvals, at the time the change(s) occur or are proposed or occur.

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This Appendix Agreement of Additional Terms shall be effective as of the effective date of the Stipulation.

For Claimant The Nature Conservancy

Douglas W. MacDougal, OSB #98077
Schwabe, Williamson & Wyatt, P.C., Of Attorneys for Claimant

SEPT. 18, 2006
Date

For Contestants The Klamath Tribes

Carl Ullman, Oregon State Bar No. 89156

Date

For Contestant the United States of America

Barbara Scott-Brier
Special Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

9/15/06
Date

David W. Harder
Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

Date

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Douglas W. MacDougal, OSB #98077
Schwabe, Williamson & Wyatt, P.C., Of Attorneys for Claimant

Date

For Contestants The Klamath Tribes

Carl Ullman

30 AUG 06

Carl Ullman, Oregon State Bar No. 89156

Date

For Contestant the United States of America

Barbara Scott-Brier
Special Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

Date

David W. Harder
Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

Date

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This Appendix Agreement of Additional Terms shall be effective as of the effective date of the Stipulation.

For Claimant The Nature Conservancy

Douglas W. MacDougal, OSB #98077
Schwabe, Williamson & Wyatt, P.C., Of Attorneys for Claimant

Date

For Contestants The Klamath Tribes

Carl Ullman, Oregon State Bar No. 89156

Date

For Contestant the United States of America

Barbara Scott-Brier
Special Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

Date

David W. Harder
Attorney, United States Department of Justice
Of Attorneys for Contestant the United States of America

August 31, 2006
Date

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December 2006, I served the within Letter to All Partics, STIPULATION TO RESOLVE CONTESTS and Certificate of Service on the parties hereto by regular first-class mail and by e-mail if an e-mail address is listed below, a true, exact and full copy thereof to:

VIA STATE SHUTTLE MAIL
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Salem, OR 97301-1271
dwight.w.french@state.or.us
teri.k.hranac@wrd.state.or.us

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U.S. Department of the Interior
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Jesse D. Ratcliffe, #04894
Assistant Attorney General

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BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of	)	PARTIAL ORDER OF
WAYNE RANCH, LLC	)	DETERMINATION
	)	
_____	)	Water Right Claim 74

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE CORRECTED PROPOSED ORDER

1. Claim 74 (Claimant: WAYNE RANCH, LLC) and its associated contests (2838, 3466, 3742, and 4123) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 202.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a CORRECTED PROPOSED ORDER ORDER[1] (Corrected Proposed Order) for Claim 74 on December 8, 2006.

3. Exceptions were filed to the Corrected Proposed Order within the exception filing deadline by (1) Wayne Ranch, LLC, and (2) the United States of America.

4. The exceptions filed to the Corrected Proposed Order have been reviewed and considered in conjunction with the entire record for Claim 74. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Corrected Proposed Order as described in Sections A.6, A.7, A.8 and A.9, below.

5. The Corrected Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted with modifications, as set forth in Section A.6, below.
   b. The "Evidentiary Rulings" is adopted in its entirety.
   c. The "Issues" is adopted in its entirety.

[1] The CORRECTED PROPOSED ORDER replaced a PROPOSED ORDER issued on December 5, 2006. The CORRECTED PROPOSED ORDER corrected an error in the Priorty date as stated in Paragraphs 3 through 6 of the Findings of Fact. No other changes were made.

d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, below.
e. The "Conclusions of Law" is adopted in its entirety~~with modifications, as set forth in Section A.8, below~~.
f. The "Opinion" is adopted~~replaced~~ in its entirety ~~as set forth in Section A.9, below~~.
g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B in this Partial Order of Determination for Claim 74. ~~Consistent with Sections A.7, A.8, and A.9, below, the outcome of the Order has been modified to recognize a right for irrigation on an additional 371.4 acres, and to approve livestock watering incidental to irrigation.~~

6. **History of the Case.** Within the section titled "History of the Case" of the Corrected Proposed Order, the final paragraph is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

> The evidentiary record closed on November 21, 2004. On December 14, 2004, a Scheduling Order was issued, providing due-dates for submission of written argument. On ~~February 11~~ June 23, 2005, Claimant filed its Closing Argument. ~~On March 30, 2005, the United States filed a motion seeking an extension of time to file its brief in response. This motion was denied, but, upon renewal of the motion, a short extension, until April 6, 2005, was allowed.~~ On ~~April 6~~ September 2, 2005, the United States filed its ~~Posthearing Brief~~ Closing Argument. Also on ~~April 6~~ September 2, 2005, KPWU filed its ~~Response~~ Opposition to Claimant's Closing ~~brief~~ Argument. ~~On April 29, 2005, OWRD filed its Reply Brief. Also on April 29, 2005~~, On October 20, 2005, Claimant filed its Reply Brief. ~~The record closed on April 29, 2005.~~

Reason for Modification: To make corrections raised in exceptions and to correct scrivener's errors.

7. **Findings of Fact.** The Corrected Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: The general reasons for modifications are as follows: (1) ~~To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow, an issue raised in exceptions.~~ ~~(2)~~ To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions. (~~3~~2) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by the first non-Indian successor(s) after transfer from Indian ownership, an

issue raised in exceptions. (~~4~~3) To provide evidence from the record to substantiate continued use of water by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions. (~~5~~4) To provide evidence from the record to substantiate incidental livestock watering after transfer from Indian ownership, an issue raised in exceptions. (~~6~~5) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record.

Modified Corrected Proposed Order Findings of Fact

1. Claim 74 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. It was originally 13 parcels, all of which were allotted to Klamath Indians after 1910. ~~as part of the termination of the Reservation.~~ (OWRD Ex. 1 at 37 - 129.) The total claim is for irrigation of 710.3 acres from the Sprague River with a season of use April through October. (*Id*. at 5 ~~7~~ -9.) Abstracts of Permits 21150, 24816, and 32240 covering portions of the claimed lands (submitted as a part of the Claimant's signed Statement and Proof of Claim), provide the only evidence of the claimed rate and duty of water. All three abstracts show water use at a rate of 1/40 of one cfs per acre and a duty of 3.0 acre-feet per acre during the irrigation season of each year. (OWRD Ex. 1 at 17, 19, 21.)

Reason for Modification: To provide more specific information with reference to what was claimed, using evidence on the record.

2. The allotments are located on or near the Sprague River. (*Id.* at 27, 147.) ~~Prior to development, most of the land was subject to periodic flooding, while other portions were subject to subirrigation from the Sprague River or its tributaries. (Direct Test of Walter Seput , at 2.)~~ Except for 13.4 acres located in the south half of Section 31 (within the north half of Allotment 1154), all of the claimed lands lie within the floodplain of the Sprague River and are naturally flood irrigated. While most of the claimed lands are in a depression, the lowest part of the claimed lands lies just north of the Sprague River Highway [southern border of most of the claimed lands]. The land closest to the river is higher than the land immediately to the south and west. When it naturally floods, the water all flows down slope to the south and away from the river. The land just north of

the Sprague River Highway is the last to dry out in the spring after flooding. (Seput Direct, at 2, 3, Ex. A-1, A-2.) Lands appurtenant to the claim within Allotments 713, 714, 127, 205, 206, and 1156 (north) receive natural overflow annually, while lands within Allotments 126, 547, 207, 548, 989, 1156 (south), and 1284, only receive natural overflow during periods of major floods. (*Id.* at 3, 4, Ex. A-3.) Ditches are utilized to even out the natural overflow and to facilitate draining of the land if the overflow lingers too long in the spring. (*Id.* at 5, 6, 7, Ex. A-4, E-1, E-2, F-1, F-2, H-1, H-2; Yockim Affidavit (Nov. 1, 2004), Ex. RS-6 at 2, 11.) Levees have been built by the government, landowners, or lessees to help control the natural overflow, but are only partially effective. (Seput Direct at 4, 5; Yockim Affidavit (Nov. 1, 2004), Ex. RS-6 at 6, 11, RS-9 at 2.) Once the lands have dried out in the spring and the season progresses, such use provides even further benefits. (Gurney Direct, Ex. 6 at 11-14; Seput Rebuttal at 2.)

Reason for Modification: To provide an additional citation to the record; to add clarification using evidence on the record, the ALJ's proposed finding of fact failed to fully set forth the evidence on the record. The ALJ's statement regarding periodic flooding and subirrigation is stricken because it is has been replaced with a more detailed description of the natural flooding; furthermore, there is no mention of subirrigation in the Direct Testimony of Walter Seput at 2, and the finding related to subirrigation is not supported by a preponderance of evidence in the record.

Allotments 713 and 714 (198.8 acres claimed)

3. Klamath Indian Allotments 713 (131.9 acres) and 714 (66.9 acres), totaling 198.8 acres ~~at~~ within the SE¼ of Section 36, Township 34 S, Range 8 E, W.M. and NE¼ of Section 1, Township 35 S, Range 8 E, W.M., respectively, were allotted to Clarence Cowen and Ransom Cowen, both members of the Klamath Tribe. (Gurney Direct, Ex. 3 at 2; OWRD Ex. 1 at 14, ~~18~~, 101, 149-151.) ~~The property~~ Allotment 713 was sold to Henry G. Wolff, a non-Indian, in 1955. ~~(Allotment 713) and 1957 (Allotment 714).~~ (*Id.* at ~~78,~~ 104.) Allotment 714 was ultimately sold to Henry G. Wolff, a non-Indian, in 1957. (*Id.* at 77 - 78.) ~~Lands within these two allotments receive natural overflow from the Sprague River. (Seput Direct at 3, 4; Ex. A-3.) As evidenced by multiple grazing permits, beneficial use of water was established under Indian ownership of the land.~~

~~(Yockim Affidavit (Nov. 1, 2004), Ex. RS-5 - RS-9; Linn Rebuttal, Ex. ML-2, ML-6.)~~ Wolff filed for a water right permit (S-24816) to develop irrigation on this property on April 9, 1957. (OWRD Ex. 1 at 19, 20, 187.) Development was complete by ~~January 24~~ March 23, 1962, when Certificate 29626 was issued. (*Id.* at 187.) Two points of diversion have been developed to irrigate separate portions of these lands. Pump 3 is located in the NE¼ SE¼, Section 36, Township 34 S, Range 8 E, W.M., and a second point of diversion, Pump 2, is located in the NW¼ SE¼, Section 31, Township 34 S, Range 9 E, W.M. (*Id.* at 146 - 151.) Proved application of water on this property, based on the rate and duty established in Certificate 29626, is 1/40 cfs per acre, three acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864. ~~The Diversion Point is located in the NE ¼ SE ¼ Section 36, Township 34 S, Range 8 E.W.M. (*ID.* at 18, 19.).~~

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. The date on which Certificate 29626 was issued was corrected to March 23, 1962, the date clearly shown in the evidence cited for this fact (OWRD Ex. 1 at 187). OWRD has determined that the ALJ's finding that these lands are irrigated from a single point of diversion is not supported by a preponderance of evidence on the record.

Allotments 127, 548 and 989 (5.1 acres claimed)

4. Klamath Indian Allotments 127 (0.9 acres), 548 (0.6 acres) and 989 (~~8.6~~ approximately 3.6 acres), totaling ~~10.1~~ 5.1 acres located within the NW¼ NW¼ of Section 31, Township 34 S, Range 9 E, W.M. (127), the ~~NW¼~~ N½ SW¼ NW¼ of Section 32, Township 34 S, Range 9 E, W.M. (548), and the N½ NW¼ SW¼ of Section 32, Township 34 S, Range 9 E, W.M. (989)[2] (Gurney Direct Ex. 3 at 2; OWRD Ex. 1 at 14, ~~18~~, 149-151), were first purchased by non-Indians Earl Harris, F.F. McCready and Nellie McCready in the 1950s. (Gurney Direct Ex. 5 at 1~~, 8~~; OWRD Ex. 1 at 125 - 129; Yockim Affidavit (Mar. 29, 2004), Ex. AB-3.) Allotment 548 was leased for grazing while in Indian ownership. (Linn Rebuttal,

[2] Allotment 989 is within the S½ SW¼ NW¼ and N½ NW¼ SW¼, Section 32, however, the claimed acreage is only within the N½ NW¼ SW¼. **Reason for addition of footnote:** to show location of the claimed acreage relative to the entire allotment.

Ex. ML-1 at 12.) The properties were already under an application for a water right permit (Application No. 26915 / Permit S-21150) on March 3, 1952, when the property passed out of Indian ownership. (OWRD Ex. 1 at 17.) A Final Proof Survey shows the system was completed in 1958, for which Certificate 24655 was issued. (*Id.* at 17, 18, 191.) A diversion point, Pump 2, located in the NW¼ SE¼, Section 31 Township 34 S, Range 9 E, W.M. has been developed to irrigate these lands. (*Id.* at 146 - 151.) Proved application of water on this property, based on the rate and duty established in Certificate 24655, is 1/40 cfs per acre, three acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864. ~~The Diversion Point was located in the NW¼ SE¼, Section 31 Township 34 S, Range 9 E, W.M. (127); SW ¼ SW ¼ Section 32, Township 34 S Range 9 E.W.M. (548, 989) (*Id.* at 17, 18).~~

Reasons for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition, OWRD has determined that the ALJ's findings that the claimed acreage in Allotment 989 is 8.6 acres, and that the sum of the claimed acres in these three allotment totals 10.1 acres are not supported by a preponderance of evidence on the record. The maps referenced in the above citations show that the 8.6 acres are split between Allotments 989 and 1156 (south). In the Corrected Proposed Order's Finding of Fact #7 the ALJ found that Allotment 1156 (south) is approximately 5 acres, which would leave a balance of approximately 3.6 acres claimed in Allotment 989. OWRD has determined that the ALJ's finding that these lands are also irrigated from a point of diversion within the SW¼ SW¼ Section 32 is not supported by a preponderance of evidence on the record.

Allotment 1284 (9.8 acres claimed)

5. Klamath Indian Allotment 1284 (~~9.4~~ 9.8 acres), located within the SW¼, SW¼ of Section 32, Township 34 S, Range 9 E, W.M., (Gurney Direct, Ex. 3 at 2; OWRD Ex. 1 at 14, ~~18~~ 149-151) was first sold to non-Indians J.W. Wolff, Gerald C. Wolff, and Henry C. Wolff on May 11, 1948. (Gurney Direct, Ex. 5 at 3 ¶m; OWRD Ex. 1 at 119.) The Wolff family filed for a water right permit (S-21150) to develop irrigation on this property on March 3, 1952. (*Id.* at 17, 18.) Development was complete by 1958 as evidenced by the Final Proof Map for Certificate 24655. (*Id.* at 17, 18, 191.) Pump 1, located in the SW¼ SW¼, Section 32, Township 34 S, Range 9 E, W.M., has been developed to irrigate a portion of

the claimed 9.8 acres (Allotment 1284), and a second point of diversion, Pump 2, located in the NW¼ SE¼, Section 31, Township 34 S, Range 9 E, W.M., has been developed to irrigate the remaining portion. (*Id.* at 146 -151.) Proved application of water on this property, based on the rate and duty established in Certificate 24655, is 1/40 cfs per acre, three acre-feet per acre, from April 1 through October 31 with a priority date October 14, 1864. ~~The Diversion Point: SW ¼ SW ¼ Section 32, Township 34 S Range 9 E.W.M. (*Id.* at 17, 18.).~~

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition, OWRD has determined that the ALJ's finding that the claimed acreage in Allotment 1284 is 9.4 acres is not supported by a preponderance of evidence on the record. The OWRD investigation map (OWRD Ex. 1 at 14, 149) and the claimant's place of use listing (OWRD Ex. 1 at 150) both clearly show 9.8 acres were claimed within the SW¼, SW¼ of Section 32.

Allotments 205, 206, and 1156 (north) (322.2 acres claimed)

6. Klamath Indian Allotment~~s~~ 205 (154.3 acres) located within the SW¼, Section 31, Township 34 S, Range 9 E, W.M., Allotment 206 (116 acres) located within the NW¼, Section 6, Township 35 S, Range 9 E, W.M., and a portion of Allotment 1156 (Allotment 1156 (north) (51.9 acres) located within the NW¼, Section 31, Township 34 S Range 9 E, W.M., ~~was~~ were first sold to non-Indian Marvin Williams, Sr. in 1920. ~~It was~~ These allotments were transferred to Klamath Indian Marvin Williams, Jr. in 1923, from Marvin Williams, Jr. to C.R. Bowman, a non-Indian, and from C.R. Bowman to L.V. Corbell later the same year. (OWRD Ex. 1 at 49; Gurney Direct at 3.) Although Corbell applied for a water right permit in 1924, that permit (Permit S-6300) for lands appurtenant to Allotments 205, 206 and 1156 (north) was subsequently cancelled for ~~lack of diligent development~~ failure to submit proof (lack of proper showing) of construction and beneficial use of an irrigation system. ~~Water was not applied to this property prior to the transfer of the property by C.R. Bowman to L.V. Corbell.~~ (*Id.*, ~~at 3, 4,~~ Ex. 7.) Because the lands within these three allotments receive natural overflow from the Sprague River (Seput Direct at 3, 4, Ex. A-3), and Corbell is documented as having cattle in 1922 (150 head owned by Lee

Corbell) and 1935 (184 head owned by L.V. Corbell) (Seput Direct, Ex. M), it is more likely than not that he was grazing cattle on these lands. ~~Beneficial use of water was made by the method of the natural overflow of water from the Sprague River; therefore, water use was made with reasonable diligence following transfer from Indian ownership~~. ~~A point of diversion, Pump 2, located in the NW¼ SE¼, Section 31, Township 34 S, Range 9 E, W.M., has been developed to irrigate the largest portion of these lands within Allotments 205, 206, 1156 (north), and a second point of diversion, Pump 1, located in the located in the SW¼ SW¼, Section 32, Township 34 S, Range 9 E, W.M., has been developed to irrigate the remaining portion within Allotments 205 and 206. (OWRD Ex. 1 at 146 -151.) The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of three acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864.~~

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition, the ALJ's statement that the permit was cancelled for lack of diligent development is not supported by a preponderance of the evidence on the record. The OWRD order cancelling the permit (Gurney Direct, Ex. 7 at 6) did not make any determination about diligent development or lack thereof, but cancelled the permit for failure to submit proof. The ALJ's statement that water was not applied to beneficial use on this property prior to the transfer of the property by C.R. Bowman to L.V. Corbell was stricken because it is not supported by a preponderance of the evidence on the record.

Allotment 1156 (south) (approximately 5 acres claimed)

7. In 1926, a fee patent for the remaining portion of Allotment 1156 (south)[3] (approximately 5 acres) located within the S½ NW¼ SW¼, Section 32, Township 34 S, Range 9 E, W.M. was issued to Valentine Lee Corbell (Yockim Affidavit (Mar. 29, 2009), Ex. AB-5), a Klamath Indian, (*Id.* Ex. AC-1, AD-2 at 3, AD-3 at 3), before it was first sold to D.E. Colwell and R.D. Colwell, the first non-Indian~~s~~ owners, in 1943. (OWRD Ex. 1 at 52.) Water was ~~not applied to~~ beneficially used on this property ~~prior to~~ after the transfer of the property by the Colwells to the Wolff family in 1945, as evidenced by water right Certificate 24655 which

[3] Allotment 1156 was divided into two separate, non-contiguous parcels in different Sections.

includes lands in Allotment 1156 (south) and has a priority date of March 3, 1952. (OWRD Ex. 1 at 17, 18, 54.) This is 9 years following transfer from Indian ownership which does not demonstrate use of water made with reasonable diligence by the first non-Indian owner.

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 207 (92.6 acres claimed)

8. Klamath Indian Allotment 207 (92.6 acres) located within the S½ NE¼ and N½ SE¼, Section 31, Township 34 S, Range 9 E, W.M. was first sold to non-Indian owners A.C. and Dora Gienger in 1918. (OWRD Ex. 1 at 45.) The property was then sold to L.H. and Daisy Lauritsen on May 17, 1920. (*Id.* at 46.) Water was not applied to this property prior to the transfer to the Lauritsens. (Ex. 9, 10, 11, 12; Gurney Direct at 7.) The property eventually passed to Henry G. and Josephine M. Wolff, also non-Indians. (*Id.* at 113.) The record shows that water was applied to this property (Allotment 207) after the transfer to the Wolffs in 1952, 34 years following transfer from Indian ownership. This does not demonstrate use of water made with reasonable diligence by the first non-Indian owner.

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 547 (53.8 acres claimed)

9. Klamath Indian Allotment 547 (53.8 acres) located within the N½ NE¼, Sections 31 and N½ NW¼, Section 32, Township 34 S, Range 9 E, W.M. was first transferred to non-Indian F. F. McCready in 1948 or 1949.[4] Prior to McCready's ownership, Allotment 547 was leased from 1930 through 1949 from Indian

[4] The property was owned by Klamath Indian Fanny Alta Jackson in 1948. (~~Ex. J.~~ Gurney Direct, Ex. 13; Yockim Affidavit (Mar. 29, 204), Ex. AB-6) It was transferred by F.F. McCready to his wife in 1949. (OWRD Ex.1 at 107.) The record does not contain a transfer from Fanny Alta Jackson. She probably conveyed to F.F. McCready, but the record is silent. **Reason for modification of footnote:** To correct and provide additional citations to the record.

Allottee Fanny Alta Captain (Jackson) for farming and grazing. (Linn Rebuttal, Ex. ML-1, ML-4 - ML-6.) The property then passed to Henry G. and Josephine M. Wolff, also non-Indians, in 1952. (OWRD Ex. 1 at 113.) Beneficial use of water ~~was not applied~~ ~~to~~ on this property ~~prior to~~ was made after the transfer to the Wolffs as evidenced by water right Certificate 24655 which includes lands in Allotment 547 and has a priority date of March 3, 1952.[5] ~~A point of diversion, Pump 2, located in the NW¼ SE¼, Section 31, Township 34 S, Range 9 E, W.M., has been developed to irrigate these lands. (*Id.* at 146 -151.) The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of three acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864.~~But this does not show beneficial use of water, with reasonable diligence, by the first non-Indian owner.

Reason for Modification: Using evidence on the record, to provide more specific information with reference to what was claimed. In addition, the ALJ's statement that water was not applied to the property prior to the transfer of the property to the Wolff family is not supported by a preponderance of the evidence on the record.

Allotment 1154 (23.4 acres claimed)

10. Klamath Indian Allotment 1154 (23.4 acres) located within the S½ SE¼ Section 31, Township 34 S, Range 9 E, W.M., and the N½ NE¼, Section 6, Township 35 S, Range 9 E, W.M. was first transferred to Della Barber, on July 2, 1947. (OWRD Ex. 1 at 62, 63.) ~~While~~ Although an Indian, Barber was not a member of the Klamath Tribe. (Gurney Direct, Ex. 14 at 4, 7.) Barber sold the property to the Wolff family on August 12, 1947. (OWRD Ex. 1 at 64.) Barber did not apply water to the property prior to her sale to the Wolffs. (*Id.* at 17-18, 191.) Although the Wolffs filed for a water right in 1952 which included 1.6 acres within the SW¼ SE¼ , Section 31, Township 35 S, Range 9 E, W.M., a comparison of the final proof map for this water right (Permit S-21150 / Certificate 42655) with the claim map shows that these 1.6 acres are not co-extensive with the claimed 9.8 acres within this same quarter-quarter. (*Id.* at 16,

[5] As Claimant notes, a water right application was filed while the McCreadys were still in title. (OWRD Ex. 1 at 17.) This application, however, was filed by the Wolffs. It is not likely that

17, 18.) The Wolff's filed for a water right in 1966 (Permit S-32240), which included the 23.4 acres claimed within these allotments. (*Id.* at 21, 23.) This use

of water, 19 years following transfer from Indian ownership, does not demonstrate use of water with reasonable diligence by the first non-Indian owner.

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 126 (0.7 acres claimed)

11. Klamath Indian Allotment 126 (0.7 acres) located within the SW¼ SW¼, Section 30 Township 34 S, Range 9 E, W.M. was first transferred to non-Indian F.F. McCready in 1915. (Gurney Direct, Ex. 5 at 1; Yockim Affidavit (Mar. 29, 2004), Ex. AB-1.) There is no evidence that this property was irrigated.

Reason for Modification: To provide additional citations to the record; to add clarification using evidence on the record.

Artificial Irrigation in 1918

12. Although the Claimant asserted that historical accounts showed that in 1918, A.C. Gienger was irrigating property appurtenant to a portion of the claimed lands, this assertion is not supported by a preponderance of the evidence on the record. Similarly, there is insufficient evidence on the record to support the existence of the Lewis Dam in 1918. A 1925 Report on the Application for a Patent in Fee and a 1925 Certificate of Appraisement for the allotment on which the dam was built do not identity irrigation works pertaining to the construction of a dam or ditch system on this allotment. (Gurney Direct at 3 ¶10).

Reason for Additional Finding of Fact: Reorganization of a finding found in the opinion section of the ALJ's Corrected Proposed Order; this finding has been moved from the opinion section and reworded.

Livestock Use

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water was diverted to the property by the Wolffs in the 24 days before their deed, as second non-Indian owner, was recorded.

13. Historical grazing has been documented on Allotments 713, 714, 127, 1156 (north and south), 205, 206, 547, 548, and 989. (Linn Rebuttal, Ex. ML-1, ML-2, ML-4, ML-5, ML-6; Yockim Affidavit (Nov. 1, 2004), Ex. RS-5, RS-6, RS-7, RS-8, RS-9, RS-10.) Livestock watering which is incidental to irrigation should be approved on these lands for the number of livestock claimed (250 pair).

Reason for Additional Finding of Fact: With regards to livestock watering, the ALJ's failed to fully set forth the evidence on the record.

8. **Conclusions of Law.** Within the section titled "Conclusions of Law" of the Corrected Proposed Order, Conclusions #10 and #11 are modified as follows (additions are shown in "underline" text, deletions are shown in "strikethrough" text):

a. Conclusion 10:

Beneficial use of water for irrigation with incidental livestock watering of 250 pair of cattle of part on a portion of the claimed place of use was developed made with reasonable diligence by the first non-Indian purchaser from an Indian owner following transfer from Indian ownership.

b. Conclusion 11:

Water provided to Allotments 127, 1156 (north), 205, 206, 713, and 714 within the claimed place of use by the method of natural overflow, means (flooding in the spring or through subirrigation) and although not through a diversion system created by humans, cannot be the is a valid basis for a Walton right, or constitute irrigation under a *Walton* right.

Reasons for Modification: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports conclusions other than those in the 2006 Corrected Proposed Order.

9. **Opinion.** The section titled "Opinion" of the Corrected Proposed Order is replaced in its entirety as follows:

OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

In addition, OWRD incorporates into the Opinion section all the paragraphs below:

Application of Walton Elements to the Modified Corrected Proposed Order Findings of Fact

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division,* 47 Or App 437 (1980); *Metcalf v. AFSD,* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

As discussed below, the various allotments have very different histories. Those different histories control the outcome as to each parcel.

Allotments 713, 714, 127, 547, 548, 989, 1284

Beneficial use of water by the method of natural overflow was made on Allotments 713, 714, and 548 while still under Indian ownership as evidenced by grazing leases. On Allotments 127, 547, 989, and 1248 beneficial use of water was made with reasonable diligence following transfer from Indian to non-Indian ownership.

The United States concedes that Claimant has met its burden as to Allotments 713, 714, 127, 548, 989 and 1284. The United States argues that the rate and duty as allowed in the Preliminary Evaluation exceed the amount claimed. This is correct. Claimant enclosed with his claim water right permits previously issued as evidence of use of water. Those permits expressly limited the rate and duty to 1/40 of one cfs per acre and 3 acre-feet per acre. The permits provide the best evidence in the record of the appropriate rate and duty to apply to the portion of the claim that qualifies for a *Walton* right. The qualifying acres are therefore limited to a rate of 1/40th cfs per acre and a duty of 3 acre-feet per acre.

Allotments 1156 (north), 205, 206

The existence of natural overflow on these allotments, combined with grazing records, show that Corbell made beneficial use of water within two years after the land was transferred out of Williams' Indian ownership. Beneficial use was made with reasonable diligence on the claimed portions of these allotments following transfer from Indian ownership.

The Claimants also asserted that water had been artificially applied to a beneficial use with reasonable diligence following transfer from Indian ownership. The evidence does not support this contention.[6] Since the evidence

[6] Claimant asserted that the "historical accounts" showed that in 1918, A.C. Gienger was irrigating the property that he owned for two years. That "historical account" is actually the hearsay recital of Leroy Gienger as to what he had been told at third hand about the activities of his grandfather. While recourse to such evidence has sometimes been necessary in the Klamath Adjudication, it must be viewed with some caution. In this case, there were maps and reports prepared contemporaneously with the Giengers' occupation of Allotment 207 which purported to record the property that was irrigated within the Klamath Reservation, including private developments. Those maps and reports make no mention of irrigation works developed in the area included within Gienger's property.

In *Cole v. DMV,* 336 Or 565 (2004) the Supreme Court discussed the factors to be considered in deciding whether hearsay may be treated as substantial evidence in any particular case. There, the Supreme Court concluded that where hearsay evidence is based upon multiple hearsay, and is contradicted by evidence presented by the

~~establishes beneficial use of natural overflow with reasonable diligence following transfer from Indian ownership, proof of artificial irrigation is unnecessary with respect to the claimed lands in these allotments.~~

~~**Allotments 126, 207, and 1154, 1156 (south)**~~

~~Claimants have not proved that water was applied to a beneficial use on these Allotments with reasonable diligence. There is no evidence that water was ever applied to a beneficial use on Allotment 126. Water was not applied to a beneficial use on Allotment 1154 for 19 years following transfer from Indian ownership. Water was not applied to beneficial use on Allotment 1156 (south) for 9 years following transfer from Indian ownership[7]. Water was not applied to a beneficial use on Allotment 207 for 34 years following transfer from Indian ownership. These time periods do not demonstrate reasonable diligence based on the facts in this case.~~

~~**Summary**~~

~~In view of the foregoing, the portion of Claim 74 related to Allotments 713, 714, 127, 205, 206, 1156 (north), 547, 548, 989 and 1284 should be allowed for irrigation with incidental livestock watering. The remainder of the claim (Allotments 126, 207, 1154 and 1156 (south) should be denied.~~

~~**Reasons for Modification:** To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein; to apply the appropriate legal bases to the Corrected Proposed Order's modified findings of fact.~~

B. DETERMINATION

1. The Corrected Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
    h. The "History of the Case" "History of the Case" is adopted with modifications, as set forth in Section A.6, above.
    a. The "Evidentiary Rulings" is adopted in its entirety.
    b. The "Issues" is adopted in its entirety.
    c. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, above.
    d. The "Conclusions of Law" is adopted in its entirety~~with modifications, as set forth in Section A.8, above~~.

~~opposing party, it is not sufficiently reliable to allow it to be treated as substantial evidence in an administrative case. Here, that is the case. The testimony of Leroy Gienger is multiple hearsay, and is contradicted by contemporaneously prepared documents in the record. It is not, therefore, sufficiently reliable to allow it to be treated as substantial evidence to support a finding of fact in this case.~~

~~Likewise, Claimant's argument for the existence of the Lewis Dam in 1918 is based entirely on inference unsupported by evidence sufficient to allow the inference to be made.~~

~~[7] The only evidence of beneficial use prior to transfer from Indian ownership is the fact that Corbell owned cattle in 1922 and 1935, and that Allotment 1156 (south) receives natural overflow during "major" floods. These facts are insufficient to establish a *Walton* right on this allotment.~~

e. The "Opinion" is adoptedreplaced in its entirety as set forth in Section A.9, above.
f. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B in this Partial Order of Determination for Claim 74. Consistent with Sections A.7, A.8, and A.9, above, the outcome of the Order has been modified to recognize a right for irrigation on an additional 371.4 acres, and to approve livestock watering incidental to irrigation.

2. The elements of a Walton claim are established on some allotments. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

3. Beneficial use of water by the method of natural overflow was established on portions of the claim prior to the development of specific points of diversion.

4.3. Based on the file and record herein, IT IS ORDERED that Claim 74 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 74

CLAIM MAP REFERENCE:
OWRD INVESTIGATION MAPS – T 34 S, R 8 E; T 34 S, R 9 E; T 35 S, R 8 E; and T 35 S, R 9 E.

CLAIMANT: WAYNE RANCH, LLC
6205 CRESCENT DR
ENIDA, MN 55436

SOURCE OF WATER: The SPRAGUE RIVER, tributary to the WILLIAMSON RIVER

PURPOSE OR USE:
IRRIGATION OF 213.7589.7 ACRES FROM PUMP 1, PUMP 2, AND PUMP 3, WITH INCIDENTAL LIVESTOCK WATERING OF 250 PAIR; NOT TO EXCEED IRRIGATION OF 9.8 135.2 ACRES FROM PUMP 1 AND 74.7 ACRES FROM PUMP 3.

RATE OF USE:
14.745.34 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION (PUMP 1, PUMP 2 AND PUMP 3), NOT TO EXCEED 0.2453.38 CFS FROM PUMP 1 AND 1.86 CFS FROM PUMP 32.

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

DUTY:
3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: APRIL 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
Pump 1	34 S	9 E	WM	32	SW SW	150 FEET NORTH AND 420 FEET EAST FROM SW CORNER, SECTION 32
Pump 2	34 S	9 E	WM	31	NW SE	
Pump 3	34 S	8 E	WM	36	NE SE	

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
~~34 S~~	~~9 E~~	~~WM~~	~~31~~	~~NE SW~~		~~36.9~~	Pumps 1 and 2
~~34 S~~	~~9 E~~	~~WM~~	~~31~~	~~SE SW~~		~~38.2~~	
34 S	9 E	WM	32	SW SW		9.8	
~~35 S~~	~~9 E~~	~~WM~~	~~6~~	~~NE NW~~	~~3~~	~~31.8~~	
~~35 S~~	~~9 E~~	~~WM~~	~~6~~	~~SE NW~~		~~18.5~~	
34 S	8 E	WM	36	NE SE		37.2	Pump 2
34 S	8 E	WM	36	SE SE		40.0	
~~34 S~~	~~9 E~~	~~WM~~	~~31~~	~~NE NE~~		~~29.2~~	
~~34 S~~	~~9 E~~	~~WM~~	~~31~~	~~NW NE~~		~~15.9~~	
34 S	9 E	WM	31	NW NW	1	0.9	
~~34 S~~	~~9 E~~	~~WM~~	~~31~~	~~SW NW~~	~~2~~	~~29.7~~	
~~34 S~~	~~9 E~~	~~WM~~	~~31~~	~~SE NW~~		~~22.2~~	
~~34 S~~	~~9 E~~	~~WM~~	~~31~~	~~NW SW~~	~~3~~	~~39.6~~	
~~34 S~~	~~9 E~~	~~WM~~	~~31~~	~~SW SW~~	~~4~~	~~39.6~~	
~~34 S~~	~~9 E~~	~~WM~~	~~32~~	~~NW NW~~		~~8.7~~	
34 S	9 E	WM	32	SW NW		0.6	
34 S	9 E	WM	32	NW SW		3.6	
35 S	8 E	WM	1	NE NE	1	39.8	
35 S	8 E	WM	1	SE NE		7.1	
~~35 S~~	~~9 E~~	~~WM~~	~~6~~	~~NW NW~~	~~4~~	~~39.6~~	
~~35 S~~	~~9 E~~	~~WM~~	~~6~~	~~SW NW~~	~~5~~	~~26.1~~	
34 S	8 E	WM	36	NW SE		16.6	Pumps 2 and 3
34 S	8 E	WM	36	SW SE		38.1	
35 S	8 E	WM	1	NW NE	2	20.0	

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of CLIFFORD C. RABE AND MARY A. RABE	))))	PARTIAL ORDER OF DETERMINATION Water Right Claim 95

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE PROPOSED ORDER

1. Claim 95 (Claimants: CLIFFORD C. RABE AND MARY A. RABE) and its associated contests (2764, 3477, 3746, and 4131) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 211.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 95 on February 1, 2007.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by Clifford C. Rabe and Mary A. Rabe.

4. The exceptions to the Proposed Order along with responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 95. The exceptions are not found to be persuasive ~~in part~~, and therefore, no modifications are made to the Proposed Order ~~as described in Sections A.7, A.8, and A.9, below~~to accommodate the exceptions.

5. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as described below:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, below.
   c. The "Issues" is adopted in its entirety.

d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, below.
e. The "Conclusions of Law" is adopted ~~with modifications, as set forth in Section A.8, below~~in its entirety.
f. The "Opinion" is adopted ~~with modifications, as set forth in Section A.9, below~~in its entirety.
g. The "Order" is ~~replaced~~ adopted in its entirety ~~by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 95. Consistent with Sections A.7, A.8, and A.9, below, the outcome of the Order has been modified to recognize a right for irrigation on 220.3 acres and livestock watering~~.

6. **Evidentiary Rulings.** Within the section titled "Evidentiary Rulings" of the Proposed Order, the first paragraph is modified as follows:

> The AFFIDAVIT OF VINCE BODNER, JR. dated April 9, 2004, is added to the list of items that were admitted into the record.

Reason for Modification: To correct an omission from the list of Evidentiary Rulings.

7. **Findings of Fact.** The Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the general reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: (1) To correct scrivener's errors and provide clarity of evidence in the record. ~~(2) To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow, an issue raised in exceptions by the Claimants. (3) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions by the Claimants (4) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions by the Claimants. (5) To provide evidence from the record to substantiate continued use of water by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions by the Claimants. (6) To provide evidence from the record to substantiate livestock watering after transfer from Indian ownership, an issue raised in exceptions by the Claimants.~~ (~~7~~2) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record.

Modified Proposed Order Findings of Fact

1. Claim 95 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. The claim is comprised of six allotments in the Klamath Reservation (Allotment numbers 400, 409,

637, 638, 1091, and 1252), that have been consolidated into the ownership of Clifford and Mary Rabe (Claimants). The total acreage is 353.6 acres.[1] Claimants acquired the property in 1976. (Rabe Direct at 2.) The claim is for 7.0 cfs of water from the Sprague River, a tributary of the Williamson River, for irrigation and livestock watering of 225 head of cattle. The claimed season of use is April 15 to October 15 for irrigation, and year around for livestock watering. The claimed priority date is October 14, 1864. (OWRD Ex. 1 at 1-5.) The claimant submitted a 1995 pump test demonstrating the pumping capacity of his system to be 2613.0 gallons per minute, or 5.82 cfs. (Claimant's Ex. 55.)

Reason for Modification: Using evidence on the record, to provide more specific information with reference to what was claimed.

2. The claimed acreage for Claim 95 extends into each of the six allotments. The Sprague River flows through the property and the acreage in the claim is located on the west and south sides of the Sprague River. Near the property, Trout Creek joins the Sprague River, approximately one-half mile west of the property, and downstream from the claimed point of diversion on the Sprague River. (Book Affidavit (Direct) at 13, Ex. 3.) Claimants ~~identified~~ claimed ~~two~~ a single point of diversions on ~~serving the property from Trout Creek and~~ the Sprague River, located within the NW¼ NE¼, Section 36, Township 35 South, Range 9 East, W.M. (OWRD Ex. 1 at ~~13~~ 3, 68.) ~~The claimed lands are within the flood plain of the Sprague River, are relatively flat, and therefore flood readily making them subject to natural overflow in the spring. This natural overflow has provided water for wild and cultivated grasses which have been utilized for hay and pasture (grazing). (Rabe Direct at 2, 3, Ex. C-1; Book Direct, Ex. 13; Rabe Rebuttal at 2, 3, Ex. H-1, H-2; Bodner Affidavit at 2, 5, 6, Ex. U.S.G.S. Quadrangle Map – Sprague River West.)~~

Reasons for Modification: The ALJ's finding with respect to the number of points of diversion is not supported by a preponderance of evidence on the record; the Sprague River is the only source of water that was claimed in Claim 95. In addition, the ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

[1] Claimants claimed the total acreage was 374.8 acres, but OWRD determined the correct acreage was 353.6 acres. (OWRD Ex. 1 at 24, 29, 113, 118, 69.) There is no evidence to dispute OWRD's determination.

3. Vincent Bodner, Jr.,[2] a Klamath Indian, acquired allotment 637 in the late 1940s. He acquired allotments 638 and 1091 in the mid 1950s. He inherited allotments 400, 409, and 1252 in 1962. (Bodner Affidavit at 2-4.) Mr. Bodner did not use an irrigation system to artificially irrigate any of the allotments. (*Id.* at 5, 6.) ~~However, he did make beneficial use of water by the method of natural overflow from the Sprague River on five of the six allotments (all except 1091) to grow and harvest hay crops, and/or by utilizing pasture for grazing cattle. (*Id.* at 2, 5, 6.) Although Mr. Bodner did not continue the artificial irrigation of the grass, as done by the prior landowner land on allotment 638, he continued to pasture and hay the grass that grew after the spring floods. He planted allotments 1252, 409, and 637 into rye grass which were "flooded by the [Sprague] River in the spring and the flood provided water for the hay and pasture. We hayed it and let the cows in onto the stubble in the fall." With regards to allotment 400 Bodner stated that "we hayed and grazed [the wild hay] along the river while my family and I owned these lands." (*Id.* at 2, 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.)~~

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

4. In 1967, the California Land Co. acquired all of the allotments from Vincent Bodner, Jr., Shirley Bodner, Alfareta Skeen Bodner, and Vincent Bodner, Sr., all Klamath Indians. The California Land Co. was a group of non-Indians. (OWRD Ex. 1 at 11; Bodner Affidavit at 4.) The property was then conveyed to David Griffith in 1967 and subsequently acquired by a partnership in 1971 that included Cecil Elliott. The land was conveyed from Elliott to the Claimants in 1976. (OWRD Ex. 1 at 11.) There is no evidence that any of the persons in the chain of title after the California Land Co. are Klamath Indians. (Book Affidavit (Direct) at 12.)

[2] The Affidavit filed in this case shows the name spelled Bodnar. However, most of the other documents in the record spell the name Bodner. ~~I have adopted~~ The spelling used by the majority of documents, Bodner, is adopted. ~~I note that~~ There is no contention that the two spellings refer to two different people.

5. ~~There is no evidence~~ It is more likely than not that water was not ~~diverted~~ beneficially used for livestock use ~~because allotments 400, 1252, 409, 637, and 638 were grazed under the ownership of Vincent Bodner, Jr~~. ~~(Bodner Affidavit at 2, 5, 6.)~~

~~**Reason for Modification:** The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.~~

Allotment 400 (13.6 acres claimed)

6. This property is located in the N½ NE¼, Section 36, Township 35 S, Range 9 E, W.M. The property was allotted to Rosa Dick, a Klamath Indian, by trust patent in 1900. (Book Direct, Ex. 14 at 4.) In 1918, the allotment was conveyed to John A. Smith, as heir to Rosa Dick, by fee patent from the United States. (Claimants' Ex. 25.) John Smith was not a member of the Klamath Tribe or any other tribe.[3] (Book Direct, Ex. 14 at 2.) John Smith was the first non-Indian owner of Allotment 400. The property was conveyed to Nettie Smith, a Klamath Indian, in 1924. (Claimants' Ex. 33.) The property remained in Indian ownership until sold by Alfareta and Vincent Bodner to the California Land Co. in 1967. (*Id.*, Ex. 50.)

7. Part of Allotment 400 was irrigated from a diversion on Trout Creek prior to 1923. (Book Direct, Ex. 10 at 27.) This irrigation was discontinued by at least the 1930's and was not resumed through 1967. (Bodner Affidavit at 3-4.) The Claimants did not claim Trout Creek as a source of water for Allotment 400. Trout Creek is a tributary of the Sprague River, but Trout Creek enters the Sprague River downstream from the point of diversion on the Sprague River claimed for Allotment 400. ~~Although there~~ There was no state water right for Allotment 400 prior to 1976 (Book Affidavit (Direct) at 16). ~~, beneficial use of water from the Sprague River by the method of natural overflow began by 1962. (Bodner Affidavit at 5, 6, Ex. U.S.G.S. Quadrangle Map – Sprague River West.)~~ There was no irrigation on the property from 1967 to 1976 when Claimants purchased the property. (Bodner Affidavit at 3.) ~~There was no irrigation on the property from 1967 to 1976 when Claimants purchased the property. (Bodner Affidavit at 3.)~~ Claimants started

[3] John Smith self-reported to being one quarter Pitt River Indian and three quarters white. He was not enrolled in any Indian Tribe. He was the widow of Rosa Dick and inherited the property from her on her death. ~~I am not persuaded by~~ Claimants' argument that Smith should be treated as an Indian for *Walton* right purposes because he married a Klamath Tribal member is not persuasive. *See* Claimants' Closing Argument at 9-10.

to build the current artificial irrigation system on Allotment 400 in 1976. (Rabe Direct at 2.)

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

Allotment 1252 (69.4 acres claimed)

8. This property is located in the S½ NE¼, Section 36, Township 35 S, Range 9 East, W.M. The allotment was confirmed to David Skeen, a Klamath Indian, by trust patent granted in 1915 (Claimants' Ex. 24), and by fee patent in March 1918. (*Id.*, Ex. 26.) The property was conveyed from David Skeen to B. S. Grigsby and then back to David Skeen in 1918.[4] (*Id.*, Ex. 27.) B. S. Grigsby was a non-Indian ~~white man~~. (Stipulation.) The property was conveyed by Sheriff's deed to Klamath County in 1930, (*Id.*, Ex. 37 at 5), and then back to David Skeen in 1933. (*Id.*, Ex. 38.) The property was subsequently conveyed to the United States in trust for David Skeen in 1950 and conveyed to David Skeen again in 1959. (OWRD Ex. 1 at 8, 9.) The property was inherited by Vincent Bodner Jr. and Alfareta Skeen Bodner in 1962. (Bodner Affidavit at 3.) The property was subsequently conveyed to the California Land Co. in 1967. (Claimants' Ex. 50.)

Reason for Modification: For consistency of terminology; to clarify a citation.

9. A portion of Allotment 1252 was irrigated by a ditch from Trout Creek prior to 1923. (Bodner Affidavit at 3 and Book Direct, Ex. 10.) However, irrigation was discontinued some time prior to 1950. (Bodner Affidavit at 3.) The ditch from Trout Creek was not used from at least 1950 through 1976. (*Id.* and Book Affidavit (Direct) at 18.) Mr. Bodner did not recall Trout Creek Ditch ever being used to irrigate Allotment 1252. (*Id.*) ~~Beneficial use of water from the Sprague River on Allotment 1252 by the method of natural overflow began by 1962. (Bodner Affidavit at 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.)~~There was no irrigation of the property from 1967 until Claimants purchased the property in 1976. (Bodner Affidavit at 2-4.) ~~There was no irrigation of the property from 1967 until Claimants purchased the property in 1976. (Bodner Affidavit at 2-4.)~~ Claimants started to build the current artificial

irrigation system on Allotment 1252 in 1976. (Rabe Direct at 8, 9.) ~~The point of diversion for this parcel is located in the NW¼ NE¼ Section 36, Township 35 S, R 9 E, W.M. (OWRD Ex. 1 at 68.) Rate is 1.74 cfs[5]. Duty is 208.2 acre feet per year. The period of use for irrigation is April 15 through October 15, and year-round for livestock watering. The priority date is October 14, 1864.~~

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.; to add clarification using evidence on the record~~; the statement that there was no irrigation on the on the property from 1967 to 1976 was stricken because it is not supported by a preponderance of the evidence on the record~~.

Allotment 409 (115.0 acres claimed)

10. The property is located in the SE¼, Section 36, Township 35 S, Range 9 E, W.M. The allotment to Bessie Faithful, a Klamath Indian, was confirmed by trust patent dated 1910. (Ex. 23.) David Skeen received a fee patent as heir to Bessie Faithful in 1919. (Ex. 28.) The property was conveyed by Sheriff's deed to Klamath County in 1930, (Ex. 37 at 5), and back to David Skeen by deed in 1933. (Ex. 38.) The property was conveyed from David Skeen to Hans Anderson in January 1945. (Ex. 43.) Hans Anderson was not an Indian. (Book Direct, Ex. 15 at 2.) The property was conveyed to David Skeen again in July 1945. The property was subsequently conveyed to the United States in trust for David Skeen in 1950. (OWRD Ex. 1 at 8.) The property was inherited by Vincent Bodner, Jr. and Alfareta Skeen Bodner in the early 1960s. (Bodner Affidavit at 3.)

11. An early Bureau of Indian Affairs (BIA) report for Allotment 409 did not show the Trout Creek Ditch irrigating this allotment, although the Trout Creek Ditch appears to extend a short distance onto this allotment. (Book Affidavit (Direct) at 13-14.) Mr. ~~Bodnnar~~ Bodner knew of a ditch from Trout Creek on the edge of this allotment, but he did not recall it ever being used to irrigate land in Allotment 409. (Bodner Affidavit at 3.) The Claimants did not claim Trout Creek as a source of water for Allotment 409. In

[4] Documentation for the conveyance from David Skeen to B.S. Grigsby, or some other sequence of ownership in 1918, has not been provided. (Book Affidavit at 8.)

the 1930s, David Skeen built a small dam on the Sprague River to obtain water for a ditch that ran onto allotment 409. (Bodner Affidavit at 3, 4.) The dam lasted two years and was not used again after that time. (*Id.* at 4.) A pump installed in the Sprague River in Allotment 638 provided water to Allotment 409 and 1252 but was used for only one year. (*Id.* at 3.) The pump and ditch were not used after that. (*Id.*) Although a 1957 appraisal by the General Services Administration noted that there was no developed source of water to the allotment, it was stated that of the 160 acres of this property, sixty eight acres were under cultivation, and thirty five acres were in pasture at that time. (Book Direct, Ex. 20 at 3.) ~~Any development of irrigation of Allotment 409 was temporary and sporadic. (Book Affidavit at 21.)~~ Vincent Bodner did not artificially irrigate Allotment 409 during his period of ownership from the early 1960s to 1967~~.~~ (Bodner Affidavit at 2-4)~~; however, he did make beneficial use of water from the Sprague River by the method of natural overflow~~. ~~(*Id.* at 5, 6, Ex. U.S.G.S. Quadrangle Map – Sprague River West.)~~ ~~There was no irrigation on the property from 1967 to 1976~~ when ~~Claimants purchased the property. (Bodner Affidavit at 2-4.)~~ There was no artificial irrigation from 1967 to 1976. (Bodner Affidavit at 2-4). Claimants started to build the current irrigation system on this allotment in 1976. (Rabe Direct at 8, 9.) ~~The point of diversion for this parcel is located in the NW¼ NE¼ Section 36, Township 35 S, R 9 E, W.M. (OWRD Ex. 1 at 68.) The rate is 2.87 cfs. The duty is 345.0 acre-feet per year. The period of use for irrigation is April 15 through October 15, and year-round for livestock watering. The priority date is October 14, 1864.~~

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record~~; the statement that there was no irrigation on the on the property from 1967 to 1976 was stricken because it is not supported by a preponderance of the evidence on the record~~.

Allotment 637 (35.9 acres claimed)

12. The property is located in the NW¼, Section 31, Township 35 S, Range 10 E, W.M. The allotment was confirmed to Neffie Weeks, a Klamath Indian, by trust patent dated 1910. (Claimants' Ex. 17.) The property was passed to the heirs of Weeks,

~~[5] All rates and duties allowed are calculated at 1/40th cfs per acre and 3 acre-feet per acre, based on the amount approved in the water use permits issued on these properties. (OWRD Ex. 1 at 17, 24, 93.) Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.~~

Caroline Cowen and Cinda Checaskane, Klamath Indians. (*Id.*, Ex. 18, 19.) The property was conveyed to Vincent Bodner Jr. in 1942. (*Id.*, Ex. 21.) The property was conveyed to California Land Co. in 1967. (*Id.*, Ex. 50.)

Reason for Modification: To provide additional citations to the record.

13. Allotment 637 was not artificially irrigated until the Claimants acquired it and started their development in 1976. (Rabe Direct Testimony at 8-9.) ~~Allotment 637 was not irrigated until the Claimants acquired it and started their development in 1976. (Rabe Direct Testimony at 8-9.) Beginning in the 1940s, Mr. Bodner made beneficial use of water by the method of natural overflow from the Sprague River. Allotment 637 was planted into rye grass which was "flooded by the [Sprague] River in the spring and the flood provided water for the hay and pasture. We hayed it and let the cows in onto the stubble in the fall." (Bodner Affidavit at 5, 6, Ex. U.S.G.S. Quadrangle Map – Sprague River West.) Claimants started to build the current irrigation system on allotment 637 in 1976. (Rabe Direct at 8, 9.) The point of diversion for this parcel is located in the NW¼ NE¼ Section 36, Township 35 S, R 9 E, W.M. (OWRD Ex. 1 at 68.) Rate is 0.90 cfs. Duty is 107.7 acre-feet per year. Period of use for irrigation is April 15 through October 15, and year-round for livestock watering. Priority date is October 14, 1864.~~

~~**Reasons for Modification:** The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.~~

Allotment 638 (67.2 acres claimed)

14. The property is located in the SW¼, Section 31, Township 35 S, Range 10 E, W.M. The allotment was allotted to Ella Cowen, a Klamath Indian~~, was confirmed by the allotment ledgers and township allotment maps~~. ~~(OWRD Ex. 1 at 9.)~~ (Rabe Direct at 2; Claimants' Ex. 15.) David Skeen received a fee patent in 1923 from Ella Cowen. (*Id.*) The property was conveyed to Albert Thalhofer in 1927. (*Id.*, Ex. 16.) Mr. Thalhofer was non-Indian ~~white~~. (Stipulation.) The property was subsequently conveyed to Klamath County by Sheriff's deed in 1941. (*Id.*, Ex. 40.) The property was then conveyed to Leroy Gienger in 1942. (*Id.*, Ex. 20.) Mr. Gienger was not an Indian. (Bodner Affidavit at 2.) Mr. Gienger conveyed the property to Vincent Bodner Jr. in

1964. (OWRD Ex. 1 at 9; Claimants' Ex. 2.) The property was conveyed to the California Land Co. in 1967. (*Id.*, Ex. 50.)

Reasons for Modification: To provide corrected and additional citations to the record; to add clarification using evidence on the record; for consistency of terminology.

15. There was no artificial irrigation on the land prior to 1950, when Leroy Gienger started development of irrigation. An application for a water right was filed in 1950 to irrigate lands on both sides of the Sprague River within Allotment 638. Permit 20509 was ~~granted~~ issued in 1952 to Mr. Gienger. (OWRD Ex. 1 at 94.) ~~A water right was granted to Mr. Gienger for lands in Allotment 638. (*Id.*) A permit application was filed in 1950 to irrigate lands on both sides of the Sprague River.~~ Mr. Gienger submitted proof of appropriation in 1958 for irrigation of 286.5 acres and was granted a certificate in 1959, of which 126.5 acres were located in Allotment 638. (*Id.* at 93, 97.) ~~Only 67.2 acres were located on Allotment 638. (Book Affidavit at 16.)~~ Mr. Gienger's irrigation development started 23 years after the conveyance to Mr. Thalhofer, the first non-Indian owner. ~~Irrigation was discontinued on this allotment~~ ~~From the time that Mr. Bodner acquired it this allotment in 1964 until the Claimants acquired the property in 1976 (Bodner Affidavit 3.) he sold it in 1967, he continued to pasture and hay the grass that grew after the spring floods, thus making beneficial use of water from the Sprague River by the method of natural overflow. (Bodner Affidavit at 2, 5, 6, Ex. U.S.G.S. Quadrangle Map – Sprague River West.)~~ Artificial irrigation was discontinued on this allotment from the time Mr. Bodner acquired it in 1964 until 1976. (Bodner Affidavit 3.) Claimants started to build ~~on~~ the current irrigation system on this allotment in 1976. (Rabe Direct at 8, 9.)

Reasons for Modification: Changes were made to the description of Permit 20509 for added clarity. In addition, the ALJ's findings that only 67.2 acres of the area covered by the certificate resulting from Permit 20509 is~~, and that irrigation was discontinued on this allotment from the time Mr. Bodner acquired it, are~~ not supported by a preponderance of evidence on the record. The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

Allotment 1091 (52.5 acres claimed)

16. This property is located in the E½, NE¼, Section 1, Township ~~35~~ 36 S, Range 9 E, W.M. The allotment to Julia Hart, a Klamath Indian, was confirmed by a 1913 trust

patent. (Claimants' Ex. 1, 5.) Julia Hart died in 1911. The ownership by heirs was described in the 1958 Land Status Report issued for allotment 1091. (*Id.* at 5) The heirs conveyed the property to the Bly Lumber Co. in 1959. (*Id.* at 6 - 9.) Bly Lumber Co. was the first non-Indian owner. (Book Direct, Ex. 12 at 2, ¶5.d.) The property was subsequently conveyed to Leroy Gienger in 1959. (Claimants' Ex. 11.) Vincent Bodner Jr. acquired the property in 1964 and conveyed it to the California Land Co. in 1967. (*Id.* at 50.)

17. Allotment 1091 was not irrigated (either artificially or naturally) from 1940 - 1979. (Book Affidavit (Direct) at 22, and Book Direct, Ex. 6, 1968 photograph.) There was no way to serve this land historically from ~~Trout Creek or~~ the Sprague River pump. (*Id.* at 22.) ~~There is no evidence in the record confirming any beneficial use of water made, either by the method of natural overflow or by use of an irrigation system on the property until after the Claimants purchased the property in 1976.~~ Claimants developed the ditch serving this allotment several years after they acquired the property in 1976. (OWRD Ex. 1 at 99 - 100.)

Reasons for Modification: To correct a scrivener's error in the township; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

~~8. **Conclusions of Law.** The Proposed Order's "Conclusions of Law" section is modified as follows (additions are shown in "underline" text, deletions are shown in "strikethrough" text):~~

~~1. The period of use is not relevant because a *Walton* right has not been established on any allotment should be April 15 through October 15 for irrigation and year-round for livestock watering, as claimed.~~

~~2. The record does not supports the claimed rate, duty, actual uses, the points of diversion, and re-diversion, place of use, seasons of use and/or acreage claimed because on allotments where a *Walton* right has not been established, on any allotment.~~

~~3. Title information does not establishes a *Walton* right on any portions of the claimed places of use.~~

4. There is insufficient continuous use of water on the Place of Use to establish a *Walton* right for any allotment. On allotments where the Claimants have otherwise established the elements of a *Walton* right, the Contestants have failed to prove lack of continued use of the developed rights.

5. The diversion rate for the place of use is not relevant because a where a *Walton* right has not been established for any allotment should be 1/40 cfs per acre.

6. The diversion rate for livestock watering is not relevant because a where a *Walton* right has not been established for any allotment should be 12 gallons per day per head for the number of cattle claimed (225 cattle). The season of use for livestock watering should be January 1 through December 31 as claimed.

7. The period of use for irrigation in the preliminary evaluation is not relevant because a *Walton* right has not been established for any allotment exceeded the period of use claimed.

8. Beneficial use of water for irrigation was made on 35.9 acres of allotment 637 by Indian owners prior to transfer out of Indian ownership. Allotments 409 and 1252 went through periods of non-Indian ownership before Klamath Indian owners made beneficial use of water for irrigation on 184.4 acres within these two allotments. These periods of non-Indian ownership were not long enough for the inchoate *Walton* rights to expire for lack of diligent development. The claimed place of use was not under irrigation by the Indian owner before the land was transferred to the first non-Indian owner.

9. Beneficial use of water for irrigation on 133.3 acres within allotments 400, 638 and 1091 of the claimed place of use was not developed made with reasonable diligence by the first non-Indian purchaser from an Indian owner following transfer from Indian ownership.

10. Beneficial use of water for livestock watering was made on 35.9 acres of allotment 637 by Indian owners prior to transfer out of Indian ownership. Allotments 409, and 1252 went through periods of non-Indian ownership before Klamath Indian

owners made beneficial use of water for livestock watering on 184.4 acres of these allotments. These periods of non-Indian ownership were not long enough for the inchoate *Walton* rights to expire for lack of diligent development. Irrigation of the claimed place of use was not developed with reasonable diligence by the non-Indian owner(s) after the first non-Indian purchaser from an Indian owner.

11. Water provided to the claimed place of use by the method of natural overflow means (flooding in the Spring or through sub-irrigation) -- although not through a diversion system created by humans -- does not constitute irrigation under is a valid basis for a *Walton* right.

12. Where the Claimants have otherwise established the elements of a Walton right, the Contestants have failed to demonstrate that the developed *Walton* rights have been abandoned as a result of non-use. If any part of the claimed place of use was ever irrigated by the Indian owner before the land was transferred to the first non-Indian owner or developed with reasonable diligence by the first non-Indian purchaser from an Indian owner, the water claimed for that part of the claimed place of use has not been continuously used by the first non_Indian successor and by all subsequent successors.

13. The irrigation season of use is not relevant because a *Walton* right has not been established for any allotment is limited to April 15 through October 15, the season of use claimed.

14. Because none of the claimed place of use is awarded a water right, the water duty for that part of the claimed place is not relevant. The water duty for that part of the claimed place of use that is approved should be 3.0 acre-feet per acre.

15. Because none of the claimed place of use is awarded a water right, the diversion rate for that part of the claimed place of use is not relevant.

16. 15. The Preliminary Evaluation for Claim No. 95 (including Appendix A to the Preliminary Evaluation entitled "Standards for Rates, Duties, and Seasons of Use Within Previously Adjudicated Areas of the Klamath Basin") should not be accorded any weight in this contested case.

Reason for Modifications: The evidence in the record and the application of the appropriate legal bases to the evidence in the record supports conclusions other than those in the Proposed Order.

9. **Opinion.** The Proposed Order's "Opinion" section is modified as described herein.

OWRD removed the ALJ's discussions regarding the elements of a *Walton* Claim including the first non-Indian purchaser rule, and regarding natural overflow and subirrigation of water as a basis for a *Walton* claim. The deleted paragraphs are noted below as "*****" In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

The remaining portions of the Opinion section of the ALJ's Proposed Order have been labeled "Application of Walton Elements to the Modified Proposed Order Findings of Fact." Additions are shown in "underline" text, deletions are shown in "strikethrough" text.

Application of Walton Elements to the Modified Proposed Order Findings of Fact

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division,* 47 Or App 437 (1980); *Metcalf v. AFSD,* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

*****

The record shows that all of the allotments at issue in this case were of the Klamath Indian Reservation and the land was allotted to a member of the Klamath tribe. Each of the allotments was transferred from the original allottee or a direct Indian successor to the original allottee, to a non-Indian successor. Therefore, the first two elements of a *Walton* right, as articulated by Judge Young, have been satisfied by each allotment.

Claimants must also establish that the claimed irrigation was developed beneficial use of water from the Sprague River was made by their Indian predecessors or by the first

non-Indian purchaser successors of each allotment with reasonable diligence. prior to the conveyance of the allotment to the next owner. To satisfy *Walton* elements, claimants must also show that each allotment was continuously irrigated after the initial development. Following case precedent[6] and Oregon statutes Oregon Administrative Rule 690-028-0045,[7] I adopt a five year rule of thumb as the reasonable time period to make beneficial use of water for diligent development of the irrigation system and to determine the "continuous use" of the irrigation established by the last Indian owner or by the first by subsequent non-Indian owners is that which does not require unusual or extraordinary effort, absent extraordinary circumstances. In this case, even if a five year standard did not apply, the extended periods of non-use far exceed any amount of time justified on this record. Below, I apply these The four elements of a *Walton* right are applied to the facts of each allotment at issue in this claim.[8]

Allotment 400

The first non-Klamath Indian purchaser of this allotment was John Smith in 1918. The record shows irrigation of the claimed portion of Allotment 400 from Trout Creek occurred prior to 1923. but was discontinued by at least 1940 and not resumed until 1976, when the first state water right was granted. Because the water was not continuously used after development by the first non-Indian successor and by all subsequent successors, this allotment fails to meet standards that establish a *Walton* right. The allotment returned to Indian ownership in 1924.

[6] *See, Seaward v. Pacific Livestock Co.,* 49 Or 157 (1907) (when several appropriators quit expanding their irrigation in 1899 and did nothing for five years, the Oregon Supreme Court limited their claim to the acreage fed by a diversion that they each had developed by 1899).

[7] ORS 537.230(1) provides for five years for the completion of the works necessary to put water to beneficial use, unless good cause to enlarge the period can be shown. *See* ORS 539.010(5). ORS 540.610(1) creates a rebuttable presumption of forfeiture after five years of non-use of irrigation. OAR 690-028-0045 provides that reasonable diligence in the construction of the system of works necessary to fully accomplish appropriation of the water does not require unusual or extraordinary effort. Reasonable diligence is that which is usual and ordinary with persons performing similar projects. The water user must demonstrate a genuine intent to complete the appropriation in a timely manner. The question is one of fact, to be determined from the circumstances on case-by-case basis.

[8] Claimants also argued that the standards should be different for allotments that leave Indian ownership and then at some point return to Indian ownership for a period of time before again returning to non-Indian ownership. Claimants argued lands that return to Indian ownership should provide a new chance for that Indian or his grantee to put in an irrigation system and receive a *Walton* right. (Claimants' Closing Argument at 8-9) (Vince Bodner's reacquisition of the property after a seller defaulted allegedly reinstated the reserved water right). This argument is not supported by case law. The *Walton III* court explained that the right flows from the allottee to the first grantee. (752 F2d at 402) ("the immediate grantee of the original allottee must exercise due diligence"). It is the reasonable diligence of the first non-Indian that is at issue to establish a *Walton* right.

Irrigation from Trout Creek was discontinued no later than the 1930s. The irrigation from Trout Creek would have been sufficient to have established a *Walton* right for diversion from Trout Creek on the claimed portion of Allotment 400. Beneficial use was made within five years of transfer from Indian ownership. Under the facts in this case, that constitutes reasonably diligent development. However, the Claimants did not claim Trout Creek as a source of water for Allotment 400, instead claiming a point of diversion on the Sprague River. Trout Creek enters the Sprague River downstream from the current point of diversion on the Sprague River. The change from Trout Creek to Sprague River therefore constitutes a change in source, which is not permissible.[9] The failure to claim the Trout Creek as a source of water for Allotment 400 by the January 31, 1991, claim filing deadline means that Claimants are now estopped from doing so. ORS 539.210. Finally, even if the Claimants had properly claimed Trout Creek as a source, any right to divert water from Trout Creek has been abandoned. There is no evidence of use of water from Trout Creek on this allotment after the 1930s. While the right to use of water from Trout Creek could not have been abandoned during the 1930-1967 period of Indian ownership, it was subject to abandonment beginning with the 1967 purchase by the California Land Co. Abandonment may be inferred from non-use if the period of non-use is sufficiently long. A forty-plus year period of nonuse is sufficient to infer abandonment.

With respect to the claim for use from the Sprague River, Allotment 400 was out of Indian ownership between 1918 and 1924, a period of six years. This is long enough, under the facts in this case, for the right to have expired if not diligently developed. When the property was re-conveyed to a Klamath Indian (Nettie Smith) in 1924, she could only have acquired those rights that had not been lost. There is no evidence that beneficial use of water from the Sprague River was made on Allotment 400 by the time Nettie Smith purchased it. The first evidence of use from the Sprague is not until 1962. The Claimants have not established a *Walton* right on the claimed lands in Allotment 400.

Allotment 1252

[9] Note that, per OAR 690-030-0085(2)(f), in the context of requesting a change of a claimed point of diversion for an adjudication claim, moving a point of diversion from an *upstream* tributary is not considered an impermissible change of source.

The first non-Indian purchaser of this allotment was B.S. Grigsby, who owned the property for a short time in 1918. David Skeen reacquired it and kept it until 1930 when it was conveyed to Klamath County. There is no evidence Mr. Grigsby developed irrigation. However, the record shows a portion of the allotment was irrigated by a ditch from Trout Creek prior to 1923. Even if Mr. Grigsby developed the irrigation described in 1923, use was discontinued some time prior to 1950. The ditch was not used from 1950 to 1976. This allotment fails to establish a *Walton* right because either there is no evidence that the first non-Indian owner developed irrigation or because the irrigation that was developed was not used continuously.

Allotment 1252 went through two periods of non-Indian ownership prior to the beginning of beneficial use of water: a period during 1918 (B.S. Grigsby) and 1930 – 1933 (Klamath County). In *United States v. Anderson*, the Ninth Circuit addressed the effect on *Walton* rights of reacquisition by an Indian tribe after a period of non-Indian ownership. The court held that:

> a non-Indian successor acquires a right to that quantity of water being utilized at the time title passes, plus that amount of water which the successor puts to beneficial use with reasonable diligence following the transfer of title. Where "the full measure of the Indian's reserved water right is not acquired by this means and maintained through continued use, it is lost to the non-Indian successor." Consequently, on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse and those rights will have an original, date-of-the-reservation priority.

736 F2d 1358, 1362 (1984). As is discussed in greater detail in the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS, "reasonable diligence" is the measure of whether a *Walton* right has been timely developed after transfer from Indian ownership. Per *Anderson*, if the period for reasonably diligent development expired prior to reacquisition of the property by a member of the Klamath Tribes, reacquisition by the member cannot revitalize the right. However, if the period for reasonably diligent development has not expired by the time of reacquisition of the property by a member of the Klamath Tribes, then an inchoate right remains appurtenant to the property. If the inchoate right has returned intact to Indian ownership, the Indian owner retains the right to hold the inchoate right indefinitely, so long as the property remains within Indian ownership.

The first period of non-Indian ownership for this allotment lasted less than a year. The second lasted less than four years. The period for reasonably diligent development of a water right is dependent on a number of circumstances, and may vary in length. Generally, though, within a five year period an inchoate right will not be considered to have expired for failure to diligently develop. The five-year period is the default period for diligent development under Oregon's Water Rights Act. ORS 537.230(1). Given this general rule, and the absence of evidence that a period of non-Indian ownership less than five years in length would have been an unreasonably long period for development, we conclude that the inchoate *Walton* right had not expired by the time it re-entered Indian ownership in 1933, and therefore remained eligible for development.[10]

Beneficial use of water by the method of natural overflow was subsequently established under Indian ownership, at least by 1962. The water has continued to be put to beneficial use by non-Indian successors. This allotment meets all the standards that establish a *Walton* right.

Allotment 409

The first non-Indian purchaser of this allotment was Klamath County in 1930. The County did not develop irrigation on the land. The land was conveyed to David Skeen in 1933 and to Hans Anderson in 1945. The Trout Creek ditch extended onto this allotment, but was not used to irrigate the allotment. In the 1930s, David Skeen built a small dam on the Sprague River to obtain water for a ditch that ran into allotment 409. The ditch was used for two years and was not used after that time. There was no irrigation from the 1950s through 1976. Because the first non-Indian owner did not develop irrigation and because water was not used continuously after Mr. Skeen's development, this allotment fails to meet standards that establish a *Walton* right.

Allotment 409 also went through two periods of non-Indian ownership prior to the beginning of beneficial use of water: from 1930-1933 (Klamath County), and for a period during 1945 (Hans Anderson). As with Allotment 1252, neither period was long enough for the *Walton* right to expire for failure to diligently develop the claimed lands. Beneficial use of the majority of the claimed lands was occurring by 1957, under Klamath Indian ownership. Beneficial use of all of the claimed lands, resulting from

[10] Oregon Administrative Rule 690-028-0026(3) provides that in a filing for Practicably Irrigable Acreage a claimant shall document through a chain of title statement that the lands have never had more than *five consecutive years* of non-Indian ownership since the date of the reservation (emphasis added). We interpret this rule to pertain only to the documentation accompanying a claim, and not to set a fixed period for reasonably diligent development of Practicably Irrigable Acreage (inchoate acreage).

natural overflow of the Sprague River, began by 1960, also under Klamath Indian ownership.[11] Beneficial use has continued, from an artificial irrigation system, under the ownership of the non-Indian successors. The claimed lands in this allotment meet the standards that establish a *Walton* right.

Allotment 637

Beneficial use of water by the method of natural overflow was established under Indian ownership prior to the non-Indian purchase of the allotment. The first non-Indian purchaser of this allotment was the California Land Company in 1967. There was no irrigation on this allotment until the Claimants acquired it and started their development in 1976. Because there was no development of irrigation by the first non-Indian purchaser for nine years, The record shows that water has continued to be put to beneficial use by non-Indian successors. Therefore, this allotment fails meets all the standards that to establish a *Walton* right.

Allotment 638

The first non-Indian purchaser of this allotment was Albert Thalhofer in 1927, who owned the land for 14 years. There is no evidence that Mr. Thalhofer either artificially irrigated the land or made beneficial use of natural overflow. The record shows that the first development of irrigation occurred in 1952 when a water permit was granted issued to Leroy Gienger, who acquired the land in 1942. Mr. Gienger's irrigation development started 23 years after transfer from Indian ownership, well outside a reasonable period for development of beneficial use given the facts in the record. Because Mr. Thalhofer was the first non-Indian purchaser and did not irrigate the land, the irrigation that was begun by Mr. Gienger in 1952 is of no moment. Furthermore, after Mr. Geinger irrigated the land in the 1950s, the land was not irrigated for approximately 20 years until Claimants started development of a system in 1976. The standards of a *Walton* right are not established for this allotment because beneficial use of

[11] Because beneficial use was made under Indian ownership no later than 1960, and has continued under the non-Indian successors, it is not necessary to consider whether the initial efforts at development made in the 1930s by Mr. Skeen were sufficient to establish a right.

water was not made with reasonable diligence following transfer from Indian ownership. there has not been diligent development or continuous use.

Allotment 1091

There is no evidence that the Indian owners irrigated this parcel either artificially or by natural overflow. The first non-Indian purchaser was Bly Lumber Company in 1959. There is no evidence that any irrigation occurred from 1940 to 1979. The first evidence of beneficial use of water was in 1976. Thus, there is no evidence that the first non-Indian owner successors developed made beneficial use of water for irrigation with reasonable diligence. and there is no evidence of continuous use. Therefore, the standards of a *Walton* right are not established for this allotment.

Reasons for Modifications: (1) To correct and clarify the elements of a *Walton* right. (2) To provide clarity of evidence in the record and further substantiate approval of the claim. (3) To correct the legal basis for determining reasonable diligence in an adjudication of pre-1909 water rights. (4) To apply the appropriate legal bases to the Proposed Order's modified findings of fact.

Summary

For the reasons stated above, none of the allotments at issue in this case establish a *Walton* right is established for irrigation and livestock watering on 220.3 acres within allotments 1252, 409, and 637. The elements of a *Walton* right are not established for 133.3 acres within allotments 400, 638 and 1091.

Reason for Modifications: To provide consistency with Sections A.7, A.8 and A.9.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as described below:

   a. The "History of the Case" adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, above.
   c. The "Issues" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, above.
   e. The "Conclusions of Law" is adopted in its entirety with modifications, as set forth in Section A.8, above.

f. The "Opinion" is adopted in its entirety~~with modifications, as set forth in Section A.9, above~~.

g. The "Order" is ~~replaced~~ adopted in its entirety ~~by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 95. Consistent with Sections A.7, A.8, and A.9, above, the outcome of the Order has been modified to recognize a right for irrigation on 220.3 acres and livestock watering~~.

2. The elements of a Walton claim are not established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

3. Based on the file and record herein, IT IS ORDERED that Claim 95 is denied ~~approved as set forth in the following Water Right Claim Description~~.

~~[Beginning of Water Right Claim Description]~~

~~**CLAIM NO.** 95~~

~~**CLAIMANT:** CLIFFORD C. RABE~~
~~MARY A. RABE~~
~~22539 HWY 140 E~~
~~DAIRY, OR 97625~~

~~**CLAIM MAP REFERENCE:** CLAIM # 95, PAGE 74~~

~~**SOURCE OF WATER**: The SPRAGUE RIVER, tributary to the WILLIAMSON RIVER~~
~~**PURPOSE OR USE:**~~
~~IRRIGATION OF 220.3 ACRES; AND LIVESTOCK WATERING OF 225 HEAD.~~

~~**RATE OF USE:**~~
~~5.5142 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:~~

~~5.51 CFS FOR IRRIGATION MEASURED AT THE POINT OF DIVERSION, AND~~

~~0.0042 CFS FOR LIVESTOCK WATERING MEASURED AT THE PLACE OF USE, NOT TO EXCEED 2700 GALLONS PER DAY.~~

~~DIVERSION OF STOCK WATER TO THE PLACE OF USE IS LIMITED TO THAT WHICH HAS BEEN HISTORICALLY DIVERTED FOR BENEFICIAL USE AND IS REASONABLY NECESSARY TO TRANSPORT THE WATER, AND TO PREVENT THE WATERCOURSE FROM BEING COMPLETELY FROZEN WHEN TRANSPORTING WATER OUTSIDE OF THE IRRIGATION SEASON.~~

~~THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.~~

~~**DUTY:**~~
~~3.0 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR~~

PERIOD OF ALLOWED USE:

Use	Period
Irrigation	April 15 - October 15
Livestock	January 1 - December 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	9 E	WM	36	NW NE	1830 FEET NORTH AND 140 FEET EAST FROM C¼ CORNER, SECTION 36

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION and LIVESTOCK WATERING						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**
35 S	9 E	WM	36	SW NE		35.4
35 S	9 E	WM	36	SE NE		34.0
35 S	9 E	WM	36	NE SE		40.0
35 S	9 E	WM	36	NW SE		28.8
35 S	9 E	WM	36	SW SE		6.2
35 S	9 E	WM	36	SE SE		40.0
35 S	10 E	WM	31	NW NW	2	1.3
35 S	10 E	WM	31	SW NW	2	33.8
35 S	10 E	WM	31	SE NW	2	0.8

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of DONALD LAWLESS, MARLENE LAWLESS, AND LEWIS LAWLESS	)	PARTIAL ORDER OF DETERMINATION
	)	Water Right Claim 97

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE PROPOSED ORDER

1. Claim 97 (Claimants: DONALD LAWLESS, MARLENE LAWLESS, AND LEWIS LAWLESS) and its associated contests (38, 2840, 3478, 3747, 4132) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 212.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 97 on December 13, 2006.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) Donald Lawless, Marlene Lawless and Lewis Lawless, and (2) the United States of America.

4. The exceptions to the Proposed Order along with responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 97. The exceptions are found to be persuasive, in part and therefore, modifications are made to the Proposed Order as described in Section~~s~~ A.7~~, A.8 and A.9~~, below.

5. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, below.
   c. The "Issues" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, below.

e. The "Conclusions of Law" is adopted in its entirety~~with modifications, as set forth in Section A.8, below~~.

f. The "Opinion" is adopted in its entirety~~with modifications, as set forth in Section A.9, below~~.

g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 97. Consistent with Section~~s~~ A.7~~, A.8, and A.9~~, below, the outcome of the Order has been modified to recognize a right for irrigation on an additional 1.1~~7.3~~ acres

6. **Evidentiary Rulings.**

a. Within the section titled "Evidentiary Rulings" of the Proposed Order, the first paragraph is modified as follows:

> The AFFIDAVIT OF RICK N. BARNES dated July 16, 2004, and the REBUTTAL AFFIDAVIT OF RONALD S. YOCKIM dated July 16, 2004, are added to the list of items that were admitted into the record.

Reason for Modification: To correct omissions from the list of Evidentiary Rulings.

b. Within the section titled "Evidentiary Rulings" of the Proposed Order, the second sentence within the last paragraph is corrected as follows (the correction is shown in "underline" text):

> This motion was granted by order dated August 18, 2005.

Reason for Modification: To correct a scrivener's error.

7. **Findings of Fact.** The Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: The general reasons for modifications are as follows: (1) ~~To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow, an issue raised in exceptions. (2)~~ To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions. (2~~3~~) To provide evidence from the record to substantiate of beneficial use of water being made with reasonable diligence by the first non-Indian successor(s) after transfer from Indian ownership, an issue raised in exceptions. (3~~4~~) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record.

Modified Proposed Order Findings of Fact

1) Claim 97 seeks a water right for lands owned by non-Indian successors to Indian allottees on the Klamath Indian Reservation. The claim is for a diversion rate of

14 cubic feet per second (cfs) from the Sprague River to irrigate 675.1 acres[1] and ~~instream~~ stockwater for 150 head of cattle. The claimed priority date is October 14, 1864. The claimed season of use for irrigation is May 1 through October 1, and incidental~~year-round for instream~~ livestock watering. (OWRD Ex. 1 at 1-8, 140, 143.) The claim is comprised of eight allotments in the Klamath Indian Reservation (Book Direct, Ex. 2-3.), which have been consolidated into the ownership of Donald, Marlene and Lewis Lawless (Claimants). The Claimants acquired the property in 1993 from Jeffrey and Tami Carter who filed this claim on behalf of Carter Air Balance, Inc. in 1991. (OWRD Ex. 1. at 1-104, 141-142.)

The claim for watering of livestock was not addressed in any contest other than claimants'. Livestock has been grazed on the property since before its conveyance out of Indian ownership. (Yockim Rebuttal Affidavit at 2, Ex. RS-29; OWRD Ex. 1 at 81.) The claim as a whole is based on the assertion that beneficial use of water for irrigation was ~~developed~~ made by the Indian owners, or made with reasonable diligence by first non-Indian owners, and has been continuous since that time. (OWRD Ex. 1 at 1-8, 15-17, 228-232.)

¶ ~~The lands within Allotments 637, 638, a small portion of 634, 135, and most of 832 and 566 are subject to natural overflow in the spring from the Sprague River. (L. Lawless Rebuttal at 2, Ex. 3; D. Lawless Rebuttal at 2, Ex 7; Ex. RS-26 at 51-56, 75-86, 101, 106 – 107.)~~

Reasons for Modification: Using evidence on the record, to provide more specific information with reference to what was claimed; to correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to use consistent terminology regarding beneficial use of water; to add clarification using evidence on the record.

2) **Allotment 135 (39.6 acres claimed)**

This property located in the NW¼, Section 6, Township 36 S, Range 10 E, W.M. was allotted to Millie George, a Klamath Indian, by trust patent dated 1910. (OWRD Ex. 1 at 202.) The property was split into two tracts under the ownership of the heirs of Millie George. The allotment includes land on both sides of the Sprague River. (*Id.* at 77; Book Direct, Ex. 3.) Only land on the east side is included in Claim 97. (OWRD Ex.

[1] The original claim was for 720 acres in 1991. (OWRD Ex. 1 at 3). The claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)

1 at ~~102~~ 143.) Tract A includes the south part of allotment 135 within the claim (SE¼ NW¼) and Tract B includes the north part of allotment 135 within the claim (NE¼ NW¼). (Book Direct at 10.)

Tract A (6.2 acres) was conveyed from Norma Weeks Jackson, a Klamath Indian, to Gienger Enterprises, a non-Indian business, on March 7, 1968. (OWRD Ex.1 at 89.) On September ~~25~~ 27, 1968, Gienger Enterprises conveyed the SE¼ NW¼ in Section 6, Township 36 S, Range 10 E, W.M., among other parcels, to Charles Dixon, a non-Indian. (*Id.* at 90.) On June 24, 1969, Charles Dixon conveyed SE¼ NW¼ East of the Sprague River, Section 6, Township 36 S, Range 10 E, W.M. among other parcels to Dale and Madeline Newman. (*Id.* at 91.)

Although, prior to transfer out of Indian ownership, a small part of this property was sometimes flooded by a temporary dam across the Sprague River, this practice was discontinued at some time prior to conveyance out of Indian ownership in 1968, and the extent of this irrigation is unknown.[2] (Ex. RS-26 at 83.) ~~Tract A is subject to natural overflow from the Sprague River. (Ex. RS-26 at 51-56, 106.)~~ After conveyance out of Indian ownership, irrigation of Tract A was not initiated prior to conveyance to Dixon, the second non-Indian owner. However, a subsequent owner, Richard Perry, applied for an Oregon water right (Permit S-37151) for lands appurtenant to Allotment 135 in 1973. (OWRD Ex. 1 at 12-13; Book Direct, Ex. 11 at 12-14.) Notice of Complete Application of Water to a Beneficial Use ("Form C") was filed by the permit holder for Permit S-37151 on December 2, 1977. (Book Direct, Ex. 11 at 15.) Although Tract A was not included in the original 1973 application and its map for this water right, a 1994 final proof survey for this permit included 7.4 acres within Tract A (SE¼ NW¼, Section 6). (Book Direct, Ex. 11 at 12-17; OWRD Ex. 1 at 12-13.)

¶ ~~The point of diversion for this parcel, Pump 1, is located within the SE¼ SW¼, Section 32, Township 35 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is 0.16 cfs. The duty is 18.6 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.~~

[2] Given the direction of the current in the Sprague river, (as shown by OWRD Ex. 1 at 13) a dam located at the Southern end of Tract A, (as described by James Goold in Ex. RS-26 at 83) would have flooded only a very small portion of this tract, or of any land subject to this claim.

Tract B (33.4 acres) was under the ownership of David Skeen, a Klamath Indian, in 1948. (OWRD Ex 1 at 75-76.) In ~~1960~~ 1969, the tract was conveyed by Charles Dixon, a non-Indian to Dale Newman, also a non-Indian. The chain of title between Skeen and Dixon is unknown. (Book Direct at 10.) ~~Tract B is subject to natural overflow from the Sprague River (Ex. RS-26 at 51-56, 106); however, there is no evidence on the record confirming any beneficial use of water for irrigation made on this allotment prior to the 1973.~~ Irrigation of Tract B was initiated under Oregon water permit number S-37151 in 1973 (Book Direct at 13-14; OWRD Ex. 1 at 12-14.)

Reasons for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

3) **Allotment 566 (104.0 acres claimed)**

This allotment, composed of 104 acres located in NW¼, Section 5, Township 36 S, Range 10 E, W.M., was confirmed to Mildred Miller by instrument dated March 7, 1910. (OWRD Ex. 1 at 194-195.) The property was conveyed by the heirs of Mildred Miller to Leroy Gienger, a non-Indian, on September 8, 1958. (*Id.* at 73 -74.) The property was subsequently conveyed to Albeit Lang in 1965 (*Id.* at 30-31).

~~Portions of Allotment 566 are subject to natural overflow from the Sprague River. (Ex. RS-26 at 51-56, 106.)~~ As evidenced on an 1958 Indian Land Status report, Allotment 566 was leased for farming and grazing beginning in 1954, which was prior to the initial transfer from Indian ownership. (OWRD Ex. 1 at 171-172.) Gienger, the first non-Indian owner, developed or continued to develop an artificial irrigation system on the property by 1960. Allotment 566 has continuously been irrigated since that time. (Book Direct at ~~17~~ 18.)

The point of diversion for this parcel, Pump 3, is located within the NW¼ NW¼, Section 5, Township 36 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is 2.6 cfs.[3] The duty is 312 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

[3] All rates and duties allowed are calculated at 1/40th cfs per acre ~~(?)~~ and 3 acre-feet per acre, based on the amount approved in the water use permits issued on these properties. (OWRD Ex. 1 at 10-13.) Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

4) **Allotment 634 (160.0 acres claimed)**

This allotment, composed of 160 acres located in the SE¼, Section 31, Township 35 S, Range 10 E, W.M., was confirmed to Charley~~s~~ Cowan, a Klamath Indian by ~~trust~~ fee simple patent dated February 7, 1920. (OWRD Ex. 1 at 183.) The property remained in Klamath Indian ownership until May 10, 1923, when it was conveyed by David Skeen, a Klamath Indian, to B.E. Wolford and Dan Wann, both non-Indians. (*Id.* at 63; Book Direct, Ex. 8 at 5.) B. E. Wolford acquired the Wann interest in 1929. (OWRD Ex. 1 at 68-69, 178.) The property was then conveyed by the Wolford heirs to Leroy Gienger in 1944. (~~*Id.*~~ Book Direct, Ex. 3b.)

¶ ~~A small portion of Allotment 634 is subject to natural overflow from the Sprague River (Ex. RS-26 at 51-56, 106), however the record contains no evidence of beneficial use of water for irrigation made prior to 1950.~~ Irrigation on Allotment 634 was first initiated by Leroy Gienger, a subsequent non-Indian owner, in 1950, 27 years after transfer from Indian ownership. (Book Direct at 13.) Gienger applied for Oregon water right Permit S-20509 on lands appurtenant to this allotment in 1950. (OWRD Ex. 1 at 10-11.) This does not demonstrate beneficial use water for irrigation made with reasonable diligence by the first non-Indian owner.

Reasons for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

5) **Allotment 636 (100.1 acres claimed)**

This allotment, composed of 100.1 acres located in the NE¼, Section 31, Township 35 S, Range 10 E, W.M., was confirmed to Ward Weeks, a Klamath Indian, by trust patent dated March 7, 1910. (OWRD Ex. 1 at 186-187.) The heirs of Ward Weeks conveyed the property to Vincent Bodner, Jr., a Klamath Indian, on September 3, 1947. (*Id.* at 85, 188-189).

The property was conveyed by Vince Bodner, Jr. to Gienger Enterprises, a non-Indian business, in April 1964. (*Id.* at 87.) The property was subsequently conveyed to James Templeton on May 20, 1965 (*Id.* at 93), and then to Albeit Lang on May 4, 1966. (*Id.* at 95.)

Beneficial use of water for irrigation was ~~developed~~ made on the property while under the ownership of Gienger Enterprises, in 1964, prior to the transfer of the property to James Templeton. (Bodner, Jr. Affidavit at 1.)

The points of diversion for this parcel, Pump 1 and Pump 2, ~~is~~ are located in the SE¼ SW¼, Section 32, Township 35 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is 2.50 cfs, being 0.59 cfs from Pump 1 for 23.7 acres, and 1.91 cfs from Pump 2 for 76.4 acres. The duty is 300 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.

Reasons for Modification: To correct and provide additional citations to the record; to use consistent terminology regarding beneficial use of water; to add clarification using evidence on the record. In addition the ALJ's finding with respect to the number of acres claimed within the NE¼, Section 31 (Allotment 636) is not supported by a preponderance of evidence on the record. In a footnote to the Proposed Order's Finding of Fact #1, the ALJ noted that "the claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)." The map at OWRD Ex. 1 at 143 clearly shows 100.1 acres within this allotment. Since this map is intended to provide definitive information about the place of use, OWRD views this change as the correction of a clerical error.

6) **Allotment 637 (24.4 acres claimed)**

This allotment, composed of 24.4 acres located in the NW¼, Section 31, Township 35 S, Range 10 E, W.M., was confirmed to Neffie Weeks, a Klamath Indian, by trust patent dated March 7, 1910 (*Id.* at 184, 185). The property was passed to the Indian heirs of Neffie Weeks, Caroline Cowen and Cinda Checaskane, on November 1, 1920. (*Id.* at 83-84.) The property was subsequently conveyed to Vince Bodner, Jr., a Klamath Indian, on December 21, 1942. (*Id.*) The property was conveyed from Vince Bodner, Jr. to Gienger Enterprises, a non-Indian business, in 1964. (*Id.* at 87; Book Direct at 7.)

~~Allotment 637 is subject to natural overflow from the Sprague River. (Ex. RS-26 at 51-56, 106.)~~ Like Allotment 636, this property was first irrigated by Gienger Enterprises, the first non-Indian owner, in 1964. (Bodner, Jr. Affidavit at 1) The points of diversion for this parcel, Pump 1 and Pump 2, ~~is~~ are located in the SE¼ SW¼, Section 32, Township 35 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is 0.61 cfs, being 0.15 cfs from Pump 1 for 6.0 acres, and 0.46 cfs from Pump 2 for 18.4 acres. The duty is 73.2 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.

Reasons for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

7) **Allotment 638 (52.0 acres claimed)**

This allotment, composed of ~~65.8~~ 52.0 acres located in the SW¼, Section 31, Township 35 S, Range 10 E, W.M., was confirmed to Ella Cowen, a Klamath Indian, prior to 1923. (OWRD Ex. 1 at 64-65; 204-205.) David Skeen, a~~n~~ Klamath Indian, received the patent ~~in~~ on June 30, 1923. (*Id.*; Ex. RS -14) The property was conveyed from David Skeen to Albeit Thalhofer, a non-Indian, on February 5, 1927. (*Id.* at 66-67.) The property was subsequently conveyed from Mr. Thalhofer to Klamath County by Sheriff's deed in 1941 and to Leroy Gienger in 1942. (*Id.* at 179.)

¶ ~~Allotment 638 is subject to natural overflow from the Sprague River (Ex. RS-26 at 51-56, 106); however, the record contains no evidence of beneficial use of water for irrigation prior to 1950.~~ Irrigation on Allotment 638 was first initiated by Leroy Gienger, a subsequent non-Indian owner, in 1950, 23 years after transfer from Indian ownership. (Book Direct at 16.) Gienger applied for Oregon water right Permit S-20509 on lands appurtenant to this allotment in 1950. (OWRD Ex. 1 at 10-11.) This does not demonstrate beneficial use of water for irrigation made with reasonable diligence by the first non-Indian owner.

Reasons for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition the ALJ's finding with respect to the number of acres claimed within the SW¼, Section 31 (Allotment 638) is not supported by a preponderance of evidence on the record. In a footnote to the Proposed Order's Finding of Fact #1, the ALJ noted that "the claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)." The map at OWRD Ex. 1 at 143 clearly shows 52.0 acres within this allotment. Since this map is intended to provide definitive information about the place of use, OWRD views this change as the correction of a clerical error.

8) **Allotment 832 (160.0 acres claimed)**

This allotment composed of ~~158.34~~ 160.0 acres located in the NE¼, Section 6, Township 36 S, Range 10 E, W.M., was confirmed to Robinson (aka Psissum - Ky - wath) prior to 1921. (OWRD Ex. 1 at 198.) The property was conveyed to Anna Willis, a Klamath Indian, on April 30, 1921. (*Id.*) The property was conveyed from Anna Willis

to David Skeen, a Klamath Indian, in 1921. (*Id.* at 179.) The property was conveyed from David Skeen to Albeit Thalhofer, a non-Indian, on February 5, 1927. (*Id.* at 66-67.) Klamath County subsequently obtained the property. (*Id.* at 179.) The property was conveyed from Klamath County to ~~Gienger Enterprises~~ Leroy Gienger April 15, 1941. (*Id.* at 70).

Although it is possible that some part of this property was sometimes flooded by a temporary dam across the river, the inception date of this practice and the extent of the irrigation thereby accomplished is unknown. (Ex. RS-26 at 83.) ~~Most of Allotment 832 is subject to natural overflow from the Sprague River (Ex. RS-26 at 51-56, 106).~~ The record contains no evidence of beneficial use of water for irrigation prior to 1940. ~~Beneficial use of water from the Sprague River by the method of natural overflow may have been made on a portion of this allotment in the 1940s, 13 years after transfer to non-Indian successors. (Book Rebuttal at 2.)~~ A subsequent owner, Richard Perry, applied for an Oregon water permit number S-37151 for lands appurtenant to Allotment 832 in 1973. (OWRD Ex. 1 at 12-13; Book Direct, Ex. 11 at 12-14). ~~The first clear record of irrigation on Allotment 832 was in 1974, by James Goold. (Test of Book.)~~ This does not demonstrate beneficial use of water for irrigation made with reasonable diligence by the first non-Indian owner.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition the ALJ's finding with respect to the number of acres claimed within the NE¼, Section 6, (Allotment 832) is not supported by a preponderance of evidence on the record. In a footnote to the Proposed Order's Finding of Fact #1, the ALJ noted that "the claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)." The map at OWRD Ex. 1 at 143 clearly shows 160.0 acres within this allotment. Since this map is intended to provide definitive information about the place of use, OWRD views this change as the correction of a clerical error. The statement that the first clear record on irrigation on this allotment was in 1974 by Goold was stricken because it is not supported by a preponderance of the evidence on the record.

9) **Allotment 1264/1542 (35.0 acres claimed)**

This allotment, composed of ~~34~~ 35 acres located in the S½ SW¼, Section 32, Township 35 S, Range 10 E, W.M., was confirmed to Sylvester Smith ~~prior to 1956~~ on October 25, 1950. ~~(Ex. 9.)~~ (OWRD Ex. 1 at 168.) The property was then conveyed to Theodore Crume, a Klamath Indian, in 1956. (~~*Id.*~~ Book Direct, Ex. 9 at 4.) The property was conveyed from Theodore Crume to Leroy Gienger, a non-Indian, in 1957 (Book

Direct, Ex. 10 at 9), and from Leroy Gienger to Albeit Lang ~~in~~ on August 12, 1965. (OWRD Ex. 1 at 30-31~~; Ex. 10~~.)

Irrigation of the property was initiated by Theodore Crume, the last Indian owner, and was continued by Mr. Gienger, and has been maintained through the present. (Book Direct at 17-18; Gienger Direct at 2.) Two points of diversion serve this parcel. One point, Pump 3, is located in the NW¼, NW¼ Section 5, Township 36 S, Range 10 E, W.M. The other point, Pump 1, is located in the SE¼ SW¼, Section 32, Township 35 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is ~~0.85~~ 0.88 cfs, being 0.42 cfs from Pump 1 for 16.7 acres, and 0.46 cfs from Pump 3 for 18.3 acres. The duty is ~~102~~ 105 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.

Reasons for Modification: To correct and provide additional citations to the record; to add clarification using evidence on the record. In addition the ALJ's finding with respect to the number of acres claimed within the S½ SW¼, Section 32 (Allotment 1264/1542) is not supported by a preponderance of evidence on the record. In a footnote to the Proposed Order's Finding of Fact #1, the ALJ noted that "the claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)." The map at OWRD Ex. 1 at 143 clearly shows 100.1 acres within this allotment. Since this map is intended to provide definitive information about the place of use, OWRD views this change as the correction of a clerical error.

~~**10) Instream Livestock Watering:**~~

~~The property within all claimed allotments was used for the grazing of livestock since before its conveyance out of Indian owership. (Yockim Rebuttal Affidavit at 2, Ex. RS-29; OWRD Ex. 1 at 81.) The stock water claim for instream livestock watering of 150 head of cattle should be allowed where the Sprague River is coextensive with these allotments, being within Allotments 135 (Tracts A and B), 566, 637, 638, and 1264/1542. Because there is no evidence on the record to the contrary, the standard rate for livestock watering is 12 gallons of water per head of livestock per day as outlined in the GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION. OWRD incorporates into this Finding of Fact #10 the portions of The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION pertaining to the standard rate for livestock watering. The rate of 12 gallons of water per head of livestock per day is consistent with OWRD's standard as set forth in Appendix A of the Preliminary Evaluation.~~

Reason for Additional Finding of Fact #10: The facts in the ALJ's Proposed Order failed to fully set forth the evidence on the record. To include a finding regarding a rate for livestock grazing.

8. **Conclusions of Law.** Within the section titled "Conclusions of Law" of the Proposed Order, Conclusions 1, 3-6, 9-11, and 16-19 are adopted without modification. Conclusions 2, 7, 8, 12, 13, 14 and 15 are modified, and Conclusions 20, and 21 are added as follows (additions are shown in "underline" text, deletions are shown in "strikethrough" text):

a. Conclusion 2:

For the part of the claimed place of use that is approved, the period of use for irrigation should be May 1 through October 1 of each year, as claimed.

b. Conclusion 7:

There is sufficient information on the development beneficial use of water for irrigation having been made with reasonable diligence or continuous continued use of water on a portion of this place of use to establish a *Walton* right.

c. Conclusion 8:

Part of the claimed place of use has been continuously continued to be irrigated.

d. Conclusion 12:

Beneficial use of water on a portion of the claimed place of use was not developed made with reasonable diligence by the first non-Indian purchaser from an Indian owner following transfer from Indian ownership.

e. Conclusion 13

Beneficial use of water for irrigation of on a portion of the claimed place of use for was not developed made with reasonable diligence by the first non-Indian owners successors.

f. Conclusion 14:

Water provided to the claimed place of use by the method of natural overflow means (flooding in the spring or through sub-irrigation) -- although not through a diversion system created by humans -- does not constitute irrigation under is a valid basis for a *Walton* right.

g. Conclusion 15:

Water claimed for a portion of the claimed place of use has been continuously continued to be used by the first non-Indian successor and by all subsequent successors.

h. Conclusion 20:

Beneficial use of water by the method of natural overflow was made on Allotment 566 prior to the initial transfer from Indian ownership.

i. Conclusion 21:

Property within all the claimed allotments was used for the grazing of livestock since before its conveyance of Indian ownership. Therefore, the stock water claim for instream livestock watering of 150 head of cattle is allowed where the Sprague River is coextensive with these allotments, being within Allotments 135 (Tracts A, and B), 566, 637, 638 and 1264/1542. The period of use for instream livestock watering is year-round. The rate is 12 gallons of water per head of livestock per day.

Reasons for Modification: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports additional conclusions and conclusions that differ from those in the 2006 Proposed Order.

9. **Opinion.** The Proposed Order's "Opinion" section is modified as described herein.

OWRD removed the ALJ's discussions regarding the elements of a *Walton* Claim including the first non-Indian purchaser rule, and regarding natural overflow and subirrigation of water as a basis for a *Walton* claim. The deleted paragraphs are noted below as "*****". In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

The remaining portions of the Opinion section of the ALJ's Proposed Order have been labeled "Application of Walton Elements to the Modified Proposed Order Findings of Fact." Additions are shown in "underline" text, deletions are shown in "strikethrough" text.

Application of Walton Elements to the Modified Proposed Order Findings of Fact

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division,* 47 Or App 437 (1980); *Metcalf v. AFSD,* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

*****

As discussed below, the various allotments have very different histories. Those different histories control the outcome as to each parcel.

Allotment 135

A small portion of this property, which was divided into two parcels while still in Indian ownership, may have been irrigated by the Indian owners through flooding as a result of temporary dams across the Sprague River, but the amount of this irrigation, and its date, are unknown. It would have been very little, however, as most of the property in question is downstream from the dam. The first substantial evidence of irrigation of Tract A, the small southernmost of the tracts, is the 1977 Notice of Complete Application of Water to a Beneficial Use ("Form C") for which a water right application was filed in 1973, and its 1994 final proof map. appears after the property had been conveyed to Charles Dixon, the second non-Indian owner. Beneficial use of water for irrigation on Tract A was made with reasonable diligence. Tract A, therefore, does not qualify for a *Walton* right.

Tract B, likewise, was not subject to irrigation until 1973, when Richard Perry applied for a water right permit. The property was first conveyed out of Indian ownership before 1960, and in 1960 was transferred to the second non-Indian owner, Dale Newman. Because the chain of title is incomplete it is not possible to determine when the land was transferred out of Indian ownership. Reasonable diligence cannot be determined. Tract B, also, does not qualify for a *Walton* right.

Allotment 566

Beneficial use of water was established prior to the initial transfer from Indian ownership, and evidenced by reference to a 5 year grazing and farming lease on an Indian Land Status report. Irrigation on this allotment was continued to be developed by Leroy Gienger, the first non-Indian owner, by 1960. These 104 acres, therefore, qualify for a *Walton* right.

Allotment 634

Beneficial use of water for irrigation was developed made on this allotment by Leroy Gienger, who acquired the property from the Wolford family in 1944, 21 years after transfer from Indian ownership. The earliest evidence of beneficial use of water for irrigation is in 1950, 27 years after transfer from Indian ownership. Since the Wolfords were not Indians, Gienger was at least the second non-Indian owner. Beneficial use of water was not made with reasonable diligence. The allotment does not, therefore, qualify for a *Walton* right.

Allotment 636

The 100.1 acres of this allotment were first irrigated by Gienger Enterprises, the first non-Indian owner, in 1964, shortly after the land was transferred from Indian ownership. Beneficial use of water was made with reasonable diligence. This allotment qualifies for a *Walton* right.

Allotment 637

Like Allotment 636, beneficial use of water for irrigation was developed made on this parcel, at the latest, by Gienger Enterprises the first non-Indian owner. This occurred in 1964, shortly after the land was transferred from Indian ownership. Beneficial use of water was made with reasonable diligence. The 24.4 acres of this parcel, therefore, qualify for a *Walton* right.

Allotments 638 and 832

Beneficial use of water for irrigation of these allotments was not initiated prior to at a sheriff's sale, to Klamath County, the second non-Indian owner. Beneficial use of water occurred 23 years (Allotment 638) and 47 years (Allotment 832) after their initial transfer from Indian ownership.[4] Beneficial use of water was not made with reasonable diligence. These allotments do not qualify for a *Walton* right.

Allotment 1264/1542

[4] As noted in the findings of fact, there is some evidence that irrigation may have occurred within 13 years of transfer from Indian ownership. Because a 13 year period is insufficient to establish reasonable diligence, it is not necessary to determine whether the evidence of irrigation after 13 years is substantial enough to support a *Walton* right.

~~Irrigation of this property was initiated by Theodore Crume, the last Indian owner, and has continued to the present. The 34 acres in this property qualify for a *Walton* right.~~

~~**Instream Livestock Watering**~~

~~As noted, no party other than Claimants addresses stock water in their contest. The evidence establishes that the property~~ claimed ~~in question was used for the grazing of livestock since before conveyance out of Indian ownership. Consequently, the stock water claim for~~ instream livestock watering of ~~150 head of cattle should be allowed where the Sprague River is coextensive with these allotments, being within Allotments 135 (Tracts A and B), 566, 637, 638, , and 1264/1542.~~

~~**Reasons for Modification:** To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.~~

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, above.
   c. The "Issues" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, above.
   e. The "Conclusions of Law" is adopted in its entirety~~with modifications, as set forth in Section A.8, above~~.
   f. The "Opinion" is adopted in its entirety~~with modifications, as set forth in Section A.9, above~~.
   g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 97. Consistent with Section~~s~~ A.7, ~~A.8, and A.9~~, above, the outcome of the Order has been modified to recognize a right for irrigation on an additional 1.1~~7.3~~ acres.

2. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

3. Based on the file and record herein, IT IS ORDERED that Claim 97 is approved as set forth in the following Water Right Claim Description.

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[Beginning of Water Right Claim Description]

CLAIM NO. 97

CLAIM MAP REFERENCE: CLAIM # 97 MYLAR MAP (Jan. 20, 1999)

CLAIMANT: DONALD T. LAWLESS
MARLENE LAWLESS
LEWIS LAWLESS
PO BOX 1778
GRANTS PASS OR 97528

SOURCE OF WATER: The SPRAGUE RIVER, tributary to the WILLIAMSON RIVER

PURPOSE OR USE:

IRRIGATION OF 263.5~~269.7~~ ACRES, BEING 46.4~~52.6~~ ACRES FROM PUMP 1, 94.8 ACRES FROM PUMP 2, AND 122.3 ACRES FROM PUMP 3; AND INCIDENTAL~~INSTREAM~~ LIVESTOCK WATERING OF 150 HEAD.

RATE OF USE:

6.597~~428~~ CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

6.597~~4~~ CFS FOR IRRIGATION MEASURED AT THE POINT OF DIVERSION, BEING 1.16~~1.31~~ CFS FROM PUMP 1, 2.37 CFS FROM PUMP 2, AND 3.06 CFS FROM PUMP 3; AND

~~0.0028 CFS FOR INSTREAM LIVESTOCK WATERING MEASURED AT THE PLACE OF USE, NOT TO EXCEED 1800 GALLONS PER DAY.~~

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE:

Use	Period
Irrigation	May 1 - October 1
~~Instream Livestock Watering~~	~~January 1 - December 31~~

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Pod Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
Pumps 1 & 2	35 S	10 E	WM	32	SE SW		4034 FEET SOUTH AND 1491 FEET EAST FROM

Pod Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
							NW CORNER, SECTION 32, T 35 S, R 10 E
Pump 3	36 S	10 E	WM	5	NW NW	4	5437 FEET SOUTH AND 1121 FEET EAST FROM NW CORNER, SECTION 32, T 35 S, R 10 E
Sprague River	35 S	10 E	WM	31	SE NW		No specific point of diversion - livestock drink directly from the Sprague River
	35 S	10 E	WM	32	SW SW		
	36 S	10 E	WM	5	NE NW	3	
	36 S	10 E	WM	5	NW NW	4	
	36 S	10 E	WM	5	SE NW		
	36 S	10 E	WM	6	SE NW		

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
35 S	10 E	WM	31	NE NE		8.9	Pump 1
35 S	10 E	WM	31	NW NE		0.5	
35 S	10 E	WM	31	SE NE		14.3	
35 S	10 E	WM	31	SE NW		6.0	
35 S	10 E	WM	32	SW SW		15.7	
35 S	10 E	WM	32	SE SW		1.0	
~~36 S~~	~~10 E~~	~~WM~~	~~6~~	~~SE NW~~		~~6.2~~	
35 S	10 E	WM	31	NE NE		1.1	Pump 2
35 S	10 E	WM	31	NW NE		9.6	
35 S	10 E	WM	31	SW NE		40.0	
35 S	10 E	WM	31	SE NE		25.7	
35 S	10 E	WM	31	SE NW		18.4	
35 S	10 E	WM	32	SW SW		18.3	Pump 3
36 S	10 E	WM	5	NE NW	3	5.0	
36 S	10 E	WM	5	NW NW	4	39.0	
36 S	10 E	WM	5	SW NW		40.0	
36 S	10 E	WM	5	SE NW		20.0	

~~INSTREAM LIVESTOCK WATERING FROM THE SPRAGUE RIVER~~				
~~Twp~~	~~Rng~~	~~Mer~~	~~Sec~~	~~Q-Q~~
~~35 S~~	~~10 E~~	~~WM~~	~~31~~	~~SE NW~~
~~35 S~~	~~10 E~~	~~WM~~	~~31~~	~~NE SW~~
~~35 S~~	~~10 E~~	~~WM~~	~~31~~	~~SE SW~~
~~35 S~~	~~10 E~~	~~WM~~	~~32~~	~~SW SW~~
~~35 S~~	~~10 E~~	~~WM~~	~~32~~	~~SE SW~~
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~NE NW~~
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~NW NW~~
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~SE NW~~
~~36 S~~	~~10 E~~	~~WM~~	~~6~~	~~NE NW~~
~~36 S~~	~~10 E~~	~~WM~~	~~6~~	~~SE NW~~

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of DUANE MARTIN	)	PARTIAL ORDER OF DETERMINATION
	)	
	)	Water Right Claim 114

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE PROPOSED ORDER

1. Claim 114 (Claimant: DUANE MARTIN) and its associated contests (3106, 3490, 3758, and 4145) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 225.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 114 on March 23, 2006.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by Duane Martin.

4. The exceptions to the Proposed Order along with responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 114. The exceptions are not found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Section~~s~~ A.6, ~~A.7, and A.8,~~ below.

5. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Issues" is adopted in its entirety.
   c. The "Evidentiary Rulings" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.6, below.
   e. The "Conclusions of Law" is adopted in its entirety. ~~with modifications, as set forth in Section A.7, below.~~

f. The "Opinion" is adopted in its entirety. ~~with modifications, as set forth in Section A.8, below.~~

g. The "Order" is adopted ~~replaced~~ in its entirety. ~~by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 114. Consistent with Sections A.6, A.7 and A.8, below, the outcome of the Order has been modified to recognize a right for irrigation on an additional 45.6 acres.~~

6. **Findings of Fact.** The Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the general reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: (1) ~~To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow, an issue raised in exceptions. (2)~~ To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions. (2~~3~~) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions. (3~~4~~) To provide evidence from the record to substantiate continued use of water by the first non-Indian owner or successor~~s~~ after transfer from Indian ownership, an issue raised in exceptions. (4~~5~~) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record.

Modified Proposed Order Findings of Fact

(1) On or before January 31, 1991, Duane Martin (Claimant) filed a Statement and Proof of Claim as a non-Indian successor to a Klamath Indian Allottee for water from the Sprague River, a tributary of the Williamson River, which is a tributary of the Klamath River. His claim is No.114 for an Indian reserved right for ~~practicably irrigable acreage~~ irrigation of 781.4 acres from three points of diversion with a season of use April 1 through October 31. (OWRD Ex. 1 at 1-7.) His claim consists of 13 allotments he owns, which have been consolidated under Claimant's ownership after his purchase in 1987 or 1988. (Book Direct at 5, 8; Ex. U2; Ex. C56 at 9.) All the land included in this claim is within the former boundaries of the Klamath Indian Reservation. All the land included in Claim 114 was allotted by the United States to members of the Klamath Tribes. (Book Direct at 5.) The location of the claim is detailed in OWRD Ex. 1 at ~~6-7~~ 70-71.

Reason for Modification: To correct and provide additional citations to the record; using evidence on the record, to provide more specific information with reference to what was claimed.

(2) The claimed purpose~~s~~ is irrigation for pasture and grass hay. ~~The claim is for less than 1.80 acre-feet per acre for irrigation.~~ (~~Book Direct Testimony at 4~~ OWRD Ex. 1 at 1.) Claimant has state water rights on the majority of the claimed lands, with priority dates of 1921 (Permit No. 5184 from Whiskey Creek), 1927 (Permit No. 7908 from the Sprague River), ~~or~~ and 1951 (Permit No. 21236 from the Sprague River) for surface water rights, and 1947 (Permit U-216) or 1948 (Permit U-254) for ground water rights. (OWRD Ex. 1 at 13-18, Ex. U22-U24.) Only two of the water right permits are for irrigation from the Sprague River, and were submitted in abstract form to accompany the Statement and Proof of Claim. (OWRD Ex. 1 at 8, 9, 13, 15.) Of these, only Permit No. 21236 specified any rate and duty, being 1/40 of one cfs for each acre irrigated, and 3.0 acre-feet per acre for each acre irrigated during the irrigation season. (OWRD Ex. 1 at 13, 15.) This provides the only evidence of the claimed rate and duty of water. Claimant seeks the reservation's priority date for his allotments. (OWRD Ex. 1 at ~~13 to 19~~ 1, 4.) ~~; Book Direct, at 15 to 17 Ex. U22-U23.)~~

Reason for Modification: To correct and provide additional citations to the record; using evidence on the record, to provide more specific information with reference to what was claimed; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. The statement that the claim is for less than 1.80 acre-feet per acre was stricken because it is not supported by a preponderance of the evidence on the record; furthermore, no such statement is found in Book's Direct Testimony at 4.

(3) Claimant's claim is based in good part on natural overflow of the Sprague River on his allotments. (Martin Direct at 3-5; Ex. C56 at 21-28, 62-64, 68-72.) He also has asserted that artificial irrigation in his allotments was developed by the first non-Indian owner~~s~~ or successor and the developed irrigation has been continuous since. In addition to natural overflow, the historic artificial irrigation, prior to development of the existing system, was supplied by a ditch diverting water from Whiskey Creek, on a portion of the claimed area, and a pump and ditch diverting from the Sprague River in Allotment 426. ~~Two~~ Six wells were also developed in the mid-1940s, and used for irrigation ~~to~~ on part of the claimed area. (Book Direct ~~at 5~~, Ex. U22-U24.)

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In the last sentence, two wells was corrected to six wells, because the finding that only two wells were developed for irrigation on part of the claimed area is not supported by a preponderance of the evidence on the record.

(4) Claimant's claim covers 13 allotments along the south side of the Sprague River in Range 11 East, Township 36 South. Irrigation in this area occurred in three areas—land east of Council Butte in Sections 10 and 11 ("east section," *see* Book Direct, Ex. U15), land in Sections 7 and 18 ("west section," *see* Book Direct, Ex. U16), and land in Sections 8 and 9 ("middle section", *see* Book Direct, Ex. U17). (Book direct at 5.)

(5) The claim in the "east section" is for 152.9 acres in two allotments from Diversion Point No. 3 on the Sprague River. It is about 1.5 miles upstream of the "middle section" of the claim and is not contiguous with the other sections. (Ex. U2; OWRD Ex. 1 at 70-71.) The "east section" is ~~subject to natural overflow from the Sprague River (Martin Direct at 3-5, Ex. C56 at 21-28) and is~~ covered by a state water right from Whiskey Creek with a priority date of 1921. (OWRD Ex. 1 at 17-18.) ~~The~~ Whiskey ~~River~~ Creek joins the Sprague River about one mile upstream from the "east section." Early development of the "east section" was supplied with water diverted from Whiskey Creek. Irrigation occurred along the Creek prior to 1923. (Book Direct at 17-18.)

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to correct a scrivener's error in the name of Whiskey Creek.

(6) The claim in the "west section" is for 284.3 acres in six allotments from Diversion Point Nos. 1 and 2 on the Sprague River. (Ex. U2; OWRD Ex. 1 at 70-71.) Portions of this section ~~are subject to natural overflow from the Sprague River (Martin Direct at 3-5; Ex. C56 at 68-72) and~~ were irrigated ~~by a~~ under the authority of a 1927 surface water right from the Sprague River and supplemented with a 1948 ground water right~~s~~. (Book Direct at 18, Ex. U22; OWRD Ex. 1 at 89.)

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

(7) The claim in the "middle section" is for 344.2 acres in five allotments from Diversion Point No. 2 on the Sprague River. (Ex. U2; OWRD Ex. 1 at 70-71.) Portions of this section ~~are subject to natural overflow from the Sprague River (Martin Direct at 3-5; Ex. C56 at 62-64, 68-72) and~~ were developed for irrigation in the 1940s using water supplied from ~~with one of~~ the Drew wells and a diversion ~~from~~ on the Sprague River. The Drew wells have a 1947 priority date. ~~and~~ The Sprague diversion has a 1951 water right, which was issued on April 30, 1954, for primary irrigation and for supplemental irrigation on lands otherwise irrigated by the Drew wells. (Book Direct at 18, Ex. U24; OWRD Ex. 1 at 90-91.)

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

(8) The prior ownership, ~~developed~~ beneficial use of water for irrigation, and water priority dates of the allotments are summarized as follows:

Allotment 279 (Sect. 17, T. 36 S, R. 11 E., N½ NE¼, N½ NW¼, "middle section")

Acres 12.2

Allottee: Roxie Barkley (Rosie)

Conveyed to her in 1910. (Ex. U4 at 3; Ex. C3.)

Conveyed to her heir, Clifford Barkley, December 15, 1955. (OWRD Ex. 1 at 102.)

Conveyed from Barkley's heir, Clifford Barkley, to Pierre Dick on December 19, 1955. (OWRD Ex. 1 at 104-105.) Pierre Dick is not listed on the Klamath Tribe Final Roll published in the 1957 Federal Register (Ex. U9).

Conveyed from Dick to Frank Goularte in 1958. (OWRD Ex. 1 at 106-107.)

A Certificate of Appraisement (from an onsite inspection made April 19, 1955) indicates irrigated and/or irrigable acreage within Allotment 279 while under Indian ownership; 140 acres were characterized as agricultural, and 20 acres as grazing. (Ex. C82.)

The ~~irrigation of the~~ 12.2 acres claimed on this allotment appear irrigated from the ditch crossing the northwest corner of the allotment in aerial photos in 1960, after the purchase by Goularte. (Book Direct at 31, Ex. U3.)

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel. ~~was made on this parcel within five years of transfer from Indian ownership.~~

~~The point of diversion (POD 1) for this parcel is located in the SW¼ SE¼ Section 7, Township 35 S, Range 11 E, W.M. The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of 3.0 acre-feet per acre, from April 1 through October 31, with a priority date of October 14, 1864.~~

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

Allotment 280 (Sect. 8, T. 36 S, R. 11 E., SE¼, "middle section")

Acres 116.1

Allottee: William Barkley

Conveyed to Barkley in 1917. (Ex. U4 at 12; Ex. C112.) Conveyed from William Barkley to non-Indian Charles E. Drew on April 28, 1919. (*Id*.) On May ~~27~~ 20, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company (OCERC). (Ex. C59-C60; Book Rebuttal at 2.)

The right of way agreement between Drew and OCERC stipulated that the railway company, upon construction of the railway, was to provide suitable passage for cattle under the railroad and install pit cattle guards unless the right of way became fenced. (Ex. C59-C60.) This occurred eight years after the land passed out of Indian ownership.

Based on permits ~~granted~~ with priority dates in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and 1951 (Permit 21236 to Drew to divert surface water), wells were developed for irrigation, and an irrigation system that utilized water from the Sprague River ~~development started~~ was developed. (Book Direct at ~~30,~~ 23, 28, and 31; Ex. U3; OWRD Ex. 1 at 90-91.) Application of water under the permit could not have occurred until at least twenty-four years following transfer from Indian ownership.

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To provide additional citations to the record; to correct the date of the right of way deed with the railroad company; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 281 (Sect. 9, T. 36 S, R. 11 E., SW¼, "middle section")

Acres 22.4

Allottee: Hattie Barkley

Conveyed to her in 1910. (Ex. U6 at 1; Ex. C79.)

Conveyed from US to Charles Drew in 1927. (Ex. U4 at 14; Ex. C79.)

~~Charles~~ C. E. Drew is listed as a non-Indian ~~purchaser~~ owner or successor of ~~in~~ Allotment 413 and so designated by Claimant. (Ex. U11 at 3.) The next owner is unknown.

Based on permits ~~granted~~ with priority dates in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and 1951 (Permit 21236 to Drew to divert surface water), irrigation development and application of water to beneficial use did not occur until at least twenty-four years following transfer from Indian ownership. ~~started.~~ (Book Direct, at ~~30~~ 23; Ex. U3; U24; OWRD Ex. 1 at 90-91)

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To correct and provide additional citations to the record; to add clarification using evidence on the record.

Allotment 413 (Sect. 18, T. 36 S, R. 11 E., N½ NE¼, "west section")

Acres 78.8

Allottee: Julia Jefferson

Conveyed to her in 1910. (Ex. U6 at 2.) She died on July 2, 1923. (Ex. U6 at 4.)

Conveyed from US to non-Indian Charles Drew on October 19, 1920. (Ex. U6 at 3; U-11 at 3; Ex. C75.)

Conveyed from Charles Drew to Fred Haworth on September 14, 1927. (Ex. C113.)

The first irrigation development occurred after the Haworth water rights application was filed in 1927~~,~~. A certificate based on this application was issued on

November 28, 1930. This means that beneficial use was made sometime between the filing of the application and the issuance of the certificate. Beneficial use was therefore made between seven and ten years after it passed from Indian ownership. (Book Direct at 29; OWRD Ex. 1 at 89.)

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 423 (Sect. 8, T. 36 S, R. 11 E., SW¼, "middle section")

Acres 144.6

Allottee: Sarah John

Conveyed to her in 1910. (Ex. U6 at 5.)

Conveyed from US to non-Indian Luke Walker in 1919. (Book Direct, Ex. U4 at 13; Ex. C77-C78; OWRD Ex. 1 at 96; Ex. U11 at 7.)

On May 20, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company (OCERC). (Ex. C59-C60; Book Rebuttal at 2.) The right of way agreement between Drew and OCERC stipulated that the railway company, upon construction of the railway, was to provide suitable passage for cattle under the railroad and install pit cattle guards unless the right of way became fenced. (Yockim Affidavit, Ex. 59-60.) This occurred eight years after the land passed out of Indian ownership.

Irrigation development using ground water occurred in 1947 (Permit U-216 to Charles Drew for five groundwater wells). ~~and~~ In 1951 an irrigation system that utilized water from the Sprague River was developed (Permit 21236 to Drew to divert surface water). (Book Direct at ~~30~~ 31; Ex. U3; OWRD Ex. 1 at 90-91.) Application of water under the permit could not have occurred until at least thirty-two years following transfer from Indian ownership.

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 424 (Sect. 8, T. 36 S, R. 11 E., S½ N½, "middle section")

Acres 48.9

Allottee: Alonzo Weeks

Conveyed to him in 1910. (Ex. U6 at 6.)

Conveyed from US to non-Indian Charles Drew in 1927. (Ex. U4 at 10; Ex. C89.)

Irrigation development using ground water occurred in 1947 (Permit U-216 to Charles Drew for five groundwater wells). ~~and~~ In 1951 an irrigation system that utilized water from the Sprague River was developed (Permit 21236 to Drew to divert surface water). (Book Direct at ~~30~~ 31; Ex. U3; OWRD Ex. 1 at 90-91.) Application of water to beneficial use did not occur until at least twenty-four years following transfer from Indian ownership.

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To correct and provide additional citations to the record; to add clarification using evidence on the record.

Allotment 426 (Sect. 18, T. 36 S, R. 11 E., N½ NW¼, SW¼ NW¼, "west section")

Acres 67.2

Allottee: Duffie Tupper

Conveyed to him in 1910 (Ex. U6 at 7; Ex. C2.)

Conveyed from US to Watson "Duffy" Tupper in 1918. (Ex. U6 at 8, Ex.U4 at 2; Ex. C2, Ex. C62.)

Conveyed from non-Indian Charles Drew to Fred Haworth on September 14, 1927. (Ex. C113.)

There is insufficient evidence on the record of the date of conveyance from Indian ownership. Irrigation development using water from the Sprague River started with the 1927 Haworth water right. (Book Direct at 29; Ex. U3; OWRD Ex. 1 at 89.) Based on the last known date of ownership by a Klamath Indian (1918), as many as nine years could have passed following transfer of the parcel from Indian ownership until development began, and as many as twelve years could have passed until water was applied to beneficial use (based on the issuance of a certificate for this application on November 28, 1930).

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 428 (Sect. 18, T. 36 S, R. 11 E., E½ SW¼, SE¼ SW¼, "west section")

Acres 0.6

Allottee: Duffie Tupper

Conveyed to him as a trust patent in 1910 (Ex. U6 at 9; Ex. C61.)

Conveyed from USA to Watson Duffy Tupper, an heir of Duffie Tupper, as a fee patent in 1927. (Ex. U6 at 10.)

Conveyed from US to Bly Lumber Co. ~~in~~ on January 25, 1957 (OWRD Ex. 1 at ~~100~~ 110), to Esther ~~Duffy~~ Tupper Wilson (a Klamath Indian) ~~in~~ on August 29, 1957 (OWRD Ex. 1 at 111), and to ~~Martin~~ Marlin Dale Wilson ~~in~~ on March 26, 1959 (OWRD Ex. 1 at 112). Marlin Dale Wilson is listed on the Klamath Tribe 1957 Final Roll. ~~but no Martin Dale Wilson.~~ (Ex. U9.)

This allotment received water on the claimed area of 0.6 acres from the Hess Wells, put in place in the 1950s. (Book Direct at 30; Ex. U3.)

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition, the names "Ester Duffy Wilson" and "Martin Dale Wilson" were changed/corrected to reflect the names as they appear on

the deeds; a BARGAIN AND SALE DEED dated August 29, 1957 lists a Esther Tupper Wilson as the grantee (OWRD Ex. 1 at 111), and a DEED, COUNTY OF KLAMATH, VOL 311, PAGE 21, dated March 26, 1959 (OWRD Ex. 1 at 112) lists a Esther Tupper Wilson as the grantor conveying the property to a Marlin Dale Wilson.

Allotment 439 (Sect. 7, T. 36 S, R. 11 E., S½ SE¼, "west section")

Acres 31.5

Allottee: Bill Wild (Wild Bill Squire)

Conveyed to him as a trust patent in 1910. (Ex. U6 at ~~10~~ 11.)

Conveyed to Fred Haworth as a fee patent in 1927. (Ex. U6 at ~~11~~ 12; Ex. C11.) Haworth is not listed on the Klamath Tribe 1957 Final Roll (Ex. U9) and Claimant considers him to be the first non-Indian owner or successor. (Ex. U10.) Haworth owned it until at least 1956.

A Certificate of Appraisement (from an onsite inspection made on January 25, 1926) shows that, while under Indian ownership, Allotment 439 was being used for grazing; 80 acres were characterized as grazing land with wire fence improvements in place. (Ex. C68.)

At the time of conveyance from Indian ownership, Haworth filed for Sprague River water rights and claimed land on this and Allotment 440 as part of the area served. He received state water Permit 7908 and after perfecting the permit, Certificate 8896 was issued. (Book Direct at 21; Ex. U3; OWRD Ex. 1 at 89.) Book testified that except for 27.1 acres, aerial photographs taken in 1940 or 1941, 1953, and 1960 show no irrigation, or limited irrigation, on this allotment. (Book Direct at 26, 27, 30; Exs. U29-U32.) ~~these two allotments were not continuously irrigated after the Haworth irrigation system was developed, based on aerial photographs from 1940 to 1969.~~ After 1969, this area received water from the system in Section 8, with water diverted from Diversion Point No. 2, consistent with the current operation on the claim. (Book Direct at ~~21,~~ 30~~, Ex. U3; OWRD Ex. 1 at 89~~.)

Beneficial use of water from the Sprague River by the method of natural overflow is not a valid basis for a *Walton* water right. ~~was made on this parcel prior to transfer from Indian ownership.~~

~~The points of diversion for this parcel are located in the SW¼ SE¼ Section 7, Township 35 S, Range 11 E, W.M. (POD 1) for 3.6 acres, and the NW¼ SE¼ Section 8, Township 35 S, Range 11 E, W.M. (POD 2) for 27.9 acres. The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of 3.0 acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864.~~

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 440 (Sect. 7, T. 36 S, R. 11 E., N½ SE¼, "west section")

Acres 28.4

Allottee: Minnie Smithson

Conveyed to her as a trust patent in 1910. (Ex. U6 at 13; Ex. C70.)

A fee patent conveyed from the US to non-Indian Fred Haworth in 1927. (Ex. U4 at 4; Ex. C74). Haworth owned it until at least 1956.

A Certificate of Appraisement (from an onsite inspection made on February 9, 1921) shows that, while under Indian ownership, Allotment 440 was being used for grazing, and that there were established fences. (Ex. C71.) A subsequent inspection made on January 25, 1926 characterized 80 acres as grazing land. (Ex. C73.)

At the time of conveyance from Indian ownership, Haworth filed for Sprague River water rights and claimed land on this and Allotment 439 as part of the area served. He received state water Permit 7908 and after perfecting the permit, Certificate 8896 was issued. (Book Direct at 21; Ex. U3; OWRD Ex. 1 at 89.) Book testified that, except for 27.1 acres, aerial photographs taken in 1940 or 1941, 1953, and 1960 show no irrigation, or limited irrigation, on this allotment. (Book Direct at 26, 27, 30; Exs. U29-U32.) ~~these two allotments were not continuously irrigated after the Haworth irrigation system was developed, based on aerial photographs from 1940 to 1969.~~ After 1969, this area received water from the system in Section 8, with water diverted from Diversion Point

No. 2, consistent with the current operation on the claim. (Book Direct at ~~21,~~ 30~~, Ex. U3; OWRD Ex. 1 at 89~~.)

Beneficial use of water from the Sprague River by the method of natural overflow is not a valid basis for a *Walton* water right. ~~was made on this parcel prior to transfer from Indian ownership~~

~~The point of diversion (POD 2) for this parcel is located in the NW¼ SE¼ Section 8, Township 35 S, Range 11 E, W.M. The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of 3.0 acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864.~~

Reason for Modification: To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 865 (Sect. 10, T. 36 S, R. 11 E., SE¼, "east section")

Acres 72.9

Allottee: Horace Taylor

Conveyed to him as a trust patent in 1910. (Ex. U6 at 15; Ex. C92.)

A fee patent conveyed from the USA to Charles Snelling in 1914. (OWRD Ex. 1 at 97; Ex. C92.) The transaction is listed as "Indian Lands Sold to White Men." (Ex. U11 at 6.) and Claimant considers Snelling to be the first non-Indian owner or successor of the allotment. The property was later conveyed to Marvin Cross (OWRD Ex. 1 at 98) and then to Charles E. Drew (OWRD Ex. 1 at 99). No evidence that Snelling or Cross, the first two non-Indian owners or successors, developed an irrigation system on this allotment.

Although this allotment is also located at the end of the Turner-George Ditch, which diverted water from Whiskey Creek, with a priority date of 1921. (Book Direct at 28-29; Ex. U3), the claimed source of water for Claim 114 is the Sprague River. There is no evidence on the record of beneficial use of water from the Sprague River being made with reasonable diligence after transfer from Indian ownership. Irrigation from Whiskey Creek on this allotment started after 1921, as developed by Charles E. Drew. (Book Direct at 28-29.) The earliest evidence of development of irrigation from Whiskey Creek comes from a Notice of Prosecution of Work with Diligence, dated September 22, 1922.

In the document, Mr. Drew states that he "enlarged old ditch and constructed new ditch" between August 15, 1921, and August 15, 1922, in order to serve the property. (Book Direct at Ex. U14.) Only a portion of the claimed area has been irrigated since development, about 100 acres from the old ditch and 60 acres from the Sprague River. (Book Direct at 28-29~~; Ex. U3~~.)

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 867 (Sect. 11, T. 36 S, R. 11 E., W½ SW¼, "east section")

Acres 80.0

Allottee: Emma Taylor

Conveyed to her as a trust patent in 1910. (Ex. U6 at 16.)

A fee patent conveyed from the US to B.S. Grigsby in 1914. (OWRD Ex. 1 at 100; Ex. U4 at 6; Ex. C6, Ex. C93.) The transaction is listed as "Indian Lands Sold to White Men." (Ex. U11 at 6.) and Claimant considers Grigsby to be the first non-Indian owner or successor of the allotment. In 1914, the property was conveyed from Grigsby and Emma Grigsby to Charles Snelling. No evidence that Snelling or Grigsby, the first two non-Indian owners or successors, developed an irrigation system on this allotment. (OWRD Ex. 1 at 101.)

Although this allotment is located at the end of the Turner-George Ditch, which diverted water from Whiskey Creek, with a priority date of 1921~~.~~ (Book Direct at 28-29; Ex. U3), the claimed source of water for Claim 114 is the Sprague River. There is no evidence on the record of beneficial use of water from the Sprague River being made with reasonable diligence after transfer from Indian ownership. Irrigation from Whiskey Creek on this allotment started after 1921, as developed by Charles E. Drew. (Book Direct at 28-29~~; Ex. U3~~.) The earliest evidence of development of irrigation from Whiskey Creek comes from a Notice of Prosecution of Work with Diligence, dated September 22, 1922. In the document, Mr. Drew states that he "enlarged old ditch and

constructed new ditch" between August 15, 1921, and August 15, 1922, in order to serve the property. (Book Direct at Ex. U14.)

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 1562 (Sect. 18, T. 36 S, R. 11 E., S½ NE¼, SE¼ NW¼, NE¼ SW¼, "west section")

Acres 77.8

Allottee: Samuel Clinton

A fee patent conveyed from the US to Samuel Clinton ~~in~~ on March 25, 1918. (Ex. U4 at 1.) The property was then conveyed to B.E. Wolford ~~in~~ on June 18, 1918. (Ex. U5 at ~~1~~ 2.) B.E. Wolford is not listed on the Klamath Tribe Final Roll and Claimant considers Wolford the first non-Indian owner or successor of the allotment. Wolford conveyed the property to John and Emma Jackson ~~in~~ on August 7, 1918. (Ex. U5 at ~~2~~ 1.) A John Jackson is listed on the 1914 census of the Klamath Tribe. Charles and Iva Drew conveyed the property to Fred Haworth on September 14, 1927. (Ex. C113.) There is a broken chain of title between the Jacksons and the Drews.

Development of six acres of this allotment occurred in conjunction with the 1927 Haworth water right. Given the broken chain of title between the Jacksons and the Drews, August 7, 1918 is the last known date of Indian ownership. As many as nine years could have passed following transfer of the parcel from Indian ownership until development began, and as many as twelve years could have passed until water was applied to beneficial use (based on the issuance of a certificate for this application on November 28, 1930). Additional land was brought into irrigation after 1947, some 30 years after conveyance from Indian ownership. (Book Direct at 30; Ex. U3; OWRD Ex. 1 at 89.)

Beneficial use of water from the Sprague River with reasonable diligence by the first non-Indian owner or successor has not been demonstrated on this parcel.

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

~~(9) USA Witness Dale Book has a master's degree in civil engineering, with specialty in water resources planning and management. He has been self-employed as a water rights analyst since 1984. (Ex. U1.) He is qualified as an expert pursuant to Rule 702 in civil engineering and aerial photography interpretation. (Stipulated record of the hearing on May 4, 2005, cross-exam of Book.)~~

~~(10) Based on his professional opinion and expertise, Book makes the following factual conclusions, which are supported by a preponderance of the evidence, in reference to Claimant's claim, pursuant to various *Walton* holdings:~~

~~653.7 acres in Allotments 279, 280, 281, 413, 423, 424, 865, 867, and 1562 did not meet the *Walton* standards because they were not developed by original Indian allottees or *first* non-Indian owners.~~

~~32.8 acres in allotments 439 and 440 may have met the initial *Walton* criteria, but were not in continuous use.~~

~~The first conveyance to a non-Indian owner was not established with respect to 67.2 acres in Allotment 426, did not meet the *Walton* standards because the date of the first conveyance to a non-Indian owner was not established.~~

~~27.1 acres in Allotments 439 and 440 meet the *Walton* standards. Allotments 439 and 440 passed out of Indian ownership in 1927 and have been authorized for irrigation from the Sprague River with a state water right since 1930. Except for 27.1 acres, aerial photographs taken in 1940 or 1941, 1953, and 1960 show no irrigation, or limited irrigation, on Allotments 439 and 440. (Book Direct at 26, 27, 30; Exs. U29-U32.) The season of use is April 1 through October 31, as requested by Claimant. (Book Direct at 32; Affidavit and Rebuttal of Book at 3.)~~

~~**Reason for Modification:** The ALJ qualified Book as an expert in civil engineering and aerial photography, and his testimony pertaining to these subjects is entitled to significant weight. Book also gave his opinions as to whether the claimed lands were eligible for *Walton* rights. This involves an application of fact to law, and is the province of the decision maker, not the witness. The Department has removed the ALJ's incorporation of Book's "findings" with respect to eligibility for *Walton* rights, since these constitute conclusions of law rather than statements of fact. In addition, the ALJ's proposed finding of fact failed to fully set forth the evidence on the record.~~

(11) Book further opined the following regarding duty of water.:

For the claim area covered by Allotments 279, 413, 426, 428, 439, 440, 865, 867, and 1562, Book's testimony supports the application of water not to exceed 3.5 acre-feet/acre. the water diverted from the *Walton* right should be limited such that the total water delivered to the approved acreage, in combination with water delivered from the well, does not exceed 3.5 acre-feet/acre, the standard duty for the Klamath Basin. (Book Direct at 33.) The Claimant claimed only 3.0 acre-feet per acre.

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record. In addition, a duty of 3.5 acre-feet per acre as opined by Book is not supported by a preponderance of the evidence on the record. Furthermore, the method of determining the duty of surface water use in combination with groundwater use involves an issue of law, not fact, and is not the appropriate subject of a finding of fact.

(12) Book finally opined the following regarding rate of diversion:

The rate of discharge should be based on the measured pumping rate for the facilities in place documented in the record at OWRD Ex. 1 at 69. According to Book, the rate should be prorated to the amount of acreage approved for the *Walton* right. (Book Direct at 33.) However, for any of the parcels where the elements of a Walton claim are established, the rate should be based on 1/40 of one cfs per acre as claimed, not to exceed the claimed pumping rate.

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record. In addition, the non-standard method of determining rate by prorating acreage according to a measured pumping rate involves an issue of law, not fact, and is not the appropriate subject of a finding of fact.

7. **Conclusions of Law.** The Proposed Order's "Conclusions of Law" section is modified as follows (additions are shown in "underline" text, deletions are shown in "strikethrough" text):

1. Beneficial use of water by the method of natural overflow does not constitute is a valid basis for a *Walton* water right. However, except for Allotments 439 and 440, the evidence on the record does not establish beneficial use of water by the method of natural overflow.

2. Claimant has not provided sufficient title information to establish a *Walton* water right in Allotment 426.

3. Claimant has not provided sufficient evidence of the reasonably diligent development and/or continuous use of beneficial use of water for irrigation needed to establish a *Walton* water right in Allotments 279, 280, 281, 413, 423, 424, 428, 865, 867, and 1562. and 32.8 acres in allotments 439 and 440. Claimant has established a *Walton* water right for 27.1 59.9 acres in Allotments 439 and 440, and 12.2 acres in Allotment 279.

Reasons for Modification: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports conclusions other than those in the 2006 Proposed Order.

8. **Opinion.** The Proposed Order's "Opinion" section is modified as described herein.

OWRD has removed the ALJ's discussions regarding the elements of a *Walton* claim, including the first non-Indian purchaser rule, and regarding natural overflow and subirrigation of water as a basis for a *Walton* claim. The deleted paragraphs are noted below as "*****". In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

The remaining portions of the Opinion section of the ALJ's Proposed Order have been labeled "Application of Walton Elements to the Modified Proposed Order Findings of Fact." Additions are shown in "underline" text, deletions are shown in "strikethrough" text.

Application of Walton Elements to the Modified Proposed Order Findings of Fact

*****

Claimant has the burden of establishing his claim for a *Walton* water right by a preponderance of the evidence. ORS 539.110;[1] ORS 183.450(2);[2] OAR 690-028-0040(1).[3] *See also Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that

[1] "* * * The evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest. The burden of establishing the claim shall be upon the claimant whose claim is contested."

[2] "* * * The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position."

[3] "Each claim or registration statement for existing beneficial uses shall be compared to all information submitted for consistency regarding settlement of the area and general development of

the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). As explained below, Claimant did not meet this burden, except for Allotment 279 and a portion of Allotments 439 and 440.

1. Natural flooding/ natural overflow

There is no dispute that the land in Claim 114 was formerly part of the Klamath Indian Reservation, that the land was allotted to Klamath tribal members, and that the land was transferred to non-Indians. Claimants assert a water right of less than 1.8 acre-fee per acre for irrigation of 781.4 acres used for grass hay and pasture for livestock, based in good part on natural overflow of the Sprague River. As evidenced by permit abstract No. 21236 submitted by the Claimant to accompany the Statement and Proof of Claim, the claimed rate is 1/40 of one cfs per acre and duty is 3.0 acre-feet per acre during a season of use April 1 through October 31.

*****

2. Sufficient title information

Claimant has not provided sufficient title information to establish a *Walton* water right in Claimant's Allotment 426. Specifically, Claimant has provided no evidence of the date of the first non-Indian purchase of the allotment, and the purchaser's name. Therefore, the Claimant has not established that the additional beneficial use of water use was developed made with reasonable diligence, by the first purchaserof land from an Indian owner or that, after initial development, the water claimed must have been continuously used by the first non-Indian successor and all subsequent successors.

3. Sufficient information of the development or continuous use beneficial use of water with reasonable diligence

The evidence for some of the allotments raises a question of diligent development beneficial use of water being made with reasonable diligence. Claimant argues that there

projects. The burden of proof to establish a claim by a preponderance of relevant evidence rests on the claimant."

should be no time limit a reasonable time period without unreasonable delay within which to exercise due diligence. The United States argues more persuasively that, because there is no applicable federal law, state law should be consulted and that, based on state law, five years is a reasonable time limit, unless Claimant shows good cause reasons for a longer period of time. Oregon has adopted this time limit in Caselaw has established that five years is sufficient for reasonably diligent development in at least some factual circumstances. *See Seaward v. Pacific Livestock Co.*, 49 Or 157, 160-162 (1907). In addition, five years is the default period for application of water to a beneficial use under the Water Rights Act, unless an extension is granted. ORS 537.230(1). for pre-1909 claims and it is the time limit used by Oregon in ORS 537.230(1)[4] for completion of works necessary to put water to beneficial use. Moreover, five years of non-use creates a "rebuttable presumption of forfeiture" of a water right. However, the period for reasonably diligent development is ultimately a fact-dependent determination. The time period to make beneficial use of water with reasonable diligence for a *Walton* claim is that which does not require unusual or extraordinary effort, absent extraordinary circumstances. ORS 540.610(1) (Oregon Administrative Rule 690-028-0045).[5] Therefore, generally five years is considered the an appropriate time length for reasonable due diligence, absent evidence of extenuating circumstances. good cause reasons to rebut this presumption. Claimant offered no evidence of good cause reasons to demonstrate that more than five years was reasonably necessary to put water to beneficial use for any of the area claimed. As a result, the determinations made below as to diligent development on individual claimed allotments are based on a five-year development period. rebut this presumption. Any evidence of diligence by subsequent owners is only relevant regarding continuous use. *Walton* III at 402.

[4] "The construction of any proposed irrigation or other work shall be prosecuted with reasonable diligence and be completed within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval."

[5] "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right." OAR 690-028-0045 provides that reasonable diligence in the construction of the system of works necessary to fully accomplish appropriation of the water does not require unusual or extraordinary effort. Reasonable diligence is that which is usual and ordinary with persons performing similar projects. The

Based on Book's expert opinion evidence on the record, Claimant has failed to provide sufficient evidence of the development beneficial use of water by the Indian seller, or beneficial use of water having been made with reasonable diligence by the first non-Indian purchaser within five years of purchase successors for portions of the claim. Claimant has also failed in some cases to establish the continuous use of water since development to establish a *Walton* water right on the basis of water use made with reasonable diligence in Allotments 279, 280, 281, 413, 423, 424, 428, 865, 867 and 1562. and 32.8 acres in allotments 439 and 440. Claimant has established a *Walton* water right for 59.9 31.5 acres in Allotments 439, and 28.4 acres in Allotment 440, and 12.2 acres in Allotment 279. Each allotment is considered separately below.

Allotment 279 (middle section)

Beneficial use of water was made on this parcel within five years of transfer from Indian ownership. The first non-Indian purchaser was Pierre Dick, on December 19, 1955, and he conveyed it to Frank Goularte in 1958. There is no evidence of reasonable development of irrigation by Dick, the first non-Indian purchaser. The artificial irrigation of the 12.2 acres on this allotment began by 1960, in 1958 after the purchase by Goularte, the second non-Indian purchaser. This constitutes reasonably diligent development of the acres claimed within Allotment 279.

Allotment 280 (middle section)

On May 27 20, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company. The terms of the contract suggest that grazing may have been occurring on this allotment at the time the deed was issued. Beneficial use of water under Permit 21236 (issued in 1951 for diversion from the Sprague River) could not have occurred until at least twenty-four years following transfer from Indian ownership. Based on permits granted in 1947 (Permit U-216 to Drew for five groundwater wells) and 1951 (Permit 21236 to Drew to divert surface water), groundwater irrigation started at least 20 years after purchase by the Drews. It is unnecessary to determine whether the right of way deed is sufficient, on its own, to

water user must demonstrate a genuine intent to complete the appropriation in a timely manner. The question is one of fact, to be determined from the circumstances on case-by-case basis.

establish evidence of beneficial use of water. Even assuming that it did, the eight-year gap between transfer from Indian ownership and the issuance of the deed is too long under the facts in this case to establish beneficial use of water with reasonable diligence with respect to the *Walton* claim. This irrigation was not diligent development even if groundwater wells are considered development.

Allotment 281 (middle section)

In 1927, non-Indian Charles Drew purchased the property from the allottee. Based on A permits granted in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and was issued in 1951 (Permit 21236 to Drew to divert surface water from the Sprague River), twenty-four years after transfer from Indian ownership. groundwater irrigation started about 20 years after purchase. This irrigation was not diligent development, does not demonstrate beneficial use of water with reasonable diligence with respect to the *Walton* claim. even if groundwater wells are considered development.

Allotment 413 (west section)

The first non-Indian purchaser was Charles Drew, on October 19, 1920. The first irrigation development occurred after the Haworth water rights application was filed in 1927, seven years after it passed from Indian ownership. As explained above, five years is a reasonable time limit for due diligence, unless Claimant establishes good cause reasons to rebut this presumption. Claimant has not claimed that the time limit should be extended due to good cause reasons beyond the purchaser's control. Therefore, beneficial use of water for irrigation was not diligently developed made with reasonable diligence by Drew, the first non-Indian purchaser after transfer from Indian ownership.

Allotment 423 (middle section)

The first non-Indian purchaser was Luke Walker, in 1919. On May 27, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company. The terms of the contract suggest that grazing may have been occurring on this allotment at the time the deed was issued. Beneficial use of water under Permit 21236 (issued in 1951 for diversion from the Sprague River) could not have occurred until at least thirty-two years following transfer from Indian ownership.

It is unnecessary to determine whether the right of way deed is sufficient, on its own, to establish evidence of beneficial use of water. Even assuming that it did, the eight-year gap between transfer from Indian ownership and the issuance of the deed is too long, under the facts in this case, to establish beneficial use of water with reasonable diligence.

Based on permits granted in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and 1951 (Permit 21236 to Drew to divert surface water), groundwater irrigation started about 28 years after purchase. This irrigation, eight was not diligent development even if groundwater wells are considered development. Moreover, the development was not by Luke Walker, the first non-Indian purchaser.

Allotment 424 (middle section)

The first non-Indian purchaser was Charles Drew, in 1927. Based on A permits granted in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and was issued in 1951 (Permit 21236 to Drew to divert surface water from the Sprague River), twenty-four years after transfer from Indian ownership. groundwater irrigation began about 20 years after purchase. This irrigation was not diligent development, does not demonstrate beneficial use of water with reasonable diligence. even if groundwater wells are considered development.

Allotment 426 (west section)

As explained above in section two, Claimant has the burden of establishing his claim and he has not provided sufficient evidence of the date of conveyance from Indian ownership and the purchaser's name. Irrigation development started with the 1927 Haworth water right, but without the required evidence, Claimant cannot establish whether the first non-Indian purchasers developed this made beneficial use of water for irrigation with reasonable diligence. or whether the development was diligent or continuously maintained.

Allotment 428 (west section)

This allotment was conveyed from USA to Watson Duffy Tupper, an heir of Duffie Tupper, as a fee patent in 1927. The first non-Indian purchaser was Bly Lumber Co. in January 1957, who sold it to Esther Duffy Tupper Wilson (a Klamath Indian) in August 1957. There is insufficient evidence of the beneficial use of water from the

Sprague River on this allotment, either prior to or after transfer from Indian ownership. Claimant has the burden of establishing his claim and has not provided sufficient evidence of any irrigation development by Bly Lumber Co.

Allotment 439 (west section)

Beneficial use of water by the method of natural overflow was made on this parcel while still under Indian ownership. The first non-Indian purchaser was Fred Haworth in 1927. He owned it until at least 1956. At the time of conveyance, Haworth filed for Sprague River water rights and claimed land on this and Allotment 440 as part of the area served. He received state water permit 7908 which was later perfected. Use of water is still authorized under Certificate 8896. The aerial photographs submitted by the United States are insufficient to establish abandonment of the developed *Walton* right. The photographs show limited or no irrigation occurring on a portion of this allotment, but only on three days in three separate years since 1940 or 1941. Except for 27.1 acres for which the United States concedes that Claimant has established a *Walton* water right, these two allotments were not continuously irrigated after the Haworth irrigation system was developed, based on aerial photographs from 1940 to 1969. Beneficial use of water was established on 31.5 acres in this allotment under Indian ownership prior to transfer to a non-Indian owner.

Allotment 440 (west section)

Beneficial use of water by the method of natural overflow was made on this parcel while still under Indian ownership. The first non-Indian purchaser was Fred Haworth in 1927, who owned it until at least 1956. At the time of conveyance, Haworth filed for Sprague River water rights and claimed land on this and Allotment 439 as part of the area served. He received state water permit 7908 which was later perfected. Use of water is still authorized under this Certificate 8896. The aerial photographs submitted by the United States are insufficient to establish abandonment of the developed *Walton* right. The photographs show limited or no irrigation occurring on a portion of this allotment, but only on three days in three separate years since 1940 or 1941. Except for 27.1 acres for which the United States concedes that Claimant has established a *Walton* water right, these two allotments were not continuously irrigated after the Haworth irrigation system

was developed, based on aerial photographs from 1940 to 1969. Beneficial use of water was established on 28.4 acres in this allotment under Indian ownership prior to transfer to a non-Indian owner.

Allotment 865 (east section)

This allotment is located at the end of the Turner-George Ditch, which diverted water from Whiskey Creek, with a priority date of 1921. Irrigation on this allotment started after 1921, as developed by Charles E. Drew.

The first non-Indian purchaser was Charles Snelling in 1914. The property was later conveyed to Marvin Cross and then Charles E. Drew. Claimant has provided no evidence that Snelling or Cross, the first two non-Indian owners, developed an irrigation system beneficially used water from the Sprague River on this allotment.

Claimant alleged that irrigation in this allotment and Allotment 867 occurred in 1916, based on a 1921 letter from C.T. Darley (Ex. RS-26.) As explained in the Evidentiary Rulings above, the evidence for this allegation is not reliable and not admitted. Moreover, Claimant has failed to establish that, even if there were such Indian irrigation, the non-Indian purchasers of Allotments 865 and 867 continued such irrigation.

Irrigation from Whiskey Creek on this allotment started after 1921, as developed by Charles E. Drew. (Book Direct at 28-29.) The evidence indicates that development of irrigation works for the service of this allotment started in 1921, seven years after transfer from Indian ownership. This irrigation does not establish beneficial use of water with reasonable diligence with respect to the *Walton* claim.

Allotment 867 (east section)

This allotment is located at the end of the Turner-George Ditch, which diverted water from Whiskey Creek, with a priority date of 1921. Irrigation on this allotment started after 1921, as developed by Charles E. Drew.

The first non-Indian purchaser was B.S. Grigsby in 1914. The property was later conveyed to Marvin Cross and then to Charles E. Drew. In 1914, the property was conveyed from Grigsby and Emma Grigsby to Charles Snelling. Claimant provided no

evidence that Snelling or Grigsby, the first two non-Indian owners, developed an irrigation system beneficially used water from the Sprague River on this allotment.

Claimant alleged that irrigation in this allotment and Allotment 865 occurred in 1916, based on a 1921 letter from C.T. Darley (Ex. RS-26.) As explained above for Allotment 865, this allegation is not accepted. Moreover, Claimant has failed to establish that, even if there were such Indian irrigation, the non-Indian purchasers of Allotments 865 and 867 continued such irrigation.

Irrigation from Whiskey Creek on this allotment started after 1921, as developed by Charles E. Drew. (Book Direct at 28-29.) The evidence indicates that development of irrigation works for the service of this allotment started in 1921, seven years after transfer from Indian ownership. This irrigation does not establish beneficial use of water with reasonable diligence with respect to the *Walton* claim.

Allotment 1562 (west section)

The first non-Indian purchaser was B.E. Wolford in 1918. Wolford conveyed the property to Indian owners, John and Emma Jackson in 1918. Claimant has not established that irrigation was developed by Wolford, the first non-Indian owner. Furthermore, Development of six acres of this allotment was in conjunction with the 1927 Haworth water right, which is beyond the five-year deadline for reasonable development that is applicable to this case. As explained above, five years is a reasonable time limit for due diligence, unless Claimant establishes good cause reasons to rebut this presumption. Claimant has not claimed that the time limit should be extended due to good cause reasons beyond the purchaser's control. Additional land was brought into irrigation after 1947, some 30 years after conveyance from Indian ownership.

Reasons for Modification: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Issues" is adopted in its entirety.
   c. The "Evidentiary Rulings" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.6, above.
   e. The "Conclusions of Law" is adopted in its entirety. ~~with modifications, as set forth in Section A.7, above.~~
   f. The "Opinion" is adopted in its entirety. ~~with modifications, as set forth in Section A.8, above.~~
   g. The "Order" is adopted ~~replaced~~ in its entirety. ~~by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 114. Consistent with Sections A.6, A.7 and A.8, above, the outcome of the Order has been modified to recognize a right for irrigation on an additional 45.6 acres.~~

2. The elements of a *Walton* claim are established for 27.1 acres in Allotments 439 and 440. The United States has conceded that Claimant has established a *Walton* right for 27.1 acres in Allotments 439 and 440. ~~The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.~~

3. Beneficial use of water by the method of natural overflow is not a valid basis for a *Walton* water right. ~~was established prior to the development of specific points of diversion.~~

4. Based on the file and record herein, IT IS ORDERED that Claim 114 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 114

CLAIM MAP REFERENCE: CLAIM # 114, PAGES 69-70

CLAIMANT: DUANE MARTIN
2021 HWY 88
IONE, CA 95640-9113

SOURCE OF WATER: The SPRAGUE RIVER, tributary to the WILLIAMSON RIVER

PURPOSE OR USE:
IRRIGATION OF 27.1 ~~72.1~~ ACRES, ~~BEING 15.8 ACRES FROM POD 1 AND 56.3 ACRES~~ FROM POD 2.

RATE OF USE:
0.68 ~~1.80~~ CUBIC FEET PER SECOND (CFS) MEASURED AT ~~THE POINTS OF DIVERSION, BEING 0.39 CFS FROM POD 1 AND 1.41 CFS FROM~~ POD 2.

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

PERIOD OF ALLOWED USE: APRIL 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
~~POD 1~~	~~36 S~~	~~11 E~~	~~WM~~	~~7~~	~~SW SE~~	~~31~~	~~540 FEET NORTH FROM S¼ CORNER, SECTION 7~~
POD 2	36 S	11 E	WM	8	NW SE	18	375 FEET SOUTH AND 1675 FEET WEST FROM E¼ CORNER, SECTION 8

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
36 S	11 E	WM	7	NE SE	24	~~13.2~~8.1	POD 2
~~36 S~~	~~11 E~~	~~WM~~	~~7~~	~~NE SE~~	~~17~~	~~15.2~~	
36 S	11 E	WM	7	SE SE	32	~~9.7~~0.8	
36 S	11 E	WM	7	SE SE	25	18.2	
~~36 S~~	~~11 E~~	~~WM~~	~~7~~	~~SE SE~~	~~32~~	~~3.6~~	~~POD 1~~
~~36 S~~	~~11 E~~	~~WM~~	~~17~~	~~NE NW~~		~~1.0~~	
~~36 S~~	~~11 E~~	~~WM~~	~~17~~	~~NW NW~~		~~11.2~~	

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of RICHARD DUARTE AND SPRAGUE RIVER CATTLE COMPANY	)))))	PARTIAL ORDER OF DETERMINATION Water Right Claim 124

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE PROPOSED ORDER

1. Claim 124 (Claimants: RICHARD DUARTE AND SPRAGUE RIVER CATTLE COMPANY[1]) and its associated contests (2845, 3500, 3766, and 4154) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 232.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 124 on February 20, 2007.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) Richard Duarte, (2) Claude Taylor, and (3) the United States of America.

4. The exceptions filed to the Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 124. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.7, A.8, and A.9, below.

5. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, below.
   c. The "Issues" is adopted in its entirety.

[1] Sprague River Cattle Company, successor in interest to Claude Taylor.

d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, below.
e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.8, below.
f. The "Opinion" is replaced in its entirety as set forth in Section A.9, below.
g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 124. Consistent with Sections A.7, A.8 and A.9, below, the outcome of the Order has been modified to recognize a right for irrigation on ~~an additional 248.9~~58.4 acres in the North (Duarte) POD, and to ~~increase the rate and duty allowed on 10.3 acres to the full value claimed.~~no longer recognize the 10.3 acres of open water surface on Allotments 314(S) and 316 in the South (Taylor) POD.

6. **Evidentiary Rulings.** Within the section titled "Evidentiary Rulings" of the Proposed Order, the first paragraph is modified as follows:

a. Corrections are made to the following two items on the list of Evidentiary Rulings (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

i. ~~Paul~~ Richard Fairclo's Rebuttal Testimony on behalf of Claimants

ii. ~~Richard~~ Paul Fairclo's Direct and Rebuttal Testimony on behalf of Claimants

b. The REBUTTAL TESTIMONY OF RICHARD DUARTE dated February 7, 2006, is added to the list of items that were admitted into the record.

c. The AFFIDAVIT OF RONALD S. YOCKIM IN REBUTTAL dated February 10, 2006, is added to the list of items that were admitted into the record.

Reasons for Modification: To correct scrivener's errors and omissions from the list of Evidentiary Rulings.

7. **Findings of Fact.** The Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the general reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: (1) To correct scrivener's errors and provide clarity of evidence in the record. (2) To provide evidence from Duarte's Rebuttal Testimony which was omitted from the list of evidentiary rulings. (3) ~~To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow, an issue raised in exceptions by the Claimants. (4)~~ To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions by the Claimants. (~~4~~5) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by the first non-Indian successor(s) after transfer from Indian ownership, an issue raised in exceptions by the Claimants. (~~5~~6) To provide evidence

from the record to substantiate continued use of water by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions by the Claimants. (67) ~~To provide evidence from the record for establishing the appropriate rate, duty, and season of use on 10.3 acres within Allotments 314(S) and 316, an issue raised in exceptions by the Claimants. (8)~~ In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record.

The Modified Proposed Order Findings of Fact

(1) On December 3, 1990, John House filed Claim 124 with OWRD for a water right in the Klamath Basin. (OWRD Ex. 1 at 1- ~~10~~ 9.) The claimed lands cover eight former Indian allotments that were allotted to individual Indian allottees as well as 8.2 acres of unallotted tribal lands. (Book Direct at 7.) The property to which Claim 124 is appurtenant was subsequently purchased by Richard Duarte and Claude Taylor[2] (Claimants). (Book Direct at 4; OWRD Ex. 1 at 21, 28-30, 51.) Richard Duarte owns 307.3 acres located north of the Sprague River (North Parcel) within Allotments 314(N)[3], 449, and 1126, including 8.2 acres within an unallotted tribal parcel. Claude Taylor owns 387.8 acres located south of the Sprague River (South Parcel) within allotments 314(S)[4], 315, 316, 317, 318, and 447. (Book ~~Rebuttal~~ Direct at ~~7~~ 4-5, Ex. U2; OWRD Ex. 1 at 64.)
Reasons for Modification: To provide corrected and additional citations to the record.

(2) Claimants are asserting a *Walton* claim for water from the Sprague River as non-Indian successors to ~~a~~ Klamath Indian Allottees, and a Klamath Termination Act claim for water from the Sprague River as non-Indian successors to unallotted Klamath Indian Reservation lands, claiming sufficient water to irrigate each allotment's share of the Tribe's "practicably ~~practically~~ irrigable acreage" (PIA). Claim 124 is for diversion of 17.34 cubic feet per second (cfs) from the Sprague River, tributary to the Williamson River, to irrigate 695.1 acres of hay and pasture grass. (~~*Id.*~~ OWRD Ex. 1 at 1-9.) The claimed place of use is located in Section 5, Section 8, and Section ~~13~~ 17 in Township 36 South, Range 12 East, W.M. (OWRD Ex. 1 at 4-5, 63.) The claimed point of diversion for the North Parcel is located in the SE¼ SW¼ of Section 8 and for the South Parcel is located in SE¼ NE¼ of Section 17. (OWRD Ex. 1 at 3, 63.) The claimed period of use is

[2] Sprague River Cattle Company, successor in interest to Claude Taylor
[3] 314(N) refers to that portion of Allotment 314 north of the Sprague River.
[4] 314(S) refers to that portion of Allotment 314 south of the Sprague River.

March 10 through November 10. (OWRD Ex. 1 at 8.) The claimed priority date is October 14, 1864, the date the Klamath Indian Reservation was created. Claimants have state water rights on all of the claimed lands with priority dates ~~ranging from~~ November 26, 1963 for Certificate 48537 (Allotments 314, 315, 316, 317, 318, 447), ~~to~~ and November 10, 1967 for Certificate 49275 (Allotments 449, 1126, 8.2 acres of unallotted lands) for surface water rights authorizing use of water from the Sprague River. ~~and~~ They also have one ground water certificate for supplemental irrigation on a portion of the claimed lands with a priority date of 1966. (OWRD Ex. 1 at 88-96.) The locations of the claimed points of diversions are the same locations as the points of diversions listed on these surface water certificates. (OWRD Ex. 1 at 3, 63, 88-93.) The claimed point of diversion which serves the North Parcel is still used on the Duarte lands, and the claimed point of diversion which serves the South Parcel is still used on the Taylor lands. (Book Direct at 16-17.) The United States concedes that Claimant Taylor has established *Walton* water rights to 366.4 of his acres and Claimant Duarte to 58.4 of his acres. (Book Rebuttal at 7.)

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record; to correct a scrivener's error (Section 13 is corrected to Section 17).

(3) On October 4, 1999, the Adjudicator of the Klamath Basin Adjudication issued a Preliminary Evaluation, recommending approval of this claim for a smaller quantity than originally claimed, and for a period of use of March 1 through October 31. (OWRD Ex. 189-193.)

North Parcel Allotments (Duarte) (total claimed 307.3 acres)

Allotment 449 (152.3 acres claimed)

(4) Allotment 449 is located within the NE¼, Section 8, Township 36 South, Range 12 East, W.M. and includes 152.3 acres of claimed lands. (Ex. U2; OWRD Ex. 1 at 63.) Allotment 449 of the North Parcel was originally allotted to Thomas G. Smith, a Klamath Indian, and conveyed to him from the United States in fee simple on ~~November 15, 1920~~ August 13, 1920. (Book Direct at 11; Ex. U3; Ex. U6 at 7.) On

July 30, 1927, Klamath County filed a Complaint against Mr. Smith for failure to pay taxes from 1921 through 1925. (Klamath County Complaint, Paragraph IV; Ex. U18 at 5.) In its Complaint, Klamath County requested a "judgment, order and decree" against Mr. Smith's property for "the amount of taxes, interest and penalties and costs due and charged against said property." (*Id*. at Paragraph VIII; Ex. U18 at 6.) The sheriff was directed to sell each tract and parcel of Mr. Smith's land in a public sale. (*Id*.) The allotment was sold by auction on June 2, 1928. (Sheriff's Deed, Ex. U18 at 9.) Klamath County submitted the only bid and acquired the property on October ~~10~~ 20, 1930. (~~Sheriff's Return of Sale~~ Sheriff's Deed, Ex. U18 at 9.) Klamath County did not develop or perfect a water right on Allotment 449. In 1935 (on October 16), Klamath County sold the property to George A. Default, a Klamath Indian. (Bargain Sale Deed, Ex. U18 at 22; Ex. C25, C29.) Allotment 449 remained in Indian ownership until 1966, when it was sold by Klamath Indian Effie Driscoll to Paul Fairclo. (Ex. C15.)

¶ Lands within Allotment 449 are subject to natural overflow from the Sprague River. (Ex. C45; Fairclo Direct at 2.) While under Indian ownership, a Certificate of Appraisement (from an onsite inspection made May 20, 1920) characterized the land within Allotment 449 as river bottom land best adapted for grazing. (Ex. C45.) Beneficial use of water occurred under Indian ownership, beginning no later than 1941, as evidenced by the presence of fields and haying activity in 1941 and 1953 (Book Direct at 22), and cattle grazing by Indian owners (Ex. C55 at 47). Paul Fairclo leased Allotment 449 from Indian owners for the purpose of grazing cattle prior to his purchase of the property in 1966. (Fairclo Direct at 2; Ex. C55 at 15-16.) Paul Fairclo established a state water right on this parcel with a priority date of November 10, 1967. (Book Direct at ~~17~~ 19; OWRD Ex. 1 at 92.) The 152.3 acres of claimed lands within Allotment 449 have been continuously authorized for irrigation from the Sprague River under Permit S-32737 / Certificate 49275 since 1967 (OWRD Ex. 1 at 92) ~~and have continued to be irrigated as claimed~~. (Fairclo Direct at 4-5; Paul Fairclo Rebuttal at 1-2; Duarte Rebuttal at 1-4.) Irrigation on these lands is currently authorized from the same point of diversion as claimed, which is located in Government Lot 30, SE¼ SW¼, Section 8, Township 36 North, Range 12 East, W.M. (OWRD Ex 1 at 3-5, 63, 93.)

The elements necessary for a *Walton* claim for 152.3 acres in Allotment 449 have not been established. ~~The water rights granted for the 152.3 acres within this allotment should have the following attributes: the rate of diversion should be 3.81 cfs with a limit of 1/40 cfs per acre and a water duty of 3.0 acre-feet per acre during an irrigation season. The irrigation season should be March 10 to November 10, as claimed.~~

Reasons for Modifications: Using evidence on the record, to provide more specific information with reference to what was claimed; to correct the date the allotment was conveyed from the United States to the allottee; to correct the date that Klamath County sold the property to George Default; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record.

Allotment 314(N) (48.3 acres claimed)

(5) Allotment 314(N) (north of the Sprague River) is located within the NE¼ SW¼, NW¼ SW¼, and SE¼ SW¼, Section 8, Township 36 South, Range 12 East, W.M. and includes 48.3 acres of claimed lands. (Ex. U2; OWRD Ex. 1 at 63.) Regarding Allotment 314(N) of the North Parcel, a fee simple patent was granted to Margaret David Johnson, an Indian, on September 12, 1958. (Ex. U6 at 1.) On February 14, 1962, the first non-Indians, Paul and Ann Fairclo, purchased it. (Book Direct at 10; OWRD Ex. 1 at 52.)

¶ Lands within Allotment 314(N) are subject to natural overflow from the Sprague River. (OWRD Ex. 1 at 47, 73; Fairclo Direct at 2; C34 at 4-6.) Beneficial use of water began prior to transfer from Indian ownership to non-Indian successors. In 1910, a lease approved farming and grazing for Allotment 314 (North and South). (Ex. C36.) A 1957 appraisal report asserted that the "Sprague River flows through the subject [Allotment 314] dividing it into four or more segments, all of which are subject to flooding each year until late in June. This flooding helps to produce good pasturage and cattle are able to wade the river when flood waters recede to normal flow." (Ex. C34 at 4.) Fairclo leased the property from Indian owners for the purpose of grazing cattle prior to his purchase in 1962. (OWRD Ex. 1 at 47; Ex. C55 at 15-16; Fairclo Direct at 2). In addition to natural overflow from the Sprague River, drain water from artesian wells was delivered to this parcel through a drain ditch along the south line of Allotment 449 prior to transfer of Indian ownership to non-Indian successor Fairclo. (Fairclo Direct at 4; Ex. C55 at 36-38.)

Water from this drain ditch was cut off from Allotment 314(N) when Paul Fairclo constructed a north-south canal along the west sides of Allotments 447 and 449. This canal was part of a new irrigation system for a diversion from the Sprague River (authorized under Permit S-29348 / Certificate 48537). (Fairclo Direct at 4; C55 at 37-39; OWRD Ex 1 at 88-91.) ~~Paul Fairclo has unsuccessfully attempted irrigation in this Allotment. (*Id*. at 18.)~~ Paul Fairclo has unsuccessfully attempted irrigation in this Allotment. Paul Fairclo has admitted that, after ~~a~~ the drain ditch was severed~~,~~ ~~irrigation~~ "we took water from this irrigation system across there [to Allotment 314(N)] but I've got to tell you that it wasn't too successful because the pipe wasn't always in good shape and ~~that~~ we didn't always irrigate it." (Book Rebuttal at 6; C55 at 39 - quotes from Paul Fairclo's deposition.) During the time when irrigation "wasn't too successful," Fairclo testified that he continued to run cattle in this allotment. (Ex. C55 at 42.) When using the Sprague River irrigation system on Allotment 314(N), Fairclo describes how he used a (northern) pump at Drew Road to pull water into the [north-south] ditch. Then he could turn water out onto the allotment through a series of head gates and culverts. (Fairclo Direct at 4.) A 1986 OWRD Field Investigation Report noted that the northern pump was missing as it was used to replace a pump on a different parcel that year, and that there were no means to irrigate this land other than the spring-time overflow. ~~(Book Direct at 22.)~~ (OWRD Ex. 1 at 73.) The 48.3 acres of claimed lands within Allotment 314(N) have been continuously authorized for irrigation from the Sprague River under Permit S-29348 / Certificate 48537 since the early 1960s (OWRD Ex. 1 at 48, 88-90) and have continued to be irrigated as claimed. (OWRD Ex. 1 at 47-48; Fairclo Direct at 4; Duarte Rebuttal at 1-4.) Irrigation on these lands is currently authorized from the same point of diversion as claimed, which is located in Government Lot 16, SE¼ NE¼, Section 17, Township 36 North, Range 12 East, W.M. (OWRD Ex 1 at 3-5, 63, 90.)

The elements necessary for a *Walton* claim for 48.3 acres in Allotment 314(N) have not been established. ~~The water rights granted for the 48.3 acres within this allotment should have the following attributes: rate of diversion of 1.21 cfs with a limit of 1/40 cfs per acre and a water duty of 3.0 acre-feet per acre during an irrigation season. The irrigation season should be March 10 to November 10, as claimed.~~

Reasons for Modification: Using evidence on the record, to provide more specific information with reference to what was claimed; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record.

Allotment 1126 (98.5 acres claimed)

(6) Allotment 1126 is located within the S½ S½, Section 5, Township 36 South, Range 12 East, W.M. and includes 98.5 acres of claimed lands. (Ex. U2; OWRD Ex. 1 at 63.) Regarding Allotment 1126 of the North Parcel, the first non-Indian owners, Paul and Ann Fairclo, acquired the property in 1966. (Book Direct at 12; Ex. U3.)

¶ Starting in 1967, ~~a~~ the claimed portion of Allotment 1126 started being irrigated from the Sprague River via Paul Fairclo's diversion under Permit S-32737, which was certificated in 1980 (Certificate 49275). (Book Direct at 19; OWRD Ex. 1 at 92.) Water from this diversion ~~did not~~ did not reach~~es~~ the 15.9 acres of Allotment 1126 lying north of the functioning ditch~~.~~ (*Id.* at 23.) ~~The Sprague River did not continuously reach and the~~ The Sprague River did not continuously reach 24.5 acres in the northeastern portion of the allotment using spreader ditches and handlines (pipe). (*Id.*) (OWRD Ex. 1 at 92-94; Fairclo Direct at 5; Paul Fairclo Rebuttal at 1-2, Ex. A, B; Duarte Rebuttal at 2.) These 24.5 acres have been authorized for supplemental ~~irrigated~~ irrigation with well water pursuant to Certificate 49274, starting in 1966. (Book Direct at 19-20, OWRD Ex. 1 at 31.) This groundwater certificate for supplemental irrigation covers ~~all~~ the claimed portion of Allotment 1126, and was perfected on the same day as its primary water right Certificate 49275. (Book at 19-20; ~~Ex. U19;~~ OWRD Ex. 1 at 31-34.) At times the well water authorized under this supplemental certificate has been utilized for irrigation. (Ex. U17.) The United States concedes that Claimants and Paul Fairclo have met their burden of establishing *Walton* water rights for 58.1 acres within Allotment 1126 because these acres were reasonably developed by the first non-Indian owner, Paul Fairclo, from a Sprague River diversion with ~~a~~ state water right Certificate 49275. (~~*Id.*,~~Book Direct at 23; Book Rebuttal at 6-7.) ~~However, the remaining 40.4 acres of claimed lands within Allotment 1126 have also been developed with reasonable diligence for irrigation from the Sprague River, with irrigation beginning within a year following transfer from Indian~~

~~ownership. This development is reflected in Permit S-32737 / Certificate 49275. (OWRD Ex. 1 at 92). All 98.5 acres claimed have continued to be irrigated. (Fairclo Direct at 4-5; Duarte Rebuttal at 1-4.)~~ Irrigation on these lands is currently authorized from the same point of diversion as claimed, which is located in Government Lot 30, SE¼ SW¼, Section 8, Township 36 North, Range 12 East, W.M. (OWRD Ex 1 at 3-5, 63, 93.)

The elements necessary for a *Walton* claim for ~~98.5~~ 58.1 acres in Allotment 1126 have been established. The water rights granted for the ~~98.5~~ 58.1 acres within this allotment should have the following attributes: rate of diversion of ~~2.46~~ 1.45 cfs with a limit of 1/40 cfs per acre and a water duty of 3.0 acre-feet per acre during an irrigation season. The irrigation season should be March 10 to November 10, as claimed.

Reasons for Modification: Using evidence on the record, to provide more specific information with reference to what was claimed; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record. ~~In addition, OWRD has determined that the ALJ's finding that the diversion did not reach the 15.9 acres or continuously reach the 24.5 acres is not supported by a preponderance of evidence on the record.~~

Unallotted Lands (8.2 acres claimed)

(7) The unallotted tribal lands claimed in the Northern Parcel include 8.2 acres within the N½ SE¼, Section 5, Township 36 South, Range 12 East, W.M. (Ex. U2; OWRD Ex. 1 at 63.) Regarding the 8.2 acres of the unallotted tribal part in the Northern Parcel, the first non-Indian owners were Paul and Ann Fairclo in 1966. (Book Direct at 13.)

¶ This unallotted parcel is located in the far northeastern portion of Claim 124. ~~and does not appear irrigated in most aerial photographs. (Book Direct at 23-24.)~~ [5] ~~The acres that do appear to be irrigated are covered by the groundwater from the well subject to Certificate 49274 (*Id.*; Ex. U20).~~ Paul Fairclo established a diversion for irrigation on this parcel from the Sprague River under a state water right with a priority date of November 10, 1967 (Permit S-32737 / Certificate 49275. (Book Direct at 17; OWRD Ex.

1 at 92-93.) According to Book, only 0.3 acres of the 8.2 acres in the unallotted parcel appear to receive Sprague River water from the Fairclo diversion~~,~~ under Certificate 49275, and the remaining 7.9 acres are irrigated only by the well (Certificate 49274) or have not been continuously irrigated. (Id. at ~~23~~ 24; Ex. U3.) The United States concedes that Claimants and Fairclo have established Walton water rights for these 0.3 acres. (Book Rebuttal at 7.) The remaining 7.9 acres are mostly irrigated by groundwater. (*Id.*; Ex. U20.) ~~The remaining 7.9 acres are mostly irrigated by groundwater. (*Id.*; Ex. U20.)~~ However, Fairclo irrigated the lands in the N½ S½ of Section 5 from the Sprague River point of diversion with the use of pumps and hand lines (Fairclo Direct at 4-5; Paul Fairclo Rebuttal at 1-2, Ex. A, B; OWRD Ex. 1 at 94), and these lands have continued to be irrigated (Duarte Rebuttal at 1-4). The 8.2 acres of claimed lands have been continuously authorized for irrigation from the Sprague River under Permit S-32737 / Certificate 49275 since 1967. (OWRD Ex. 1 at 92.) Irrigation on these lands is currently authorized from the same point of diversion as claimed, which is located in Government Lot 30, SE¼ SW¼, Section 8, Township 36 North, Range 12 East, W.M. (OWRD Ex 1 at 3-5, 63, 93.)

The elements necessary for a Klamath Termination Act claim for ~~8.2~~0.3 acres of unallotted lands have been established. The water rights granted for the ~~8.2~~0.3 acres within this allotment should have the following attributes: rate of diversion of ~~0.20~~0.01 cfs with a limit of 1/40 cfs per acre and a water duty of 3.0 acre-feet per acre during an irrigation season. The irrigation season should be March 10 to November 10, as claimed.

Reasons for Modification: Using evidence on the record, to provide more specific information with reference to what was claimed; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record. In addition, the statement that the unallotted parcel does not appear irrigated in most aerial photographs is stricken because OWRD finds that no such statement is made in the Affidavit and Testimony of Dale Book (Book Direct) at 23 or 24, nor in paragraph 16 where Book summarizes his analysis of aerial photographs for the North Parcel/Duarte Lands. ~~The statement that 7.9 acres are mostly irrigated by ground water was stricken because OWRD finds that it is not supported by a preponderance of the evidence on the record.~~

[5] In the Affidavit and Testimony of Dale Book (Book Direct), no such statement is made at pages 23 or 24, or in Section 16 of the testimony, where Book summarizes his analysis of aerial photographs for the North Parcel/Duarte Lands.

South Parcel Allotments (Taylor)(total claimed 387.8 acres)

Allotments 314(S), 315, 316, 317, 318, 447

(8) Allotment 314(S) (south of the Sprague River) is located within the NW¼ SW¼ and S½, Section 8, and includes 56.9 acres of claimed lands. Allotment 315 is located within the NE¼, Section 17, and includes 98.2 acres of claimed lands. Allotment 316 is located within the NW¼, Section 17, and includes 146.1 acres of claimed lands. Allotment 317 is located within the N½ S½, Section 17, and includes 69.5 acres of claimed lands. Allotment 318 is located within the N½ S½ S½ Section 17, and includes 6.0 acres of claimed lands. These allotments are all located within Township 36 South, Range 12 East, W.M (Ex. U2; OWRD Ex. 1 at 63.) Allotments 314(S), 315, 316, 317, 318 of the South Parcel (all of the south parcel allotments except for Allotment 447) were first purchased by a non-Indian, Paul Fairclo, in 1962. (Book Direct at 8-11; Ex. U3.)

¶ (9) Allotment 447 is located within the SE¼, Section 8, Township 36 South, Range 12 East, W.M. and includes 11.1 acres of claimed lands. (Ex. U2; OWRD Ex. 1 at 63.) The record contains no deed evidence to identify the first non-Indian owner or successor ~~purchaser~~ of Allotment 447 of the South Parcel. (Book Direct at 10-11.) The elements necessary for a *Walton* claim have not been established for Allotment 447.

¶ (10) Lands within the south parcel allotments are subject to natural overflow from the Sprague River. (OWRD Ex. 1 at 47; Paul Fairclo Direct at 2; Ex. C34 at 4-16.) Beneficial use of water began prior to transfer from Indian ownership to non-Indian successors. In 1910, farming and grazing leases were approved for Allotments 314(S), 316 (Ex. C36), and 315 (Ex. C38). While under Indian ownership, a Certificate of Appraisement (from an onsite inspection made September 25, 1945) characterized 720 acres within Allotments 314-5-6-7-8 as grazing land. (Ex. C32.) Fairclo leased the property from Indian owners for the purpose of grazing cattle prior to his purchase in 1962. (OWRD Ex. 1 at 47; Ex. C55, page 15; Fairclo Direct at 2). In 1963, Paul Fairclo developed an irrigation system in the South Parcel. (Book Direct at 16.) He secured state water right Certificate 48537. (Book Direct at 20; Ex. U19.) Based on his analysis of

aerial photos of the South Parcel Allotments, Book opined that 366.4 acres within Allotments 314(S), 315, 316, 317, 318 have been continuously irrigated. (*Id*. at 21-22.) Book opined that 10.3 acres within Allotments 314(S), 315, 316, 317, 318 have not been continuously irrigated because the area has been under water in repeated aerial photographs. (Book Rebuttal at 3-4.) Although according to Book, the latest photo during a year was in late July and revealed flooding in the area~~.~~ (*Id*. at 4~~.~~), the area dries up later in the season (~~Direct Testimony of~~ Taylor Direct at 2). This flooding is typical, and is due in part to irrigation water that collects in areas of natural depressions. Such areas dry out in late summer and are grazed. (Taylor Direct at 2, Ex. 1; Ex. C55 at 34-35.) ~~The water duty should be reduced by at least one-half to account for the limited period of growth and the season limited to August and September. (Book Rebuttal at 4.)~~ The ~~376.7~~ 366.4 acres of claimed lands within Allotments 314(S), 315, 316, 317, 318 have been continuously authorized for irrigation from the Sprague River under Permit S-29348 / Certificate 48537 since the early 1960s. (OWRD Ex. 1 at 48, 88-90.) Irrigation on these lands is currently authorized from the same point of diversion as claimed, which is located in Government Lot 16, SE¼ NE¼, Section 17, Township 36 North, Range 12 East, W.M. (OWRD Ex 1 at 3-5, 63, 90.)

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide clarification to a citation to the record. ~~In addition, OWRD has determined that the ALJ's finding with respect to the statement that the water duty on 10.3 acres should be reduced by at least one-half to account for the limited period of growth is not supported by a preponderance of the evidence on the record. OWRD has determined that the ALJ's proposal to limit the season of use to August and September on these 10.3 acres is not supported by a preponderance of the evidence on the record and therefore has been stricken; OWRD finds that no evidence of any statement made about the season of use on this 10.3 acres in the rebuttal testimony of Book at 4.~~

¶ (11) The elements necessary for a *Walton* claim for ~~376.7~~ 366.4 acres in the South Parcel have been established. The water rights granted for the ~~366.1~~ ~~376.7~~ 366.4 acres within these allotments (314(S), 315, 316, 317, 318) should have the following attributes: ~~the~~ a rate of diversion ~~should be 1/cfs per 40 acres~~ of ~~9.42~~ 9.16 cfs with a limit of 1/40 cfs per acre during an irrigation season, and ~~the~~ a water duty ~~should be~~ of 3.0 acre-feet per acre~~,~~ during an irrigation season. ~~and~~ The irrigation season should be March 10 to

~~October 31~~ November 10, as claimed. ~~(Book Direct at 24-25.) Claimants did not contest these attributes.~~

Reasons for Modification: To add clarification using evidence on the record. In addition, OWRD has determined that the ALJ's proposed season of use March 1 to October 31 is not supported by a preponderance of the evidence on the record. Note: The 366.1 acres noted in the ALJ's proposed order (second sentence) is a scrivener's error; it should have been 366.4 acres as referenced in Proposed Order Findings of Facts 2 and 9.

8. **Conclusions of Law.** The Proposed Order's "Conclusions of Law" section is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

1. The first non-Indian owner or successor rule, as defined in the *Walton* line of cases, dictates that Klamath County was the first non-Indian owner or successor of ~~The first purchaser rule, as defined in the *Walton* line of cases, dictates that Klamath County was the first non-Indian owner of~~ Allotment 449, which was acquired initially through foreclosure and subsequently through Sheriff's public auction~~, was held by Klamath County for less than five years before being returned to Indian ownership~~.

2. ~~Beneficial use of water by the method of n~~Natural overflow ~~cannot establish~~ is not a valid basis for a *Walton* water right~~, and is established~~ as claimed on Allotments 314(S), 315, 316, 317, 318 in the South Parcel, and on Allotments 314(N) and 449 in the North Parcel.

~~3. Irrigation has continued on the claimed portions of part of Allotments 314(N), 1126, and the unallotted portion of the Northern Parcel. has been continuous.~~

~~4. Claimants' *Walton* water right is not reduced for areas of open water in any portions of Allotments 314(S) and 316. , but the water duty for these areas is reduced by one-half.~~

3~~5~~. Claimants have not provided sufficient title information to establish a *Walton* water right in Allotment 447.

46. The Klamath Tribes Termination Act is a valid basis for ~~the portion of the claim covering~~0.3 acres claimed in the unallotted, former Klamath Indian Reservation land.

Reason for Modifications: To ensure that final conclusions reflect the evidence in the record and the application of the appropriate legal bases to the evidence in the record.

9. **Opinion.** The section titled "Opinion" of the Proposed Order is replaced in its entirety as follows:

OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS and the GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS.

In addition, OWRD incorporates into the Opinion section all the paragraphs below:

~~**Application of Walton Elements to the Modified Proposed Order Findings of Fact**~~

~~The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division,* 47 Or App 437 (1980); *Metcalf v. AFSD,* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed. The proponent of a fact or position has the burden of presenting evidence to support that fact or position. ORS 183.450(2).~~

~~The issues in contention are listed above for the 270.3 acres in dispute. The issues are considered separately below.~~

~~**1. Klamath County as a non-Indian successor of Allotment 449**~~

~~Claimants assert *Walton* water rights for 152.3 acres within Allotment 449 located in the North Parcel of this claim. (Book Direct, Ex. U3.) They concede that Klamath County is the first non-Indian owner of Allotment 449, purchased in a foreclosure sale of the property.[6] They argue that such ownership should not count as the first non-Indian purchaser because Klamath County acquired the allotment through foreclosure and public auction. (*See* Claimants' Closing Brief at 22-28.)~~

~~Claimants advance a number of arguments in support of their position. First, they assert that the *Walton* line of cases is distinguishable on their facts from the present case with respect to the limitation on the appropriation of water by the first non-Indian~~

~~[6] Claimants argued that Klamath County acquired the property through foreclosure, which seems to imply that it was only foreclosing on a note it held. Such was not the case. Klamath County acquired the land at a public auction as any other purchaser could.~~

appropriator. They suggest that the court in the *Walton* cases was not confronted by the situation presented in this case, where the property was acquired in foreclosure. Second, Claimants argue that Klamath County should not be treated as the first non-Indian purchaser because of Klamath County's alleged inability to develop the property it purchased. Claimants rely on the language that "a non-Indian purchaser, under no competitive disability vis-à-vis other water users, may not retain the right to that quantity of water despite non-use." *Walton II*, 647 F.2d at 51 (emphasis by Claimants). Claimants argue that Klamath County was not a user of water and was at a competitive disability because it had no legal right to develop irrigation. Third, Claimants argue that such rights cannot be lost by inaction by a governmental entity.

It is unnecessary to address the effects of Klamath County's purchase of the property, whether due to Klamath County's status as a government entity or due to the particular circumstances in which Klamath County acquired the property. OWRD declines to do so.

In *United States v. Anderson*, the Ninth Circuit addressed the effect on *Walton* rights of reacquisition by an Indian tribe after a period of non-Indian ownership. The court held that:

> a non-Indian successor acquires a right to that quantity of water being utilized at the time title passes, plus that amount of water which the successor puts to beneficial use with reasonable diligence following the transfer of title. Where "the full measure of the Indian's reserved water right is not acquired by this means and maintained through continued use, it is lost to the non-Indian successor." Consequently, on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse and those rights will have an original, date-of-the-reservation priority.

736 F2d 1358, 1362 (1984). As is discussed in greater detail in the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS, "reasonable diligence" is the measure of whether a *Walton* right has been timely developed after transfer from Indian ownership. Per *Anderson*, if the period for reasonably diligent development expired prior to reacquisition of the property by a member of the Klamath Tribes, reacquisition by the member cannot revitalize the right. However, if the period for reasonably diligent development has not expired by the time of reacquisition of the property by a member of the Klamath Tribes, then an inchoate right remains appurtenant to the property. If the inchoate right has returned intact to Indian ownership, the Indian owner retains the right to hold the inchoate right indefinitely, so long as the property remains within Indian ownership.

In the case of Allotment 449, the property was in non-Indian ownership between October 20, 1930 and October 16, 1935, a period just short of five years. The period for reasonably diligent development of a water right is dependent on a number of circumstances, and may vary in length. Generally, though, within a five year period an inchoate right will not be considered to have expired for failure to diligently develop. The five-year period is the default period for diligent development under Oregon's Water

Rights Act. ORS 537.230(1).Given this general rule, and the considerable size of the allotment, we conclude that the inchoate *Walton* right had not expired by the time it re-entered Indian ownership on October 16, 1935, and therefore remained eligible for development.[7]

2. Natural flooding/ natural overflow

There is no dispute that the land in Claim 124 was formerly part of the Klamath Indian Reservation, that the land was allotted to Klamath tribal members, and that the land was transferred to non-Indians. Claimants claim a water right for grass and pasture for livestock, based in good part on natural overflow of the Sprague River.

Allotment 449 is subject to natural overflow, and beneficial use of water by natural overflow was established under Indian ownership no later than 1941, after the period of non-Indian ownership described above. Allotments 314 (North and South), 315, 316, 317, and 318 are subject to natural overflow, and beneficial use of water by natural overflow on these allotments was established under Indian ownership prior to transfer to non-Indian successors. Beneficial use of water by natural overflow in Allotment 314(N) continued under non-Indian ownership during times when an irritation system was not utilized.

3. Reasonable diligence

Allotment 449

Lands within Allotment 449 are subject to natural overflow from the Sprague River. Beneficial use of water by the method of natural overflow from the Sprague River was established no later than 1941, as evidenced by the presence of fields and haying activity in 1941 and 1953 (Book Direct at 22), and cattle grazing by Indian owners (Ex. C55 at 47.) Paul Fairclo leased Allotment 449 from Indian owners for the purpose of grazing cattle prior to his purchase of the property in 1966. (Fairclo Direct at 2; Ex. C55 at 15-16.) Paul Fairclo developed an irrigation system for these lands under the authority of a state water right (Permit S-32737 / Certificate 49275) with a priority date of November 10, 1967. Beneficial use of water has continued as claimed. (Fairclo Direct at 4; Paul Fairclo Rebuttal at 1-2; Duarte Rebuttal at 1-4.) Because the right was not lost as to Allotment 449 during Klamath County's ownership, from 1930 to 1935, beneficial use under subsequent Indian ownership is sufficient to establish reasonably diligent development.

Allotment 314(N)

Lands within this allotment are subject to natural overflow from the Sprague River. Beneficial use of water by the method of natural overflow from the Sprague River

[7] Oregon Administrative Rule 690-028-0026(3) provides that in a filing for Practicably Irrigable Acreage a claimant shall document through a chain of title statement that the lands have never had more than *five consecutive years* of non-Indian ownership since the date of the reservation (emphasis added). We interpret this rule to pertain only to the documentation accompanying a claim, and not to set a fixed period for reasonably diligent development of Practicably Irrigable Acreage (inchoate acreage).

was established while still in Indian ownership. (Ex. C34 at 4-6, C36, C55 at 15-16; OWRD Ex. 1 at 47, Fairclo Direct at 2.) In addition to natural overflow from the Sprague River, tailwater from an artisan well(s) was delivered to this allotment through an east-west drain ditch prior to transfer of Allotment 314(N) from Indian ownership to non-Indian successors. The first non-Indian successors were Paul and Ann Fairclo in 1962. Fairclo cut off the water supply from the east-west drain ditch when establishing a new irrigation system from the Sprague River; the drain ditch was severed during the construction of a north-south canal designed to utilize Sprague River water. Dale Book, who was qualified as an expert and whose testimony was not rebutted by expert testimony, has opined that, based on aerial photographs, no irrigation has occurred within Allotment 314(N) because the parcel appears dry in aerial photographs after a tailwater ditch at the south end of Allotment 449 was severed prior to 1968. (Book Direct at 17-18.) Book's conclusion is based on his analysis of photographs from five days taken over a 32-year span (1968 – 2000). This is not an adequate assessment of whether beneficial use of water was made with reasonable diligence or continued. During limited periods of time when Allotment 314(N) was not irrigated using an irrigation system, Fairclo continued to graze cattle on this allotment, making beneficial use of Sprague River water by the method of natural overflow. (Ex. C55 at 42; OWRD Ex. 1 at 73.) Fairclo perfected the use of irrigation water from the Sprague River to this allotment by 1979 as evidenced by the issuance of a water right certificate including these lands. (OWRD Ex. 1 at 88-91.) Beneficial use of water has continued as claimed. (OWRD Ex. 1 at 47-48; Fairclo Direct at 4; Duarte Rebuttal at 1-4.)

Allotment 1126

The first non-Indian successors of this allotment were Paul and Ann Fairclo in 1966. The United States concedes that Claimants and Paul Fairclo have met their burden of establishing *Walton* water rights for 58.1 acres within Allotment 1126 because these acres were reasonably developed and continuously irrigated by Fairclo. (Book Direct at 23.) Book opined that 15.9 acres located within Allotment 1126 are above the functioning ditch and have not been continuously irrigated (*Id.*). Further, he stated that the well authorized by Certificate 49274 is the only source of irrigation for the 24.5 acres east of the draw located in Allotment 1126. (Book Direct at 17; Ex. U20.) A groundwater certificate covers the claimed lands in Allotment 1126, and at times these lands have been irrigated under the groundwater certificate. However, this ground water right is supplemental to Certificate 49275 which specifically authorizes primary irrigation from the Sprague River. The claimed portion of Allotment 1126 started being irrigated from the Sprague River in 1967 via Paul Fairclo's diversion under Permit S-32737. (Book Direct at 19; OWRD Ex. 1 at 92.) Fairclo perfected use of irrigation water from the Sprague River on all the claimed lands within Allotment 1126 as evidenced by the issuance of water right Certificate 49275 in 1980. (OWRD Ex. 1 at 92.) The record establishes that water from the Sprague River diversion reaches these 40.8 acres using spreader ditches and handlines (pipe). (OWRD Ex. 1 at 94; Fairclo Direct at 4-5; Paul Fairclo Rebuttal at 1-2, Ex. A, B; Duarte Rebuttal at 1-4.) Beneficial use of water was made with reasonable diligence on 98.5 acres within Allotment 1126 after transfer from Indian ownership to non-Indian successors. Beneficial use of water on the claimed acres in Allotment 1126, including the 15.9 acres north of the ditch, and the 24.5 acres in the

~~northeastern portion of the allotment, has continued as claimed. (Fairclo Direct at 4-5; Paul Fairclo Rebuttal at 1-2, Ex. A, B; Duarte Rebuttal at 1-4.)~~

~~**Unallotted Lands in Section 5**~~

~~The first non-Indian successors of these parcels of land were Paul and Ann Fairclo in 1966. The United States concedes that Claimants and Fairclo have established *Walton* water rights for these 0.3 acres of the 8.2 acres within the unallotted parcel. Book opined that 7.9 acres are served only by well water or have not been continuously irrigated. (Book at 24.) A groundwater certificate covers the claimed unallotted lands in Section 5, and at times these lands have been irrigated under the groundwater certificate. However, this groundwater right is supplemental to Certificate 49275, which specifically authorizes primary irrigation from the Sprague River. The claimed unallotted lands in Section 5 started being irrigated from the Sprague River in 1967 via Paul Fairclo's diversion under Permit S-32737. (Book Direct at 19; OWRD Ex. 1 at 92.) Fairclo perfected use of irrigation water from the Sprague River on 8.2 acres of unallotted lands in Section 5 as evidenced by the issuance of water right Certificate 49275 in 1980. (OWRD Ex. 1 at 92.) The record establishes that water from the Sprague River diversion reaches these 8.2 acres using spreader ditches and handlines (pipe). (OWRD Ex. 1 at 94; Fairclo Direct at 5; Paul Fairclo Rebuttal at 1-2, Ex. A, B; Duarte Rebuttal at 1-4.) Beneficial use of water was made with reasonable diligence on the 8.2 acres of unallotted lands in Section 5 after transfer from Indian ownership. Beneficial use has continued as claimed. (Fairclo Direct at 4-5; Paul Fairclo Rebuttal at 1-2, Ex. A, B; Duarte Rebuttal at 1-4.)~~

Allotments 314(S), 315, 316, 317, and 318

~~Lands within these allotments are subject to natural overflow from the Sprague River. Beneficial use of water by the method of natural overflow from the Sprague River was established under Indian ownership prior to transfer to non-Indian successors (Ex. C32, C34, C36, C38).~~ Paul Fairclo leased the property from Indian owners for the purpose of grazing cattle prior to his purchase of the land in 1962. (OWRD Ex. 1 at 47; Ex C55 at 15; Fairclo Direct at 2). After becoming the non-Indian successor to these allotments, Paul Fairclo developed an irrigation system for these lands under an established a state water right with a priority date of November 26, 1963 (Permit S-29348 / Certificate 48537). Beneficial use of water has continued as claimed. (OWRD Ex. 1 at 47-48; Fairclo Direct at 3-4; Taylor Direct at 1-3.)

Allotment 447

Claimants have not established *Walton* water rights for the 11.1 acres in Allotment 447 because the first non-Indian owner or successor ~~purchaser~~ is not identified. Furthermore, the Claimants have provided no evidence of the date when the property left Indian ownership.

4. Open water surface, Allotments 314(S) and 316

Book opined that 10.3 acres within Allotments 314(S) and 316 have not been irrigated because the area has been under water in repeated aerial photographs. (Book Rebuttal at 3-4.) Photographic evidence taken sparsely throughout the growing season

once revealed flooding in the area as late as July. At issue is whether or not beneficial use of water has been made on these 10.3 acres within Allotments 314(S) and 316. Testimony on behalf of Claimants establishes that this flooding recedes later in the season. Furthermore, testimony establishes that the flooding is typical, and is due in part to the irrigation water that collects in areas of natural depressions. ~~Given that these lands are grazed in late summer, beneficial use of water has been demonstrated on these 10.3 acres.~~ Water is applied only by the method of natural overflow on these 10.3 acres. Therefore, Claimants have not established *Walton* water rights.

~~The water rights granted for the 10.3 acres within these allotments should have attributes which are consistent with the appurtenant state water right certificates: rate of diversion of 0.26 cfs with a limit of 1/40 cfs per acre, and a water duty of 3.0 acre-feet per acre. The record supports the irrigation season as claimed and should be March 10 to November 10.~~

~~**5. Continued Use**~~

~~As described in the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS, a *Walton* claimant need not establish continuous beneficial use of water following initial development of the right. Instead, a contestant has the burden to prove that a claimant has abandoned the right after development. In this case, Book's testimony tends to show non-use of water on certain allotments on five specific days over a 32-year period, based on analysis of aerial photographs. The sporadic nature of this evidence is insufficient to establish abandonment of any portion of the developed rights. In addition, there is testimony that groundwater may have been used to irrigate portions of certain allotments during certain periods of time, and that Fairclo's ditch system may not have provided water to portions of certain allotments during certain periods of time. Again, this evidence of non-use is too sporadic to establish abandonment. In addition, Fairclo continued to graze cattle and make beneficial use of natural overflow during periods when the ditch system was unable to serve portions of certain allotments. The developed water rights have not been abandoned.~~

6. Summary

North Parcel:

Claimants have established *Walton* water rights for ~~299.1~~ 58.1 acres within Allotment~~s 314(N), 449, and~~ 1126, as explained above.

Claimants have established Klamath Termination Act water rights for 0.3 ~~8.2~~ acres of unallotted lands within Section 5, as explained above.

The water rights granted for the 58.4 ~~307.3~~ acres within Allotment 1126 and the unallotted lands within Section 5 ~~these allotments~~ should have attributes which are consistent with the appurtenant state water right certificates: the rate of diversion should be ~~7.68~~ 1.46 cfs with a limit of 1/40 cfs per acre, and the water duty should be 3.0 acre-

feet per acre. The record supports the irrigation season as claimed and should be March 10 to November 10.

South Parcel:

Claimants have established *Walton* water rights for ~~376.7~~366.4 acres within Allotments 314(S), 315, 316, 317, and 318, as explained above.

The water rights granted for the ~~376.7~~366.4 acres within these allotments should have attributes which are consistent with the appurtenant state water right certificates: the rate of diversion should be ~~9.42~~9.16 cfs with a limit of 1/40 cfs per acre, and the water duty should be 3.0 acre-feet per acre. The record supports the irrigation season as claimed and should be March 10 to November 10.

Reasons for Modification: (1) To correct and clarify the elements of a *Walton* water right. (2) To provide clarity of evidence in the record and further substantiate approval of the claim, especially pertaining to beneficial use of water prior to transfer from Indian ownership and beneficial use of water being made with reasonable diligence after transfer to non-Indian successors. (3) To correct the basis used to evaluate a period of non-Indian ownership in Allotment 449. (4) To apply the appropriate legal bases to the Proposed Order's modified findings of fact.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, above.
   c. The "Issues" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, above.
   e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.8, above.
   f. The "Opinion" is replaced in its entirety as set forth in Section A.9, above.
   g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 124. Consistent with Sections A.7, A. 8 and A.9, above, the outcome of the Order has been modified to recognize a right for irrigation on 58.4 ~~an additional 248.9~~ acres in the North (Duarte) POD, and to ~~increase the rate and duty allowed on 10.3 acres to the full value claimed~~no longer recognize the 10.3 acres of open water surface on Allotments 314(S) and 316 in the South (Taylor) POD.

2. The elements of a Walton claim are established for the acres described in the Water Right Claim Description, below. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

3. The Klamath Tribes Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 et seq. for an Indian reserved water right is a valid basis for a portion of this claim. The elements of a Klamath Termination Act claim are established for 1.1 acres within the SE¼ SW¼, and 7.1 acres within the SE¼ SE¼, SECTION 5, TOWNSHIP 36 SOUTH, RANGE 12 EAST, W.M. The GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS is incorporated as if set forth fully herein.

~~4. Beneficial use of water by the method of natural overflow is shown to be established prior to the development of specific points of diversion for portions of this claim.~~

~~5.~~4. Based on the file and record herein, IT IS ORDERED that Claim 124 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 124

CLAIM MAP REFERENCE: OWRD INVESTIGATION MAP – T 36 S, R 12 E

CLAIMANT: RICHARD DUARTE
9701 HARVEY RD
GALT, CA 65632

SPRAGUE RIVER CATTLE COMPANY
35000 SPRAGUE RIVER ROAD
SPRAGUE RIVER, OR 97639

SOURCE OF WATER: The SPRAGUE RIVER, tributary to WILLIAMSON RIVER

PURPOSE OR USE:
IRRIGATION OF ~~684.0~~424.8 ACRES, BEING ~~307.3~~58.4 ACRES FROM THE NORTH (DUARTE) POD, AND ~~376.7~~366.4 ACRES FROM THE SOUTH (TAYLOR) POD

RATE OF USE:
~~17.10~~10.62 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION, BEING ~~7.68~~1.46 CFS FROM THE NORTH (DUARTE) POD AND ~~9.42~~9.16 CFS FROM THE SOUTH (TAYLOR) POD

DUTY:
3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

LIMIT:

1/40 CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 10 - NOVEMBER 10

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
North (Duarte) POD	36 S	12 E	WM	8	SE SW	30	475 FEET NORTH AND 50 FEET WEST FROM S¼ CORNER, SECTION 8
South (Taylor) POD	36 S	12 E	WM	17	SE NE	16	460 FEET NORTH AND 25 FEET WEST FROM E¼ CORNER, SECTION 17

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
36 S	12 E	WM	5	SW SW		~~14.4~~8.8	North (Duarte) POD
36 S	12 E	WM	5	SE SW		~~22.0~~20.8	
36 S	12 E	WM	5	NE SE		~~7.1~~0.3	
~~36 S~~	~~12 E~~	~~WM~~	~~5~~	~~NW SE~~		~~1.1~~	
36 S	12 E	WM	5	SW SE		~~31.6~~24.0	
36 S	12 E	WM	5	SE SE		~~30.5~~4.5	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~NE NE~~	~~1~~	~~14.3~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~NE NE~~	~~8~~	~~20.0~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~NW NE~~	~~2~~	~~19.0~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~NW NE~~	~~7~~	~~20.0~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~SW NE~~	~~10~~	~~19.5~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~SW NE~~	~~15~~	~~19.5~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~SE NE~~	~~9~~	~~20.0~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~SE NE~~	~~16~~	~~20.0~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~NE SW~~	~~19~~	~~18.2~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~NE SW~~	~~22~~	~~11.0~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~NW SW~~	~~20~~	~~9.7~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~SE SW~~	~~27~~	~~8.6~~	
~~36 S~~	~~12 E~~	~~WM~~	~~8~~	~~SE SW~~	~~30~~	~~0.8~~	
36 S	12 E	WM	8	NW SW	21	3.5	South (Taylor) POD
36 S	12 E	WM	8	SW SW	28	~~14.8~~14.3	
36 S	12 E	WM	8	SW SW	29	~~20.0~~18.7	
36 S	12 E	WM	8	SE SW	27	1.4	
36 S	12 E	WM	8	SE SW	30	~~17.2~~16.0	
36 S	12 E	WM	17	NE NE	8	5.1	
36 S	12 E	WM	17	NW NE	2	6.2	
36 S	12 E	WM	17	NW NE	7	15.2	

IRRIGATION							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
36 S	12 E	WM	17	SW NE	10	20.0	
36 S	12 E	WM	17	SW NE	15	18.8	
36 S	12 E	WM	17	SE NE	9	15.2	
36 S	12 E	WM	17	SE NE	16	17.7	
36 S	12 E	WM	17	NE NW	3	~~20.0~~1 9.2	
36 S	12 E	WM	17	NE NW	6	~~20.0~~1 8.5	
36 S	12 E	WM	17	NW NW	4	~~20.0~~1 7.8	
36 S	12 E	WM	17	NW NW	5	~~19.9~~1 7.1	
36 S	12 E	WM	17	SW NW	12	16.7	
36 S	12 E	WM	17	SW NW	13	11.5	
36 S	12 E	WM	17	SE NW	11	19.5	
36 S	12 E	WM	17	SE NW	14	18.5	
36 S	12 E	WM	17	NE SW	19	12.7	
36 S	12 E	WM	17	NW SW	20	0.8	
36 S	12 E	WM	17	NE SE	17	17.5	
36 S	12 E	WM	17	NE SE	24	17.5	
36 S	12 E	WM	17	NW SE	18	17.5	
36 S	12 E	WM	17	NW SE	23	3.5	
36 S	12 E	WM	17	SE SE	25	6.0	

58.1 acres in the S1/2 S1/2 of Section 5 is further described as lying south of the functioning ditch and extending east.

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of NORA L. FLYNN; CECIL R. AND MILDRED K. SOMMERS; LAVINA ARLENE ANDERSON; AND ROBERT U. BURCH	))))))	PARTIAL ORDER OF DETERMINATION Water Right Claim 676

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT

1. Claim 676 (Claimants: NORA L. FLYNN; CECIL R. AND MILDRED K. SOMMERS; LAVINA ARLENE ANDERSON – 1408 MARTIN ST, KLAMATH FALLS, OR 97601; AND ROBERT U. BURCH – PO BOX 53, BEATTY, OR 97621) and its associated contests (1756 and 3563) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 83.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 676 on April 2, 2002. No exceptions were filed to the Proposed Order within the exceptions filing deadline.

3. On July 21, 2011, the Adjudicator issued an AMENDED PROPOSED ORDER (Amended Proposed Order) to modify the season of use and rate, and to recognize a right for 5 acres of irrigation by the method of natural overflow. The Amended Proposed Order replaces the 2002 Proposed Order in its entirety.

4. No exceptions were filed to the Amended Proposed Order.

5. The Amended Proposed Order is adopted and incorporated ~~in its entirety as if set forth fully herein~~, with modifications, into this Partial Order of Determination as follows~~.~~
   a. The "History of the Case" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, below.
   c. The "Issues" is adopted in its entirety.

d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.6, below.
e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.7, below.
f. The "Opinion" is adopted with modifications, as set forth in Section A.8, below.
g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 676.

6. Findings of Fact.

a. Finding of Fact #7 (Amended Proposed Order at 6-7) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

7) At the time Cecil and Mildred Sommers purchased the property in Section 14 in 1992, 11 acres were irrigated from the Brown Ditch. Five acres were ~~watered~~ irrigated by ~~a~~ the method of natural overflow from springs located in the northwest corner of ~~on~~ the Sommers' property. Anderson had also irrigated 80 acres with a tractor-mounted pump. Claimants Sommers continue to irrigate the 11 acres from Brown Ditch but have not irrigated the 80-acre parcel since 1992. Since purchasing the property, the Sommers have continued to irrigate the 5 acres by method of natural overflow. ~~that are irrigated from the springs. It is unclear whether the five acres are watered by natural flow from the springs or has been diverted. The evidence does not include a description of any diversion works.~~ (Direct Testimony of Cecil Sommers; Corrected Direct Testimony of Mildred Sommers.) ~~The only evidence of an appropriate rate for the 5 acres currently irrigated from the springs comes from OWRD' s Appendix A to the Preliminary Evaluation. (OWRD Ex. 1 at 211.)~~
Reasons for Modifications: To correct findings of fact that were not supported by a preponderance of evidence in the record; to more fully set forth the facts in the record.

7. Conclusions of Law

a. The modifications to the Proposed Order in Conclusions of Law #6 and #7 (Amended Proposed Order at 7) are rejected and the Amended Proposed Order shall not be modified as provided for in those paragraphs.

b. Conclusion of Law #14 (Amended Proposed Order at 8) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

14. Irrigation based on natural overflow may not, as a matter of law, form the basis for a *Walton* water right.

c. Conclusion of Law #15 (Amended Proposed Order at 8) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

15. The record supports a *Walton* right for irrigation of 71 acres with water from Brown Creek/Ditch, ~~and irrigation of 5 acres by natural overflow from spring water~~.

d. The section titled "Reasons for modifications to the Conclusions of Law section" (Amended Proposed Order at 8) is modified as follows (additions are shown in "underline" text, deletions are shown in ~~strikethrough~~ text):

The conclusions ~~have~~ of law have been modified to reflect the modified and additional findings of fact. Reasons for modification of the findings of fact are provided in the Findings of Fact section. In addition, the conclusions of law have been modified to reflect OWRD's conclusions concerning the elements of a *Walton* rights. ~~These conclusions are described in the Opinion section, below.~~

8. Opinion

a. The "Opinion" section in the Amended Proposed Order is rejected except for the section entitled "Non-Indian Beneficial Use and Development." Otherwise, the "Opinion" section in the Proposed Order is adopted in its entirety.

B. DETERMINATION

1. The Amended Proposed Order is adopted with modifications, into this Partial Order of Determination, as set forth above~~and incorporated in its entirety as if set forth fully herein~~.

2. The elements of a Walton claim are established for the acres described in the Water Right Claim Description, below. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

~~3. Beneficial use of water by the method of natural overflow is shown to be established for a portion of this claim.~~

~~4.~~3. Based on the file and record herein, IT IS ORDERED that Claim 676 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 676
FOR A VESTED WATER RIGHT

CLAIM MAP REFERENCE: CLAIM # 676, PAGE 9

CLAIMANTS:

NORA FLYNN
421 SOUTH G STREET
LAKEVIEW, OR 97630

CECIL SOMMERS
MILDRED SOMMERS
PO BOX 99
BEATTY, OR 97621

PARCEL: FLYNN

SOURCE OF WATER: BROWN CREEK/DITCH, tributary to the SPRAGUE RIVER

PURPOSE or USE:

IRRIGATION OF 60.0 ACRES FROM BROWN CREEK/DITCH (POD 1)

RATE OF USE:

1.5 CUBIC FEET PER SECOND (CFS) FOR IRRIGATION, MEASURED AT THE POINT OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.1 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 1 – OCTOBER 16

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot
POD 1	36 S	12 E	WM	15	SE NE	9

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION FROM POD 1						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**
36 S	12 E	WM	15	SW NW	12, 13	17.4 [a]
36 S	12 E	WM	15	SE NW	11, 14	23.6 [a]
36 S	12 E	WM	15	SW NE	10, 15	9.7 [a]
36 S	12 E	WM	15	SE NE	9, 16	9.3 [a]

[a] The approved lands are restricted to the area between the railroad tracks and Browns Creek/Ditch

PARCEL: SOMMERS

SOURCES OF WATER:

BROWN CREEK/DITCH, tributary to the SPRAGUE RIVER, and

UNNAMED SPRINGS, tributary to BROWN CREEK/DITCH

PURPOSE or USE:

IRRIGATION OF 11.0 ACRES FROM BROWN CREEK/DITCH (POD 2)~~., AND IRRIGATION OF 5.0 ACRES FROM UNNAMED SPRINGS BY THE METHOD OF NATURAL OVERFLOW~~

RATE OF USE OF WATER APPLIED FROM POD 2

0.28 CFS FROM POD 2 FOR IRRIGATION, MEASURED AT THE POINT OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY OF WATER APPLIED FROM POD 2

4.3 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE OF WATER APPLIED FROM POD 2: MARCH 1 – OCTOBER 16

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Source	Twp	Rng	Mer	Sec	Q-Q	GLot
POD 2	Brown Creek/Ditch	36 S	12 E	WM	14	NE SW	22
	~~Unnamed Springs~~	~~No Specific Point of Diversion – Natural Overflow~~					

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION FROM POD 2						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**
36 S	12 E	WM	14	NW SW	20, 21	5.3
36 S	12 E	WM	14	NE SW	22	4.3
36 S	12 E	WM	14	SE SW	27	1.4

~~IRRIGATION BY METHOD OF NATURAL OVERFLOW FROM UNNAMED SPRINGS~~					
~~Twp~~	~~Rng~~	~~Mer~~	~~Sec~~	~~Q-Q~~	~~Acres~~
~~36 S~~	~~12 E~~	~~WM~~	~~14~~	~~NW SW~~	~~5.0~~

~~**FURTHER LIMITATIONS TO THE RIGHT TO USE OF WATER BY NATURAL OVERFLOW:**~~

~~BENEFICIAL USE OF WATER MADE FROM THE METHOD OF NATURAL OVERFLOW IS A PRIVILEGE ONLY. AS LONG AS BENEFICIAL USE OF WATER BY NATURAL OVERFLOW CONTINUES, THE HOLDER OF THIS VESTED WATER RIGHT CANNOT MAKE A CALL ON WATER APPROPRIATED UNDER ANY OTHER WATER RIGHTS.~~

~~ANY CONVERSION FROM BENEFICIAL USE OF WATER BY NATURAL OVERFLOW TO BENEFICIAL USE OF THE SAME WATER FROM A SYSTEM RELYING ON A POINT(S) OF DIVERSION WILL BE CONSIDERED A CHANGE IN POINT OF DIVERSION~~

~~SUBJECT TO APPROVAL OF A TRANSFER OF WATER RIGHT IN COMPLIANCE WITH THE PROVISIONS OF ORS 540.505 TO 540.587. NOTWITHSTANDING APPROVAL OF A CHANGE IN POINT OF DIVERSION, THE FOLLOWING CONDITIONS WILL APPLY TO ANY APPROVED POINT OF DIVERSION TRANSFER: DUTY FOR IRRIGATION MAY NOT EXCEED 3.1 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR. THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR~~

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of JERRY L. NEFF AND LINDA R. NEFF; ROBERT M. COOK - T P C, LLC, AN OREGON LIMITED LIABILITY CO.	)	PARTIAL ORDER OF DETERMINATION
	)	Water Right Claim 9

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE PROPOSED ORDER

1. Claim 9 (Claimants: JERRY L. NEFF AND LINDA R. NEFF[1]; ROBERT M. COOK - T P C, LLC, AN OREGON LIMITED LIABILITY CO.) and its associated contests (2815, 3262, 3715, and 4071) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 160.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 9 on January 19, 2007.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) T P C, LLC, (2) Jerry L. and Linda Neff, and (3) the United States of America.

4. The exceptions filed to the Proposed Order along with opposition and responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 9. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.6, A.7, A.8, A.9, A.10, below.

5. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted with modifications, as set forth in Section A.6, below.
   b. The "Evidentiary Rulings" is adopted in its entirety.

[1] On Nov. 3, 2004, the portion of the property appurtenant to Claim 9 that was previously owned by HART ESTATE INVESTMENT COMPANY was transferred to JERRY L. AND LINDA R. NEFF. *See* CHANGE OF OWNERSHIP FORM and CERTIFICATE OF SERVICE (February 9, 2005.)

c. The "Issues" is adopted in its entirety.
d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, below.
e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.8, below.
f. The "Opinion" is adopted with modifications, as set forth under Section A.9, below.
g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 9. Consistent with Sections A.7, A.8, A.9, below, the outcome of the Order has been modified to recognize a right for irrigation on an additional ~~584.7~~7.3 acres for a total of 892.9 acres; the season of use for livestock watering is corrected in Findings of Fact A.10.a, and a rate is specified for livestock watering in Section A.10.b, below.

6. **History of the Case.** Within the section titled "History of the Case" of the Proposed Order, the first Paragraph is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

> Claimants seek a water right as non-Indian successors to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the allotments' share of the Tribe's "practically irrigable acreage" ("PIA").[2] This *Walton* claim is for ~~589.3~~ 58.3 cubic feet per second (cfs) of water from the Williamson River, Jack Creek, Long Prairie Creek, and commingled water from Long Prairie Creek, Jack Creek and tailwater from the Williamson River, for irrigation of approximately 2333.8 acres of land, and 1 cfs from the Williamson River for livestock use. The claimed period of use is February through October. (OWRD Ex. 1 at 1-3, 7-9, 23-24.)

Reasons for Modification: To correct the amount of cfs claimed – issue raised in exceptions; to add clarification using evidence on the record; to provide additional citations to the record.

7. **Findings of Fact.** The Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the general reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: ~~(1) To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow~~

[2] Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397, 402 (9th Circuit, 1985).

~~– issue raised in exceptions.~~ (~~2~~1) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership – issue raised in exceptions. (~~3~~2) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by non-Indian successors after transfer from Indian ownership – issue raised in exceptions. (~~4~~3) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record.

Modified Proposed Order Findings of Fact

1) For all allowed water rights in Claim 9 where the Williamson River is the source of water, the Rate is 1/80th cfs/acre.[2] ~~For all allowed water rights in Claim 9 where the source of water is Long Prairie Creek, the Rate is 1/40 of one cfs per acre.~~ The Duty for all allowed water rights in Claim 9 is 3.5 acre-feet per acre per year. The Period of Use for irrigation is March 1 through October 31. The rate for livestock watering is 12 gallons per head per day from the Williamson River. The Period of Use for livestock watering is February 1 through October 31, as claimed. The Priority date is October 14, 1864.[3] (OWRD Ex. 1 at 23, 59, 131.)

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record, and did not include ~~an irrigation rate from Long Prairie Creek or~~ a rate for livestock watering, ~~each of~~ which needed to be included due to other modifications made in this Proposed Order; to provide an additional citation to the record.

[3] The rate allowed from the Williamson River is based on a certificate of water right obtained by William Kittredge with a priority of April 16, 1930, which specified a rate of 1/80th cfs per acre. (OWRD Ex. 1 at 59.) ~~The rate of 1/40 of one cfs per acre for irrigation from Long Prairie Creek and the duty for all irrigation approved under Claim 9 is based on the rate and duty specified in Appendix A of the Preliminary Evaluation for those cases where a different rate or duty does not apply. (*Id.* at 131.)~~ The rate of 12 gallons per day per head for livestock watering from the Williamson River is based on the rate specified in Appendix A of the Preliminary Evaluation for those cases where a different rate does not apply. (*Id.* at 132. Season of Use is also as specified in Appendix A~~, except as to livestock~~. Claimant did not specify a season of use for livestock only, in the claim document, but only stated that the period of use was "Feb through Oct." (*Id.* at 23.) OWRD asked for clarification of the season of use for livestock, but did not receive a response. Consequently, the season of use for livestock is limited to the season claimed, February through October. Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation. **Reasons for modification of footnote:** To correctly apply the irrigation terms rate (a fraction of one cubic foot per second) and duty (a volume expressed in acre-feet per acre); to include the livestock watering rate; season of use *is* specified in Appendix A.

2) Beginning in 1912, William Kittredge began leasing properties that had formerly been part of the Klamath Reservation, and had been allotted to individual Klamath Indians. He later bought a number of the allotments as they became available. The property subject to this claim is part of the property acquired by Kittredge between 1917 and 1931. Beginning in 1917, Kittredge began developing irrigation systems throughout his property, which was, and is still, used for pasture and hay. (Ex. 60138.)[4] In 1918, Kittredge built a diversion dam across the Williamson River called the Big Wire Dam, located in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. Several ditches were then built upstream from this dam to provide irrigation for much of the property subject to this claim. (Ex. OWRD Ex. 1 at 63; Ex. 60138 at 4.) William Kittredge's map for Williamson River water right Permit 9592 (later certificated as 11956), labeled "Map Showing Kittredge Ditches" within T 30, S, R 10 E, W.M., shows the locations of his ditches, and includes the following footnote:

> "Everything in Twp 30 S. Rge 10 E, under water since year 1922 and the land South of the Williamson River in the SW¼ and in that part of the SW¼ of SW¼ lying between the main River and the fork, all in Section 18, and all of the land in S½ NW¼ and SW¼ Sec 19, and NW¼ and N½ SW¼ Sec. 30 lying Westerly and Northerly of black line was irrigated prior to 1893."

(OWRD Ex. 1 at 59-61, 63.) As a result of the diversions and ditches, by 1921, hay was being cut from three fields named Big Wire, Little Wire, and Timothy. Ex. 60138 at 4, 7.) By 1930, an additional dam had been built downstream on the Williamson River, at the SW¼ ~~SW¼~~ SE¼ Section 18, T 30 S, R 10 E, W.M. (OWRD Ex. 1 at 59, Supplemental Direct Testimony of James P. Lynch, Ex. 1.)

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to correct a scrivener's error.

[4] Although the exhibits were marked with a 12-digit number, the first seven digits did not change from exhibit to exhibit. For ease of reference only the last five digits of the exhibit numbers will be cited in this order.

(3) Upstream from Kittredge's holdings, George Mayfield acquired a number of non-contiguous properties, also formerly Indian allotments. (Shaw Direct, Ex. 30004 at 16). In 1924, Mayfield built a diversion at Rocky Ford, about 4 miles upstream from the mouth of the Mayfield Ditch ~~and ditch to draw~~ in order to use water from the Williamson River to irrigate some of his properties. (Ex. 60138 at 5; Shaw Rebuttal, Ex. 30003 at 4-5, para 10,11; Shaw Direct, Ex. 30004 at 41, OWRD Ex. 1 @ 25.) This diversion reduced the availability of water for irrigation of Kittredge's holdings downstream. (~~*Id.*~~ Ex. 60138 at 5; Shaw Direct, Ex. 30004 at 41.) ~~A few years later~~ In 1932, William Kittredge bought out Mayfield's holdings, which consisted of Rocky Ford, the Royce place and the Mayfield place,[5] and discontinued the use of this diversion at Rocky Ford. (~~*Id.*~~ Ex. 60138 at 5; Shaw Direct Ex. 30004 at 16-17, 41, 49-50.) Only lands described as the Mayfield place are appurtenant to Claim 9. (OWRD Ex. 1 at 7-12, 36, 39-40; Shaw Direct Ex. 30004 at 49-50.)

At an unknown date, the Mayfield Ditch was constructed across the Mayfield place which originates south of the Mayfield place near the center of Section 14, enters the Mayfield place at the SW Corner of the SE¼ NW¼ Section 11 and ends near the center of Section 9. (OWRD Ex. 1 at 5, 7-8, 25, 36, 58.) The Mayfield Ditch conveys water commingled from Jack Creek, Long Prairie Creek, and tailwater from an upstream user of Williamson River water for irrigation across the Mayfield place. (*Id.* at 5.)

~~Those portions of land lying above the Mayfield Ditch are subject to natural overflow from two intermittent streams, Jack Creek and Long Prairie Creek. (*Id.* at 5, 25.)~~

Although in his affidavit Oscar Kittredge states that water from Jack Creek, Long Prairie Creek and tailwater pumped from the Williamson River, in addition to overflow from Jackson Creek was all used for irrigation on the

[5] **Rocky Ford**: Lots 3, 4, 5, and the SW¼ NW¼ ["NW¼"], Section 1; SW¼ Section 1; and the SE¼ Section 2, all within T 31S, R 10 E. **Royce Place**: SE¼, Section 24; NE¼ Section 25; and portion of NW¼ east of the Williamson River, Section 25; all within T 30 S, R 10 E. **Mayfield Place**: E½ and SW¼ , Section 9; all Section 10; and the NW¼, Section 11; all within T 30 S, R 10 E (Shaw Direct Ex. 30004 at 16-17, 41, 49-50; OWRD Ex. 1 at 36, 39-40.) **Reason for addition**

Mayfield place, his statement is ambiguous as to whether this was occurring at or prior to the time when the Kittredge's first took ownership of this parcel in 1932, or use of water from these sources began after the Mayfield place was purchased by the Kittredges. (Ex. 60138 at 5; Shaw Direct Ex. 30004 at 16-17.)

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to provide additional citations to the record; OWRD has determined that the ALJ's finding that a ditch to draw water from the Williamson River built in conjunction with the 1924 diversion is not supported by a preponderance of evidence on the record.

4) It is possible that before 1918, part of this property was subject to flooding from temporary dams. However, the evidence is not sufficient to establish when this practice was carried out, how often it was done, or what land benefited from the dams.

5) **Allotment 54 (87.6 acres claimed)**

This allotment, composed of 160 acres located in S½ S½ Section 8, T 30 S, R 10 E, W.M., was confirmed to Evangeline Blow, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40013.) In 1910 the property was described as having no improvements except fencing. (*Id.* at 18.) The property was conveyed to William Kittredge, a non-Indian, on July 7, 1926. (Ex 60045.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, on May 20, 1944. (Ex. 60047.)

The claim is for 28.8 acres irrigated from Jack Creek, and ~~57.5~~ 58.8 acres, being 20.8 within the SW¼ SW¼, 34.8 within the SE¼ SW¼, and 3.2 within the SE¼ SE¼ [6] irrigated from the Williamson River with a diversion point at the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (Point of Diversion (POD) north of Big Wire Dam). (OWRD Ex. 1 at 8, 11, 13, 25.)

¶ The 20.8 acres within the SW¼ SW¼ and the 34.8 acres within the SE¼ SW¼ are part of the Timothy Field that was being cut for hay by 1921.

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of footnote: To show support using evidence on the record that the three Mayfield properties were non-contiguous.

(Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) for 67.1 acres in Section 8, T 30 S, R 10 E, W.M. with ~~a~~ points of diversion from the Williamson River located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (~~*Id.*~~ OWRD Ex. 1 at 25, 57, 59, 60, 63.) A footnote on a map for Permit 9592[7] (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system since beginning in 1922. (*Id.* at 25, 59, 63.) At hearing, the United States conceded that the Water Right Certificate established the elements of a *Walton* right for irrigation from the Williamson River. (Transcript at 39.) The remaining irrigated acreage claimed was not described in this water right certificate, and was developed at a later date by Kittredge, or a subsequent non-Indian owner.

Beneficial use of water from the Williamson River on 58.8 acres in Allotment 54 was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 58.8 acres, or 0.74 total cfs. The point of diversion is north of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

The record contains no evidence of beneficial use of water from Jack Creek with reasonable diligence on this allotment following transfer from Indian ownership.

Reasons for Modification: To correct the number of acres claimed within this allotment; to add clarification using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

6) **Allotment 153 (132.0 acres claimed)**

This allotment, composed of 160 acres located in NE¼ Section 9, T 30 S, R 10 E, W.M., was confirmed to Luty Howard, a Klamath Indian, by instrument

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[6] 57.5 was a typographical error in the Preliminary Evaluation. (*See* Ex. 40004, and *Compare* OWRD Ex. 1 at 11, 25, and 92.) **Reason for addition of footnote:** To show that this scrivener's error was recognized on the record.

[7] The map referred to here is on the record at OWRD Ex. 1 at 63. **Reason for addition of footnote:** To avoid potential confusion with a second map included in the same group of citations, being OWRD Ex. 1 at 25.

dated March 3, 1910. (Ex. 40018.) In 1920, the property was described as having no ditch for irrigation. (*Id.* at 6.) The property was conveyed to George Mayfield, a non-Indian, on August 2, 1923. (Ex. 60057.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on April 19, 1924. (Ex. 60056.)

The claim is for 132 acres irrigated by water diverted from the combined flow of Jack Creek, Long Prairie Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977~~.~~ (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Jack Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (OWRD Ex. 1 at 52, 58, 62.) There is no evidence of a diversion of water to this property prior to transfer of ownership, in 1924, to William Mayfield, the second non-Indian owner. Oscar Kittredge's 1978 affidavit establishes that as of 1978, the property was watered for the most part by natural overflow from Jackson Creek, a source not included in this claim, and by return flow from a diversion by an upstream user. (*Id.*)

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

7) **Allotment 158 (107.2 acres claimed)**

This allotment, composed of 160 acres located in SW¼ Section 9, T 30 S, R 10 E, W.M., was confirmed to Horace Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40022.) In 1920 the property was described as having no ditch. (*Id. at 4.)* The property was conveyed to J.W. McCoy, a non-Indian, on August 6, 1920. (Ex. 60052.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60055.).

This claim is for 107.2 acres irrigated by water diverted from Jack Creek. (OWRD Ex. 1 at 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent ~~streams~~, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5.) ~~A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (*Id.* at 62.)~~ There is no evidence of a diversion of water to this property prior to transfer of the property to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: Lands within the SW¼ Section 9 were not included in Permit 42725. (OWRD Ex. 1 at 52, 62.)

8) **Allotment 154 (108.2 acres claimed)**

This allotment, composed of 160 acres located in SE¼ Section 9, T 30 S, R 10 E, W.M., was confirmed to Eva Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40019.) The property was conveyed to Charles Pitcher, a non-Indian, on November 29, 1918. (Ex. 60053.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on April 20, 1920. (Ex. 60054.).

The claim is for 80.2 acres irrigated from the combined waters of Jack Creek, Long Prairie Creek, and return flow from an upstream user, and 28 acres irrigated from a diversion on Jack Creek. (OWRD Ex. 1 at 7, 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977~~.~~ (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Jack Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 52, 58, 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

9) **Allotment 264 (114.8 acres claimed)**

This allotment, composed of 160 acres located in NE¼ Section 10, T 30 S, R 10 E, W.M., was confirmed to Jack Palmer (Kane), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40025.) The property was conveyed to A.C. Beal and J.W. McCoy, non-Indians, on April 22, 1920. (Ex. 60010.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60014, 60015.).

This claim is for 114.8 acres, being 78 acres irrigated from a diversion in Long Prairie Creek, and 36.8 acres irrigated from the combined waters of Long Prairie Creek, Jack Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7, 8.)

Klamath Indian Jack Palmer, on an application for a Patent in Fee signed by him on May 3, 1919, stated that Allotment 264 was used for grazing or mowing, and that he himself owned cattle and horses. (Ex. 40025.)

¶ Long Prairie Creek naturally floods the lands above the Mayfield Ditch in this allotment (*Id.* at 5, 25.) Diversion facilities were later built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 52, 58, 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

~~As evidenced by the Patent in Fee application, beneficial use of water from Long Prairie Creek by the method of natural overflow was established under~~

~~Indian ownership of the parcel. The 78.0 acres within Allotment 264 which were claimed for irrigation from Long Prairie Creek and are located above the Mayfield Ditch should be approved. The rate is 1/40 of one cfs per acre for 78.0 acres, or 1.95 total cfs. The point of diversion is on Long Prairie Creek within the NW¼ NW¼ Section 11, T 30 S, R 10 E, W.M.~~

The record also does not contain evidence that the water from the combined sources for irrigation on 36.8 acres was put to beneficial use with reasonable diligence.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

10) **Allotment 156 (128.9 acres claimed)**

This allotment, composed of 160 acres located in NW¼ Section 10, T 30 S, R 10 E, W.M., was confirmed to Frank Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40020.) In 1920 the property was described as having no irrigation. (*Id.* at 3.) The property was conveyed to George Mayfield, a non-Indian, on June 13, 1923. (Ex. 60057.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on April 19, 1924. (Ex. 60056.)

This claim is for 128.9 acres, with diversion for 15.6 acres from Long Prairie Creek, and the remainder from combined waters of Long Prairie Creek, Jack Creek and return flow from an upstream user. (OWRD Ex. 1 at 7, 8.) Long Prairie Creek naturally floods the lands above the Mayfield Ditch in this allotment (*Id.* at 5, 25.) At some unknown date prior to 1977 diversions were built on Long Prairie Creek or Jack Creek, which were intermittent creeks, to divert an unknown amount of water. (*Id.* at 5.) Likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Jack Creek and Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (*Id.* at 52, 58, 62.) There is no evidence of irrigation on this property prior to its acquisition by the second non-Indian owner. Oscar Kittredge's 1978 affidavit establishes that as of 1978, the

property was watered for the most part by natural overflow from Jackson Creek, not a source under this claim, and by return flow from a diversion by an upstream user. (Ex. 600138 at 5.)

Although there is evidence of natural overflow from Long Prairie Creek on 15.6 acres claimed for irrigation from Long Prairie Creek, as it is situated above the Mayfield ditch, there is no evidence on the record confirming beneficial use of this water being made with reasonable diligence. The record does not contain evidence that the water from the combined sources for irrigation on 113.3 acres was put to beneficial use with reasonable diligence.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

11) **Allotment 157 (136.8 acres claimed)**

This allotment, composed of 160 acres located in SW¼ Section 10, T 30 S, R 10 E, W.M., was confirmed to Hampton Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40021.) This property was described in 1920 as having no ditches. (*Id.* at 4.) The property was conveyed to A.C. Beal, a non-Indian, on August 13, 1920. (Ex. 60009.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60014.).

The claim is for 136.8 acres irrigated from the combined waters of Long Prairie Creek, Jack Creek and return flow from an upstream user. (OWRD Ex. 1 at 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Jack Creek and Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 52, 58, 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

12) **Allotment 265 (159.3 acres claimed)**

This allotment, composed of 160 acres located in SE¼ Section 10, T 30 S, R 10 E, W.M., was confirmed to Lillie Palmer (Kane), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40026.) The property was conveyed to Klamath Cattle Co. a non-Indian, on August 25, 1926. (Ex. 60018.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 3, 1927. (Ex. 60006.)

The claim is for 159.3 acres irrigated from the combined waters of Jack Creek, Long Prairie Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7, 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (*Id.* 1 at 52, 58, 62.) There is no evidence as to when water was first diverted to this property.

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

13) **Allotment 152 (79.5 acres claimed)**

This allotment, composed of 160 acres located in NW¼ Section 11, T 30 S, R 10 E, W.M., was confirmed to Jason Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40017.) In 1916 this property was described as having no irrigation and no water supply. The property was mostly

in wild grass, uncultivated and without a water right. (*Id.* at 8 through 11.) The property was conveyed to George Mayfield, a non-Indian, on April 4, 1924. (Ex. 60002.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on November 19, 1924. (Ex. 60056.).

While still in Indian ownership, Allotment 152 was leased to William Mayfield for the purpose of grazing cattle in 1909. William Mayfield was characterized as a "stockman of good reputation." (*See* FARMING AND GRAZING LEASE, dated May 15, 1909, Ex. 40017.)

The claim is for ~~82.5~~ 79.5 acres irrigated from ~~the combined waters of Jack Creek,~~ Long Prairie Creek. ~~, and return flow from an upstream user.~~ (OWRD Ex. 1 at 7-11.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977~~.~~ (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (Id. at 52, 58, 62.) Oscar Kittredge's 1978 affidavit establishes that as of 1978, the property was watered for the most part by natural overflow from Jackson Creek, and by return flow from a diversion by an upstream user. (Ex. 60138 at 5.)

As evidenced by a grazing lease, ~~beneficial use of water from Long Prairie Creek by the method of~~ natural overflow from Long Prairie Creek occurred on this parcel ~~was established~~ under Indian ownership, but this does not constitute~~.~~ ~~Beneficial~~ beneficial use of water. ~~with reasonable diligence has been shown on the 79.5 acres within Allotment 152 which were claimed for irrigation from Long Prairie Creek and are located above the Mayfield Ditch. The rate is 1/40 cfs per acre for 79.5 acres, or 1.99 total cfs. The point of diversion is on Long Prairie Creek within the NW¼ NW¼ Section 11, T 30 S, R 10 E, W.M~~. The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence by the first non-Indian owner.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to correct the source of water that was claimed; to show the

correct number of acres claimed within this allotment; to add clarification using evidence on the record; to provide additional citations to the record.

14) **Allotment 18 (115.2 acres claimed)**

This allotment, composed of 160 acres located in NW¼ Section 16, T 30 S, R 10 E, W.M., was confirmed to Logan Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40006.) The property was conveyed to William Kittredge, a non-Indian, on January 29, 1923. (Ex. 60017.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, also a non-Indian, on May 20, 1944. (Ex. 60047.).

The claim is for 101.2 acres irrigated from two points of diversion on the Williamson River (94.4 acres, being 12.4 acres within the NE¼ NW¼, 17.6 within the NW¼ NW¼, 40.0 within the SW¼ NW¼, and 24.4 within the SE¼ NW¼, from a diversion on the South side of the river [POD south of Big Wire Dam], and 6.8 acres within the NW¼ NW¼, from a diversion on the North side of the river [POD north of Big Wire Dam], both located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.); and 14 acres irrigated from Jack Creek. (OWRD Ex. 1 at 8, 9, 11, 13, 25.)

¶ The 12.4 acres within the NE¼ NW¼, 17.6 within the NW¼ NW¼, 40.0 within the SW¼ NW¼, and 24.4 within the SE¼ NW¼, are part of the Big Wire Field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 118 acres in NW¼ Section 16, T 30 S, R 10 E, W.M. from ~~two~~ diversions ~~from~~ on the Williamson River in NE¼ NW¼, and NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.) The acreage claimed to be watered from Jack Creek was not described in this water right certificate, and may have been developed at a later date by Kittredge, or a subsequent non-Indian owner.

Beneficial use of water from the Williamson River on 101.2 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 101.2 acres, or 1.27 total cfs. The point of diversion for 6.8 acres within the NW¼ NW¼ Section 16 is north of Big Wire Dam, and the point of diversion for the remaining 94.4 acres is south of Big Wire Dam, both diversions being located within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

The record contains no evidence of beneficial use of water from Jack Creek with reasonable diligence on this allotment following transfer from Indian ownership.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

15) **Allotment 20 (129.6 acres claimed)**

This allotment, composed of 160 acres located in the SW¼ Section 16, T 30 S, R 10 E, W.M., was confirmed to Grover Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40007.) In 1921 the property was described as having no irrigation. (*Id.* at 5.) The property was conveyed to William Kittredge, a non-Indian, on May 31, 1921. (Ex. 60001.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, also a non-Indian, on May 20, 1944. (Ex. 60047.)

The claim is for irrigation of 129.6 acres from the Williamson River with a diversion point within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam). (OWRD Ex. 1 at 9, 13, 25.)

¶ The 129.6 acres are part of the Big Wire field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 128.1 acres in SW¼ Section 16, T 30 S, R 10 E, W.M. from ~~one~~ diversion points on the Williamson River in the NE¼ NW¼ and NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (~~*Id.*~~ OWRD Ex. 1 at 55, 57, 60, 63.) The additional 1.5 acres, not included on the certificate may have

been developed subsequently. A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

Beneficial use of water from the Williamson River on 128.1 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 128.1 acres, or 1.60 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

16) **Allotment 52 (152.1 acres claimed)**

This allotment, composed of 160 acres located in NE¼ Section 17, T 30 S, R 10 E, W.M., was confirmed to Jennie Blow (Blew), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40011.) In 1914 the property was described as having no improvements. (*Id.* at 11.) The property was sold on contract to Alex Davis, a non-Indian, in 1916. On March 9, 1920 a patent was issued in Davis' name. (Ex. 60022.) Prior to this patent, William Kittredge, also a non-Indian, had apparently agreed to purchase the property, and was making Davis' payments on the contract as early as May 1917. (Ex. 40011 at 4, 5.) William Kittredge received title to the property on October 2, 1922. (Ex. 60027.)

The claim is for 152.1 acres, being 148.5 acres irrigated from the Williamson River (117.4 acres from the POD north of Big Wire Dam, and 31.1 acres irrigated from the POD south of Big Wire Dam, both located ~~from the Williamson River~~ within the NW¼ NW¼ Section 16, T 30 S, R 10 E); and 3.6 acres irrigated from Jack Creek. (OWRD Ex. 1 at 9, 11, 13, 25.)

¶ The 0.3 acres within the NE¼ NE¼, the 10.8 acres within the SW¼ NE¼, and the 20.0 acres within the SE¼ NE¼, are part of the Big Wire Field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right

(#11956) to irrigate 151 acres in NE¼ Section 17, T 30 S, R 10 E, W.M. from ~~two~~ diversion points on the Williamson River in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* 25, 59, 63.) The diversion from Jack Creek may have been developed by a subsequent owner.

~~Beneficial use of water from the Williamson River on 148.5 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The is 1/80th cfs per acre for 148.5 acres, or 1.85 cfs. The point of diversion for 31.1 acres [0.3 acres within the NE¼ NE¼, 10.8 acres within the SW¼ NE¼, and 20 acres within the SE¼ NE¼ Section 17] is south of Big Wire Dam, and the point of diversion for the remaining 117.4 acres is north of Big Wire Dam, both diversions being located within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.~~ The record does not contain evidence that the water claimed for irrigation from the Willliamson River on 148.5 acres within this allotment was put to beneficial use with reasonable diligence by the first non-Indian owner.

The record contains no evidence of beneficial use of water from Jack Creek with reasonable diligence within this allotment following transfer from Indian ownership.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

17) **Allotment 53 (154.4 acres claimed)**

This allotment, composed of 160 acres located in NW¼ Section 17, T 30 S, R 10 E, W.M., was confirmed to Elvira Blow (Blew), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40012.) The property was conveyed to William Kittredge, a non-Indian, on June 26, 1920. (Ex. 60024, 60026.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 21, 1955. (Ex. 60049.).

The claim is for ~~148.4~~ 154.4 acres irrigated from the Williamson River~~.~~, being 148.4 acres from the POD north of Big Wire Dam, and 6.0 acres irrigated from the POD south of Big Wire Dam. (OWRD Ex. 1 at 9, 11, 13, 25.)

¶ The acres claimed within this allotment are either a part of the Timothy (154.4 acres) or the Little Wire (6.0 acres) fields that were being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 160 acres in NW¼ Section 17, T 30 S, R 10 E, W.M. from ~~one~~ diversion points on the Williamson River in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

Beneficial use of water from the Williamson River on 154.4 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 154.4 acres, or 1.93 total cfs. The point of diversion for 6.0 acres [2.4 acres within the SW¼ NW¼ and 3.6 acres within the SE¼ NW¼ Section 17] is south of Big Wire Dam, and the point of diversion for the remaining 148.4 acres is north of Big Wire Dam, both diversions being located within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to show the correct the number of acres claimed within this allotment – the ALJ's proposed order did not include the 2.4 acres claimed within the SW¼ NW¼ or the 3.6 acres within the SE¼ NW¼; to add clarification using evidence on the record; to provide additional citations to the record.

18) **Allotment 78 (150.2 acres claimed)**

This allotment, composed of 160 acres located in SW¼ Section 17, T 30 S, R 10 E, W.M., was confirmed to Golliep Elksnat, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40016.) The property was conveyed to George Mayfield, a non-Indian, on August 9, 1920. (Ex. 60023.) The property was subsequently conveyed to William Kittredge, also a non-Indian, on October 30, 1920. (Ex. 60025.).

The claim is for 150.2 acres irrigated from the POD south of Big Wire Dam, located within the NW¼ NW¼ Section 16, T 30 S, R 10 E on the Williamson River. (OWRD Ex. 1 at 9, 13, 25.)

¶ The acres claimed within this allotment are part of the Little Wire field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) Kittredge obtained a Certificate of Water Right (#11956) to irrigate 152.4 acres in SW ¼ Section 17, T 30 S, R 10 E, W.M. from ~~one~~ diversion points in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

The record does not contain evidence that the water claimed for irrigation ~~Beneficial use of water~~ from the Williamson River on 150.2 acres within this allotment was ~~made with~~put to beneficial use with reasonable diligence by the first non-Indian owner. ~~following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 150.2 acres, or 1.88 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.~~

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

19) **Allotment 174 (159.8 acres claimed)**

This allotment, composed of 160 acres located in SE¼ Section 17, T 30 S, R 10 E, W.M., was confirmed to Silas Jackson, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40024.) In 1916 the property was described as having no irrigation installed. (*Id.* at 3.) The property was conveyed to William Kittredge, a non-Indian, on November 11, 1917. (Ex. 60013.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.).

The claim is for 159.8 acres irrigated from the POD south of Big Wire Dam, located within the NW¼ NW¼ Section 16, T 30 S, R 10 E on the Williamson River. (OWRD Ex. 1 at 10, 13, 25.)

¶ The acres claimed within this allotment are part of the Big Wire field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 160 acres in SE¼ Section 17, T 30 S, R 10 E, W.M.. from ~~one~~ diversion points in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.*, 59, 63.)

Beneficial use of water from the Williamson River on 159.8 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 159.8 acres, or 2.0 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

20) **Allotment 24 (54.4 acres claimed)**

The total allotment is located in several parcels, only 80 acres of which is subject to this claim. That portion is located in E½ NE¼ Section 18, T 30 S, R 10 E, W.M., and was confirmed to Fannie Ball, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40009.) In 1918 the property was described as subject to "some private wild flooding" but having no constructed irrigation ditches. (*Id.* at 8, 9.) The property was conveyed by Fannie Ball (under the name "Mrs. Lion Hart") to William Kittredge, a non-Indian, on April 29, 1921. (Ex. 60032.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.).

The claim is for 54.4 acres irrigated from the POD north of Big Wire Dam located on the Williamson River within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.. (OWRD Ex. 1 at 11, 13, 25.)

¶ The 54.4 acres are part of the Timothy field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 52.7 acres in E½ NE¼ Section 18, T 30 S, R 10 E, W.M. from ~~one~~ diversion points in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) The additional 1.7 acres not included on the certificate may have been developed subsequently. A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

Beneficial use of water from the Williamson River on 52.7 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 52.7 acres, or 0.66 total cfs. The point of diversion is north of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

21) **Allotment 25 (24.2 acres claimed)**

The total allotment is composed of 160 acres, only 80 of which are subject to this claim. That portion, located in W½ SE¼ Section 18, T 30 S, R 10 E, W.M., was confirmed to Eddie Ball, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40010.) The property was conveyed to A.A. Bellman, a non-Indian, on October 13, 1917. (Ex. 60020.) The property was subsequently conveyed to Charles Worden, also a non-Indian, on October 16, 1917. (Ex. 60021.) William Kittredge received title to the property in 1920. (Ex. 60028.)

The claim is for 24.2 acres, being 0.2 acres irrigated in the NW¼ ~~SW¼~~ SE¼ Section 18, T 30 S, R 10 E, W.M., and 24 acres irrigated in the SW¼ ~~SW¼~~

SE¼ Section 18, T 30 S, R 10 E, W.M. The claimed point of diversion is the POD south of Big Wire Dam located on the Williamson River within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (OWRD Ex. 1 at 10, 13, 25.)

¶ The claimed acres are part of the Little Wire field that was being cut for hay by 1921, and the Horse field. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) for 29 acres in SW¼ SE¼ Section 18, T 30 S, R 10 E, W.M. from ~~one~~ diversion points within the NW¼ NW¼, Section 16, and the SW¼ SE¼ Section 18, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

The record does not contain evidence that the water claimed for irrigation~~Beneficial use of water~~ from the Williamson River on 24.2 acres within this allotment was put to beneficial use~~was made~~ with reasonable diligence by the first non-Indian owner ~~following transfer from Indian ownership~~. ~~The rate is 1/80 of one cfs per acre for 24.2 acres, or 0.30 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.~~

Reasons for Modification: To correct a scrivener's error in the location of the claimed acreage; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

22) **Allotment 77 (65.6 acres claimed)**

The total allotment includes a number of different parcels, only 80 acres of which are subject to this claim. That portion, located in E½ SE¼ Section 18, T 30 S, R 10 E, W.M., was confirmed to Irene Skellock, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40015.) The property was conveyed to William Kittredge, a non-Indian, on April 20, 1921. (Ex. 60030.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.).

The claim is for 65.6 acres, being 62 acres irrigated from one diversion point on the Williamson River, located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam), and 3.6 acres irrigated from a second diversion point on the Williamson River also located in ~~SW¼ SE¼ Section 18~~, NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD north of Big Wire Dam). (OWRD Ex. 1 at 10, 11, 13, 25.)

¶ The claimed acres are part of the Little Wire and Timothy fields that were being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) for 71.3 acres in E½ SE¼ Section 18, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

Beneficial use of water from the Williamson River on 65.6 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 65.6 acres, or 0.82 total cfs. The point of diversion for 3.6 acres within the NE¼ SE¼ is north of Big Wire Dam, and the point of diversion for the remaining 62.0 acres is south of Big Wire Dam, both diversions being located within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: To correct and clarify the locations of the claimed points of diversion; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

23) **Allotment 75 (105.8 acres claimed)**

This allotment, composed of 160 acres located in NE¼ Section 19, T 30 S, R 10 E, W.M., was confirmed to Mamie Skellock, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40014.) The property was conveyed to William Kittredge, a non-Indian, on March 10, 1926. (Ex. 60034.) The property

was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.).

The claim is for 105.8 acres irrigated from a single diversion point on the Williamson River located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam). (OWRD Ex. 1 at 10, 13, 25, 63.)

William Kittredge obtained a Certificate of Water Right (#11956) for 110.4 acres in NE¼ Section 19, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (*Id.* at 55, 57, 60.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* 25, 59, 63.) At hearing, the United States conceded that the Water Right Certificate established the elements of a *Walton* right for irrigation from the Williamson River. (Transcript at 39.)

Beneficial use of water from the Williamson River on 105.8 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 105.8 acres, or 1.32 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

24) **Allotment 173 (97.0 acres claimed)**

This allotment, composed of 160 acres located in NE¼ Section 20, T 30 S, R 10 E, W.M., was confirmed to Emma Jackson, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40023.) A Fee Patent was issued to Emma Jackson December 28, 1918. (Ex. 60029.) The property was conveyed to Robert Wilson and Nora Bernice Wilson, non-Indians, by an unrecorded transfer. (Ex. 60066.) The property was subsequently conveyed to William Kittredge, also a non-Indian, on April 4, 1931. Ex. 60066.)

The claim is for 97 acres irrigated from a single diversion point on the Williamson River located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam). (OWRD Ex. 1 at 10, 13, 25, 63.)

¶ William Kittredge obtained a Certificate of Water Right (#11956) for ~~93.0~~ 98.0 acres in NE¼ Section 20, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

The record .does not contain evidence that the water claimed for irrigation ~~Beneficial use of water~~ from the Williamson River on 97.0 acres within this allotment was put to beneficial use~~made~~ with reasonable diligence by the first non-Indian owner~~following the last known date the property was still under Indian ownership~~. ~~The rate is 1/80 of one cfs per acre for 97.0 acres, or 1.21 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.~~

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; 98.0 acres are shown on the 1930 water right certificate 11956 within the NE¼ Section 20; to add clarification using evidence on the record; to provide additional citations to the record.

25) **Allotment 21 (71.2 acres claimed)**

This allotment, composed of 160 acres located in NW¼ Section 21, T 30 S, R 10 E, W.M., was confirmed to Nannie Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40008.) In 1923, this property was described as mostly in timber, with about 40 acres of flat meadow ground. (*Id.* at 3.) The property was conveyed to William Kittredge, a non-Indian, on January 23, 1924. (Ex. 60065.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 21, 1955. (Ex. 60049.)

The claim is for 71.2 acres irrigated from a single diversion point located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam). (OWRD Ex. 1 at 10, 13, 25.)

¶ William Kittredge obtained a Certificate of Water Right (#11956) for 66.5 acres in NW¼ Section 21, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) The additional 4.7 acres not included on the certificate may have been developed subsequently. A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

Beneficial use of water from the Williamson River on 66.5 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 66.5 acres, or 0.83 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

8. **Conclusions of Law.** Within the section titled "Conclusions of Law" of the Proposed Order, Conclusions #3 and #6 are modified~~, and Conclusion #7 is added~~ as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

a. Conclusion #3

There is sufficient information on the development or ~~continuous~~ continued use of water on this Place of Use to establish a *Walton* right for a portion of the property subject to this claim.

b. Conclusion #6

There is not sufficient information to support a period of use for irrigation outside of March 1 to October 31.

~~c. Conclusion #7~~

~~Beneficial use of water by the method of natural overflow is a valid basis for a *Walton* water right.~~

Reasons for Modifications: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports conclusions other than those in the 2007 Proposed Order.

9. **Opinion.** The entire section titled "Opinion" of the Proposed Order is modified as described herein.

OWRD has removed the ALJ's discussions regarding the elements of a *Walton* claim, and natural overflow of water as a basis for a *Walton* claim. The deleted paragraphs are noted below as "*****". In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

The remaining portions of the Opinion section of ALJ's Proposed Order have been labeled "Application of Walton Elements to the Modified Proposed Order Findings of Fact." Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text.

Application of Walton Elements to the Modified Proposed Order Findings of Fact

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division,* 47 Or App 437 (1980); *Metcalf v. AFSD,* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

*****

Unlike many of the cases in the Adjudication, in this case we have the advantage of sworn statements made by a percipient witness to many of the events of significance, Oscar Kittredge. While Contestants have been able to raise questions as to the reliability of some of the other affidavits placed in this record, there is no clear evidence suggesting that Kittredge's affidavit marked as Ex. 60138 is not reliable.

To the contrary, ~~I consider~~ this affidavit is considered, with limited corroboration from another Kittredge affidavit dated in 1977 and attached to the

Supplemental Direct Testimony of James P. Lynch, to be of particular value for several reasons:

Kittredge was born in 1900, and was 12 years old when he came to the Klamath Marsh area. He was an adult, or nearly so, when many of the events described in his affidavits occurred. He made his affidavits in 1978 and 1979, in the course of different litigation. The *Walton* cases were not published until the mid-1980s. Thus, particularly with regard to the "successor non-Indian" rule, and the artificial diversion rule, the principles stated in the *Walton* case could not have been in the contemplation of either Kittredge or his counsel when the affidavits were produced. No parties have suggested that Kittredge's affidavits are unreliable. To the contrary, all parties have relied upon different parts of his affidavits as support for their positions.

Although both affidavits are on the record, the shorter affidavit Kittredge signed in 1979 is primarily useful in clarifying statements contained in the longer and more detailed affidavit he prepared in 1978[8]. For example, reading the two affidavits together, it is clear that the "diversion in the Big Wire Field" mentioned in the earlier affidavit is the "Big Wire Dam" that was in existence in the 1970s.

For these reasons ~~I have relied on~~ Kittredge's affidavits <u>were relied on</u> in much of the fact-finding in this case. While there is other evidence from which inferences could be made that contradict Kittredge's affidavits,[9] ~~I am not prepared to ignore~~ the otherwise apparently reliable statements by a percipient witness

[8] The Department has noted that there appear to have been some alterations in this exhibit after it was signed, and questions its reliability. (*cf.* Oregon Water Resources Department's Response to Robert Cook and TPC, LLC's Motion to admit Exhibit 160E00060129 through 160E00060138**** dated August 27, 2004) In view of the points the Department has made, ~~I have treated~~ this document <u>has been treated</u> with some care. However, the only portion for which it was considered is a list of dams contained on the same page as Kittredge's notarized signature, which seems sufficiently reliable to merit consideration.

[9] For example, the Big Wire Dam is located in a parcel that was owned by Logan Pompey in 1918, the year Kittredge says his father built the dam. It could be inferred from this that Kittredge was mistaken, and the dam was built after 1923, when William Kittredge bought the property. This is not a necessary inference, though, as there are other explanations possible. William Kittredge, after all, leased a number of Indian allotments in the area, and, as his son put it "the water development had been instigated on many of the allotments prior to the date of actual acquisition of title and while the same were under lease. " (Ex. 60138 at 6.)

should not be ignored in favor of possible, but not necessary, contrary inferences that could be drawn.

As discussed below, the various allotments have different histories. Those different histories control the outcome as to each parcel. Several general statements can be made, however, that control the way the various portions of the claim are analyzed.

Long Prairie Creek and Jack Creek

~~Long Prairie Creek and Jack Creek are both subject to natural overflow, but mainly above the Mayfield Ditch. Where Jack Creek is claimed as the source of water, there is no evidence on the record to support beneficial use of water by natural overflow. Where Long Prairie Creek is claimed as the source of water such evidence on the record only exists for two allotments, 152 and 264.~~

The only eyewitness evidence as to the construction of any diversion of water to the non-contiguous Mayfield properties from the Williamson River was contained in the affidavit of Oscar Kittredge, who was present in 1924 when Mayfield constructed a diversion from the Williamson River at Rocky Ford. However, that testimony does not establish that water from that diversion was ever applied or conveyed by the Mayfield Ditch on the property appurtenant to Claim 9 which Mayfield sold (in addition to other parcels) to Kittredge. Although David Shaw speculated that the diversions on Long Prairie Creek and Jack Creek would logically have been built before the 1924 diversion, the evidence is insufficient to prove this occurred. Shaw noted that "The Long Prairie and Jack Creek water supplies probably spread over much of the Mayfield place without construction of ditches and diversion facilities***." (Rebuttal Testimony of David B. Shaw at 4.) Shaw draws from this that it would be logical for diversions to be developed on these creeks before a diversion on the Williamson River, because of the comparative ease with which the creek diversions could be accomplished.

However, it is also possible that the early property owners would see no need to change the natural pattern of water dispersion if water was reaching the points at which it was needed with no additional effort by the owners. In any event, Oscar Kittredge stated in his affidavit in 1978 that at that time the former

Mayfield properties were largely irrigated by overflow from Jackson Creek, a source that is not part of this claim. ~~I find it also telling that the Kittredges, who had acquired the Mayfield property by 1930, did not include that property in the application for a water right with a 1930 priority. One would suppose that if water was being applied by the Kittredge family through an artificial diversion by that time, the property would have been included in the certificate.~~ [10]

On this record it is not possible to determine when the diversions on Long Prairie and Jack Creek, or the Mayfield Ditch which is used to spread water out from these sources, were constructed. It is therefore not possible to determine whether those diversions were constructed with reasonable diligence after transfer from Indian to non-Indian ownership. ~~before the property transferred to the second non-Indian owner. Even if it were found that the diversions were developed before transfer to the second non-Indian owner, it would not be possible to quantify the various diversions, given that, as noted above, the property was largely watered by overflow from a source that is not subject to this claim, and the amount of water attributable to each stream has never been established. Consequently, I have concluded~~ In conclusion, ~~except for the limited instances where the record supports beneficial use of water from Long Prairie Creek made by the method of natural overflow, that~~ those parts of the claim where the point of diversion is on Jack Creek ~~and~~ or Long Prairie Creek cannot be allowed as a *Walton* right.

Combined Flows: Jack Creek, Long Prairie Creek, Return Flow

Part of the claim is based on a combination of water from Jack Creek, Long Prairie Creek, and return flow diverted from the Williamson River by an upstream user. This commingled water is treated as a single source; as claimed, it is not possible to quantify the rate of water from each supply source separately. ~~I am not convinced that~~ Although a claim based on return flow/tailwater ~~is~~

[10] The Kittredge's acquired the Mayfield properties in 1932, two years after the water right with a 1930 priority date was filed. (Shaw Direct Ex. 30004 at 16-17.) **Reason for addition of footnote:** To show the reason why OWRD has determined that the stricken statement is not supported by a preponderance of the evidence on the record.

~~allowable as a privilege only[11] in this adjudication, in any event., Even if such a claim could be allowed, however, the~~ The evidence in this case is not sufficient to establish ~~one~~ when beneficial use of the commingled water first began and thus reasonable diligence cannot be determined. ~~As discussed above, the claimed diversion from Jack Creek and Long Prairie Creek cannot be allowed. Claimants have not provided evidence from which it could be determined how much of the combined flow can be derived from each source. Without that information, the amount of return flow claimed cannot be quantified.~~ This part of the claim cannot be allowed.

Big Wire Dam and Reasonable Diligence

Contestants argue that, absent evidence of special circumstances, the correct measurement of due diligence would require irrigation to have been developed within five years of the acquisition of the property by the first non-Indian owner. Contestants also argue that this five-year period should be found to end on the priority date of Kittredge's water right certificate, April 16, 1930. In this case, Contestants' position would require ~~me to~~ disallowing a *Walton* right as to all properties that Kittredge acquired before April 16, 1925, since Kittredge could not be found to have developed the irrigation with reasonable diligence as to those parcels.

While a five-year rule might be a useful rule of thumb, no rule or statute requires it. To the contrary, the only governing rule on the subject, OAR 690-028-0045(1) defines reasonable diligence as: "that which is usual and ordinary with persons performing similar projects." Such a determination must be made on a case-by-case basis. OAR 690-028-0045(2). Contestants' argument assumes that the "reasonable diligence" standard should be applied to each allotment separately without regard to its context. As each allotment was acquired, it became but part of a much larger property, for which an irrigation system was

~~[11] Use of tailwater cannot be insisted upon if the use or non-use of water by upstream users no longer results in waste water or overflow being available to a downstream user, and as such is a privilege only use of water. Use of tailwater within irrigation districts or federal reclamation projects is addressed separately in the Findings of Fact and Order of Determination in the Klamath Basin Adjudication, and is not at issue in this particular claim.~~

being constructed. Oscar Kittredge stated in his affidavit that William Kittredge built the Big Wire Dam in 1918, and began moving water into ditches behind the dam soon thereafter. Since the Big Wire Dam was one of the Points of Diversion noted in the 1930 Water Right Permit, it is apparent that Kittredge was developing his irrigation system well before 1930. Thus, 1930 is not the appropriate bench-mark from which to measure reasonable diligence in developing the irrigation system on these properties. To the contrary, 1930 would better be treated as the end-point,. ~~by which at least the basic outlines of the irrigation system had been completed.~~ Because it is noted on his map labeled "Kittredge Ditches," which is a part of his 1930 water right application, that water had been used beginning in 1922, eight years prior to when he applied for the water right, a preponderance of evidence on the record supports the conclusion that the irrigation system was completed or nearly completed before he applied for his water right. Considering the extensive system of ditches that was constructed between 1918 and 1930[12], it is not surprising that it would take up to 12 years to complete. The gauge of reasonable diligence for a system as extensive as that involved here could logically be considerably longer than five years. In conclusion, when considering the property as a whole (excluding the Mayfield place which he acquired in 1932), ~~I conclude that~~ 12 years was a reasonable time in which to construct the irrigation system, and ~~that~~ William Kittredge exercised reasonable diligence in doing so.

The Mayfield Place and Reasonable Diligence

For the purposes of this discussion, the Mayfield place means the parcel appurtenant to Claim 9 which was purchased by Kittredge from Mayfield in 1932 and described as the E½ and SW¼, Section 9; all Section 10; and the NW¼, Section 11; all within T 30 S, R 10 E. Beneficial use of water on the Mayfield place is from sources of water and on places of use not included in Kittredge's 1930 water right. Water is conveyed through the Mayfield Ditch, which is not

[12] ~~I take~~ Judicial notice is taken that a section is composed of one square mile. (*Webster's Third New International Dictionary* (1986) at page 2052) The allotments are spread over several sections. Consequently, the ditches required to irrigate the several allotments would span several miles in length.

shown on the map labeled "Kittredge Ditches." On this record it is not possible to determine when the Mayfield Ditch was first constructed. Thus is not possible to establish beneficial use of water with reasonable diligence on the Mayfield place ~~except where beneficial use of water by the method of natural overflow can be established~~.

Individual Allotments

~~I turn now to the several allotments.~~

Allotment 54

This allotment first passed from Indian to non-Indian ownership in 1926. Of this portion of the claim, 28.8 acres are based on a diversion from Jack Creek. For the reasons discussed above, the evidence is insufficient to establish a *Walton* claim for water diverted from Jack Creek. However, the Contestants conceded that the portion of the claim (~~57.5~~ 58.8[13] acres) diverted from the Williamson River was allowable as a *Walton* claim, since William Kittredge, the first non-Indian owner, acquired the property less than five years before the approved priority date on a water permit Kittredge was later granted. Although Kittredge's permitted right was for 67.1 acres, only ~~57.5~~ 58.8 acres was claimed from the Williamson River in this proceeding, so only ~~57.5~~ 58.8 acres can be allowed.

Allotment 153

This portion of the claim is based on diversion of the combined flow of Jack Creek, Long Prairie Creek, and return flow from an upstream user. ~~As discussed above, a diversion from this combined source cannot be allowed as a *Walton* right. In any event,~~ There is no evidence of ~~a diversion~~ beneficial use of water prior to conveyance out of Indian ownership. ~~, and it is unlikely that a diversion was constructed in the seven months between~~ George Mayfield's acquisition of the property was in 1923 and his transfer to William Mayfield occurred 10 months later in April 1924. As discussed above, the evidence does not support a finding of development ~~before~~ after transfer from Indian ownership

[13] *See* Fn 5

to the ~~second~~ non-Indian ~~user~~ successors. ~~,or continuous use of the water thereafter.~~ No *Walton* right exists respecting this allotment.

Allotment 158

This portion of the claim is based on use of water from Jack Creek. In 1920 this property was described as having no ditch. ~~It is unlikely that irrigation was developed in the three months between acquisition by J.W. McCoy, the first non-Indian owner, and transfer to George Mayfield, the second non-Indian owner. There is no evidence that J.W. McCoy constructed any diversions. Although Mayfield is recorded as having constructed diversions in this area, he was the second non-Indian owner, so any irrigation he developed would not qualify for treatment under a *Walton* claim.~~ As discussed above, the record does not support beneficial use of water made from Jack Creek with reasonable diligence after transfer from Indian to non-Indian successors. No *Walton* right can be found on this record.

Allotment 154

This portion of the claim is based on use of water from Jack Creek, and from commingled water from Jack Creek, Long Prairie Creek and return flow from an upstream user. ~~There is no clear evidence that Charles Pitcher constructed any diversion facilities in the area. The earliest record of a diversion by George Mayfield was in 1924, and this was from the Williamson River, not the source claimed here. In any event, Mayfield was the second non-Indian owner of the property.~~ As discussed above, the record does not support beneficial use of water made from these two sources with reasonable diligence after transfer from Indian to non-Indian successors. The record will not support a *Walton* right.

Allotment 264

This portion of the claim is based on use of water from Long Prairie Creek, and from commingled water from Jack Creek, Long Prairie Creek and return flow from an upstream user. ~~As in the case of Allotment 158, there is no evidence that the first non-Indian owner constructed any diversions on this~~

~~property in the three months before George Mayfield, the second non-Indian owner, acquired it. Moreover, the claimed sources, Jack Creek, Long Prairie Creek, and combined water with return flow from an upstream user, cannot form the basis of a *Walton* right, as discussed above.~~ As discussed above, the record does not support beneficial use of water made from the commingled water source with reasonable diligence after transfer from Indian to non-Indian successors. No *Walton* right can be found for this portion of Allotment 264.

Because the portion of this allotment claimed from Long Prairie Creek is situated above the Mayfield Ditch, it would be subject to natural overflow on 78 acres~~. As supported by the Indian owner's Patent in Fee application, beneficial use of water~~ from Long Prairie Creek ~~was made on this allotment~~ while still in Indian ~~his~~ ownership, as supported by the Patent in Fee Application. However, the occurrence of natural overflow on a parcel without a diversion does not constitute beneficial use of water. The record does not support~~s~~ a *Walton* right for 78.0 acres ~~based on use of water by the method of natural overflow~~ for this portion of Allotment 264.

Allotment 156

The ~~circumstances~~ ownership history of this allotment ~~are~~ is similar to ~~those~~ that for Allotment 153. There is no evidence that the claimed sources of the water from Long Prairie Creek, or from commingled water from Jack Creek, ~~and~~ Long Prairie Creek and return flow from an upstream user were developed ~~before the property was transferred to William Mayfield, the second non-Indian owner~~ with reasonable diligence following transfer from Indian ownership to non-Indian successors. No *Walton* right can be found.

Allotment 157

As in the case of Allotment 154, there is nothing on the record suggesting that ~~the first non-Indian owner, in this case A.C. Beal, ever constructed any diversion facilities. While George Mayfield is known to have done so, he was the second non-Indian owner, so any development he might have done would not qualify for a *Walton* right~~ beneficial use of water was made with reasonable

diligence following transfer from Indian ownership to non-Indian successors. ~~Moreover,~~ The source~~s~~ of this water, the combined flow of Jack Creek, Long Prairie Creek, and return flow, will not support a *Walton* right.

Allotment 265

Again, the claimed source of water, Long Prairie Creek, ~~and~~ Jack Creek and return flow has not been shown to have been developed ~~before George Mayfield, the second non-Indian owner, acquired this property~~ with reasonable diligence following transfer from Indian ownership to non-Indian successors. No *Walton* right can be found.

Allotment 152

Like Allotment 153, George Mayfield acquired this property in April 1924, and transferred it to William Mayfield in November of the same year. ~~As the claimed source is Jack Creek, Long Prairie Creek, and return flow, and there is no evidence for development of these sources as early as 1924, no *Walton* right can be found. No *Walton* right can be found.~~ This allotment is situated above the Mayfield Ditch, and as such would be subject to natural overflow from the claimed source, Long Prairie Creek. This allotment was leased for grazing prior to transfer from Indian ownership~~, thus beneficial use of water was made while still in Indian ownership~~. However, the occurrence of natural overflow on a parcel does not constitute beneficial use of water. The record does not support~~s~~ a *Walton* right for 79.5 acres on this allotment~~based on use of water by the method of natural overflow~~.

Allotment 18

This allotment first passed from Indian to non-Indian ownership in 1923. Of this portion of the claim, 14 acres are based on a diversion from Jack Creek. However, the evidence is not sufficient to establish when water was diverted from Jack Creek, or whether that portion of the claim was developed with reasonable diligence.

As to the remainder of the claim, William Kittredge built the Big Wire Dam in 1918. That dam is currently located in this allotment. While Kittredge

acquired the property seven years before he obtained a Water Right Certificate including it, he apparently began construction of the dam while the allotment was still in Indian ownership. ~~this does not establish that the irrigation system of which the Big Wire Dam was a part was not developed with reasonable diligence. It is likely that Kittredge would have applied water to the land closest to the dam as soon as he acquired title, if not before.~~ This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922. A *Walton* right in 101.2 acres irrigated from the Williamson River should be allowed. However, that portion of the claim from Jack Creek should not be allowed, as the evidence does not show when the diversion was constructed.

Allotment 20

This allotment first passed from Indian to non-Indian ownership in 1921. This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930~~.~~, with beneficial use of water beginning in 1922. ~~As discussed above, 12 years was a reasonable amount of time in which to have built such an extensive system.~~ A *Walton* right in 128.1 acres, the amount developed with reasonable diligence ~~by 1930,~~ should be allowed. The remaining 1.5 acres should not be allowed, as the evidence does not show that it was developed with reasonable diligence.

Allotment 52

This allotment first passed from Indian to non-Indian ownership in 1916. On this allotment, 3.6 acres are based on a diversion from Jack Creek. However, the evidence is not sufficient to establish when water was diverted from Jack Creek, or whether that portion of the claim was developed with reasonable diligence.

~~While~~ As to the remainder on this allotment, William Kittredge is known to have constructed a diversion on the Williamson River as early as 1918, and may have had some interest in this property in 1917 when he made a payment on behalf of Alex Davis, the first non-Indian owner~~,~~. Kittredge acquired title to this allotment in 1922. ~~the evidence does not show that water was applied to this property prior~~

~~to Kittredge's obtaining title in 1922 as the second non-Indian owner. Unlike the case of Allotment 18, where it is known that Kittredge constructed works on the parcel before he acquired title to it, the record is silent as to the development of irrigation on this parcel while in another non-Indian's title.~~ ~~A *Walton* right should not be allowed.~~ The evidence does not show that water was applied to this property prior to Kittredge's obtaining title in 1922 as the second non-Indian owner. Unlike the case of Allotment 18, where it is known that Kittredge constructed works on the parcel before he acquired title to it, the record is silent as to the development of irrigation on this parcel while in another non-Indian's title. A *Walton* right should not be allowed. ~~This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922. A *Walton* right for 148.5 acres irrigated from the Williamson River should be allowed. However, that portion of the claim from Jack Creek should not be allowed, as the evidence does not show when the diversion was constructed.~~

Allotment 53

This allotment first passed from Indian to non-Indian ownership in 1920. Irrigation of this allotment was developed between 1918 and 1930 as part of the system William Kittredge constructed during that period. Beneficial use of water was made beginning in 1922. A *Walton* right should be allowed for ~~148.4~~ 154.4 acres, the amount claimed.

Allotment 78

William Kittredge was the second non-Indian owner of this parcel. There is no evidence that George Mayfield, the first non-Indian owner, developed irrigation to the property in the two months before he transferred it to Kittredge. ~~William Kittredge was the second non-Indian owner of this parcel. There is no evidence that George Mayfield, the first non-Indian owner, developed irrigation to the property in the two months before he transferred it to Kittredge. A *Walton* right should not be allowed.~~ This allotment first passed from Indian to non-Indian ownership in 1920. ~~It was encompassed within the irrigation system that William~~

~~Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922.~~ A *Walton* right should not be allowed for 150.2 acres, the amount claimed.

Allotment 174

The circumstances of this allotment are similar to those of Allotments18, 20 and 53. Likewise, a *Walton* right should be allowed for 159.8 acres, the amount claimed.

Allotment 24

The circumstances of this allotment are similar to those of Allotments 18, 20, 53 and 174. Likewise, a *Walton* right should be allowed for 52.7 acres, the amount allowed in Kittredge's 1930 water permit. The remainder should not be allowed, as it has not been shown to have been developed with reasonable diligence.

Allotment 25

This allotment first passed from Indian to non-Indian ownership in 1917. ~~There is no evidence that irrigation was developed on this property by its Indian owners. Nor is there evidence that A.A. Bellman, the first non-Indian owner, developed irrigation on this property in the three days before he transferred the property to Charles Worden. A *Walton* right should not be allowed.~~ ~~This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922.~~ There is no evidence that irrigation was developed on this property by its Indian owners. Nor is there evidence that A.A. Bellman, the first non-Indian owner, developed irrigation on this property in the three days before he transferred the property to Charles Worden. A *Walton* right should not be allowed for 24.2 acres, the amount claimed.

Allotment 77

Like Allotment 174, a *Walton* right should be allowed in 65.6 acres, the amount claimed.

Allotment 75

At hearing, Contestants conceded that a *Walton* right existed for water to this parcel from the Williamson River. A *Walton* right should be allowed in 105.8 acres, as claimed.

Allotment 173

This allotment was still under Indian ownership on December 28, 1918, being titled by fee patent to the same Indian owner confirmed as the allottee in 1910. Thus this allotment had not been transferred to non-Indian ownership prior to that date. Because of a break in the chain of title, the identity of the first non-Indian owner cannot be determined. While it is possible that the Wilsons were the first non-Indian owners, there is no evidence that the Wilsons developed irrigation to the property before it was transferred to William Kittredge in 1931. ~~A *Walton* right should not be allowed.~~ ~~Because of a break in the chain of title, the identity of the first non-Indian owner cannot be determined. While it is possible that the Wilsons were the first non-Indian owners, there is no evidence that the Wilsons developed irrigation to the property before it was transferred to William Kittredge in 1931. A *Walton* right should not be allowed.~~ ~~This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922.~~ A *Walton* right should not be allowed for 97.0 acres, the amount claimed.

Allotment 21

Like Allotment 24, a *Walton* right should be allowed in 66.5 acres, the amount allowed to William Kittredge in 1930. The remaining 4.5 acres should not be allowed, as not shown to have been diligently developed.

Livestock Watering

Neither party addressed the question of livestock watering. These allotments were used for grazing well before transfer out of Indian ownership, and have been either grazed or cut for hay ever since. There is ample support for the

livestock watering portion of this claim for up to 2400 head of cattle, the number claimed.

Reasons for Modifications: To correct and clarify the elements of a *Walton* water right; to provide consistency with the above Modified Proposed Order Findings of Fact; to provide clarity of evidence on the record; to further substantiate approval of the claim; to apply the appropriate legal basis/bases to the proposed order's modified findings of fact.

10. **Order.**

a. Within the section titled "Order" of the Proposed Order, the season of use for livestock watering is corrected as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

Stock Water for 2400 head of cattle, between ~~March~~ February 1 and October 31.

Reason for Modification: To provide consistency with Conclusion of Law #1.

b. Within the section titled "Order" of the Proposed Order, a rate for livestock watering is added (shown in "underline" text) as follows:

Rate for Livestock Watering: 28,800 gallons per day, or 0.0~~4~~5 cfs from the Williamson River (based on 12 gallons per head per day for 2400 head).

Reason for Modification: To allow a separate rate for livestock watering – issue raised in exceptions.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:

a. The "History of the Case" is adopted with modifications, as set forth in Section A.6, above.
b. The "Evidentiary Rulings" is adopted in its entirety.
c. The "Issues" is adopted in its entirety.
d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, above.
e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.8, above.
f. The "Opinion" is adopted with modifications, as set forth under Section A.9, above.
g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 9. Consistent with Sections A.7, A.8, A.9, above, the outcome of the Order has been modified to recognize a right for irrigation on an additional ~~584.7~~7.3 acres for a total of 892.9

acres; the season of use for livestock watering is corrected in Findings of Fact A.10.a, and a rate is specified for livestock watering in Section A.10.b, above.

2. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

~~3. Beneficial use of water by the method of natural overflow was established on Allotments 152 and 264 prior to the development of specific points of diversion.~~

~~4.~~3. Based on the file and record herein, IT IS ORDERED that Claim 9 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 9

CLAIM MAP REFERENCE:
CLAIM # 9, PAGE 25; OWRD INVESTIGATION MAP – T 30 S, R 10 E;

CLAIMANT: JERRY L. NEFF AND LINDA R. NEFF
4118 HARBOR WALK DRIVE
FORT COLLINS, CO 80525

ROBERT M. COOK - T P C, LLC, AN OREGON LIMITED LIABILITY CO
32041 CARTNEY DR.
HARRISBURG, OR 97446

SOURCE OF WATER:
~~LONG PRAIRIE CREEK, tributary to UPPER KLAMATH LAKE, and~~
The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE:
IRRIGATION OF ~~1470.3~~892.9 ACRES ~~AS FOLLOWS:~~

~~157.5 ACRES FROM LONG PRAIRIE CREEK POD, AND~~

~~1312.8 ACRES~~ FROM THE WILLIAMSON RIVER, BEING ~~387.7~~270.3 ACRES FROM BIG WIRE DAM POD NORTH, AND ~~925.1~~622.6 IACRES FROM BIG WIRE DAM POD SOUTH;

LIVESTOCK WATERING FROM THE WILLIAMSON RIVER FOR 2400 HEAD

RATE OF USE:
~~20.395~~11.205 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

~~3.94 CFS FROM LONG PRAIRIE CREEK FOR IRRIGATION, MEASURED AT THE POINT OF DIVERSION,~~

~~16.41~~11.16 CFS FROM THE WILLIAMSON RIVER FOR IRRIGATION, MEASURED AT THE POINTS OF DIVERSION, BEING ~~4.85~~3.38 CFS FROM BIG WIRE DAM POD NORTH, AND ~~11.56~~7.78 CFS FROM BIG WIRE DAM POD SOUTH, AND

0.045 CFS FOR LIVESTOCK WATERING FROM THE WILLIAMSON RIVER MEASURED AT THE PLACE OF USE, NOT TO EXCEED 28,800 GALLONS PER DAY.

DIVERSION OF STOCK WATER TO THE PLACE OF USE IS LIMITED TO THAT WHICH HAS BEEN HISTORICALLY DIVERTED FOR BENEFICIAL USE AND IS REASONABLY NECESSARY TO TRANSPORT THE WATER.

~~THE RATE OF USE FOR IRRIGATION FROM LONG PRAIRIE CREEK MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.~~

THE RATE OF USE FOR IRRIGATION FROM THE WILLIAMSON RIVER MAY NOT EXCEED 1/80 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.5 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE:

Use	Period
Irrigation	March 1 - October 31
Livestock Watering from the Williamson River	February 1 - October 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name	Source	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
~~Long Prairie Creek POD~~	~~Long Prairie Creek~~	~~30 S~~	~~10 E~~	~~WM~~	~~11~~	~~NW NW~~	~~330 FEET EAST FROM NW CORNER, SECTION 11~~
Big Wire Dam POD North	Williamson River	30 S	10 E	WM	16	NW NW	NONE GIVEN
Big Wire Dam POD South	Williamson River	30 S	10 E	WM	16	NW NW	NONE GIVEN

THE PLACE OF USE IS LOCATED AS FOLLOWS:

~~IRRIGATION FROM LONG PRAIRIE CREEK POD~~					
~~Twp~~	~~Rng~~	~~Mer~~	~~Sec~~	~~Q-Q~~	~~Acres~~
~~30 S~~	~~10 E~~	~~WM~~	~~10~~	~~NE NE~~	~~17.2~~
~~30 S~~	~~10 E~~	~~WM~~	~~10~~	~~NW NE~~	~~17.6~~
~~30 S~~	~~10 E~~	~~WM~~	~~10~~	~~SW NE~~	~~11.2~~
~~30 S~~	~~10 E~~	~~WM~~	~~10~~	~~SE NE~~	~~32.0~~
~~30 S~~	~~10 E~~	~~WM~~	~~11~~	~~NW NW~~	~~10.4~~
~~30 S~~	~~10 E~~	~~WM~~	~~11~~	~~SW NW~~	~~35.1~~
~~30 S~~	~~10 E~~	~~WM~~	~~11~~	~~SE NW~~	~~34.0~~

IRRIGATION and LIVESTOCK WATERING FROM THE WILLIAMSON RIVER						
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD
30 S	10 E	WM	8	SW SW	20.8	BIG WIRE DAM POD NORTH
30 S	10 E	WM	8	SE SW	34.8	
30 S	10 E	WM	8	SE SE	3.2	
30 S	10 E	WM	16	NW NW	6.8	

IRRIGATION and LIVESTOCK WATERING FROM THE WILLIAMSON RIVER						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**Acres**	**Authorized POD**
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~NE NE~~	~~34.4~~	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~NW NE~~	~~39.4~~	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~SW NE~~	~~28.0~~	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~SE NE~~	~~15.6~~	
30 S	10 E	WM	17	NE NW	40.0	
30 S	10 E	WM	17	NW NW	40.0	
30 S	10 E	WM	17	SW NW	35.6	
30 S	10 E	WM	17	SE NW	32.8	
30 S	10 E	WM	18	NE NE	31.9	
30 S	10 E	WM	18	SE NE	20.8	
30 S	10 E	WM	18	NE SE	3.6	
30 S	10 E	WM	16	NE NW	12.4	
30 S	10 E	WM	16	NW NW	17.6	
30 S	10 E	WM	16	SW NW	40.0	
30 S	10 E	WM	16	SE NW	24.4	
30 S	10 E	WM	16	NE SW	25.7	
30 S	10 E	WM	16	NW SW	40.0	
30 S	10 E	WM	16	SW SW	40.0	
30 S	10 E	WM	16	SE SW	22.4	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~NE NE~~	~~0.3~~	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~SW NE~~	~~10.8~~	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~SE NE~~	~~20.0~~	
30 S	10 E	WM	17	SW NW	2.4	
30 S	10 E	WM	17	SE NW	3.6	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~NE SW~~	~~40.0~~	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~NW SW~~	~~38.6~~	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~SW SW~~	~~31.6~~	
~~30 S~~	~~10 E~~	~~WM~~	~~17~~	~~SE SW~~	~~40.0~~	
30 S	10 E	WM	17	NE SE	40.0	BIG WIRE DAM POD SOUTH
30 S	10 E	WM	17	NW SE	39.8	
30 S	10 E	WM	17	SW SE	40.0	
30 S	10 E	WM	17	SE SE	40.0	
30 S	10 E	WM	18	NE SE	22.0	
~~30 S~~	~~10 E~~	~~WM~~	~~18~~	~~NW SE~~	~~0.2~~	
~~30 S~~	~~10 E~~	~~WM~~	~~18~~	~~SW SE~~	~~24.0~~	
30 S	10 E	WM	18	SE SE	40.0	
30 S	10 E	WM	19	NE NE	29.6	
30 S	10 E	WM	19	NW NE	40.0	
30 S	10 E	WM	19	SW NE	32.6	
30 S	10 E	WM	19	SE NE	3.6	
~~30 S~~	~~10 E~~	~~WM~~	~~20~~	~~NE NE~~	~~40.0~~	
~~30 S~~	~~10 E~~	~~WM~~	~~20~~	~~NW NE~~	~~28.0~~	
~~30 S~~	~~10 E~~	~~WM~~	~~20~~	~~SW NE~~	~~0.2~~	
~~30 S~~	~~10 E~~	~~WM~~	~~20~~	~~SE NE~~	~~28.8~~	
30 S	10 E	WM	21	NE NW	7.0	
30 S	10 E	WM	21	NW NW	39.5	
30 S	10 E	WM	21	SW NW	20.0	

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of JOHN M. MOSBY AND MARILYN MOSBY	)))))	PARTIAL ORDER OF DETERMINATION Water Right Claim 18

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE PROPOSED ORDER

1. Claim 18 (Claimants: JOHN M. MOSBY AND MARILYN MOSBY) and its associated contests (2818, 3099, 3436, 3720, and 4076) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 165.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued an AMENDED PROPOSED ORDER (Proposed Order) for Claim 18 on June 2, 2006.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) the United States of America and (2) John M. and Marilyn Mosby.

4. On May 8, 2012, the Adjudicator issued a SECOND AMENDED PROPOSED ORDER (Amended Proposed Order) to modify the season to April 1 through October 31 because the season of use in the June 2, 2006 Proposed Order exceeded the claimed season of use. No exceptions were filed to Amended Proposed Order.

5. The Amended Proposed Order issued on May 8, 2012, is adopted and incorporated in its entirety as if set forth fully herein.

6. The exceptions filed to the Proposed Order issued on June 2, 2006, along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 18. The exceptions are found to be persuasive in part, and therefore,

modifications are made to the Proposed Order as described in Sections A.8, A.9, A.10 and A.11, below.

7. The Proposed Order is adopted and incorporated with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted with modifications, as set forth in Section A.8, below.
   b. The "Evidentiary Rulings" is adopted in its entirety.
   c. The "Issues" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.9, below.
   e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.10, below.
   f. The "Opinion" is adopted with modifications, as set forth in Section A.11, below.
   g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in this Partial Order of Determination for Claim 18. Consistent with Sections A.8, A.9, A.10 and A.11, below, the outcome of the Order has been modified to recognize a right for irrigation ~~on an additional 787.2 acres~~, to approve livestock watering incidental to irrigation for ~~1356~~ 408 head, to limit the season of use to April 1 to October 31 as claimed, and to describe the effects of naturally occurring subirrigation from the Williamson River on a portion of the claimed place of use.

8. **History of the Case.** The first paragraph is modified as follows: (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

Claimants John M. and Marilyn Mosby filed their claim (claim 18) on December 7, 1990, making a claim for water as non-Indian successors to ~~a~~ Klamath Indian Allottees, and as non-Indian successors to unallotted Klamath Indian Reservation lands. This *Walton* claim[1] is for 77.73 cubic feet per second (cfs) of water, being 4.78 cfs from Scott Creek, 41.25 cfs from Sand Creek, and 26.7 cfs from the Williamson River for irrigation of approximately 5,376.7[2] acres of land; and 5 cfs (unspecified source) for livestock use.~~,~~ ~~with a~~ The claimed period of use ~~of~~ is April through October for irrigation, and year round for livestock. (Ex. 20002 at 1-10). On October 4, 1999, Richard D.

[1] Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den*, 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den*, 475 US 1010 (1986) (*Walton III*).

[2] On the Statement and Proof of Claim, Item 7, the total acres are listed as 5376.7 acres. However, the sum of the acres listed by source and quarter-quarter is 5336.3. (Compare Ex. 20002 at 3 – 5 with Ex. 20002 at 8).

Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation for this claim preliminarily denying the claim. Various contests were filed, including Contest 2818 filed by WaterWatch,[3] Contest 3099 filed by Claimants, Contest 3436 filed by Klamath Project Water Users (KPWU),[4] Contest 3720 filed by the United States, and Contest 4076 filed by the Klamath Tribes.[5]

Reason for Modifications: To make corrections raised in exceptions; using evidence on the record, to provide more specific information with reference to what was claimed; to provide an additional citation to the record; and to clarify the number of acres claimed in a footnote.

9. **Findings of Facts.** The Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of the modified findings of fact are provided beneath certain sections of modified findings. A summary of the reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: The general reasons for modifications are as follows: (1) To correct scrivener's errors and provide clarity of evidence in the record. ~~(2) To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow, and by the method of subirrigation, issues raised in exceptions.~~ (32) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions. (43) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by the first non-Indian successor(s) after transfer from Indian ownership, an issue raised in exceptions. (~~5~~4) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record.

[3] Withdrawn on February 20, 2003.

[4] KPWU is a group of separate water users and districts within the Klamath Basin who have filed joint contests in Adjudication proceedings. The group is composed of the following parties: 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; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC.

[5] Withdrawn on August 12, 2004.

Modified Proposed Order Findings of Fact

GENERAL DEVELOPMENT OF LANDS APPURTENANT TO THE CLAIM:

1. Claim 18 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. It was originally 43 parcels, all but three of which were originally allotted to Klamath Indians as part of the termination of the Reservation. The remaining three parcels were transferred by the United States to the Klamath Indian Tribes after the Reservation was terminated, and then transferred by the Tribes. The total claim is for 5,376.7 acres.[6] (Ex. 20002 at 8.)

2. The Allotments are located on both sides of the Williamson River, west of the Klamath Marsh. (Exs. 40008, 50172, ~~50183~~ 20002 at 154-155.) Prior to development, part of the land was subject to periodic flooding, while other portions were subject to subirrigation from the Williamson River or its tributaries. (Exs. 40061, 40065, 40067[7]; Affidavit of John Mosby at 2; 40001 at 65-134.) Early in the 1900s, several studies were conducted as to the feasibility of developing drainage ditches to drain portions of the reservation that were inundated much of the year. (Ex. 50105.) In addition, by 1920, several irrigation systems were under construction or completed on the reservation, including the Sand Creek Unit~~,~~.

¶ Construction of the irrigation system for the Sand Creek Unit began sometime after 1918 and was completed in 1920 (Exs. 50094 at 4-5; 50105 at 20; 50106 at 2-3; 20002 at 139) ~~which~~ The Unit was reported to irrigate 3,614 acres in the area. (Ex. 50105 at 10, 20; Ex. 20002 at 129, 143.) It was found, however, that the Sand Creek Unit was difficult and expensive to maintain, and the area irrigated from the Unit was reduced to 1,150 acres in 1939. (Exs. 20002 at 143; 50094 at 4-5; 50107 at 8.) Owners of the 1,150 acres land in the Sand Creek Unit were later assessed government charges under a Secretary of Interior Contract # 14-20-0500-2150 dated April 21, 1965. This contract specified which lands remained in the project as of 1965. (Ex. 20002 at 72-73, 143; Ex.

[6] As stated in the claim document. Claimant asserted in briefing that the actual irrigable acreage was 5,587. Since the claim controls, that will be the figure used in this case.

[7] The three exhibits listed are appraisals of the area shortly after 1900 that refer to the lands as "wet" or "marsh land." Since no irrigation works were in place at the time, ~~I~~ it is inferred from these descriptions that the property was receiving water by natural subirrigation.

40001 at 17.) The source of water for irrigation within the Sand Creek Unit is commingled water from Scott Creek and Sand Creek. (Ex. 20002 at 129-130, 143).

¶ ~~A 1952 aerial photograph clearly shows a ditch passing through Allotments 84, 91, 92, and 94. (Ex. 40022.) The shape and location of this ditch is consistent with an "Old Ditch" marked on a 1962 Final Proof Survey map for Permit S-23046. (Ex. 20002 at 27.)~~ ~~In approximately~~ By 1955, the Sand Creek Ditch was already developed by D.O. Williams as evidenced on a 1955 aerial photo. (Exs. 40001 at 36-37; 40023.) Laterals in Allotments 1347½ and 1387 were extended from the Sand Creek Ditch in 1969. (Ex. 40001 at 88-90, 96.)

Reasons for Modifications: To provide corrected and additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

ALLOTMENTS 133, 38, 39, 123, and 122:

3. These properties were part of the property served by the Sand Creek Unit, an irrigation system developed ~~prior to 1964~~ by 1920. (Exs. 50094 at 4-5; 50105 at 20; 50106 at 2-3; 20002 at 139.) Pursuant to the Act of August 20, 1964 (Public Law 88-456, 78 Stat 554) Allotments 133, 38, 39, 122, and 123 were identified in a 1965 contract between the United States and the property owners for assessments based upon the number of total acres under contract within each allotment.[8] ~~, 160 acres each. The contract does not refer to either acreage recited as "irrigable" or "under cultivation."~~ The contract does not refer to either acreage recited as "irrigable" or "under cultivation." The acres under contract, by allotment, are as follows: Allot. 133 – 160 ac; Allot. 38 – 154 ac; Allot. 39 – 160 ac; Allot. 123 – 160 ac; Allot. 122 – 110 ac. (Exs. 50112; 20002 at 72-73.)

4. The claimed source of water for Allotments 133, 38, 39, 123, and 122 is commingled water from Scott and Sand Creeks. The claimed Scott Creek point of diversion is located within the NESE, Section 1, Township 31 S, Range 7 E, W.M. The

[8] For example, in Allotment 122 only 110 acres of the 160 acre allotment were assessed. (Compare Ex. 20002 at 131 to Ex. 50129 at 1.)

claimed (upper) Sand Creek point of diversion is located within the NWNW, Section 28 Township 31 S, Range 7 E, W.M. (Ex. 20002 at 1-6, 34; Ex. 40008.)

4 5. The parties agree that Allotment 122, located in the NE¼ of Section 17, Township 31 S, Range 8 E, W.M. should be allowed as a *Walton* claim, with ~~at least~~ 110 acres irrigated. (Claimants' Reply Brief at 24; United States' Posthearing Brief at 42.) The ~~parties agree that at least~~ United States asserts that 134 acres have a developed water right for Allotment 39, located in the NE¼ of Section 7, Township 31 S, Range 8 E, W.M. and that at least 119 acres have a developed water right for Allotment 123, located in the NW¼ of Section 17, Township 31 S, Range 8 E, W.M.~~,~~. The claimants disagree with this evaluation of Allotments 39 and 123, asserting that additional acreage should be allowed. The United States' relied on interpretation of nine aerial photographs spanning the years 1952 to 2000 for measuring the maximum acres historically irrigated within these two allotments. The acreage for Allotment 39 is based on a 1961 aerial photograph and a 2000 aerial photograph for Allotment 123. ~~based upon the evidence of water actually beneficially applied to the allotments. The source for these properties is Sand Creek, a tributary of Williamson River. The diversion point is located in the NW 1/4 SE 1/4, section 16, Township 31 S, Range 7 E, W.M.~~ (Exs. ~~20002 at 45, 40008, 40010;~~ 40001 at 26-35; Claimants' Reply Brief at 25; United States' Posthearing Brief at ~~41~~ 42.)

Allotment 122

6. Allotment 122 was transferred from Indian ownership to a non-Indian successor as early as 1917. (Ex. 20002 @ 97-98; Ex 40010.) As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 110 acres assessed in the 1965 contract.

Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)

The Claimants did not provide the location of these 110 acres by quarter-quarter. OWRD estimated the 110 acres by quarter-quarter using the 1923 map of the Sand Creek

Unit (Ex. 20002 at 131) which illustrates the location of 110 acres within the NE¼ of Section 17, the OWRD Field Investigation Map for Township 31 S, Range 8 E, W.M., and a mapping tool as follows: 33.5 ac within the NENE ; 40.0 ac within the NWNE; 33.0 ac within the SWNE; and 3.5 ac within the SENE.

Allotment 39

7. Allotment 39 was transferred from Indian ownership to a non-Indian successor in 1917. (Ex. 20002 at 93; Ex 40010.) ~~As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 156.0 acres claimed, being 40.0 acres within the NENE, 40.0 acres within the NWNE, 38.0 acres within the SWNE, and 38.0 acres within the SENE.~~

~~Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)~~

Allotment 123

8. Allotment 123 was transferred from Indian ownership to a non-Indian successor as early as 1917. (Ex. 20002 @ 97-98; Ex 40010.) ~~As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 160.0 acres claimed, being 40.0 acres within the NENW, 40.0 acres within the NWNW, 40.0 acres within the SWNW, and 40.0 acres within the SENW.~~

~~Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)~~

Allotments 133 and 38

~~5~~ 9. In 1915, Grover Neil acquired title to both Allotments 133 and 38. He was the first non-Indian owner. (Ex. 50085.) In 1914, prior to his obtaining title to this property, Grover Neil apparently filed an application for a water right for irrigation of this land with the State of Oregon. (Ex. 40054.) Neil transferred the property to another non-Indian owner on August 23, 1915. (Ex. 20002 at 83.) There is no evidence that water was diverted to the property before this second transfer. In 1914, the Superintendent of the Klamath Indian Reservation sent a letter concerning the water right application of Grover Neil in connection with these Allotments. (Ex. 40054.)

~~10. Allotment 133 is located in the SW¼ of Section 5, Township 31 S, Range 8 E, W.M. As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 160.0 acres claimed, being 40.0 acres within the NESW, 40.0 acres within the NWSW, 40.0 acres within the SWSW, and 40.0 acres within the SESW.~~

~~Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)~~

~~11. Allotment 38 is located in the NW¼ of Section 7, Township 31 S, Range 8 E, W.M. As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 140.0 acres claimed, being 40.0 acres within the NENW, 31.6 acres within Lot 1 (NWNW), 30.4 acres within Lot 2 (SWNW), and 38.0 acres within the SENW.~~

~~Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)~~

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide corrected and additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In Finding of Fact 6, OWRD addresses the location of 110 acres within the NE¼ of Section 17.

ALLOTMENTS 168, 91, 94, 184 and 84:

~~6~~ 12. In the letter discussed above in relation to Allotments 133 and 38, the Superintendent stated: "The Indians tell me that the waters of Sand Creek have been used by them for irrigation purposes and for livestock for more than 20 years." (Ex. 40054.) The distance between Allotments 133 and 38 and Allotments 84, 91, 94, 168, and 184 is more than one mile. (Ex. 40008.)

13. Testimony was given by the United States that water from Sand Creek, prior to the installation of the Sand Creek Ditch in 1955, under high flows would spread out to the east and work it way east to the Klamath Marsh which is located immediately to the east of Claim 18 lands. (Attachments 3 and 4 to Claimants' Reply Brief – Hearing Transcript at 40-41.) The United States also testified that natural overflow from Sand Creek spread over portions of Allotments 168 and 184. (Exs. 40001 at 45, 62; 40008.)

~~7~~ 14. In 1920, a farming and grazing lease entered into respecting Allotment 94 made provision for the lessee to clean out a ditch. The lease does not recite whether this ditch is for irrigation or drainage. (Ex. 40068.) ~~In 1951,~~ A 1962 Final Proof Survey map was filed for a state water right covering ~~a portion of~~ this entire block of allotments. This Survey map shows an "old ditch" passing continuously through Allotments 170, 92, 94, 91 and 84. ~~west of this block of allotments. It does not show any connection between that "old ditch" and Allotments 84, 91, 94, 168 and 184.~~ A ditch with the same contours is visible on a 1952 aerial photograph. (Compare Ex. 20002 at 27 to Ex. 40022 .) Furthermore, the United States testified that in 1952, a pre-existing ditch intercepted excess runoff from Sand Creek to the north prior to the construction of the Sand Creek Ditch spreading water onto Allotments 91, 94 and 84. (Ex. 40001 at 56, 58-60, 67.)

~~8~~ 15. Allotment 91 was transferred to B.S. Grigsby, a non-Indian, on April 20, 1921. (Ex. 50012.) Allotment 94 was transferred to B.S. Grigsby, a non-Indian, on June 29, 1927. (Ex. 50020.) Allotment 184 was transferred to Emma R. Grigsby, a non-Indian on February 18, 1918. (Exs. 50010, 50011.) Allotment 84 was transferred to B.S. Grigsby, a non-Indian, on March 9, 1914. (Ex. 50002.) Allotment 168 was transferred to D.O. Williams, a non-Indian, on December 20, 1937. (Ex. 40016 at 2.)

Allotment 168

16. Allotment 168 is located in the NE¼ of Section 20, Township 31 S, Range 8 E, W.M. Two sources of water were claimed for this parcel. Commingled water from Scott and Sand Creeks were claimed on the northernmost 76.8 acres. Sand Creek from the "lower" point of diversion was claimed on the southernmost 71.8 acres. The claimed lower Sand Creek point of diversion is located within the NWNW, Section 20 Township 31 S, Range 8 E, W.M. (Ex. 20002 at 1-6, 27; Ex. 40008.) Department of Interior Grazing Lease # 115 was issued in 1925 on lands appurtenant to this parcel. (Ex. 50117.) ~~Beneficial use of water from Sand Creek by the method of natural overflow on a portion of Allotment 168, being the 71.8 acres claimed from Sand Creek, was made prior to transfer from Indian ownership.~~

~~Irrigation from the claimed source has continued on this parcel as evidenced by water right Permit S-23046/Certificate 31364, priority date February 7, 1951. (Exs. 20002 at 27; 50133; 40101.)~~

Allotment 94

17. Allotment 94 is located in the NW¼ of Section 29, Township 31 S, Range 8 E, W.M. The claimed source of water for this parcel is Sand Creek with a claimed "lower" point of diversion located within the NWNW, Section 20 Township 31 S, Range 8 E, W.M. (Ex. 20002 at 1-6, 27; Ex. 40008.) A FARMING AND GRAZING LEASE dated 1920 was issued for this allotment wherein the lessee agreed to repair fences and clean out the ditch. (Ex. 40068.) In addition, DEPARTMENT OF INTERIOR GRAZING LEASE # 115 was issued in 1925 on lands appurtenant to this parcel. (Ex. 50117.) On a 1927 CERTIFICATE OF APPRAISEMENT, 160 acres were characterized as grazing land. ~~Beneficial use of water~~

~~was made on this parcel prior to transfer from Indian ownership on 156.9 acres claimed[9]; being 39.3 acres within the NENW, 39.0 acres within the NWNW, 39.3 acres within the SWNW, and 39.3 acres within the SENW; Section 29, Township 31 S, Range 8 E, W.M. Irrigation from the claimed source has continued on this parcel as evidenced by water right Permit S-23046/Certificate 31364, priority date February 7, 1951. (Exs. 20002 at 27; 50133; 40101; 40008).~~

Allotments 91, 184, 84

18. Although there was natural overflow and/or evidence of an early ditch on Allotments 91, 184 and 84, the first evidence of beneficial use of water from Sand Creek on these parcels is water right Permit S-23046/Certificate 31364 with a priority date of February 7, 1951. (Exs. 50133; 40008; 40101.) These allotments transferred out of Indian ownership between the years 1914 and 1921. Thus beneficial use of water was not demonstrated for thirty to thirty-five years following transfer from Indian ownership.

Beneficial use of water with reasonable diligence has not been demonstrated on these three allotments.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to make findings of fact pertaining to natural overflow; to add clarification using evidence on the record.

ALLOTMENTS 170, 92, 93, 16, 80, 81, 83, 82, 95, 97, 100, 101, 103, 104, 266, 559, 591, 1311, 1374, 1493:

Allotment 170 – Claimed from Commingled Waters of Scott and Sand Creeks

19. The claimed source for Allotment 170 is commingled water from Scott and Sand Creeks. (Ex. 20002 at 1-6; Ex. 40008.) This allotment transferred out of Indian ownership in 1921. (Ex. 40010.) United States interpreted a 1952 aerial photograph as showing 96 acres of natural flooding on this allotment (Ex. 40001 at 42); ~~however, there is no~~

[9] ~~The claimants recorded 39.3 acres within the NWNW of Section 29 (Ex. 20002 at 3), but to be consistent with the map was corrected by OWRD to 39.0 acres (Ex. 20002 at 149, 151.). Therefore there are 156.9 total acres claimed in Allotment 94.~~

~~evidence on the record that beneficial use of this natural overflow was made with reasonable diligence.~~ And although these lands are included in Certificate 31364 (1951 priority date) for irrigation from a point of diversion on Sand Creek (Ex. 50133), this source of water is different from that which was claimed for this allotment. Even if it had been the same as the claimed source, beneficial use under this certificate would not have been made with reasonable diligence.

Beneficial use of water with reasonable diligence has not been demonstrated on Allotment 170.

Allotments 92, 93, 16, 80, 81, and Portions of 82, 83, 591, 1493 -- Claimed from Sand Creek.

20. The claimed source of water for these allotments is Sand Creek from the claimed lower point of diversion. (Ex. 20002 at 1-6, 27; Ex. 40008.)

21. Testimony was given by the United States that water from Sand Creek, prior to the installation of the Sand Creek Ditch, would under high flows spread out to the east toward the Klamath Marsh, which is located immediately to the east of Claim 18 lands. (Attachments 3 and 4 to Claimants' Reply Brief – Hearing Transcript at 40-41.) The United States' testimony also demonstrated that natural overflow spread over portions of Allotments 92, 93 and 16 (Ex. 40001 at 47, 50, 53; Ex. 40008.) ~~However, there is no evidence on the record that beneficial use of water by the method of natural overflow was made within these allotments.~~

22. The first evidence of beneficial use of water on Allotments 92, 93, 16, 80, and 81, and on portions of Allotments 82, 83, 591, and 1493, is from the lower point of diversion on Sand Creek under the authority of water right Permit S-23046/Certificate 31364. This water right has a priority date of February 7, 1951. (Exs. 50133; 40008; 40101.) These allotments transferred out of Indian ownership between the years 1914 and 1927. (Ex. 40010.) Beneficial use of water was not demonstrated for twenty-four to thirty-seven years following transfer from Indian ownership.

Beneficial use of water with reasonable diligence from Sand Creek has not been demonstrated on these allotments or portions of allotments.

Allotments 95, 97, 100, 101, 103, 104, 266, 559, 1311, 1374, and Portions of 82, 83, 591, 1493 -- Claimed from the Williamson River.

23. The claimed source of water for these allotments is the Williamson River, with a claimed point of diversion located within the SENW, Section 33 Township 31 S, Range 8 E, W.M. (Ex. 20002 at 1-6, 31; Ex. 40008.)

~~24. The United States' testimony demonstrates that Allotments 95, 97, 100, 101, 103, 104, 266, 559, 1311, and 1374, which are located south and east of the Williamson River, appear to receive subirrigation from the river due to the proximity of the river and the low lying nature of the land. (Ex. 40001 at 98-99.) The United States' testimony also demonstrates that Allotments 1311, 82, 591, 1493, portions of Allotments 95, 97, and 103, the western portion of 266, and the eastern three-quarters of 83 are substantially influenced by subirrigation. (Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.) An APPRAISAL REPORT for Allotment 95 states that "underground water" is at a sufficient height to provide adequate moisture to grow a good crop of grass. (Ex. 40098.) Soils maps and soils interpretations conducted by the U.S.D.A. Soil Conservation Service describe the majority of these lands as being within the Chincallo Series and subject to annual inundation (Ex. 500142 at 3), with only a small percentage of lands described as being subject to annual flooding (Exs. 500142 at 4; 40008) or frequent flooding except where diked (Ex. 500142 at 5).[10] (*See also* Exs. 500143-144; 40008; Claimants' Closing Argument at 24.)~~

25. The following allotments have grazing leases dated prior to the allotment transferring out of Indian ownership: Allotments 82, 83, 101, 104, 266, 591, and 1493 (Exs. 40010; 40076; 40078; 50116; 50117; 50118). Of these, Allotments 83, 101, 104 and 1493 also have a CERTIFICATE OF APPRAISEMENT issued under Indian ownership that

~~[10] The Chincallo Series represents the overwhelming majority of the claimed lands, the Kirk Series is of limited presence being mostly in the far northwest and southeast corners of the farm, and the Skellock series occupy a very limited amount of land within Allotment 1347½ . This analysis is based on the soils maps in Ex. 50143.~~

characterizes all the acres within the allotment as "grazing." (Exs. 40077; 40080, 40087, 40090; 40093; 40094.) Allotments 100 and 103 have similar certificates. *Id*. Finally, a 1956 APPRAISAL REPORT characterized Allotment 95 as follows: " [t]he subject tract consists of meadow land utilized at present for the grazing of cows . . . the tract is enclosed with a standard 4 barded wire fence." Allotment left Indian ownership in 1956. (Exs. 40010; 40098.)

~~Beneficial use of water from the Williamson River by the method of natural subirrigation[11] has been demonstrated on Allotments 95, 100, 101, 103, 104, and 266, and portions of Allotments 82, 83, 591 and 1493.~~

26. ~~Aside from subirrigation, t~~The first evidence of beneficial use of water on Allotments 95, 97, 100, 101, 103, 104, 266, 559, 1311, 1374, and portions of Allotments 82, 83, 591, and 1493 is from a diversion on the Williamson River as authorized under water right Permit S-25337/Certificate 33523. The water right has a priority date of February 10, 1958. (Exs. 40008; 40104.) With the exception of Allotments 95 and 1131, these allotments transferred out of Indian ownership between the years 1913 and 1927. (Ex. 40010.) Thus beneficial use of water from a diversion was not demonstrated on these twelve allotments for thirty-one to forty-five years following transfer from Indian ownership. Allotment 1131 transferred out of Indian ownership in 1950, eight years after beneficial use of water from a diversion began; beneficial use of water with reasonable diligence was not demonstrated on this allotment.

27. Allotment 95 transferred out of Indian ownership in 1956 (Exs. 50076; 40010). ~~Thus, beneficial use of water from a diversion on the Williamson River was made with reasonable diligence by non-Indian successors on the 155.9 acres claimed, being 39.8 acres within the NENW, 39.8 acres within the NWNW, 39.8 acres within the SWNW, and 36.5 acres within the SENW; Section 8, Township 32 S, Range 8 E, W.M.~~

[11] ~~Natural subirrigation as used here refers to water use which results from a naturally occurring high water table condition.~~

~~Irrigation from the claimed source has continued on this parcel as evidenced by water right Permit S-25337/Certificate 33523, priority date February 10, 1958. (Exs. 40008; 40104.)~~

Section Summary

~~9~~. 28. ~~Except for 155.9 acres within Allotment 95, t~~There is no evidence of ~~beneficial use of water by the method of natural overflow or by~~ an artificial diversion of water to the ~~other nineteen~~ allotments addressed in this section, prior to ~~or within a reasonably diligent period after~~ the transfer of the property to the second ~~the second~~ non-Indian ~~owner~~ owner ~~successors~~.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to make findings of fact pertaining to natural overflow and subirrigation; to add clarification using evidence on the record.

ALLOTMENT 532:

~~10~~ 29. The claimed source of water for Allotment 532 is commingled water from Scott and Sand Creeks. (Ex. 20002 at 1-6.) United States interpreted a 1952 aerial photograph as showing 96 acres of natural flooding on this allotment (Ex. 40001 at 39)~~; however, there is no evidence on the record that beneficial use of natural overflow was made within this allotment~~. Ditches have been identified that could have supplied water to Allotment 532 in 1955, prior to its acquisition by Ernest Bubb, the first non-Indian owner, in 1957. However, there is no evidence that water was beneficially applied to this allotment at that time. (Ex. 40016 at 1; Ex. 40001 at 36-37, 96; Ex. 40023.) The United States determined, based on interpretation of aerial photographs, that the first evidence of application of water to Allotment 532 is in 1969. (Ex. 40001 at 96.) There is no evidence in the record of a state water right appurtenant to this allotment.

Beneficial use of water with reasonable diligence has not been demonstrated on this allotment.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to make findings of fact pertaining to natural overflow; to add clarification using evidence on the record.

ALLOTMENTS 105 and 267:

~~11~~ 30. These allotments were acquired by the first non-Indian owner, McAuliffe, in 1926, and sold to D.O. Williams, also a non-Indian, in 1939. (Exs. 50035, 50041.) The claimed source of water for these two allotments is the Williamson River. (Ex. 20002 at 1-6, 31; Ex. 40008.)

¶ 31. In 1926 McAuliffe entered into an agreement, as part of the purchase of Allotment 267, to pay irrigation assessments for the portion of the property that is irrigated, and described the property as "irrigable lands now under ~~a~~ constructed ditch." (Ex. 40088.) At the same time, a Certificate of Appraisement was prepared, which shows that Allotment 267 was appraised as land for grazing, and did not show any part of the property under irrigation. (Ex. 40089.) ~~There is no evidence of irrigation of Allotments 105 or 267 prior to 1961. (Testimony of Clements.)~~

Allotment 267

32. The United States' testimony demonstrates that Allotment 267, which is located south and east of the Williamson River, receives subirrigation from the river due to the proximity of the river and the low lying nature of the land. (Ex. 40001 at 98-99; Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.) A U.S.D.A. Soil Conservation Service map shows the majority of soils in this allotment are of the Chincallo Series (2H3ZV3, 4H3ZV3), which are subject to annual inundation. (Ex. 500142 a 3.) There is a narrow strip of Kirk Series soils (4M6ZA4) along the southern edge of the allotment parallel to an irrigation ditch. The Kirk Series soils are described as being subject to frequent flooding except where diked. (Ex. 500142 at 5). (*See also* Exs. 500143 at 3; 40008; Claimants' Closing Argument at 24.)

33. The Department of Interior issued grazing leases appurtenant to this allotment in 1925 and 1926. (Exs. 50116, 50118.) ~~Beneficial use of water from the Williamson River by the method of natural subirrigation[12] has been demonstrated on this allotment.~~

34. The first evidence of a diversion from the Williamson River appears on a 1952 aerial photograph. (Ex. 50165.) The canal on this allotment is consistent with the canal associated with water right Permit S-25337/Certificate 33523, which has a priority date of February 10, 1958. (Exs. 20002 at 31; 40104.) Beneficial use of water from a diversion was not demonstrated on this allotment for at least twenty-six years following transfer from Indian ownership.

Allotment 105

35. The United States testified that Allotment 105, which is located south and east of the Williamson River, receives subirrigation from the river due to the proximity of the river and the low lying nature of the land. (Ex. 40001 at 98-99; Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.) A U.S.D.A. Soil Conservation Service map all the soils in this allotment are of the Chincallo Series (2H3ZV3, 4H3ZV3), which are subject to annual inundation (Ex. 500142 a 3;). (*See also* Exs. 500143 at 3; 40008; Claimants' Closing Argument at 24.)

36. Department of Interior Grazing Lease # 128 was issued in 1926 on lands appurtenant to this allotment. (Ex. 50118.) ~~Beneficial use of water from the Williamson River by the method of natural subirrigation[13] has been demonstrated this allotment.~~

37. Aside from subirrigation, the first evidence of beneficial use of water on this parcel was from a diversion on the Williamson River as authorized by water right Permit S-25337/Certificate 33523 with a priority date of February 10, 1958. Beneficial use of

~~[12] Natural subirrigation as used here refers to water use which results from a naturally occurring high water table condition.~~

~~[13] Natural subirrigation as used here refers to water use which results from a naturally occurring high water table condition.~~

water from a diversion was not demonstrated on this allotment for thirty-two years following transfer from Indian ownership.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to make findings of fact pertaining to subirrigation; to add clarification using evidence on the record.

ALLOTMENTS 86, 142, 143, 593, 1383, 1347½, and 1387:

38. The claimed source of water for Allotments 86, 142, 143, 593, 1383, 1347½ and 1387 is Sand Creek from the claimed lower point of diversion. (Ex. 20002 at 1-6, 27; Ex. 40008.)

39. The United States' testimony demonstrates that Allotments 86, 143, 142, 1383, and the eastern part of 593 are substantially influenced by subirrigation from the Williamson River, a source other than that which was claimed. (Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.)

~~12~~ 40. Allotment 86 was transferred to H.R. Dunlap, a non-Indian on June 30, 1920. (Ex. ~~2~~50063.) This parcel was transferred to B.S. Grigsby, also a non-Indian, on July 3, 1920. (Ex. ~~2~~50064.)

~~13~~ 41. Allotment 142 was transferred to B.S. Grigsby, a non-Indian, on August 27, 1918. (Ex. 50018.) This parcel was transferred to W.B. Stevens, also a non-Indian, on July 25, 1921. (Ex. 50021.)

~~14~~ 42. Allotment 143 was transferred to B.S. Grigsby, a non-Indian, on March 24, 1927. (Ex. 50014.) This parcel was transferred to a second non-Indian ~~no later than 1948~~ on August 29, 1936. (Ex. ~~50043~~ 50023.)

~~15~~ 43. Allotment 593 was transferred to B.S. Grigsby, a non-Indian, on July 14, 1915. (Ex. 50010.) This parcel was transferred to a second non-Indian ~~no later than 1948~~ on August 29, 1936. (Ex. ~~50043~~ 50023.)

~~16~~ 44. ~~There is no~~ The first evidence ~~for irrigation~~ of beneficial use of water from Sand Creek on Allotments 86, 142, 143, or 593 ~~prior to 2000. (Ex. 40001 at 97.)~~ is water right Permit S-23046/Certificate 31364, which has a priority date of February 7, 1951. (Exs. 50133; 40008; 40101.) The beneficial use of water was not demonstrated for twenty-four to thirty-six years following transfer from Indian ownership.

Beneficial use of water with reasonable diligence has not been demonstrated on these four allotments.

~~17~~ 45. Allotment 1383 was transferred to B.S. Grigsby, a non-Indian, on March 24, 1927. (Ex. 50016.) The first evidence of beneficial use of water from Sand Creek on this allotment is water right Permit S-23046/Certificate 31364 with a priority date of February 7, 1951. (Exs. 50133; 40008; 40101.) The beneficial use of water was not demonstrated for twenty-four years following transfer from Indian ownership.

Beneficial use of water with reasonable diligence has not been demonstrated on this allotment.

~~18~~ 46. Allotment 1347½ was transferred out of Indian ownership no later than 1962. (Ex. 40005 at 36.)

~~19~~ 47. Allotment 1387 was transferred out of Indian ownership in 1955. (Ex. 50031.) It was subsequently transferred to D.O. Williams, also a non-Indian, in 1957. (Ex. 50032.) Allotments 1347½ and 1387 were not irrigated until at least 1969, when the ditches were constructed connecting these parcels to the Sand Creek Ditch. (Ex. 40001 at 88-90, 96.) There is no evidence in the record of a state water right appurtenant to these two parcels.

Beneficial use of water with reasonable diligence has not been demonstrated on these two allotments.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to correct and provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to include a finding of fact pertaining to subirrigation; to add clarification using evidence on the record.

UNALLOTTED PARCELS A, B, C-1 and C-2:

~~20~~ 48. Parcels A, B, C-1 and C-2 were transferred directly by the Klamath Tribes to others pursuant to the Klamath Termination Act after the dissolution of the Klamath Indian Reservation.

49. The claimed source of water for these four parcels is the Williamson River, with a claimed point of diversion located within the SENW, Section 33 Township 31 S, Range 8 E, W.M. (Ex. 20002 at 1-6, 31; Ex. 40008.)

50. The United States' testimony demonstrates that Parcels B, C-1 and C-2 are substantially subirrigated from the Williamson River. (Ex. 40001 at 131, 133, 134.)

¶ 51. In 1959, Clarence and Beulah Clinton, members of the Klamath Tribe, acquired Parcel C-1, amounting to 39.6 acres, located in Lot 3 (NE¼ NW¼) of Section 5, and Parcel C-2, amounting to 55.5 acres, located in the E½ ~~NW¼~~ SE¼ of Section 6, all within Township 32 S, Range 8 E, W.M.. (Exs. 50140; 40008; 40010; 50081.) It was subsequently acquired by D.O. Williams, a non Indian, who included it within land planned to be under irrigation in a Final Proof Survey in 1964. (Ex. 20002 at 31.) ~~It was subsequently acquired by D.O. Williams, a non-Indian, who included it within land planned to be under irrigation in a Final Proof Survey in 1964. (Ex. 20002 at 31.)~~ Parcels C-1 and C-2 were conveyed by Charles and Hazel A. Heaton, non-Indians, to Dayton O. Williams on May 16, 1960. (Ex. 50071.)

52. The first evidence of beneficial use of water on Parcels C-1 and C-2 is from a diversion on the Williamson River as authorized under water right Permit

S-27254/Certificate 33422. The water right has a priority date of March 9, 1961. (Exs. 40008; 40105.)

Beneficial use of water from the Williamson River was not made with reasonable diligence by the first non-Indian successors on the 92.4 acres claimed within these two parcels, being 39.6 acres within Lot 3 (NENW), Section 5; and 15.5 acres within the NESE, and 40.0 acres within the SESE, Section 6, all within Township 32 S, Range 8 E, W.M. Water was applied to beneficial use under water right Permit S-27254/Certificate 33422 on or around February 18, 1965, after the transfer of ownership to the second non-Indian successor.

~~21~~ 53. The record does not establish when parcels A, ~~and~~ B, C-1, and C-2. ~~and C-1~~ were transferred by the Tribes pursuant to the Klamath Termination Act after the dissolution of the Klamath Indian Reservation. ~~, but by 1964, parcel C-1 was held by D.O. Williams and was part of the property planned for irrigation. (Ex. 20002 at 31.)~~ There is no evidence in the record of a state water right appurtenant to Parcels A and B.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to include a finding of fact pertaining to subirrigation; to add clarification using evidence on the record; to correct a scriveners error in the location description of Parcel C-1; to correct errors in the chain of title for Parcel C-1, issue raised in exceptions.

RATE AND DUTY:

~~22~~ 54. The Standard Rate for irrigation in the Klamath Basin is 1/40th cubic foot per second per irrigated acre. The Standard Duty in the Klamath Basin is 3.5 acre-feet for each acre irrigated. ~~The Standard Season in the Klamath Basin is March 1 through October 1.~~ (Ex. 20002 at 285.) None of the parties has contested these standards. The season of use is April 1 through October 31, as claimed.

Reasons for Modifications: The season of use was modified in the Amended Proposed Order issued by OWRD on May 8, 2012.

10. **Conclusions of Law.** The Proposed Order's "Conclusions of Law" section is modified as follows: (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

1. The land appurtenant to the claim was transferred from Klamath Indian ownership to non-Indian ownership.

2. Water for part of the claimed use was developed and used by the last ~~Water for part of the claimed use was developed and used by the last On certain portions of the claimed place of use, beneficial use of water from each of the claimed sources was made by an~~ Indian owner of the property ~~prior to transfer to a non-Indian owner~~, and/or was diligently developed and beneficially used by the non-Indian ~~owners~~ owners ~~successors~~ of the property after transfer from the last Indian owner.

3. The *Walton* elements are satisfied for a portion of this claim, being ~~1110.6~~363 acres of irrigation with incidental livestock watering ~~as follows: 726.0 acres~~ from the commingled sources of Scott and Sand Creeks within Allotments ~~133, 38,~~ 39, 123 and 122~~; 228.7 acres from Sand Creek within Allotments 94 and 168; and 155.9 acres from the Williamson River within Allotment 95, and Parcels C-1 and C-2~~.

~~4. The Klamath Tribes Termination Act is a valid basis for the portion of the claim covering unallotted, former Klamath Indian Reservation land. The elements for a Klamath Termination Act right are satisfied for irrigation with incidental livestock watering from the Williamson River on 95.1 acres within Parcels C-1 and C-2.~~

4 5. There is insufficient title information to establish a ~~*Walton*~~ Klamath Termination Act right for ~~a portion of~~ the place of use within Parcels A and B ~~.~~or C-1 and C-2.

~~5~~ 6. There is sufficient information on the development or ~~continuous~~ continued use of water on part of this place of use, being ~~1205.7~~363 acres within Allotments ~~133, 38,~~ 39, 123, and 122~~, 94, 168, 95, and Parcels C-1 and C-2~~, to establish a *Walton* right ~~or Klamath Termination Act right~~.

~~7. Beneficial use of water by the method of natural overflow, as a matter of law, is a valid basis for a *Walton* water right. However, except for a portion of Allotment 168, the evidence on the record does not establish beneficial use of water from a claimed source by the method of natural overflow.~~

8. The Claimants have not provided sufficient evidence to demonstrate that beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence on Allotments 168, 170, and 532.

9. The Claimants have not provided sufficient evidence to demonstrate that beneficial use of water from Sand Creek was made with reasonable diligence on Allotments 91, 184, 84, 92, 93, 16, 80, 81, 82, 83, 591, 1493, 86, 142, 143, 593, 1383, 1347½ and 1387.

10. The Claimants have not provided sufficient evidence to demonstrate that beneficial use of water from the Williamson River was made with reasonable diligence on Allotments 97, 100, 101, 103, 104, 266, 559, 1311, 1374, 82, 83, 591, 1493, 267 and 105.

11. The record supports an irrigation season of April 1 through October 31, a duty of 3.5 acre-feet per acre irrigated and a rate of 1/40 cubic foot per second per acre irrigated.

12. Livestock watering incidental to irrigation is limited to ~~1356~~ 408 head for ~~1205.7~~363 acres.

Reason for Modifications: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports conclusions other than those in the 2006 Proposed Order.

11. **Opinion.** The Proposed Order's "Opinion" section is modified as described herein.

OWRD has removed the ALJ's discussions regarding the elements of a *Walton* claim, including the first non-Indian purchaser rule, and regarding natural overflow and subirrigation of water as a basis for a *Walton* claim. The deleted paragraphs are noted below as "*****". In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS. In addition, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS.

The remaining portions of the Opinion section of the ALJ's Proposed Order have been labeled "Application of Walton Elements or Klamath Termination Act Elements to the Modified Proposed Order Findings of Fact." Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text.

Application of Walton Elements or Klamath Termination Act Elements (*Parcels A, B, C-1 and C-2 only*) to the Modified Proposed Order Findings of Fact

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division,* 47 Or App 437 (1980); *Metcalf v. AFSD,* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

* * * * *

The water rights sought by claimant will stand or fall based upon the ability of claimant to satisfy the elements of a *Walton* claim (or a Klamath Termination Act claim, depending on the history of the parcel). As discussed below, the various allotments have very different histories. Those different histories control the outcome as to each parcel.

ALLOTMENTS 133, 38, 39, 123, and 122:

Allotment 122

The parties agree that Allotment 122 should be allowed as a *Walton* claim, with 110 acres irrigated. Allotment 122 was conveyed from Indian ownership to non-Indian ownership in a number of Quitclaim Deeds from 1917 to 1922. (20002 at 98-103.) The United States' testimony demonstrates that Allotment 122 was irrigated by Indian predecessors or within a reasonable time after transfer to the first non-Indian owner based on construction of the Sand Creek Unit being completed in 1920, and by virtue of this allotment's inclusion in the Sand Creek Unit from 1920 through 1965, when the repayment contract (# 14-20-0500-2150) was entered into between the United States Department of Interior and prior landowner D.O. Williams. (40001 at 31-33.) Although 160 acres were claimed in Allotment 122, a *Walton* right must be limited to the 110 acres that were included in the Sand Creek Unit.

Allotments 39 and 123

The United States concedes that Allotments 39 and 123 are subject to a *Walton* right, but asserts that the water right should be limited to 134 and 119 acres respectively, based upon the evidence of water actually beneficially applied to the allotments ~~evidence of water actually beneficially applied to the allotments analysis of aerial photographs. The United States' conclusion regarding the maximum number of acres they determined to have been continuously irrigated is based on the analysis of photographs from eleven days taken over a 48 year span (1952 – 2000). (Exs. 40019 – 40053.) The aerial photographs submitted by the United States are insufficient to establish abandonment of the developed *Walton* right. As described in the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS, a *Walton* claimant need not establish continuous beneficial use of water following initial development of the right. Instead, a contestant has the burden to prove that a claimant has abandoned the right after development. Especially in light of water right Certificate 34993 which has authorized irrigation of these acres from the claimed source of water since 1957, the sporadic nature of this evidence is insufficient to establish abandonment of any portion of the developed rights.~~

Claimant asserts, to the contrary, that the water right should be for 160 acres in each case, because that was the amount identified in the Act of August 20, 1964 (P.L. 88-456, 78 Stat 554) as the acreage included within the Sand Creek Unit. Claimant argues that this identification constitutes a federal reservation of rights that overshadows any other law to the contrary. Claimant is mistaken. First, federal reservations of water right apply to property in control of the United States. No authority has been cited for the proposition that such rights appertain to property that was already in private hands when a federal law was enacted. Moreover, the contract asserted as an expression of intent to appropriate water for 160 acres is devoid of any such expression. While it measures the assessment of charges for construction and maintenance of the water system by a specified number of acres, it does not describe those acres as "irrigable" or "under cultivation." Without some such expression, the evidence for claimant's position does not reach a preponderance. Since it is claimant's burden to prove all the elements of a water right, and claimant has not done so as to 160 acres in each allotment, the water right should be limited to 134 acres for Allotment 39, and 119 acres for Allotment 123.

~~Claimant asserts, to the contrary, that the water right should be for 160 acres in each case, because that was the amount identified in the Act of August 20, 1964 (P.L. 88-456, 78 Stat 554) as the acreage included within the Sand Creek Unit. Claimant argues that this identification constitutes a federal reservation of rights that overshadows any other law to the contrary. Claimant is mistaken. First, federal reservations of water right apply to property in control of the United States. No authority has been cited for the proposition that such rights appertain to property that was already in private hands when a federal law was enacted. Moreover, the contract asserted as an expression of intent to appropriate water for 160 acres is devoid of any such expression. While it measures the assessment of charges for construction and maintenance of the water system by a specified number of acres, it does not describe those acres as "irrigable" or "under cultivation." Without some such expression, the evidence for claimant's position does not reach a preponderance. Since it is claimant's burden to prove all the elements of a water right, and claimant has not done so as to 160 acres in each allotment, the water right should be limited to 134 acres for Allotment 39, and 119 acres for Allotment 123.~~

Allotment 39 was conveyed from Indian to non-Indian ownership in 1917. (20002 at 93.) Allotment 123 was conveyed from Indian ownership to non-Indian ownership in a number of Quitclaim Deeds from 1917 to 1922. (20002 at 98-103.) ~~The United States' testimony demonstrates that Allotments 39 and 123 were irrigated within a reasonable time after transfer to the first non-Indian owner based on construction of the Sand Creek Unit being completed in 1920, and by virtue of these two allotment's inclusion in the Sand Creek Unit from 1920 through 1965, when the repayment contract (# 14-20-0500-2150) was entered into between the United States Department of Interior and prior landowner D.O. Williams. (40001 at 31-33.) A *Walton* right must be limited to the acres that were included in the Sand Creek Unit, but may not exceed the number of acres that were claimed.~~

Allotments 133 and 38

Claimant argues that Allotments 133 and 38 are the subject of federal reserved rights, because they were in Indian ownership until after the Sand Creek Unit was under

study. However, claimant does not explain how the reservation of a federal water right for development of an irrigation project can be translated into an appropriation of water for application to a particular parcel of land. Claimant does not provide any authority for such a novel assertion. Claimant's water rights in Allotments 133 and 38 stand or fall based upon whether claimant has, as to them, satisfied the elements of a *Walton* right.

Claimant states that an application for a water right was filed in 1914 by Grover Neil, who acquired title to both Allotments 133 and 38 in 1915 and was the first non-Indian owner. Claimant argues that this shows that the elements of a *Walton* right were satisfied in 1914.[14] This is not correct. Unlike a pre-1909 water right, where intent is sufficient to commence the appropriation, so long as other factors are present, in a *Walton* right water must be actually applied. There is no evidence that water was actually applied to the property during Grover Neil's tenure of ownership. This is especially so when the property was conveyed to a second non Indian owner on August 23, 1915. Under the circumstances, the elements of a *Walton* right are not satisfied as to Allotments 133 or 38. ~~This is especially so when the property was conveyed to a second non-Indian owner on August 23, 1915. Under the circumstances, the elements of a *Walton* right are not satisfied as to Allotments 133 or 38.~~ ~~However, these two allotments were irrigated within a reasonable time by non-Indian successors based on construction of the Sand Creek Unit being completed in 1920, and by virtue of these two allotment's inclusion in the Sand Creek Unit from 1920 through 1965, when the repayment contract (# 14-20-0500-2150) was entered into between the United States Department of Interior and prior landowner D.O. Williams. (40001 at 31-33.) A *Walton* right must be limited to the acres that were included in the Sand Creek Unit, but may not exceed the number of acres that were claimed.~~

Summary of Allotments 133, 38, 39, 123, and 122

[14] Claimant (Claimant's Reply Brief, at 30) describes a letter from the Superintendent as expressing concerns as to whether Mr. Neil's filing for a water right would adversely affect the Indians' use of Sand Creek water, and contends that the United States may not argue that the water was not timely developed when the United States objected to the water right application. The letter is not an objection to the application, does not "express concerns" or even mention adverse effects of the application on the Indians. It merely reports the application, and that some Indians had reportedly used water from Sand Creek for 20 years. (Ex. 40054.)

The claimed lands within Allotments ~~133, 38, 39, 123, and~~ 122 have been continuously authorized for irrigation from the commingled water of Scott and Sand Creeks under Permit S-25987 / Certificate 34993 since 1957 (Ex. 50134) and have continued to be irrigated as claimed.

Claimants have established a *Walton* water rights for 110 acres within Allotment 122~~, 156 acres within Allotment 39, 160 acres within Allotment 123, 160 acres within Allotment 133, and 140 acres within Allotment 38~~.

Reasons for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, beneficial use of water being made with reasonable diligence after transfer to non-Indian successors, and continued use of a developed right; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

ALLOTMENTS 168, 91, 94, 184 and 84:

Claimant argues that Allotments 168, 91, 94, 184 and 84 were irrigated out of Sand Creek before the allotments passed out of Indian ownership. This argument is based on the conclusion that a ditch listed in a farming and grazing lease for Allotment 94 in 1920 is the same as an "old ditch" shown on a Final Proof Survey map in ~~1951~~ 1962. This ditch was established by the time a 1952 aerial photograph was taken, and a ditch visible on the photograph matches the contours of the "old ditch" labeled on the survey map. This ditch is continuous from north to south throughout Allotments 170, 92, 94 and 91, and extends into 84. The Claimant asserts that this ditch was used for irrigation for some time before 1920, as evidenced by the description of the Superintendent in the letter of 1914 about the water right application of Neil, discussed in connection with Allotments 133 and 38, above, in which the Superintendent notes, "The Indians tell me that the waters of Sand Creek have been used by them for irrigation purposes and for livestock for more than 20 years." Thus, Claimant asserts, the "old ditch" must have been used prior to 1900 by "the Indians" who discussed irrigation with the Superintendent in 1914. ~~This assertion is supported with respect to Allotment 94.~~

~~However, with respect to Allotments 168, 91, 184 and 84 there is no evidence of beneficial use of water that may have occurred from use of this ditch.~~

~~Among this group of allotments, the "old ditch" would have conveyed water from Sand Creek to Allotments 84, 91 and 94. The proximity and direction of the ditch relative to Sand Creek in conjunction with the testimony given by the United States that prior to the installation of the Sand Creek Ditch by 1955, under high flows Sand Creek would spread out to the east, creates a plausible scenario for Sand Creek water (exclusive of any other source) being conveyed in this ditch.~~

~~The grazing lease on Allotment 94 demonstrates that water was put to beneficial use on this allotment prior to its transfer to non-Indian successors in 1927.~~

~~With respect to Allotments 84 and 91, however, Claimant has established only that they could have been irrigated by the "old ditch." Allotments 81 and 94 passed out of Indian ownership at the latest in 1927. The first evidence of beneficial use of water on these allotments is in 1951, the priority date of water right Certificate 31364.~~

So much cannot be drawn from the evidence, particularly when the allotments to which the Superintendent referred in his letter were more than a mile away from any of the allotments in this group. Moreover, there is no evidence that the ditch described in the farming and grazing lease is actually the ditch shown in the Final Proof Survey. It cannot be established when the "old ditch" in the Final Proof Survey was constructed, except to say it was constructed at some time prior to 1951. The evidence also does not show what land was irrigated out of this ditch. The most that Claimant can provide is the speculation that, given the slope and contours of the ground, water from that ditch could have irrigated the parcels in question. Since Allotments 91, 94, 184 and 84 passed out of Indian ownership at the latest in 1927, it has not been shown that the property was irrigated prior to transfer from Indian ownership. In addition, the only evidence in the record shows a ditch serving the property in 1951. The actual date of development of that ditch is unknown. The most that can be said, then, is that the ditch was developed at

some time within the 24 years after the property passed out of Indian ownership. This is not sufficient to establish diligent development by the first non-Indian owner.

~~So much cannot be drawn from the evidence, particularly when the allotments to which the Superintendent referred in his letter were more than a mile away from any of the allotments in this group. Moreover, there is no evidence that the ditch described in the farming and grazing lease is actually the ditch shown in the Final Proof Survey. It cannot be established when the "old ditch" in the Final Proof Survey was constructed, except to say it was constructed at some time prior to 1951. The evidence also does not show what land was irrigated out of this ditch. The most that Claimant can provide is the speculation that, given the slope and contours of the ground, water from that ditch could have irrigated the parcels in question. Since Allotments 91, 94, 184 and 84 passed out of Indian ownership at the latest in 1927, it has not been shown that the property was irrigated prior to transfer from Indian ownership. In addition, the only evidence in the record shows a ditch serving the property in 1951. The actual date of development of that ditch is unknown. The most that can be said, then, is that the ditch was developed at some time within the 24 years after the property passed out of Indian ownership. This is not sufficient to establish diligent development by the first non-Indian owner.~~

¶ Allotment 168 was transferred to the first non-Indian owner in 1937, but the "old ditch" did not pass through Allotment 168. According to the Final Proof Survey map, it passed through Allotment 170, to the west. It is therefore~~, again,~~, again, speculative whether water from this ditch ever was applied to Allotment 168. ~~However, this particular parcel was subject to natural overflow from Sand Creek. A 1925 grazing lease on lands that included Allotment 168 demonstrates that water was put to beneficial use prior to its transfer to non-Indian successors in 1937.~~

~~The claimed lands within Allotment 94 and 71.8 acres claimed within Allotment 168 have been continuously authorized for irrigation from Sand Creek under Permit S-23064 / Certificate 31364 since 1951, and have continued to be irrigated as claimed.~~

~~The "old ditch" did not pass through Allotment 184. This allotment was transferred to the first non-Indian owner in 1918. Although this parcel was subject to natural overflow from Sand Creek, the first evidence of beneficial use of water on this allotment is in 1951, the priority date of water right Certificate 31364.~~

~~In summary, claimants have established *Walton* water rights for 156.9 acres within Allotment 94, along with the portion of Allotment 168 that was claimed from Sand Creek, being 71.8 acres.~~ Claimants have not established *Walton* water rights for Allotments 84, 91, ~~and~~ 184, 94, and 168.

Reasons for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, natural overflow, and continued use of a developed right; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

ALLOTMENTS 170, 92, 93, 16, 80, 81, 83, 82, 95, 97, 100, 101, 103, 104, 266, 559, 591, 1311, 1374, 1493:

~~Claimant's entire argument for a water right as to these allotments depends on natural overflow as the basis for a *Walton* right. Since, as discussed above, a *Walton* right requires a diversion of water, and may not be based upon natural irrigation, a water right cannot be allowed for these allotments.~~ Claimant's entire argument for a water right as to these allotments depends on natural overflow as the basis for a *Walton* right. Since, as discussed above, a *Walton* right requires a diversion of water, and may not be based upon natural irrigation, a water right cannot be allowed for these allotments. ~~The claims on these 20 allotments depend in the first instance on assertions of beneficial use of natural overflow. However, the evidence supports only three (Allotments 16, 92 and 93) as being subject to natural overflow from any of the claimed sources. And while natural overflow from Sand Creek may have spread over portions of Allotments 92, 93 and 16, there is no evidence on the record that beneficial use of water was made by the method of natural overflow on these allotments.~~

~~State-issued water rights cover certain of these allotments, and serves as evidence of beneficial use of water as of the priority date of the rights. With the exception of Allotment 95, however, the priority dates are too far removed from the dates of transfer of the allotments to non-Indian successors to constitute application of water to beneficial use with reasonable diligence.~~

~~Allotment 95 left Indian ownership in 1956, and these lands were covered under a 1958 state based water right Certificate 33523 from the same water source as claimed (the Williamson River). These lands have continued to be irrigated as claimed. Claimants have established *Walton* water rights from the Williamson River for 155.9 acres within Allotment 95.~~

The claims for ~~the remaining 19~~all 20 allotments are denied.

Reasons for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, beneficial use of water being made with reasonable diligence after transfer to non-Indian successors, natural overflow, and continued use of a developed right; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

ALLOTMENT 532:

This allotment is subject to natural overflow. Furthermore, the Claimant argues that the ditches providing water to Allotment 532 were in place in 1955, prior to its acquisition by the first non-Indian owner, Earnest Bubb, in 1957. However, the existence of natural overflow or artificial diversion works that could have served a parcel is not sufficient evidence that beneficial use of water had actually been made. ~~of application of water to the ground~~. In order to make out a *Walton* right, Claimant must ~~show not only~~ demonstrate that beneficial use of water was ~~applied to~~ made on the property before it transferred, or was made with reasonable diligence after the property transferred to non-Indian successors. ~~but how much water and to what portion of the property it was applied.~~ There are no grazing leases or other evidence on the record demonstrating

beneficial use of water by the method of natural overflow. In addition, the Claimant does not controvert the evidence presented by Clements that "no irrigation is evident until 1969 – 12 years after acquisition by the first non-Indian owner." Because a *Walton* claimant must show beneficial use with reasonable diligence ~~diligent development of irrigation~~ by ~~the first~~ non-Indian successors ~~owner~~, and such a delay does not establish the necessary diligence, a *Walton* right cannot be allowed for this allotment.

Reasons for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, beneficial use of water being made with reasonable diligence after transfer to non-Indian successors, and natural overflow; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

ALLOTMENTS 105 AND 267:

These allotments were acquired by the first non-Indian owner, McAuliffe, in 1926, and sold to D.O. Williams in 1939. Claimant asserts that Clements testified that a ditch was visible in aerial photos taken in 1952, that Clements testified that he could see irrigation water coming from this ditch, and that since there was a reference to ~~a~~ "irrigable lands now under constructed ditch" in ~~a Certificate of Appraisement~~ standardized language on a FORM OF AGREEMENT – CIRCULAR NO. 1677A[15] from 1926 for Allotment 267 (Ex. 40088), that Clements' testimony shows that Allotments 105 and 267 were being irrigated in 1926, soon after transfer to the first non-Indian owner. This mischaracterizes Clements' testimony. He testified at hearing that he could see a feature on several maps, including the map dated 1952, and that at the southern end of the feature, on a map from 1961 he could see signs of irrigation which, in his opinion, came from "the ditch at the South end of that parcel." He also, however, testified that he did not know if the feature noted "was a water structure or not." ~~Clearly, then, Clements was~~

[15] The full title of this circular is as follows: THIS FORM OF AGREEMENT TO BE EXECUTED BY PURCHASE TO PAY THE CONSTRUCTION AND OPERATION AND MAINTENANCE CHARGES ASSESED ASSESSED AGAINST THE IRRIGABLE LANDS PURCHASED UNDER INDIAN IRRIGATION PROJECTS. This standardized form was an agreement that the purchaser, D.P. McAuliffe, "will pay on a per acres basis all irrigation charges assessed or to be assessed against this land. . ."

~~not referring to that feature when he mentioned a "ditch at the south end of the parcel." Indeed, although the printed language of the Certificate of Appraisement refers to property as being "now under constructed ditch," the actual space for acreage under irrigation was left blank, and the property appraised as grazing land.~~ Certificates of Appraisement for Allotment 267 (Exs. 40086, 40089), dated 1921 and 1926, characterized the allotment as "best adapted for grazing" and as grazing "all" acres. In 1926, the blanks for "Irrigated" or "Irrigable" acres were left empty. That the only reference to a ditch was stock language on a form in conjunction with the Certificates of Appraisement showing lack of irrigation strongly suggests that this allotment was not being irrigated by a diversion or natural overflow in 1926. [16]

~~Additionally, the reference from the Certificate of Appraisement to Allotment 267 as being "now under constructed ditch" clearly does not refer to the feature noted on the aerial photograph, since that feature does not cross Allotment 267 at any point. It would therefore be unlikely to be the "ditch" referred to in the Certificate of Appraisement. If the feature discussed above is not the ditch, as is probably the case, there is no evidence showing where the ditch, if any, referred to in the Certificate of Appraisement was located. Thus, the evidence does not establish the existence of a ditch serving even 267. There is even less evidence for a ditch that could have served Allotment 105.~~

The earliest evidence of irrigation on these allotments by anything other than natural subirrigation is the "feature" on the 1952 aerial photograph. This "feature" is exactly consistent with the irrigation canal on a 1964 final proof survey map for Permit S-25337/Certificate 33523, which has a priority date of 1958. The canal extends from the Williamson River through the NE corner of Allotment 105, southeast through Allotment 267 until it reaches the southern edge of irrigated acreage. Assuming Claimant's predecessors began using this canal to irrigate these allotments in 1952, this represents a 26-year period after transfer of the allotments to non-Indian ownership in 1926. This is not sufficient to demonstrate beneficial use of water with reasonable diligence. The

[16] As discussed in a section below, these two allotments were subject to natural subirrigation from the Williamson River, which would explain, without contradiction, the 1926 characterization of the property as "grazing" and the presence of a 1926 grazing lease on Allotments 105 and 267.

claims for Allotments 105 and 267 are denied. ~~The evidence is not sufficient to show artificial diversion of water in a specified amount to benefit specified property prior to the transfer of the property to the second non-Indian owner in 1939. Consequently, a *Walton* right has not been established.~~

Reason for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, and beneficial use of water being made with reasonable diligence after transfer to non-Indian successors; to apply the appropriate legal bases to the Proposed Order's modified findings of fact. Additionally, the ALJ confused the contents Exhibits 40088 and 40089 (the FORM OF AGREEMENT – CIRCULAR NO. 1677A and a CERTIFICATE OF APPRAISEMENT, both issued in 1926). The second paragraph was stricken because it is confusing and not needed. Exhibits 50164, 50166 and 50167 are aerial photographs noted in Ron Yockim's October 28, 2004 DOCUMENT LIST as "ditches drawn by Mr. Clements at hearing." None of these maps have any handwritten notations in the vicinity of the Williamson River. The handwritten labeled ditches are consistent with the "old ditch" in Allotments 170, 92, 94, 91 and 84, and with the Sand Creek Ditch. Because the weight of the evidence already shows that beneficial use of water was not likely in the year 1926, it is not necessary to rely on documents that don't pertain to the area in question, and may have been referenced by mistake.

ALLOTMENTS 86, 142, 143, 593, 1347½, 1383, 1387:

Claimant's brief did not discuss these allotments. Allotments 1347½ and 1387 could not have been irrigated until 1969, when ditches were extended to these properties from the Sand Creek Ditch. Allotment 1387 was transferred out of Indian ownership in 1955, and transferred to D.O. Williams in 1957. The evidence does not show, therefore, that it was irrigated before the subsequent non-Indian owner. Although the evidence is unclear as to when Allotment 1347½ was first transferred, it transferred no later than 1962. Therefore, because it is claimant's burden to establish all the elements of a *Walton* right, this lack of evidence defeats the claim as to this parcel. The record does not establish that beneficial use of water was made with reasonable diligence. No *Walton* right can be found as to these two parcels.

There is no evidence showing that Allotments 86, 142, 143, 593, or 1383 were irrigated prior to ~~2000~~ 1951, the priority date of water right Certificate 31364 which

authorizes irrigation from the Williamson River on these five parcels. All of these parcels had been transferred out of Indian ownership between 1915 and 1927, and to the second non-Indian owner by 1948. Beneficial use of water was made not made with reasonable diligence after transfer to non-Indian successors. No *Walton* right can be found as to these five parcels.

Reasons for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, and beneficial use of water being made with reasonable diligence after transfer to non-Indian successors; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

UNALLOTTED PARCELS, A, B, C-1 and C-2:

These properties were transferred directly by the Klamath Tribes pursuant to the Klamath Termination Act without a prior allotment. All parties agree that although, strictly speaking, they are not *Walton* claims as they did not come through the Allotment process, they are subject to a similar analysis. ~~Although~~ The United States asserted that there was no evidence as to when ~~they~~ Parcels A and B had transferred from Indian ownership.~~,~~ Exhibit 50140 shows that a portion of the property, being Parcels C-1 and C-2, ~~was~~ were transferred to Clarence and Beulah Clinton, who were members of the Klamath Tribe, in 1959. The legal description ~~does not, however,~~ matches the description ~~for any of the parcels noted except~~ of Parcel C-1 (Lot 3 within Section 5) and Parcel C-2 (E½ SE¼ NW¼, Section 6). That property apparently transferred to D.O. Williams prior to 1964, since it was included in a Final Proof Survey map filed by Williams in that year. The actual date of transfer out of Indian ownership is unknown. However, there is ~~no~~ evidence of an intervening owner between the Clintons and Williams. The property was developed for irrigation by Williams, a second non-Indian owner~~, so soon after it was originally sold by the Klamath Tribe, that it should be considered to have been diligently developed by either the Indian owners, or the first non-Indian owner~~. Consequently, the acreage in Parcels C-1 and C-2 was not under irrigation shortly after it was transferred out of Tribal ownership, and should not be

allowed as a water right. Parcels C-1 and C-2 ~~was~~ were also included in that Final Proof Survey map.~~, but the description of the property transferred to the Clintons does not include that parcel, so it cannot be determined when it left Tribal ownership, or whether an intervening non-Indian owner may be in the chain of title.~~ ~~Water use has continued as claimed under the authority of Certificate 33422.~~ However, the evidence shows that there were multiple non-Indian owners of the lands before water was applied to beneficial use thereon.

¶ Parcels A and B were outside the Final Proof Survey map, so there is no evidence that they have been irrigated.

~~A Tribal Right, analogous to a *Walton* right, should be allowed as to 95.1 acres, being 39.6 acres in Parcel C-1 and 55.5 acres in Parcel C-2.~~ A water right subject to this adjudication has not been shown as to Parcels A~~,~~ ~~or~~ B, C-1, and C-2. ~~and C-1.~~

Reasons for Modifications: To correct and clarify the elements of a Klamath Termination Act right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, beneficial use of water being made with reasonable diligence after transfer to non-Indian successors, and continued use of a developed right; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

~~**NATURAL OVERFLOW FROM CLAIMED SOURCES OF WATER**~~

~~John Mosby testified that "I have personally observed the claimed lands being hayed, grazed and irrigated from the 1930s. The overflow in the spring from the Williamson River as well as water entering the marsh from other sources, resulted in lands being covered with water and/or subirrigated." (Affidavit of John Mosby at 2, Item 3.) This statement alone is not sufficient to establish that natural overflow from the claimed sources of water actually correspond to claimed lands having those same claimed sources.~~

The only corroborating evidence which specified overflow from a named source matching the source of water claimed on specific allotments was presented in the United States' testimony. Based on interpretation of aerial photographs the United States testimony demonstrates that water from Sand Creek, prior to the installation of the Sand Creek Ditch, under high flows would spread out to the east toward Klamath Marsh. (Attachments 3 and 4 to Claimants' Reply Brief – Hearing Transcript at 40-41.) The United States further specified that natural overflow from Sand Creek would spread onto Allotments 168, 92, 93, 16 and 184. (Ex. 40001 at 45, 47, 50, 53-62.)

Those allotments or portions of allotments that are subject to natural overflow from Sand Creek, but for which the claimed source is commingled water from Scott and Sand Creeks or from the Williamson River, do not qualify for a *Walton* right with Sand Creek as a source.

Except for a portion of Allotment 168, there is no evidence in the record that demonstrates beneficial use water by the method of natural overflow. A *Walton* right was established for a portion of Allotment 168 on the basis of natural overflow (*see above*).

Reasons for Modifications: To provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to natural overflow; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

NATURAL SUBIRRIGATION FROM THE WILLIAMSON RIVER:

The United States' testimony establishes that Allotments 95, 97, 100, 101, 103, 104, 266, 559, 1311, 1374, 267, 105 and portions of Allotments 82, 83, 591, and 1493, all of which are located south and east of the Williamson River, receive subirrigation due to the proximity of the river and the low lying nature of the land. (Exs. 40001 at 98-99; Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.)

The evidence establishes that these portions of the claimed place of use are subject to natural subirrigation from the Williamson River. Subirrigation does not form

~~the basis for a Walton right or a Klamath Termination Act right. Natural subirrigation is a privilege only, as such it cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others. No priority date, season of use, rate or duty shall attach to such a privilege. This privilege may not be transferred to any other property, and may not be altered by the use of any physical means to modify the manner in which natural subirrigation occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural subirrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150.~~

~~*No Double Allocation*~~

~~Allotment 95 both receives subirrigation and qualifies for a Walton right from a point of diversion on the Williamson River. So that no double allocation will be awarded, the Walton right is limited by the principle of beneficial use when the authorized place of use on this allotment is subject to subirrigation from the same source.~~

~~**Reasons for Modifications:** To provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to subirrigation; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.~~

B. DETERMINATION

1. The Proposed Order is adopted and incorporated with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted with modifications, as set forth in Section A.8, above.
   b. The "Evidentiary Rulings" is adopted in its entirety.
   c. The "Issues" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.9, above.
   e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.10, above.
   f. The "Opinion" is adopted with modifications, as set forth in Section A.11, above.
   g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in this Partial Order of Determination for Claim 18. Consistent with Sections A.6, A.7, A.8 and A.9, above, the outcome of the Order has been modified to recognize a right for irrigation on ~~an additional 787.2~~2363 acres, to approve livestock

watering incidental to irrigation for ~~1356~~ 408 head, to limit the season of use to April 1 to October 31 as claimed, and to describe the effects of naturally occurring subirrigation from the Williamson River on a portion of the claimed place of use.

2. The Amended Proposed Order issued on May 8, 2012, is adopted and incorporated in its entirety as if set forth fully herein.

3. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

4. The Klamath Tribes Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 et seq. for an Indian reserved water right is a valid basis for this claim. The elements of a Klamath Termination Act claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS is incorporated as if set forth fully herein.

~~5. Portions of the claimed place of use are subject to natural subirrigation from the Williamson River. The use of water by natural subirrigation is a privilege only, and does not constitute a water right. This privilege cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others, and no priority date, season of use, rate or duty shall attach to such privilege. This privilege may not be transferred to any other property. This may not be altered by the use of any physical means to modify the manner in which natural subirrigation occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural subirrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150.~~

5. Based on the file and record herein, IT IS ORDERED that Claim 18 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 18

CLAIM MAP REFERENCE:
OWRD INVESTIGATION MAPS – T 31 S, R 7 E; T 31 S, R 8 E; and T 32 S, R 8 E

CLAIMANTS: JOHN M. MOSBY AND MARILYN MOSBY
1133 NORTH 'H' ST, SUITE L
LOMPOC, CA 93436

SOURCES OF WATER:
SCOTT CREEK, tributary to SAND CREEK,
SAND CREEK, tributary to the WILLIAMSON RIVER, and
~~The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE~~

PURPOSE OR USE:
IRRIGATION OF ~~1205.7~~363 ACRES WITH INCIDENTAL LIVESTOCK WATERING OF UP TO 408 ~~1356~~ HEAD FOR ENTIRE CLAIM, ~~AS FOLLOWS:~~

~~726.0 ACRES~~ FROM COMMINGLED WATER FROM SCOTT CREEK (POD 1) AND UPPER SAND CREEK (POD 2)~~,~~.

~~228.7 ACRES FROM LOWER SAND CREEK (POD 3), AND~~

~~251.0 ACRES FROM THE WILLIAMSON RIVER (POD 4)~~

RATE OF USE:

~~30.14~~ -9.08 CUBIC FEET PER SECOND (CFS) ~~AS FOLLOWS:~~

~~18.15 CFS~~ OF COMMINGLED WATER, BEING 4.78 CFS FROM SCOTT CREEK (POD 1) AND 4.3~~13.37~~ CFS FROM UPPER SAND CREEK (POD 2), MEASURED AT THE POINTS OF DIVERSION~~,~~.

~~5.72 CFS FROM LOWER SAND CREEK (POD 3) MEASURED AT THE POINT OF DIVERSION, AND~~

~~6.27 CFS FROM THE WILLIAMSON RIVER (POD 4) MEASURED AT THE POINT OF DIVERSON.~~

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.5 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: APRIL 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Source	Twp	Rng	Mer	Sec	Q-Q	Remarks
POD 1	Scott Creek	31 S	7 E	WM	1	NE SE	COMMINGLED WATER FROM UPPER SAND CREEK AND SCOTT CREEK
POD 2	Upper Sand Creek	31 S	7 E	WM	28	NW NW	
~~POD 3~~	~~Lower Sand Creek~~	~~31 S~~	~~8 E~~	~~WM~~	~~20~~	~~NW NW~~	
~~POD 4~~	~~Williamson River~~	~~31 S~~	~~8 E~~	~~WM~~	~~33~~	~~SE NW~~	

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD
~~31 S~~	~~8 E~~	~~WM~~	~~5~~	~~NE SW~~		~~40.0~~	POD 1 and POD 2
~~31 S~~	~~8 E~~	~~WM~~	~~5~~	~~NW SW~~		~~40.0~~	
~~31 S~~	~~8 E~~	~~WM~~	~~5~~	~~SW SW~~		~~40.0~~	
~~31 S~~	~~8 E~~	~~WM~~	~~5~~	~~SE SW~~		~~40.0~~	
31 S	8 E	WM	7	NE NE		35.5 ~~40.0~~	

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING							
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**	**Authorized POD**
31 S	8 E	WM	7	NW NE		32.5 ~~40.0~~	
31 S	8 E	WM	7	SW NE		31.5 ~~38.0~~	
31 S	8 E	WM	7	SE NE		34.5 ~~38.0~~	
~~31 S~~	~~8 E~~	~~WM~~	~~7~~	~~NE NW~~		~~40.0~~	
~~31 S~~	~~8 E~~	~~WM~~	~~7~~	~~NW NW~~	~~1~~	~~31.6~~	
~~31 S~~	~~8 E~~	~~WM~~	~~7~~	~~SW NW~~	~~2~~	~~30.4~~	
~~31 S~~	~~8 E~~	~~WM~~	~~7~~	~~SE NW~~		~~38.0~~	
31 S	8 E	WM	17	NE NE		33.5	
31 S	8 E	WM	17	NW NE		40.0	
31 S	8 E	WM	17	SW NE		33.0	
31 S	8 E	WM	17	SE NE		3.5	
31 S	8 E	WM	17	NE NW		16.0 ~~40.0~~	
31 S	8 E	WM	17	NW NW		39.5 ~~40.0~~	
31 S	8 E	WM	17	SW NW		39.0 ~~40.0~~	
31 S	8 E	WM	17	SE NW		24.5 ~~40.0~~	
~~31 S~~	~~8 E~~	~~WM~~	~~20~~	~~SW NE~~		~~35.5~~	~~POD 3~~
~~31 S~~	~~8 E~~	~~WM~~	~~20~~	~~SE NE~~		~~36.3~~	
~~31 S~~	~~8 E~~	~~WM~~	~~29~~	~~NE NW~~		~~39.3~~	
~~31 S~~	~~8 E~~	~~WM~~	~~29~~	~~NW NW~~		~~39.0~~	
~~31 S~~	~~8 E~~	~~WM~~	~~29~~	~~SW NW~~		~~39.3~~	
~~31 S~~	~~8 E~~	~~WM~~	~~29~~	~~SE NW~~		~~39.3~~	
~~32 S~~	~~8 E~~	~~WM~~	~~5~~	~~NE NW~~	~~3~~	~~39.6~~	~~POD 4~~
~~32 S~~	~~8 E~~	~~WM~~	~~6~~	~~NE SE~~		~~15.5~~	
~~32 S~~	~~8 E~~	~~WM~~	~~6~~	~~SE SE~~		~~40.0~~	
~~32 S~~	~~8 E~~	~~WM~~	~~8~~	~~NE NW~~		~~39.8~~	
~~32 S~~	~~8 E~~	~~WM~~	~~8~~	~~NW NW~~		~~39.8~~	
~~32 S~~	~~8 E~~	~~WM~~	~~8~~	~~SW NW~~		~~39.8~~	
~~32 S~~	~~8 E~~	~~WM~~	~~8~~	~~SE NW~~		~~36.5~~	

~~**FURTHER LIMTATIONS:**~~

~~THE RIGHT TO USE WATER IS LIMITED BY THE PRINCIPLE OF BENEFICIAL USE WHEN THE AUTHORIZED PLACE OF USE IS SUBJECT TO SUBIRRIGATON FROM THE SAME SOURCE~~.

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of EDWARD D. TOMPKINS AND MERRIE L. TOMPKINS, AS TRUSTEES OF THE DON AND MERRIE L. TOMPKINS FAMILY REVOCABLE TRUST DATED JULY 13, 1998; WILLIS STANLEY TOMPKINS	)	PARTIAL ORDER OF DETERMINATION
	)	Water Right Claim 21

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT

1. Claim 21 (Claimants: EDWARD D. TOMPKINS AND MERRIE L. TOMPKINS, AS TRUSTEES OF THE DON AND MERRIE L. TOMPKINS FAMILY REVOCABLE TRUST DATED JULY 13, 1998; WILLIS STANLEY TOMPKINS) and its associated contests (14, 15, 3723 and 4079) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 168.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 21 on February 23, 2006.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by Claimants' Edward D. Tompkins and Merrie L. Tompkins, as trustees of the Don and Merrie L. Tompkins Family Revocable Trust, and Willis Stanley Tompkins. Responses to the Claimants' Exceptions were filed by the United States of America within the response filing deadline.

4. On January 6, 2012, the Adjudicator issued an AMENDED PROPOSED ORDER (Amended Proposed Order) to modify certain portions of the Proposed Order. Except as modified, the Amended Proposed Order fully incorporated the 2006 Proposed Order.

5. Exceptions were jointly filed to the Amended Proposed Order within the exception filing deadline by the United States of America and the Klamath Tribes.

6. The exceptions filed to the Amended Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 21.~~, and are found to be unpersuasive. Accordingly, changes were not made to the Amended Proposed Order to accommodate any exceptions.~~

7. The modifications to the Proposed Order contained in the Amended Proposed Order are rejected. The ~~Amended~~ Proposed Order is adopted and incorporated in its entirety as if set forth fully herein.

B. DETERMINATION

1. The ~~Amended~~ Proposed Order is adopted and incorporated in its entirety as if set forth fully herein.

2. The elements of a Walton claim are not established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

3. Claim 21 should be denied in its entirety because the water right claimed is based entirely on natural overflow and/or sub-irrigation, not on actual diversion of water from a stream.~~The place of use set forth in the following Claim Description is subject to natural overflow. Beneficial use of the natural overflow from November 16 through March 14 is a privilege only and no priority date, rate or duty shall attach to such privilege. This privilege may not be transferred to any other property and may not be altered by the use of any physical means to modify the manner in which natural overflow occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural irrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150. The holder of this privilege cannot make a call on water appropriated under any other water rights. This privilege as described herein does not constitute a water right; as such, OWRD will not issue a water right certificate for natural overflow November 16 through March 14 as described in this paragraph.~~

4. Based on the file and record herein, IT IS ORDERED that Claim 21 is denied.~~approved as set forth in the following Water Right Claim Description.~~

~~[Beginning of Water Right Claim Description]~~

~~**CLAIM NO.** 21~~
~~FOR A VESTED WATER RIGHT~~

~~**CLAIM MAP REFERENCE:**~~
~~OWRD INVESTIGATION MAPS – T 30 S, R 8 E and T 31 S, R 8 E~~

~~**CLAIMANTS:**~~
~~EDWARD D. TOMPKINS AND MERRIE L. TOMPKINS,~~
~~AS TRUSTEES OF THE DON AND MERRIE L. TOMPKINS~~
~~FAMILY REVOCABLE TRUST DATED JULY 13, 1998~~
~~PO BOX 22~~

GUINDA, CA 95637

WILLIS STANLEY TOMPKINS
HC 63 BOX 328
CHILOQUIN, OR 97624

SOURCE OF WATER:

COW CREEK, tributary to BIG SPRINGS CREEK;
BIG SPRINGS CREEK, tributary to the WILLIAMSON RIVER; and
SIXTEEN UNNAMED SPRINGS, tributary to the WILLIAMSON RIVER

PURPOSE OR USE:

IRRIGATION OF 1964.6 ACRES FROM THE COMINGLED WATERS OF COW CREEK, BIG SPRINGS CREEK, AND SIXTEEN SPRINGS, ALL BY NATURAL OVERFLOW, WITH INCIDENTAL LIVESTOCK WATERING OF 750 HEAD

DATE OF PRIORITY: OCTOBER 14, 1864

THE SOURCES OF WATER ARE LOCATED AS FOLLOWS:

Source	Twp	Rng	Mer	Sec	Q-Q	Remarks
Cow Creek	30 S	8 E	WM			
	31 S	8 E	WM			
Big Springs Creek	30 S	8 E	WM			
	31 S	8 E	WM			
Unnamed Spring	30 S	8 E	WM	27	SE SW	
Unnamed Spring	30 S	8 E	WM	28	SW NE	
Unnamed Spring	30 S	8 E	WM	29	NE NE	
Unnamed Spring	30 S	8 E	WM	29	NW NE	
Unnamed Spring	30 S	8 E	WM	32	SE SW	No specific point of diversion; Comingled water from all sources by natural overflow.
Unnamed Spring	30 S	8 E	WM	32	NW SE	
Two Unnamed Springs	30 S	8 E	WM	33	SW NE	
Unnamed Spring	30 S	8 E	WM	34	SE NW	
Unnamed Spring	30 S	8 E	WM	34	NW SW	
Unnamed Spring	30 S	8 E	WM	34	SW SW	
Unnamed Spring	31 S	8 E	WM	4	SE NW	
Unnamed Spring	31 S	8 E	WM	4	SE SE	
Unnamed Spring	31 S	8 E	WM	5	NE NW	
Unnamed Spring	31 S	8 E	WM	5	NW SE	
Unnamed Spring	31 S	8 E	WM	8	NE NE	

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION BY NATURAL OVERFLOW WITH INCIDETNAL LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	8 E	WM	22	SW SW		1.8
30 S	8 E	WM	22	SE SW		38.4
30 S	8 E	WM	27	NE NW		40.0
30 S	8 E	WM	27	NW NW		33.6
30 S	8 E	WM	27	SW NW		40.0
30 S	8 E	WM	27	SE NW		40.0
30 S	8 E	WM	27	NE SW		40.0

IRRIGATION BY NATURAL OVERFLOW WITH INCIDETNAL LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	8 E	WM	27	NW SW		40.0
30 S	8 E	WM	28	NE NE		8.8
30 S	8 E	WM	28	SW NE		18.4
30 S	8 E	WM	28	SE NE		36.8
30 S	8 E	WM	28	SE NW		7.2
30 S	8 E	WM	28	NE SW		36.0
30 S	8 E	WM	28	NW SW		10.4
30 S	8 E	WM	28	SW SW		0.7
30 S	8 E	WM	28	SW SW	2	14.4
30 S	8 E	WM	28	NE SE		40.0
30 S	8 E	WM	28	NW SE		40.0
30 S	8 E	WM	28	SW SE		36.8
30 S	8 E	WM	28	SE SE		40.0
30 S	8 E	WM	33	NE NE		40.0
30 S	8 E	WM	33	NW NE		40.0
30 S	8 E	WM	33	NE NW	3	36.0
30 S	8 E	WM	33	NW NW	2	21.4
30 S	8 E	WM	33	NE SW		40.0
30 S	8 E	WM	33	NW SW		40.0
30 S	8 E	WM	33	SW SW	4	39.8
30 S	8 E	WM	33	SE SW	5	39.9
30 S	8 E	WM	34	NE NW		40.0
30 S	8 E	WM	34	NW NW		40.0
30 S	8 E	WM	34	SW NW		40.0
30 S	8 E	WM	34	SE NW		40.0
30 S	8 E	WM	34	NE SW		40.0
30 S	8 E	WM	34	NW SW		40.0
30 S	8 E	WM	34	SW SW	1	39.9
30 S	8 E	WM	34	SE SW	2	39.7
31 S	8 E	WM	4	NE NE	1	36.3
31 S	8 E	WM	4	NW NE	2	36.2
31 S	8 E	WM	4	SW NE		40.0
31 S	8 E	WM	4	SE NE		40.0
31 S	8 E	WM	4	NE NW	3	36.1
31 S	8 E	WM	4	NW NW	4	36.0
31 S	8 E	WM	4	SW NW		40.0
31 S	8 E	WM	4	SE NW		40.0
31 S	8 E	WM	4	NE SW		40.0
31 S	8 E	WM	4	NW SW		40.0
31 S	8 E	WM	4	SW SW		40.0
31 S	8 E	WM	4	SE SW		40.0
31 S	8 E	WM	4	NE SE		40.0
31 S	8 E	WM	4	NW SE		40.0
31 S	8 E	WM	4	SW SE		40.0
31 S	8 E	WM	4	SE SE		40.0
31 S	8 E	WM	5	NE SE		40.0
31 S	8 E	WM	5	NW SE		40.0
31 S	8 E	WM	5	SW SE		40.0
31 S	8 E	WM	5	SE SE		40.0

~~**FURTHER LIMITATIONS TO THE RIGHT TO USE OF WATER BY NATURAL OVERFLOW:**~~

~~BENEFICIAL USE OF WATER MADE FROM THE METHOD OF NATURAL OVERFLOW IS A PRIVILEGE ONLY. AS LONG AS BENEFICIAL USE OF WATER BY NATURAL OVERFLOW CONTINUES, THE HOLDER OF THIS VESTED WATER RIGHT CANNOT MAKE A CALL ON WATER APPROPRIATED UNDER ANY OTHER WATER RIGHTS.~~

~~ANY CONVERSION FROM BENEFICIAL USE OF WATER BY NATURAL OVERFLOW TO BENEFICIAL USE OF THE SAME WATER FROM A SYSTEM RELYING ON A POINT(S) OF DIVERSION WILL BE CONSIDERED A CHANGE IN POINT OF DIVERSION SUBJECT TO APPROVAL OF A TRANSFER OF WATER RIGHT IN COMPLIANCE WITH THE PROVISIONS OF ORS 540.505 TO 540 587. NOTWITHSTANDING APPROVAL OF A CHANGE IN POINT OF DIVERSION, THE FOLLOWING CONDITIONS WILL APPLY TO ANY APPROVED POINT OF DIVERSION TRANSFER: DUTY FOR IRRIGATION MAY NOT EXCEED 3.0 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION. THE SEASON OF USE MAY NOT EXCEED MARCH 15 TO NOVEMBER 15.~~

~~[End of Water Right Claim Description]~~

Dated at Salem, Oregon on March 7, 2013

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of FIVE MILE RANCH, LLC	))))	PARTIAL ORDER OF DETERMINATION Water Right Claim 105

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT

1. Claim 105 (Claimant: FIVE MILE RANCH, LLC[1]) and its associated contests (3484, 3751, and 4138) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 218.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 105 on November 10, 2004. No exceptions were filed to the Proposed Order.

3. On July 21, 2011, the Adjudicator issued an AMENDED PROPOSED ORDER (Amended Proposed Order) to modify the outcome of the original Proposed Order to recognize (1) development with reasonable diligence by non-Indian successors, and (2) the appropriate standard for determining loss of a right through nonuse. The Amended Proposed Order replaced the 2004 Proposed Order in its entirety.

4. Exceptions were jointly filed to the Amended Proposed Order within the exception filing deadline by the United States of America and the Klamath Tribes.

5. The exceptions filed to the Amended Proposed Order have been reviewed and considered in conjunction with the entire record for Claim 105, and are found to be ~~un~~persuasive in part. ~~Accordingly, changes were not made to the Amended Proposed Order to accommodate any exceptions.~~

[1] Five Mile Ranch, LLC, successor in interest to Rodney N. Murray

6. The Amended Proposed Order is adopted and incorporated, with modifications, ~~in its entirety as if set forth fully herein.~~ into this Partial Order of Determination as follows:

a. The "History of the Case" is adopted in its entirety.
b. The "Issues" is adopted in its entirety.
c. The "Evidentiary Matters" is adopted in its entirety.
d. The "Legal Standard for Ruling on Legal Issues" is adopted in its entirety.
e. The "Findings of Fact" is adopted in its entirety.
f. The "Opinion" is adopted with modifications, as set forth in Section A.7, below.
g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 105. Consistent with Section A.7 below, the outcome of the Order has been modified to recognize a right for irrigation of 37.5[2] acres in former Allotment 1461.

7. **Opinion.** The Amended Proposed Order's "Opinion" section replaced in its entirety as follows:

The General Conclusions of Law Concerning Walton Claims are incorporated into the Opinion section.

In addition, the following paragraphs from the Amended Proposed Order, as modified, are incorporated in the Opinion section.

OPINION

Application of ~~Modified~~ *Walton* Elements to the Facts in this Case

It is uncontested that Claimant's land was formerly part of the Klamath Indian Reservation, and that with respect to the two allotments involved; the land was transferred from an Indian allottee to a non-Indian successor. It is uncontested that the land was not under irrigation at the time of transfer from Indian ownership.

[2] The text of the Amended Proposed Order recognizes a right for irrigation of 37.3 acres in former Allotment 1461. Yet the Water Right Claim Description in the same document lists a total of 37.5 acres for the place of use that corresponds to Allotment 1461. A review of the record demonstrates that the Water Right Claim Description is correct. The documents Claimant originally submitted to OWRD to substantiate the claim, including a November 14, 1990 Statement and Proof of Claim (OWRD0324476) and a May 21, 1970 Final Proof Survey (OWRD0324486), identify the same 37.5 acres that are listed in the Water Right Claim Description. And the text of the Amended Proposed Order mistakenly groups the missing 0.2 acres with the unallotted parcel, characterizing the unallotted parcel as consisting of 32.4 acres. Again, the Water Right Claim Description correctly lists a total of 32.2 acres for the place of use corresponding to the unallotted parcel. The correct acreage for each area is now reflected throughout the body of this order. The total number of acres claimed for Claim 105 (72.6) remains the same.

Therefore, the questions ~~is~~ are (1) whether water use was developed with reasonable diligence by the first ~~the first~~ non-Indian owner or successor ~~purchasers~~ of the land from an Indian owner, and (2) whether the ~~use of the~~ water claimed has been continuously used by all subsequent successors. With respect to Allotment No. 734, the first non-Indian owner or successor was Weyerhaeuser Timber Company in 1957. The evidence is uncontested that Weyerhaeuser did not irrigate the land. Therefore, since the first non-Indian owner or successor of the land did not develop water use on the lands that were formerly in Allotment 734, no *Walton* water right can be claimed on this land by subsequent owners. ~~continued. continuously used by all subsequent successors. With respect to Allotment No. 734, the first non Indian purchaser was Weyerhaeuser Timber Company in 1957. The evidence is uncontested that Weyerhaeuser did not irrigate the land. Therefore, since the first non Indian purchasers of the land did not develop water use on the lands that were formerly in Allotment No. 734, no *Walton* water right can be claimed on this land by subsequent owners.~~

With respect to Allotment No. 1461, the evidence establishes that the land passed into non-Indian ownership September 13, 1960, and that the first non-Indian owners, the Meades and Murrays, built an irrigation ditch in the fall of 1963, pursuant to a water right certificate with a priority date of October 4, 1962. Additional construction occurred in 1965 and 1967. The United States concedes that additional water use was developed on the lands that were formerly part of Allotment No. 1461 with reasonable diligence by the first non-Indian owners. Water was applied to beneficial use in 1966 to the 37.5~~3~~ acres claimed in Allotment No. 1461. ~~Given the evidence of diligent construction of works, the 6-year period in between transfer from Indian ownership and application of water to beneficial use constitutes reasonably diligent development. The Claimant has established each of the required *Walton* elements for 37.3 acres in Allotment No. 1461.~~

Additionally, the Claimant has met its burden to establish continuous use. The water right certificate approved for Allotment 1461 has a priority date of October 4, 1962; the final proof survey for that certificate is dated May 21, 1970, suggesting continuous irrigation from 1962 through 1970. In 2003, the owners stated in response to a discovery request that they have "continuously irrigated this property" since they purchased it.

¶ The United States submitted evidence intended to prove a lack of continued use on a portion of these 37.5~~3~~ acres. Aerial photographs taken in 1968, 1979, 1994, and 2000 show irrigation of slightly less than the full 37.5~~3~~ acres. In particular, aerial photographs taken in 1994 and 2000 show irrigation of 34.74. acres. This evidence is insufficient to establish ~~abandonment~~ a lack of continued use of the remaining 2.5~~6~~-76 acres. At most, the aerial photographs are evidence of nonuse during a period leading up to the date the photographs were taken. The evidence is sporadic, at best, with aerial photographs taken in only 4 of the 35-plus years between 1968 and the submission of direct testimony, in 2004. There is no other evidence showing ~~that the Claimant intended to abandon these 2.56 acres, and the Contestants have failed to prove~~ a lack of continued use ~~(abandonment)~~ of any portion of these acres. There is a valid, non-cancelled water right certificate (Certificate 38088) covering all 37.5~~3~~ acres claimed in Allotment No. 1461. (OWRD Ex.1 at 13, 51; Testimony of Everaert at 4, 5, 6). ~~Claimant claimed 37.3~~

~~acres~~ in ~~former Allotment No. 1'161, but the uncontroverted evidence establishes that as of 2000, only 34.74 acres were under irrigation.~~

¶ Because the Claimant has proved the elements of a *Walton* right, ~~and the contestants have failed to prove a lack of continued~~ including continuous use, ~~Therefore~~ a *Walton* water right, with a priority date of October 14, 1864, has been established for ~~34.74~~ 37.~~53~~ acres that were formerly part of Allotment No. 1461.

With respect to the 2.9 acres in Allotment No. 734, the first non-Indian owner or successor ~~purchaser~~ was Weyerhaeuser Timber Company on May 29, 1957. The evidence is uncontested that Weyerhaeuser did not irrigate the land. ~~The description of the construction of irrigation works and application of water to beneficial use provided for Allotment No. 1461 applies to these 2.9 acres as well. This means that more than 6 years passed between transfer from Indian ownership and the beginning of construction of irrigation works. Nine years passed in between transfer form Indian ownership and the first application of water to beneficial use. Given the length of the gap without evidence of any development, the length of time before application of water to beneficial use, the small size of the parcel, and the absence of evidence of any mitigating factors, use of water on these 2.9 acres was not developed with reasonable diligence.~~ The Claimant has not established each of the required *Walton* elements for 2.9 acres in Allotment No. 734.

Claim 105 also includes 32.24 acres of unallotted Tribal land.[3] This land first passed into non-Indian ownership in August 1959. The land was not under irrigation when it passed into non-Indian ownership, nor was it irrigated by the first non-Indian owners. ~~The description of the construction of irrigation works and application of water to beneficial use provided for Allotment No. 1461 applies to these 32.4 acres as well. Given the evidence of diligent construction of works beginning in 1963, the 7-year period in between transfer from Indian ownership and application of water to beneficial use constitutes reasonably diligent development. The Claimant has established each of the required *Walton* elements for these 32.4 acres of unallotted Tribal land.~~

~~¶ The United States submitted evidence intended to prove a lack of continued use on these 32.4 acres. Aerial photographs taken in 1968 and 1979 show irrigation of 24.87 acres. Aerial photographs taken in 1994 and 2000 show irrigation of 18.73 acres. This evidence is insufficient to establish abandonment of any portion of these 32.4 acres. At most, the aerial photographs are evidence of nonuse during a period leading up to the date the photographs were taken. The evidence is sporadic, at best, with aerial photographs taken in only 4 of the 35 plus years between 1968 and the submission of direct testimony, in 2004. There is no other evidence that the Claimant intended to abandon any portion of these 32.4 acres, and the Contestants have failed to prove a lack of continued use (abandonment) of any portion of these acres. There is a valid, non-cancelled water right certificate (Certificate 38088) covering these 32.4 acres. (OWRD Ex.1 at 13, 51; Testimony of Everaert at 4, 5, 6).~~

[3] The United States refers to a water right derived from unallotted Tribal lands as a Klamath Termination Act water right, and establishment of such a water right is subject to a similar legal standard as a *Walton* water right. *See* United States' Motion for Ruling on Legal Issues at 6, footnote 5.

¶ Because the Claimant has proved the elements of a *Walton* right, and the contestants have failed to prove a lack of continued use, Therefore Therefore, a *Walton* water right, with a priority date of October 14, 1864, cannot be has not been established for this land these 32.24 acres.

The uncontested evidence establishes that the Claimant is entitled to a *Walton* water right for only 34.74 69.7 37.5 acres of land in former Allotment No. 1461 in former Allotment No. 1461, with a priority date of October 14, 1864. A water rate of 1/40th of one cfs per irrigated acre is the standard in the Klamath Basin supported by the record, as well as and is the rate approved for the subject lands by Certificate 38088, Permit 28441. There is no evidence to support a different rate. Claimant acknowledged that a water duty of 3.0 acre-feet per acre is reasonable, which is the same as the duty approved by Certificate 38088, Permit 28441. The evidence does not supports the balance use of water claimed in Claim 105 as described above. As described above, the United States was not entitled to a ruling in its favor as a matter of law; therefore, the portion of the Order granting the United States' Motion for Ruling on Legal Issues is overruled.

Because the record in this case shows that there is no genuine issue as to any material fact that is relevant to resolution of this case, and because the United States is entitled to a ruling in its favor as a matter of law, the United States' Motion for Ruling on Legal Issues is granted.

Reasons for modifications to the Opinion section: To set forth the appropriate legal standards for determining the validity of *Walton* water right claims; to apply these standards to the Findings of Fact; to more fully set forth the facts in the record; to make corrections to the Opinion section to make the Opinion section consistent with the Findings of Fact.

6. ___

B. DETERMINATION

1. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows in its entirety as if set forth fully herein:.

   a. The "History of the Case" is adopted in its entirety.
   b. The "Issues" is adopted in its entirety.
   c. The "Evidentiary Matters" is adopted in its entirety.
   d. The "Legal Standard for Ruling on Legal Issues" is adopted in its entirety.
   e. The "Findings of Fact" is adopted in its entirety.
   f. The "Opinion" is adopted with modifications, as set forth in Section A.7, above.
   1.g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 105. Consistent with Section A.7 above, the outcome of the Order has been modified to recognize a right for 37.5 acres.

2. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

3. Based on the file and record herein, IT IS ORDERED that Claim 105 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 105

CLAIM MAP REFERENCE:
CLAIM # 105, PAGE 14; OWRD INVESTIGATION MAP – T 35 S, R 13 E

CLAIMANT: FIVE MILE RANCH, LLC
DAVID P. MASTAGNI
KATHLEEN R. MASTAGNI
3827 MARSHALL AVE
CARMICHAEL, CA 95608

SOURCE OF WATER:
FIVEMILE CREEK, tributary to the NORTH FORK SPRAGUE RIVER

PURPOSE or USE:
IRRIGATION OF ~~69.7~~37.5 ACRES WITH INCIDENTAL LIVESTOCK WATERING OF 200 HEAD

RATE OF USE:
~~1.74~~0.94 CUBIC FEET PER SECOND~~, BEING 0.94 CFS~~ FROM POD 1 ~~AND 0.80 CFS FROM POD 2~~

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:
3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: APRIL 1 - NOVEMBER 1

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
POD 1	35 S	13 E	WM	27	SW SE	30 FEET NORTH AND 3640 FEET EAST FROM SW CORNER, SECTION 27

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
~~POD 2~~	~~35 S~~	~~13 E~~	~~WM~~	~~34~~	~~NW NE~~	~~480 FEET SOUTH AND 3180 FEET EAST FROM NW CORNER, SECTION 34~~

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**Acres**	**Authorized POD**
35 S	13 E	WM	27	NE SW	1.7	POD 1
35 S	13 E	WM	27	NW SW	26.7	
35 S	13 E	WM	27	SW SW	0.2	
35 S	13 E	WM	28	NE SE	8.9	
~~35 S~~	~~13 E~~	~~WM~~	~~27~~	~~SE SW~~	~~6.3~~	~~POD 2~~
~~35 S~~	~~13 E~~	~~WM~~	~~27~~	~~SW SE~~	~~3.3~~	
~~35 S~~	~~13 E~~	~~WM~~	~~34~~	~~NW NE~~	~~20.4~~	
~~35 S~~	~~13 E~~	~~WM~~	~~34~~	~~SW NE~~	~~2.2~~	

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of the UNITED STATES DEPARTMENT OF INTERIOR, U.S. FISH AND WILDLIFE SERVICE	)))))	PARTIAL ORDER OF DETERMINATION Water Right Claims 301, 302, 303, 304, 305, 306, and 307

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE PROPOSED ORDER

1. Claims 301, 302, 303, 304, 305, 306, and 307 (Claimant: UNITED STATES DEPARTMENT OF INTERIOR, U.S. FISH AND WILDLIFE SERVICE) and their associated contests (Claim 301: 3290, 3661, 3993; Claim 302: 3291, 3662; Claim 303: 3292, 3663; Claim 304: 3293, 3664; Claim 305: 3294, 3665; Claim 306: 3295, 3666; Claim 307: 3296, 3667) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 272.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a CORRECTED PROPOSED ORDER[1] (Proposed Order) for Claims 301-307 on December 8, 2006.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) the Oregon Water Resources Department, (1) the United States, and (2) the Klamath Project Water Users (KPWU). Responses to exceptions were timely filed by (1) the United States and (2) the Klamath Project Water Users.

4. The exceptions filed to the Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claims 301-307. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.6, A.7, and A.8, below.

[1] The CORRECTED PROPOSED ORDER replaced a PROPOSED ORDER issued on December 4, 2006. The CORRECTED PROPOSED ORDER corrected a reference to the claims at issue in the History of the Case.

5. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Issues" is adopted in its entirety.
   c. The "Evidentiary Rulings" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.6, below.
   e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.7, below.
   f. The "Opinion" is adopted~~replaced~~ in its entirety~~, as set forth in Section A.8, below~~.
   g. The "Order" is adopted in its entirety as regarding Claims 302, 303, 304, 305, and 306. The "Order" is replaced in its entirety by the Water Right Claim Description set forth in Section B of this Partial Order of Determination for Claims 301 and 307. ~~The Order is presented in a format standardized by OWRD. Consistent with Sections A.6, A.7, and A.8, below, the outcome of the Order has been modified as to recognize rights for irrigation on an additional 0.4 acres for Claim 301 (to correct a scrivener's error), 5677.7 acres for Claim 302, 69.4 acres for Claim 303, 160.0 acres for Claim 304, 320.0 acres for Claim 305, and 319.0 acres for Claim 306; and livestock watering for Claim 302~~.

6. **Findings of Fact.** The Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding.

a. Modifications to Finding of Fact 1 (Pertaining to Claim 301):

The first sentence is modified as follows:

> The land subject to claim 301 is composed of ~~4858.9~~ 4859.3 acres[2], all of which was once within the Klamath Indian Reservation.

Subsection c. is modified as follows:

> c. Allotment 797, located in the W½ E½ Section 14, T 30 S R 9 E. W.M. was originally allotted to Mary Mitchell, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial User (C-11956). Allotment 797 left Indian

[2] Although the total acres on the original claim submitted April, 30, 1997 was shown as 4858.9, this total included a typographical error whereby 0.05 acre was listed instead of 0.5 acre in the NW ¼ NE ¼, Section 36, T 30 S, R 9 E.W.M. The OWRD Field Investigation map, which was relied on by the Claimant, shows 0.5 acre in this quarter-quarter. (Case 272 OWRD Ex. 1 at 9 and 202.) The correct total of 4859.3 acres and correct number of acres in this quarter-quarter were indicated on the Claimant's October 1, 1999 Revised Place of Use listing. (Case 272 OWRD Ex. 1 at 176-178.)

ownership in 1914 (conveyed to A.M. Abel), and was then conveyed to William Kittridge, the second non-Indian owner, in 1918. (Rauch Corrected Testimony at 4; Exhibits 272E00040153-54.) ~~The land was conveyed to William Kittridge, a non-Indian, in 1921.~~ Kittridge then transferred the property to Nicol, also a non-Indian, in 1955 ~~1975~~. (*Id*.)

Subsection ll. is modified as follows:

ll. Allotment 364, located in the ~~N ½ NE ¼, Section 26,~~ S½ S½ SE¼, Section 25, and the N½ NE ¼, Section 36, T 30 S, R 9 E. W. M. was originally allotted to Mollie Brown, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1920. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.

Subsection oo. is added as follows:

oo. An allotment located in the NW¼, Section 25, T 30 S, R 9 E. W.M. was originally allotted to an unknown Klamath Indian, who transferred the property to Ora Summers, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred to property to the Horton Family Trust, in July 1978. (OWRD Ex. 1 at 136-142.) Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956).

Subsection pp. is added as follows:

pp. An allotment located in the Lot 2 (SW¼ NW¼), SE¼ NW ¼, and Section 30, T 30 S, R 10 E. W.M. is within the boundary of the Klamath Reservation. Water use was developed on the property prior to 1893 as noted on an water right application map for C-11956 and continued to be irrigated in 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). (Affidavit and Testimony of Paul Rauch at 13; OWRD Ex. 1

at 12, 27; Exhibit 272E00040002.) Development of water use occurred within five years of the General Allotment Act of 1887.

Subsection qq. is added as follows:

qq. An allotment located in the NE¼ SW ¼, and Lot 3 (NW¼ SW¼), Section 30, T 30 S, R 10 E. W.M. is within the boundary of the Klamath Reservation. Water use was developed on the property prior to 1893 as noted on an water right application map for C-11956 and continued to be irrigated in 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). (Affidavit and Testimony of Paul Rauch at 13; OWRD Ex. 1 at 12, 27; Exhibit 272E00040002.) Development of water use occurred within five years of the General Allotment Act of 1887.

The final paragraph of Finding of Fact 1 is modified as follows:

Water has been beneficially applied to the property as follows:

Rate: Up to 35.0 cfs each from PODs 1 and 2, and/or up to 49.8 cfs from POD 3, not to exceed a combined rate of 60.7 cubic feet per second (cfs) for irrigation.

Limit: 1/80th cfs/acre, as claimed.

Duty: 14,576.7 acre~~/~~-feet per year, not to exceed 3.0 acre-feet per acre as claimed.

Place of Use: See Attachment 1. (Contents inserted below):

Points of Diversion: from the Williamson River, tributary to Upper Klamath Lake, at the following locations:
POD 3: NE¼ NW ¼, Section 24, T 30 S, R 9 E. W.M.
POD 1: SW¼ SE ¼, Section 18, T 30 S, R 10 E. W.M.
POD 2: SE¼ NW ¼, Section 19, T 30 S, R 10 E. W.M.

Use: Irrigation of ~~4858.9~~ 4,859.3 acres

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

Priority Date: October 14, 1864.

Reasons for Modifications: To clarify the ownership history of Allotment 797, because the ownership history provided in the Proposed Order is not supported by a preponderance of the evidence; to add Findings of Fact for places of use not previously included, to provide, based on evidence in the record, the per-acre limits for rate and duty; to remove the livestock season, since livestock use was not claimed.

"Attachment 1" is modified as follows:

ATTACHMENT 1
KLAMATH ADJUDICATION CASE 272

PLACE OF USE FOR CLAIM 301, AS ALLOWED

SE¼ SE¼	Section 10, T 30 S, R 9 E.W.M.	37.9 acres
SW¼ SW¼	Section 11, T 30 S, R 9 E.W.M.	37.9 acres
SE¼ SW¼	Section 11, T 30 S, R 9 E.W.M.	37.7 acres
~~SE~~ SW¼ SE¼	Section 11, T 30 S, R 9 E.W.M.	~~37.9~~ 34.0 acres
NW¼ NE¼	Section 14, T 30 S, R 9 E.W.M.	37.4 acres
SW¼ NE¼	Section 14, T 30 S, R 9 E.W.M.	38.8 acres
NE¼ NW¼	Section 14, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NW¼	Section 14, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NW¼	Section 14, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NW¼	Section 14, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SW¼	Section 14, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SW¼	Section 14, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SW¼	Section 14, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ ~~SE~~ SW¼	Section 14, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SE¼	Section 14, T 30 S, R 9 E.W.M.	38.4 acres
SW¼ SE¼	Section 14, T 30 S, R 9 E.W.M.	39.3 acres
NE¼ NE¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NE¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NE¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NE¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ NW¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NW¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SW¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SW¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SW¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres

SE¼ SW¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SE¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SE¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SE¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ SE¼	Section 15, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SE¼	Section 16, T 30 S, R 9 E.W.M.	24.3 acres
SW¼ SE¼	Section 16, T 30 S, R 9 E.W.M.	19.2 acres
SE¼ SE¼	Section 16, T 30 S, R 9 E.W.M.	39.6 acres
NE¼ NE¼	Section 21, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NE¼	Section 21, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NE¼	Section 21, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NE¼	Section 21, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NW¼	Section 21, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SW¼	Section 21, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ SW¼	Section 21, T 30 S, R 9 E.W.M.	~~40.0~~ 37.5 acres
NE¼ SE¼	Section 21, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SE¼	Section 21, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SE¼	Section 21, T 30 S, R 9 E.W.M.	37.8 acres
SE¼ SE¼	Section 21, T 30 S, R 9 E.W.M.	~~38.8~~ 37.9 acres
NE¼ NE¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NE¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NE¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NE¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ NW¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NW¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NW¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NW¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SW¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SW¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SW¼	Section 22, T 30 S, R 9 E.W.M.	37.5 acres
SE¼ SW¼	Section 22, T 30 S, R 9 E.W.M.	37.2 acres
NE¼ SE¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SE¼	Section 22, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SE¼	Section 22, T 30 S, R 9 E.W.M.	36.1 acres
SE¼ SE¼	Section 22, T 30 S, R 9 E.W.M.	35.9 acres
NE¼ NE¼	Section 23, T 30 S, R 9 E.W.M.	38.2 acres
NW¼ NE¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NE¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NE¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ NW¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NW¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NW¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NW¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SW¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres

NW¼ SW¼	Section 23, T 30 S, R 9 E.W.M.	37.3 acres
SW¼ SW¼	Section 23, T 30 S, R 9 E.W.M.	37.0 acres
SE¼ SW¼	Section 23, T 30 S, R 9 E.W.M.	32.6 acres
NE¼ SE¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SE¼	Section 23, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SE¼	Section 23, T 30 S, R 9 E.W.M.	36.8 acres
SE¼ SE¼	Section 23, T 30 S, R 9 E.W.M.	36.9 acres
NE¼ NW¼	Section 24, T 30 S, R 9 E.W.M.	35.7 acres
NW¼ NW¼	Section 24, T 30 S, R 9 E.W.M.	38.2 acres
SW¼ NW¼	Section 24, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NW¼	Section 24, T 30 S, R 9 E.W.M.	36.5 acres
NE¼ SW¼	Section 24, T 30 S, R 9 E.W.M.	35.7 acres
NW¼ SW¼	Section 24, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SW¼	Section 24, T 30 S, R 9 E.W.M.	36.7 acres
SE¼ SW¼	Section 24, T 30 S, R 9 E.W.M.	35.3 acres
NE¼ NE¼	Section 25, T 30 S, R 9 E.W.M.	38.6 acres
NW¼ NE¼	Section 25, T 30 S, R 9 E.W.M.	38.2 acres
SW¼ NE¼	Section 25, T 30 S, R 9 E.W.M.	31.3 acres
SE¼ NE¼	Section 25, T 30 S, R 9 E.W.M.	37.1 acres
NE¼ NW¼	Section 25, T 30 S, R 9 E.W.M.	38.1 acres
NW¼ NW¼	Section 25, T 30 S, R 9 E.W.M.	38.6 acres
SW¼ NW¼	Section 25, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NW¼	Section 25, T 30 S, R 9 E.W.M.	39.4 acres
NE¼ SW¼	Section 25, T 30 S, R 9 E.W.M.	22.7 acres
NW¼ SW¼	Section 25, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SW¼	Section 25, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ SW¼	Section 25, T 30 S, R 9 E.W.M.	39.1 acres
NE¼ SE¼	Section 25, T 30 S, R 9 E.W.M.	32.6 acres
NW¼ SE¼	Section 25, T 30 S, R 9 E.W.M.	4.6 acres
SW¼ SE¼	Section 25, T 30 S, R 9 E.W.M.	32.4 acres
SE¼ SE¼	Section 25, T 30 S, R 9 E.W.M.	35.2 acres
NE¼ NE¼	Section 26, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NE¼	Section 26, T 30 S, R 9 E.W.M.	38.8 acres
SW¼ NE¼	Section 26, T 30 S, R 9 E.W.M.	38.8 acres
SE¼ NE¼	Section 26, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ NW¼	Section 26, T 30 S, R 9 E.W.M.	37.1 acres
NW¼ NW¼	Section 26, T 30 S, R 9 E.W.M.	39.0 acres
SW¼ NW¼	Section 26, T 30 S, R 9 E.W.M.	24.7 acres
SE¼ NW¼	Section 26, T 30 S, R 9 E.W.M.	37.5 acres
NE¼ SE¼	Section 26, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SE¼	Section 26, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SE¼	Section 26, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ SE¼	Section 26, T 30 S, R 9 E.W.M.	38.6 acres
NE¼ NE¼	Section 27, T 30 S, R 9 E.W.M.	40.0 acres

NW¼ NE¼	Section 27, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NE¼	Section 27, T 30 S, R 9 E.W.M.	25.8 acres
SE¼ NE¼	Section 27, T 30 S, R 9 E.W.M.	28.0 acres
NE¼ NW¼	Section 27, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NW¼	Section 27, T 30 S, R 9 E.W.M.	39.4 acres
SW¼ NW¼	Section 27, T 30 S, R 9 E.W.M.	4.5 acres
SE¼ NW¼	Section 27, T 30 S, R 9 E.W.M.	16.5 acres
NE¼ NE¼	Section 28, T 30 S, R 9 E.W.M.	36.3 acres
NW¼ NE¼	Section 28, T 30 S, R 9 E.W.M.	15.3 acres
NW¼ NE¼	Section 36, T 30 S, R 9 E.W.M.	0.5 acre
SW¼ NW¼	Section 19, T 30 S, R 10 E.W.M.	33.4 acres
SE¼ NW¼	Section 19, T 30 S, R 10 E.W.M.	35.4 acres
NE¼ SW¼	Section 19, T 30 S, R 10 E.W.M.	36.1 acres
NW¼ SW¼	Section 19, T 30 S, R 10 E.W.M.	31.4 acres
SW¼ SW¼	Section 19, T 30 S, R 10 E.W.M.	30.8 acres
SE¼ SW¼	Section 19, T 30 S, R 10 E.W.M.	10.9 acres
NE¼ NW¼	Section 30, T 30 S, R 10 E.W.M.	25.9 acres
NW¼ NW¼	Section 30, T 30 S, R 10 E.W.M.	32.4 acres
SW¼ NW¼	Section 30, T 30 S, R 10 E.W.M.	32.4 acres
SE¼ NW¼	Section 30, T 30 S, R 10 E.W.M.	33.3 acres
NE¼ SW¼	Section 30, T 30 S, R 10 E.W.M.	17.8 acres
NW¼ SW¼	Section 30, T 30 S, R 10 E.W.M.	9.5 acres

Reasons for Modifications to Attachment 1: To correct for scriverner's errors in Place of Use listing in the ALJ's Attachment 1. Corrections are based on comparing the Revised Place of Use filed on October 1, 1999 (Case 272 OWRD Ex. 1 at 176-178) with the OWRD Field Investigation Map for Township 30 South, Range 9 East (Case 272 OWRD Ex. 1 at 9).

b. Modifications to Finding of Fact 2 (Pertaining to Claim 302):

The final two paragraphs of Finding of Fact 2 are modified as follows:

The land subject to claim 302 is composed of 5,677.1[3] acres. ~~Except for 80 acres,~~ The property subject to this claim was purchased by the United States in 1989 or 1990. It was originally held directly by the Klamath Tribes, and transferred by the Tribes to the Nicol Land and Cattle Company in 1976. (Affidavit and Testimony of Paul Rauch.) ~~The other~~ One 80-acre parcel within this land (Allotment 1596, located in E½ NE¼, Section 2, T 30 S, R 9 E. W.M.) was allotted to Dolly Lawvor, a Klamath

[3] Although the original claim was for 5694.7 acres, the Preliminary Evaluation found that actual acreage was 5677.1. Claimant did not contest this figure.

Indian. However, in 1971 this 80-acre parcel was transferred by a Klamath Indian successor to Dolly Lawvor back to the Klamath Tribes. (Correction to Rauch Testimony at 3; OWRD Ex. 1 at 303-05.) ~~Allotment 1596 was sold~~ The Klamath Tribes then sold Allotment 1596 to the Nicol Land and Cattle Company in 1976. (Correction to Testimony and Affidavit of Paul Rauch, at 3; OWRD Ex. 1 at 306-309.) In 1979, Mark Nicol and Dana Nicol, ~~formerly~~ partners in the Nicol Land and Cattle Company, ~~which had been dissolved after acquiring the property,~~ applied for a Water User Permit for all the land subject to this claim, (P-44425), and completed the works that year. (OWRD Ex. 1 at 289-92.) (Testimony of Paul Rauch; OWRD Ex. 1 at 287, 288.)

Water was not beneficially applied to the property prior to transfer to the second non-Indian owner. (Correction to Testimony and Affidavit of Paul Rauch, at 3; OWRD Ex. 1 at 289-92.) ~~However, water was applied to a beneficial use with reasonable diligence following transfer from Indian ownership, as follows:~~

~~Rate: 71.05 cfs for irrigation~~

~~Limit: 1/80th cfs/acre, as claimed.~~

~~Duty: 17,053 acre-feet per year, not to exceed 3.0 acre-feet/acre as claimed.~~

~~Livestock Watering: 0.01cfs, further limited to 12 gallons per head per day[4] for a maximum of 500 head.~~

~~Place of Use:~~

~~NE¼ SW¼ Section 15, T 29 S, R 9 E.W.M. 13.5 acres~~
~~SE¼ SW¼ Section 15, T 29 S, R 9 E.W.M. 20.0 acres~~
~~NW¼ SE¼ Section 15, T 29 S, R 9 E.W.M. 37.2 acres~~
~~SW¼ SE¼ Section 15, T 29 S, R 9 E.W.M. 40.0 acres~~

~~[4] Because there is no evidence on the record to the contrary, the standard rate of 12 gallons of water per head of livestock per day, measured at the place of use, as outlined in the GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION will apply.~~

~~SE¼ SE¼ Section 15, T 29 S, R 9 E.W.M. 20.0 acres~~

~~NE¼ NE¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NE¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NE¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ NW¼ Section 22, T 29 S, R 9 E.W.M. 20.0 acres~~
~~SE¼ NW¼ Section 22, T 29 S, R 9 E.W.M. 20.0 acres~~
~~NE¼ SW¼ Section 22, T 29 S, R 9 E.W.M. 20.0 acres~~
~~SW¼ SW¼ Section 22, T 29 S, R 9 E.W.M. 38.1 acres~~
~~SE¼ SW¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SE¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SE¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SE¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ SE¼ Section 22, T 29 S, R 9 E.W.M. 40.0 acres~~

~~NW¼ NW¼ Section 23, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NW¼ Section 23, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SW¼ Section 23, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SW¼ Section 23, T 29 S, R 9 E.W.M. 40.0 acres~~

~~NE¼ NE¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NE¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NE¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ NW¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NW¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NW¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NW¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SW¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SW¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SW¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ SW¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~

~~NE¼ SE¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SE¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SE¼ Section 27, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ SE¼ Section 27, T 30 S, R 9 E.W.M. 40.0 acres~~

~~NE¼ NE¼ Section 28, T 29 S, R 9 E.W.M. 20.0 acres~~
~~SE¼ NE¼ Section 28, T 29 S, R 9 E.W.M. 20.0 acres~~
~~NE¼ SE¼ Section 28, T 29 S, R 9 E.W.M. 16.7 acres~~
~~SE¼ SE¼ Section 28, T 29 S, R 9 E.W.M. 37.9 acres~~

~~NE¼ SE¼ Section 32, T 29 S, R 9 E.W.M. 39.0 acres~~
~~SW¼ SE¼ Section 32, T 29 S, R 9 E.W.M. 32.8 acres~~
~~SE¼ SE¼ Section 32, T 29 S, R 9 E.W.M. 38.7 acres~~

~~NE¼ NE¼ Section 33, T 29 S, R 9 E.W.M. 33.7 acres~~
~~NW¼ NE¼ Section 33, T 29 S, R 9 E.W.M. 31.0 acres~~
~~SW¼ NE¼ Section 33, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NE¼ Section 33, T 29 S, R 9 E.W.M. 36.2 acres~~
~~SW¼ NW¼ Section 33, T 29 S, R 9 E.W.M. 39.1 acres~~
~~SE¼ NW¼ Section 33, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SW¼ Section 33, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SW¼ Section 33, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SW¼ Section 33, T 29 S, R 9 E.W.M. 38.7 acres~~
~~SE¼ SW¼ Section 33, T 29 S, R 9 E.W.M. 38.8 acres~~
~~NE¼ SE¼ Section 33, T 29 S, R 9 E.W.M. 36.2 acres~~
~~NW¼ SE¼ Section 33, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SE¼ Section 33, T 29 S, R 9 E.W.M. 39.0 acres~~
~~SE¼ SE¼ Section 33, T 29 S, R 9 E.W.M. 36.1 acres~~

~~NE¼ NE¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NE¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NE¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~

~~NE¼ NW¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NW¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NW¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NW¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SW¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SW¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SW¼ Section 34, T 29 S, R 9 E.W.M. 39.2 acres~~
~~SE¼ SW¼ Section 34, T 29 S, R 9 E.W.M. 39.2 acres~~
~~NE¼ SE¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SE¼ Section 34, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SE¼ Section 34, T 29 S, R 9 E.W.M. 39.4 acres~~
~~SE¼ SE¼ Section 34, T 29 S, R 9 E.W.M. 39.6 acres~~

~~NW¼ NE¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ NW¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NW¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NW¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NW¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SW¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SW¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SW¼ Section 35, T 29 S, R 9 E.W.M. 39.6 acres~~
~~SE¼ SW¼ Section 35, T 29 S, R 9 E.W.M. 39.6 acres~~
~~NW¼ SE¼ Section 35, T 29 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SE¼ Section 35, T 29 S, R 9 E.W.M. 39.6 acres~~

~~NE¼ NE¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NE¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NE¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ NW¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NW¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~

~~SW¼ NW¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NW¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SW¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SW¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SW¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ SW¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SE¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SE¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SE¼ Section 2, T 30 S, R 9 E.W.M. 40.0 acres~~

~~NE¼ NE¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NE¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NE¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ NW¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NW¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NW¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NW¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SW¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SW¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SW¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ SW¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SE¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SE¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SE¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ SE¼ Section 3, T 30 S, R 9 E.W.M. 40.0 acres~~

~~NE¼ NE¼ Section 4, T 30 S, R 9 E.W.M. 36.3 acres~~
~~NW¼ NE¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NE¼ Section 4, T 30 S, R 9 E.W.M. 36.3 acres~~

~~NE¼ NW¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NW¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NW¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ NW¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SW¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ SW¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SW¼ Section 4, T 30 S, R 9 E.W.M. 31.4 acres~~
~~SE¼ SW¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SE¼ Section 4, T 30 S, R 9 E.W.M. 36.1 acres~~
~~NW¼ SE¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ SE¼ Section 4, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SE¼ SE¼ Section 4, T 30 S, R 9 E.W.M. 36.0 acres~~

~~NE¼ NE¼ Section 5, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 5, T 30 S, R 9 E.W.M. 25.8 acres~~
~~SE¼ NE¼ Section 5, T 30 S, R 9 E.W.M. 39.9 acres~~
~~SE¼ NW¼ Section 5, T 30 S, R 9 E.W.M. 14.0 acres~~
~~NE¼ SE¼ Section 5, T 30 S, R 9 E.W.M. 33.1 acres~~

~~NE¼ NE¼ Section 9, T 30 S, R 9 E.W.M. 35.8 acres~~
~~NW¼ NE¼ Section 9, T 30 S, R 9 E.W.M. 39.2 acres~~
~~SW¼ NE¼ Section 9, T 30 S, R 9 E.W.M. 7.8 acres~~
~~SE¼ NE¼ Section 9, T 30 S, R 9 E.W.M. 26.6 acres~~
~~NE¼ NW¼ Section 9, T 30 S, R 9 E.W.M. 24.3 acres~~

~~NW¼ NE¼ Section 10, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NE¼ Section 10, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ NW¼ Section 10, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NW¼ NW¼ Section 10, T 30 S, R 9 E.W.M. 40.0 acres~~
~~SW¼ NW¼ Section 10, T 30 S, R 9 E.W.M. 34.8 acres~~
~~SE¼ NW¼ Section 10, T 30 S, R 9 E.W.M. 40.0 acres~~
~~NE¼ SW¼ Section 10, T 30 S, R 9 E.W.M. 20.4 acres~~
~~NW¼ SW¼ Section 10, T 30 S, R 9 E.W.M. 8.0 acres~~

SE¼ SW¼ Section 10, T 30 S, R 9 E.W.M. 33.0 acres

Point of Diversion: from the Williamson River, tributary to Upper Klamath Lake, at the following location:

POD 3: NE¼ NW ¼, Section 24, T 30 S, R 9 E. W.M.

Use: Irrigation of 5,677.7 acres.

Season of Use: March 1 – October 31 for irrigation; January 1 – December 31 for livestock watering

Priority Date: October 14, 1864.

Reasons for Modifications: The ALJ's conclusion that the Nicol Land and Cattle Company was dissolved is not supported by a preponderance of evidence in the record; to set forth additional evidence in the record pertaining to the ownership history of Allotment 1596.; to set forth additional evidence in the record pertaining to use of water pertinent to Claim 302.

c. Modifications to Finding of Fact 3 (Pertaining to Claim 303):

The final paragraph of Finding of Fact 3 is modified as follows:

Water was not beneficially applied to the property prior to transfer to the second non-Indian owner. (OWRD Ex. 1 at 476, 485.) However, water was applied to a beneficial use with reasonable diligence following transfer from Indian ownership, as follows:

Rate: 1.73 cfs for irrigation

Limit: 1/40th cfs/acre, as claimed.

Duty: 208.2 acre-feet per year, not to exceed 3.0 acre-feet/acre as claimed.

Place of Use:

NE¼ NW¼ Section 19, T 30 S, R 10 E.W.M. 40.0 acres
NW¼ NW¼ Section 19, T 30 S, R 10 E.W.M. 29.4 acres

Point of Diversion: from the Williamson River, tributary to Upper Klamath Lake, at the following location:

POD 4: NW¼ NW ¼, Section 19, T 30 S, R 10 E, W.M.

Use: Irrigation of 69.4 acres.

Season of Use: March 1 – October 31 for irrigation

Priority Date: October 14, 1864.

Reason for Modifications: To set forth additional evidence in the record pertaining to use of water pertinent to Claim 303.

d. Modifications to Finding of Fact 4 (Pertaining to Claim 304):

The final paragraph of Finding of Fact 4 is modified as follows:

Water was not beneficially applied to the property prior to transfer to the second non-Indian owner. (OWRD Ex. 1 at 722, 585-86.) However, water was applied to a beneficial use with reasonable diligence following transfer from Indian ownership, as follows:

Rate: 4.0 cfs for irrigation

Limit: 1/40th cfs/acre, as claimed.

Duty: 480 acre-feet per year, not to exceed 3.0 acre-feet/acre, as claimed.

Place of Use:

SW¼ SW¼	Section 12, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ SW¼	Section 12, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ NW¼	Section 13, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NW¼	Section 13, T 30 S, R 9 E.W.M.	40.0 acres

Point of Diversion: from the Williamson River, tributary to Upper Klamath Lake, at the following location:

POD 4: NW¼ NW ¼, Section 19, T 30 S, R 10 E, W.M.

Use: Irrigation of 160.0 acres.

Season of Use: March 1 – October 31 for irrigation

Priority Date: October 14, 1864.

Reason for Modifications: To set forth additional evidence in the record pertaining to use of water pertinent to Claim 304.

e. Modifications to Finding of Fact 5 (Pertaining to Claim 305):

The final paragraph of Finding of Fact 5 is modified as follows:

Water was not beneficially applied to the property prior to transfer to the second non-Indian owner. (OWRD Ex. 1 at 722, 697-98.) However, water was applied to a beneficial use with reasonable diligence following transfer from Indian ownership, as follows:

Rate: Up to 8.0 cfs from POD 3 and/or up to 5.8 cfs from POD 4, not to exceed a combined rate of 8.0 cubic feet per second (cfs) for irrigation.

Limit: 1/40th cfs/acre, as claimed.

Duty: 960 acre-feet per year, not to exceed 3.0 acre-feet/acre as claimed.

Place of Use:

SW¼ SW¼	Section 13, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ SW¼	Section 13, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ NE¼	Section 24, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NE¼	Section 24, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SE¼	Section 24, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SE¼	Section 24, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ SE¼	Section 24, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ SE¼	Section 24, T 30 S, R 9 E.W.M.	40.0 acres

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

POD 3: NE¼ NW ¼, Section 24, T 30 S, R 9 E, W.M.

POD 4: NW¼ NW ¼, Section 19, T 30 S, R 10 E, W.M.

Use: Irrigation of 320.0 acres.

Season of Use: March 1 – October 31 for irrigation

Priority Date: October 14, 1864.

Reason for Modifications: To set forth additional evidence in the record pertaining to use of water pertinent to Claim 305.

f. Modifications to Finding of Fact 6 (Pertaining to Claim 306):

The final paragraph of Finding of Fact 6 is modified as follows:

Water was not beneficially applied to the property prior to transfer to the second non-Indian owner. (OWRD Ex. 1 at 722, 831-833.) However, water was applied to a beneficial use with reasonable diligence following transfer from Indian ownership, as follows:

Rate: 7.98 cfs for irrigation

Limit: 1/40th cfs/acre, as claimed.

Duty: 957 acre-feet per year, not to exceed 3.0 acre-feet per acre as claimed.

Place of Use:

NW¼ NW¼	Section 28, T 30 S, R 9 E.W.M.	39.0 acres
SW¼ NW¼	Section 28, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ NE¼	Section 29, T 30 S, R 9 E.W.M.	40.0 acres
SW¼ NE¼	Section 29, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NE¼	Section 29, T 30 S, R 9 E.W.M.	40.0 acres
SE¼ NW¼	Section 29, T 30 S, R 9 E.W.M.	40.0 acres
NE¼ SW¼	Section 29, T 30 S, R 9 E.W.M.	40.0 acres
NW¼ SE¼	Section 29, T 30 S, R 9 E.W.M.	40.0 acres

Point of Diversion: from the Williamson River, tributary to Upper Klamath Lake, at the following location:

POD 3: NE¼ NW ¼, Section 24, T 30 S R 9 E, W.M.

~~Use: Irrigation of 319.0 acres.~~

~~Season of Use: March 1 – October 31 for irrigation~~

~~Priority Date: October 14, 1864.~~

~~**Reason for Modifications:** To set forth additional evidence in the record pertaining to use of water pertinent to Claim 306.~~

g. Additional modifications to Findings of Fact 3 – 6:

Findings of Facts 3 through 6 are modified with respect to the dates of certain transfers of ownership. Specifically, the property at issue in Claims 303 through 306 was transferred from Indian ownership on July 3, 1978. The same property was transferred from the first non-Indian owner (John C. Horton) to the Horton Family Trust on November 7, 1978. (OWRD Ex. 1 at 483-85; 720-22.)

Reason for Modifications: The Proposed Orders findings concerning these transfer dates are not supported by a preponderance of evidence in the record.

h. Modifications to Finding of Fact 7 (Pertaining to Claim 307):

The final paragraph of Finding of Fact 7 is modified as follows:

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

Rate: 3.61 cubic feet per second (cfs) (Note: The rate is limited due by the claimed diversion capacity. See OWRD Ex. 1 at 1032.)

Limit: 1/80th cfs/acre, as claimed.

Duty: ~~1,823.5~~ 1563 acre~~/~~-feet per year, not to exceed 3.0 acre-feet per acre, as claimed

Place of Use:

NE¼ NE¼	40.0 acres
NW¼ NE¼	39.8 acres
SW¼ NE¼	36.2 acres
SE¼ NE ¼	40.0 acres
NE¼ SE ¼	40.0 acres
NW¼ SE ¼	40.0 acres

Lot 3 SW¼ SE ¼ 39.3 acres
Lot 4 SE¼ SE ¼ 39.3 acres
Section 35, T 30 S R 8 E.W.M.

NE¼ SW ¼ 20.3 acres
NW¼ SW ¼ 38.1 acres
Lot 1 SW¼ SW¼ 39.4 acres
Lot 2 SE¼ SW¼ 20.0 acres
Section 36, T 30 S R 8 E.W.M.

Lot 5 NE¼ NE¼ 6.8 acres
~~NW¼ SW ¼~~
Lot 6 NW¼ NE¼ 16.4 acres
SW¼ NE ¼ 25.4 acres
SE¼ NE ¼ 40.0 acres
Section 2, T 31 S R 8 E.W.M.

Point of Diversion: From Lenz Creek (A.K.A. Big Springs Creek), tributary to the Williamson River, tributary to Upper Klamath Lake, at SE¼ NW¼ Section 35, T 30 S. R 8 E. W. M.

Use: Irrigation of 521 acres

Season of Use: March 1 – October 31 for irrigation

Priority Date: October 14, 1864

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

(OWRD Ex. 1 at 1023-24, Ex. 4008, Testimony of Rauch, Corrected Affidavit and Testimony of Rauch.)

Reasons for Modifications: To set forth additional evidence in the record pertaining to use of water pertinent to Claim 307; to make the finding of fact consistent with the Conclusions of Law and Opinion; to decrease the total volume of acre-feet per year such that it is based on a duty of 3.0 acre-feet per acre as claimed, an issue raised in exceptions to the proposed order by KPWU; to include the place of use from Allotment 693, being the NE¼ NE¼ (40.0 acres) and NW¼ NE¼ (39.8 acres), Section 35, Township 30 South, Range 8 East, W.M.; to correct for scrivener's errors in the Place of Use quarter-quarter listing in the ALJ's Proposed Order, and to insert number of acres within each quarter-quarter. Acreages and corrections to the quarter-quarter listing are based on comparing the Revised Place of Use filed on October 1, 1999 (Case 272 OWRD

Ex. 1 at 1001) with the OWRD Field Investigation Maps for Township 30 South, Range 8 East and Township 31 South, Range 8 East (Case 272 OWRD Ex. 1 at 1027-1031).

7. **Conclusions of Law.** Within the section titled "Conclusions of Law" of the Proposed Order, Conclusion #2 and Conclusion #12 are modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

2. There is sufficient evidence to establish a valid *Walton* right as to a portion of the claims as described in the Findings of Fact and the Water Right Claim Descriptions. ~~as to a portion of the claims.~~

12. ~~For some of the property, t~~ For some of the property, ~~T~~the current use was developed within a reasonable time by the first non Indian successor(s) after the claimed date of appropriation.

Reason for Modifications: The evidence on the record, as described in the modified Findings of Fact and the application of the appropriate legal bases to the evidence on the record, as described in the modified Opinion section, below, supports conclusions other than those in the Proposed Order.

~~8. **Opinion.** The Proposed Order's "Opinion" section is replaced in its entirety.~~

~~OWRD incorporates into this Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS and the GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS.~~

~~Claimants have the burden of establishing their claim by a preponderance of the evidence. ORS 539.110; 183.450(2); *see Cook v. Employment Div.*, 47 Or App 437 (1980). (In the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).~~

~~Except as described below, the Findings of Fact establish that the elements of a *Walton* right have been met for the lands that the United States continues to claim in Claims 301 and 303 through 307, and that the elements of a Klamath Termination Act right has been met for the lands claimed in Claim 302. Each of the described allotments was on land formerly part of the Klamath Indian Reservation. Each of the described allotments was allotted to a member of the Klamath Tribes, or for Klamath Termination Act claims, was retained by the Klamath Tribes and conveyed to a non-Indian without becoming part of the public domain. Each of the described allotments was either developed prior to transfer from Indian ownership, or was developed within a reasonably diligent period of time following transfer from Indian ownership. Water was applied on most allotments (or unallotted parcels) within four years of transfer to non-Indian ownership. The only~~

exceptions are Allotment 797 in Claim 301, for which there was a maximum interval of five years, and Allotment 693 in Claim 307, for which there was a maximum interval of six years. Given those findings, and under the circumstances as a whole, including the number of acres involved, this constitutes reasonably diligent development.[5]

With respect to Claim 307, the United States claimed 800.9 acres for irrigation in Claim 307. The Proposed Order limited Claim 307 to 521 acres. The Proposed Order rejected the claim for Allotment 693 because beneficial use was developed by the second non-Indian owner, not the first. As described above, and as addressed in OWRD's exceptions to the Proposed Order, the part of Claim 307 that includes Allotment 693 is allowed because Allotment 693 was put to beneficial use with reasonable diligence following transfer from Indian ownership. The two quarter-quarters (NE¼ NE¼ and NW¼ NE, Section 35, Township 30 South, Range 8 East, W.M.) associated with Allotment 693 were excluded from the Proposed Order's place of use listing, however, the total acres approved in the Proposed Order for Claim 307, being 521.0, included the 79.8 acres within Allotment 693. Thus the total number of approved acres including those in Allotment 693 remains 521.0 acres. (Note: the distribution of acres by quarter-quarter was not included in the Proposed Order.)

The Proposed Order rejected the remaining 200.1 acres in Claim 307 because these acres were subject to beneficial use by natural overflow only, and not an artificial point of diversion. The United States did not file exceptions to this portion of the Proposed Order, and in its responses to the Klamath Project Water Users' exceptions, appears to have accepted the Proposed Order's determination on this issue. As a result, this Partial Order of Determination does not address the remaining 200.1 acres in Claim 307.

In addition to the addressing the elements of a *Walton* claim, the Contestants have raised several other issues that bear on the determination in this matter. These issues are addressed below.

First, it is argued that the United States originally characterized Claim 302 as a *Walton* right, and that the change to a right under the Klamath Termination Act constitutes an impermissible amendment to the claim. So long as the parameters of the water right, such as the amount of water or the land upon which it is to be applied is not increased,

[5] The United States insists that the *Walton* line of cases rejects the well-understood principle of application of water to a beneficial use with reasonable diligence. This principle is intended to promote efficient use of water by ensuring that prospective appropriators cannot indefinitely tie up available water without developing it. It is recognized consistently by states that adhere to the doctrine of prior appropriation. The United States contends that the *Walton* cases instead created a wholly new principle, which would arbitrarily determine eligibility for water rights based on the duration of the first non Indian's ownership, without regard to an objectively reasonable period for development of water. In Claims 303-306, for example, the affected lands were acquired by the first non Indian owner (an individual) and transferred to the second non Indian owner (a trust) within four months. Obviously, such a circumstance provides little opportunity for the development of beneficial use of water. By completely disconnecting eligibility for a water right from an objectively reasonable period for development of beneficial use, this "first non Indian owner" principle serves no purpose other than to arbitrarily devalue the market value of allottee water rights. This issue is addressed more fully in OWRD's GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS, which is incorporated by reference.

however, a change in the legal theory under which a claim is made is not an amendment to the claim that is prohibited under ORS 539.210 and OAR 690-030-0085. A change in legal theory, alone, is permissible in these proceedings, so long as it does not prejudice the ability of the contestants to fairly challenge the evidence or constitute surprise. Such prejudice is not present on the record of this case. The evidence required to prove the elements of the claim is not different in any way that would prevent the parties from conducting meaningful discovery or investigation or finding contrary evidence if it exists. Nor were the parties prevented from meaningful cross-examination of witnesses by this change in legal theory.

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

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

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

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

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

> "3. The water right declared by this supplemental judgment pertains to all Klamath Marsh lands *now within the Refuge*, which has a land area of 16,377 acres." (Nicholson Response, Attachment 3 at 2.)
>
> * * * However, this supplemental judgment will not bind officials of the State as to decisions to be made in their official capacity

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

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

(Nicholson Response, Attachment 3 at 3.)

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

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

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

The property that is subject to these claims was acquired by the United States from private parties, including the Nicols, and Nicol Land and Cattle Company, in 1989 and 1990. The United States has made the claims for water rights for irrigation and stock-watering as successors to the private owners, and has not asserted a Federal Reserved Water Right under the Migratory Bird Hunting and Conservation Stamp Act. By itself,

this would tend to exclude the property subject to these claims from the scope of litigation in *Adair*. At the time the Stipulation was entered, the United States had not acquired the property in question. Indeed, In some cases, the property was in the ownership of the very defendants in that case who reserved the right to assert whatever claim they chose against any non-party to the litigation regardless of the stipulation. The United States succeeded to that right when the property was purchased. There is simply no support for the notion that the Supplemental Declaratory Judgment or the Stipulation was intended to convert a *Walton* right with an 1864 priority held by a private party at the time of the Stipulation into a Federal Reserved Water Right with a 1985 priority simply by virtue of its acquisition by the United States for inclusion in the Wildlife Refuge, particularly at the behest of a non-party to the litigation as against whom none of the parties were bound.

Third, it is argued that the water right asserted by the United States is not an agricultural water right for irrigation, but a so-called "wilderness servitude" or other use that is different from the right acquired by the United States. Irrigation use is typically broad enough to encompass the application of water for the growth of plants, without regard to plant type or the end use of the plants. *See* OAR 690-300-0010(26). However, the Contestants are correct that the *Walton* doctrine requires a narrower meaning of irrigation use. Irrigation authorized under this claim is subject to the definition of irrigation use applied by the Ninth Circuit to *Walton* claims: irrigation under a *Walton* right is that which is "essential to agricultural needs." *See United States v. Adair, 723 F.2d 1394, 1415* (9th Cir. 1983).

The Contestants have failed to prove, however, that the United States has abandoned the claimed *Walton* rights by its use of water on the claimed lands since the United States' acquisition of the property. The evidence shows that the United States has continued to graze cattle on all of the claimed lands on a rotational basis. This is sufficient to establish continued intent to use water for "irrigation" as that term is used in the *Walton* doctrine.

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

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

Because there is no evidence on the record to the contrary, the standard season of use for irrigation, being March 1 through October 31 of each year as outlined in the GENERAL FINDINGS OF FACT OF THE FINAL ORDER OF DETERMINATION will apply to Claims 301-307. Because there is no evidence on the record to the contrary, the standard rate of 12 gallons of water per head of livestock per day, measured at the place of use, as outlined in the GENERAL FINDINGS OF FACT OF THE FINAL ORDER OF DETERMINATION will apply to Claim 302; the livestock watering is limited to the maximum number of head claimed, being 500. Diversion of stock water to the place of use is limited to that which has been

~~historically diverted for beneficial use and is reasonably necessary to transport the water and to prevent the watercourse from being completely frozen when transporting water outside of the irrigation season.~~

~~**Reasons for Modification:** To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership and beneficial use of water being made with reasonable diligence after transfer to non-Indian successors; to correct the basis used to evaluate a period of non-Indian ownership in Allotment 449; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.~~

~~9.~~8. **Order.** The "Proposed Order" section of the Proposed Order is adopted in its entirety as regarding Claims 302, 303, 304, 305, and 306. The "Proposed Order" section is deleted in its entirety and replaced with the Water Right Claim Description, below, as regarding Claims 301 and 307.

Reason for Modifications: To provide consistency with the modified Findings of Fact, Conclusions of Law and Opinion sections.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "History of the Case" is adopted in its entirety.
   b. The "Issues" is adopted in its entirety.
   c. The "Evidentiary Rulings" is adopted in its entirety.
   d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.6, above.
   e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.7, above.
   f. The "Opinion" is adopted in its entirety~~with modifications, as set forth in Section A.8, above~~.
   g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claims 301-307. The Order is presented in a format standardized by OWRD. Consistent with Sections A.6, A.7, and A.8, above, the outcome of the Order has been modified as to recognize rights for irrigation on an additional 0.4 acres for Claim 301 (to correct a scrivener's error), ~~5677.7 acres for Claim 302, 69.4 acres for Claim 303, 160.0 acres for Claim 304, 320.0 acres for Claim 305, and 319.0 acres for Claim 306; and livestock watering for Claim 302~~.

2. The elements of a Walton claim are established for Claims 301 and 307. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

~~3. The elements of a Klamath Termination Act claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS is incorporated as if set forth fully herein.~~

~~4.~~3. Diversion of stock water to the place of use is limited to that which has been historically diverted for beneficial use and is reasonably necessary to transport the water and to prevent the watercourse from being completely frozen when transporting water outside of the irrigation season.

~~5.~~4. Based on the file and record herein, IT IS ORDERED that Claims 301 and~~–~~ 307 are approved to the extent set forth in the following Water Right Claim Description; and Claims 302, 303, 304, 305, and 306 are denied.

[Beginning of Water Right Claim Description]

CLAIM NO. 301

FOR A VESTED WATER RIGHT

CLAIMANT: UNITED STATES DEPARTMENT OF INTERIOR,
U.S. FISH AND WILDLIFE SERVICE
911 NE 11TH AVE
PORTLAND OR 97232

CLAIM MAP REFERENCE: OWRD INVESTIGATION MAPS – T 30 S, R 9 E and T 30 S, R 10 E

SOURCE OF WATER: The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE: IRRIGATION OF 4859.3 ACRES

RATE OF USE:

UP TO 35.0 CFS EACH FROM PODS 1 AND 2, AND/OR UP TO 49.8 CFS FROM POD 3, NOT TO EXCEED A COMBINED RATE OF 60.7 CUBIC FEET PER SECOND (CFS), MEASURED AT THE POINTS OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/80 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name		Twp	Rng	Mer	Sec	Q-Q
POD 1	CHOLO DAM	30 S	10 E	WM	18	SW SE
POD 2	CHOLO REDIVERSION	30 S	10 E	WM	19	SE NW
POD 3	ROCK ISLAND DAM	30 S	9 E	WM	24	NE NW

THE PLACE OF USE IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	9 E	WM	10	SE SE		37.9
30 S	9 E	WM	11	SW SW		37.9
30 S	9 E	WM	11	SE SW		37.7
30 S	9 E	WM	11	SW SE		34.0
30 S	9 E	WM	14	NW NE		37.4
30 S	9 E	WM	14	SW NE		38.8
30 S	9 E	WM	14	NE NW		40.0
30 S	9 E	WM	14	NW NW		40.0
30 S	9 E	WM	14	SW NW		40.0
30 S	9 E	WM	14	SE NW		40.0
30 S	9 E	WM	14	NE SW		40.0

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	9 E	WM	14	NW SW		40.0
30 S	9 E	WM	14	SW SW		40.0
30 S	9 E	WM	14	SE SW		40.0
30 S	9 E	WM	14	NW SE		38.4
30 S	9 E	WM	14	SW SE		39.3
30 S	9 E	WM	15	NE NE		40.0
30 S	9 E	WM	15	NW NE		40.0
30 S	9 E	WM	15	SW NE		40.0
30 S	9 E	WM	15	SE NE		40.0
30 S	9 E	WM	15	NE NW		40.0
30 S	9 E	WM	15	SE NW		40.0
30 S	9 E	WM	15	NE SW		40.0
30 S	9 E	WM	15	NW SW		40.0
30 S	9 E	WM	15	SW SW		40.0
30 S	9 E	WM	15	SE SW		40.0
30 S	9 E	WM	15	NE SE		40.0
30 S	9 E	WM	15	NW SE		40.0
30 S	9 E	WM	15	SW SE		40.0
30 S	9 E	WM	15	SE SE		40.0
30 S	9 E	WM	16	NE SE		24.3
30 S	9 E	WM	16	SW SE		19.2
30 S	9 E	WM	16	SE SE		39.6
30 S	9 E	WM	21	NE NE		40.0
30 S	9 E	WM	21	NW NE		40.0
30 S	9 E	WM	21	SW NE		40.0
30 S	9 E	WM	21	SE NE		40.0
30 S	9 E	WM	21	SE NW		40.0
30 S	9 E	WM	21	NE SW		40.0
30 S	9 E	WM	21	SE SW		37.5
30 S	9 E	WM	21	NE SE		40.0
30 S	9 E	WM	21	NW SE		40.0
30 S	9 E	WM	21	SW SE		37.8
30 S	9 E	WM	21	SE SE		37.9
30 S	9 E	WM	22	NE NE		40.0
30 S	9 E	WM	22	NW NE		40.0
30 S	9 E	WM	22	SW NE		40.0
30 S	9 E	WM	22	SE NE		40.0
30 S	9 E	WM	22	NE NW		40.0
30 S	9 E	WM	22	NW NW		40.0
30 S	9 E	WM	22	SW NW		40.0
30 S	9 E	WM	22	SE NW		40.0
30 S	9 E	WM	22	NE SW		40.0
30 S	9 E	WM	22	NW SW		40.0
30 S	9 E	WM	22	SW SW		37.5
30 S	9 E	WM	22	SE SW		37.2
30 S	9 E	WM	22	NE SE		40.0
30 S	9 E	WM	22	NW SE		40.0
30 S	9 E	WM	22	SW SE		36.1
30 S	9 E	WM	22	SE SE		35.9
30 S	9 E	WM	23	NE NE		38.2
30 S	9 E	WM	23	NW NE		40.0
30 S	9 E	WM	23	SW NE		40.0

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	9 E	WM	23	SE NE		40.0
30 S	9 E	WM	23	NE NW		40.0
30 S	9 E	WM	23	NW NW		40.0
30 S	9 E	WM	23	SW NW		40.0
30 S	9 E	WM	23	SE NW		40.0
30 S	9 E	WM	23	NE SW		40.0
30 S	9 E	WM	23	NW SW		37.3
30 S	9 E	WM	23	SW SW		37.0
30 S	9 E	WM	23	SE SW		32.6
30 S	9 E	WM	23	NE SE		40.0
30 S	9 E	WM	23	NW SE		40.0
30 S	9 E	WM	23	SW SE		36.8
30 S	9 E	WM	23	SE SE		36.9
30 S	9 E	WM	24	NE NW		35.7
30 S	9 E	WM	24	NW NW		38.2
30 S	9 E	WM	24	SW NW		40.0
30 S	9 E	WM	24	SE NW		36.5
30 S	9 E	WM	24	NE SW		35.7
30 S	9 E	WM	24	NW SW		40.0
30 S	9 E	WM	24	SW SW		36.7
30 S	9 E	WM	24	SE SW		35.3
30 S	9 E	WM	25	NE NE		38.6
30 S	9 E	WM	25	NW NE		38.2
30 S	9 E	WM	25	SW NE		31.3
30 S	9 E	WM	25	SE NE		37.1
30 S	9 E	WM	25	NE NW		38.1
30 S	9 E	WM	25	NW NW		38.6
30 S	9 E	WM	25	SW NW		40.0
30 S	9 E	WM	25	SE NW		39.4
30 S	9 E	WM	25	NE SW		22.7
30 S	9 E	WM	25	NW SW		40.0
30 S	9 E	WM	25	SW SW		40.0
30 S	9 E	WM	25	SE SW		39.1
30 S	9 E	WM	25	NE SE		32.6
30 S	9 E	WM	25	NW SE		4.6
30 S	9 E	WM	25	SW SE		32.4
30 S	9 E	WM	25	SE SE		35.2
30 S	9 E	WM	26	NE NE		40.0
30 S	9 E	WM	26	NW NE		38.8
30 S	9 E	WM	26	SW NE		38.8
30 S	9 E	WM	26	SE NE		40.0
30 S	9 E	WM	26	NE NW		37.1
30 S	9 E	WM	26	NW NW		39.0
30 S	9 E	WM	26	SW NW		24.7
30 S	9 E	WM	26	SE NW		37.5
30 S	9 E	WM	26	NE SE		40.0
30 S	9 E	WM	26	NW SE		40.0
30 S	9 E	WM	26	SW SE		40.0
30 S	9 E	WM	26	SE SE		38.6
30 S	9 E	WM	27	NE NE		40.0
30 S	9 E	WM	27	NW NE		40.0
30 S	9 E	WM	27	SW NE		25.8

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	9 E	WM	27	SE NE		28.0
30 S	9 E	WM	27	NE NW		40.0
30 S	9 E	WM	27	NW NW		39.4
30 S	9 E	WM	27	SW NW		4.5
30 S	9 E	WM	27	SE NW		16.5
30 S	9 E	WM	28	NE NE		36.3
30 S	9 E	WM	28	NW NE		15.3
30 S	9 E	WM	36	NW NE		0.5
30 S	10 E	WM	19	SW NW	2	33.4
30 S	10 E	WM	19	SE NW		35.4
30 S	10 E	WM	19	NE SW		36.1
30 S	10 E	WM	19	NW SW	3	31.4
30 S	10 E	WM	19	SW SW	4	30.8
30 S	10 E	WM	19	SE SW		10.9
30 S	10 E	WM	30	NE NW		25.9
30 S	10 E	WM	30	NW NW	1	32.4
30 S	10 E	WM	30	SW NW	2	32.4
30 S	10 E	WM	30	SE NW		33.3
30 S	10 E	WM	30	NE SW		17.8
30 S	10 E	WM	30	NW SW	3	9.5

CLAIM NO. 302
FOR A VESTED WATER RIGHT

CLAIMANT: UNITED STATES DEPARTMENT OF INTERIOR,
U.S. FISH AND WILDLIFE SERVICE
911 NE 11TH AVE
PORTLAND OR 97232

CLAIM MAP REFERENCE: OWRD INVESTIGATION MAPS – T 29 S, R 9 E and T 30 S, R 9 E

SOURCE OF WATER: The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE:
IRRIGATION OF 5677.7 ACRES AND LIVESTOCK WATERING UP TO 500 HEAD

RATE OF USE:
71.06 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

71.05 CFS FOR IRRIGATION FROM POD 3, MEASURED AT THE POINT OF DIVERSION, AND

0.01 CFS FOR LIVESTOCK WATERING MEASURED AT THE PLACE OF USE, NOT TO EXCEED 6000 GALLONS PER DAY.

DIVERSION OF STOCK WATER TO THE PLACE OF USE IS LIMITED TO THAT WHICH HAS BEEN HISTORICALLY DIVERTED FOR BENEFICIAL USE AND IS REASONABLY NECESSARY TO TRANSPORT THE WATER, AND TO PREVENT THE WATERCOURSE FROM BEING COMPLETELY FROZEN WHEN TRANSPORTING WATER OUTSIDE OF THE IRRIGATION SEASON.

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/80 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:
3.0 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE:

Use	Period
Irrigation	March 1 – October 31
Livestock	January 1 – December 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name		Twp	Rng	Mer	Sec	Q-Q
POD 3	ROCK ISLAND DAM	30 S	9 E	WM	24	NE NW

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION and LIVESTOCK WATERING

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
29 S	9 E	WM	15	NE SW		13.5
29 S	9 E	WM	15	SE SW		20.0
29 S	9 E	WM	15	NW SE		37.2
29 S	9 E	WM	15	SW SE		40.0
29 S	9 E	WM	15	SE SE		20.0
29 S	9 E	WM	22	NE NE		40.0
29 S	9 E	WM	22	NW NE		40.0
29 S	9 E	WM	22	SW NE		40.0
29 S	9 E	WM	22	SE NE		40.0
29 S	9 E	WM	22	NE NW		20.0
29 S	9 E	WM	22	SE NW		20.0
29 S	9 E	WM	22	NE SW		20.0
29 S	9 E	WM	22	SW SW		38.1
29 S	9 E	WM	22	SE SW		40.0
29 S	9 E	WM	22	NE SE		40.0
29 S	9 E	WM	22	NW SE		40.0
29 S	9 E	WM	22	SW SE		40.0
29 S	9 E	WM	22	SE SE		40.0
29 S	9 E	WM	23	NW NW		40.0
29 S	9 E	WM	23	SW NW		40.0
29 S	9 E	WM	23	NW SW		40.0
29 S	9 E	WM	23	SW SW		40.0
29 S	9 E	WM	27	NE NE		40.0
29 S	9 E	WM	27	NW NE		40.0
29 S	9 E	WM	27	SW NE		40.0
29 S	9 E	WM	27	SE NE		40.0
29 S	9 E	WM	27	NE NW		40.0
29 S	9 E	WM	27	NW NW		40.0
29 S	9 E	WM	27	SW NW		40.0
29 S	9 E	WM	27	SE NW		40.0
29 S	9 E	WM	27	NE SW		40.0
29 S	9 E	WM	27	NW SW		40.0
29 S	9 E	WM	27	SW SW		40.0
29 S	9 E	WM	27	SE SW		40.0
29 S	9 E	WM	27	NE SE		40.0
29 S	9 E	WM	27	NW SE		40.0
29 S	9 E	WM	27	SW SE		40.0
29 S	9 E	WM	27	SE SE		40.0
29 S	9 E	WM	28	NE NE		20.0
29 S	9 E	WM	28	SE NE		20.0
29 S	9 E	WM	28	NE SE		16.7
29 S	9 E	WM	28	SE SE		37.9
29 S	9 E	WM	32	NE SE		39.0
29 S	9 E	WM	32	SW SE		32.8
29 S	9 E	WM	32	SE SE		38.7
29 S	9 E	WM	33	NE NE		33.7
29 S	9 E	WM	33	NW NE		31.0
29 S	9 E	WM	33	SW NE		40.0
29 S	9 E	WM	33	SE NE		36.2
29 S	9 E	WM	33	SW NW		39.1
29 S	9 E	WM	33	SE NW		40.0
29 S	9 E	WM	33	NE SW		40.0

IRRIGATION and LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
29 S	9 E	WM	33	NW SW		40.0
29 S	9 E	WM	33	SW SW	1	38.7
29 S	9 E	WM	33	SE SW	2	38.8
29 S	9 E	WM	33	NE SE		36.2
29 S	9 E	WM	33	NW SE		40.0
29 S	9 E	WM	33	SW SE	3	39.0
29 S	9 E	WM	33	SE SE	4	36.1
29 S	9 E	WM	34	NE NE		40.0
29 S	9 E	WM	34	NW NE		40.0
29 S	9 E	WM	34	SW NE		40.0
29 S	9 E	WM	34	SE NE		40.0
29 S	9 E	WM	34	NE NW		40.0
29 S	9 E	WM	34	NW NW		40.0
29 S	9 E	WM	34	SW NW		40.0
29 S	9 E	WM	34	SE NW		40.0
29 S	9 E	WM	34	NE SW		40.0
29 S	9 E	WM	34	NW SW		40.0
29 S	9 E	WM	34	SW SW	1	39.2
29 S	9 E	WM	34	SE SW	2	39.2
29 S	9 E	WM	34	NE SE		40.0
29 S	9 E	WM	34	NW SE		40.0
29 S	9 E	WM	34	SW SE	3	39.4
29 S	9 E	WM	34	SE SE	4	39.6
29 S	9 E	WM	35	NW NE		40.0
29 S	9 E	WM	35	SW NE		40.0
29 S	9 E	WM	35	NE NW		40.0
29 S	9 E	WM	35	NW NW		40.0
29 S	9 E	WM	35	SW NW		40.0
29 S	9 E	WM	35	SE NW		40.0
29 S	9 E	WM	35	NE SW		40.0
29 S	9 E	WM	35	NW SW		40.0
29 S	9 E	WM	35	SW SW	1	39.6
29 S	9 E	WM	35	SE SW	2	39.6
29 S	9 E	WM	35	NW SE		40.0
29 S	9 E	WM	35	SW SE	3	39.6
30 S	9 E	WM	2	NE NE		40.0
30 S	9 E	WM	2	NW NE		40.0
30 S	9 E	WM	2	SW NE		40.0
30 S	9 E	WM	2	SE NE		40.0
30 S	9 E	WM	2	NE NW		40.0
30 S	9 E	WM	2	NW NW		40.0
30 S	9 E	WM	2	SW NW		40.0
30 S	9 E	WM	2	SE NW		40.0
30 S	9 E	WM	2	NE SW		40.0
30 S	9 E	WM	2	NW SW		40.0
30 S	9 E	WM	2	SW SW		40.0
30 S	9 E	WM	2	SE SW		40.0
30 S	9 E	WM	2	NE SE		40.0
30 S	9 E	WM	2	NW SE		40.0
30 S	9 E	WM	2	SW SE		40.0
30 S	9 E	WM	3	NE NE		40.0

IRRIGATION and LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	9 E	WM	3	NW NE		40.0
30 S	9 E	WM	3	SW NE		40.0
30 S	9 E	WM	3	SE NE		40.0
30 S	9 E	WM	3	NE NW		40.0
30 S	9 E	WM	3	NW NW		40.0
30 S	9 E	WM	3	SW NW		40.0
30 S	9 E	WM	3	SE NW		40.0
30 S	9 E	WM	3	NE SW		40.0
30 S	9 E	WM	3	NW SW		40.0
30 S	9 E	WM	3	SW SW		40.0
30 S	9 E	WM	3	SE SW		40.0
30 S	9 E	WM	3	NE SE		40.0
30 S	9 E	WM	3	NW SE		40.0
30 S	9 E	WM	3	SW SE		40.0
30 S	9 E	WM	3	SE SE		40.0
30 S	9 E	WM	4	NE NE		36.3
30 S	9 E	WM	4	NW NE		40.0
30 S	9 E	WM	4	SW NE		40.0
30 S	9 E	WM	4	SE NE		36.3
30 S	9 E	WM	4	NE NW		40.0
30 S	9 E	WM	4	NW NW		40.0
30 S	9 E	WM	4	SW NW		40.0
30 S	9 E	WM	4	SE NW		40.0
30 S	9 E	WM	4	NE SW		40.0
30 S	9 E	WM	4	NW SW		40.0
30 S	9 E	WM	4	SW SW		31.4
30 S	9 E	WM	4	SE SW		40.0
30 S	9 E	WM	4	NE SE		36.1
30 S	9 E	WM	4	NW SE		40.0
30 S	9 E	WM	4	SW SE		40.0
30 S	9 E	WM	4	SE SE		36.0
30 S	9 E	WM	5	NE NE		40.0
30 S	9 E	WM	5	SW NE		25.8
30 S	9 E	WM	5	SE NE		39.9
30 S	9 E	WM	5	SE NW		14.0
30 S	9 E	WM	5	NE SE		33.1
30 S	9 E	WM	9	NE NE		35.8
30 S	9 E	WM	9	NW NE		39.2
30 S	9 E	WM	9	SW NE		7.8
30 S	9 E	WM	9	SE NE		26.6
30 S	9 E	WM	9	NE NW		24.3
30 S	9 E	WM	10	NW NE		40.0
30 S	9 E	WM	10	SW NE		40.0
30 S	9 E	WM	10	NE NW		40.0
30 S	9 E	WM	10	NW NW		40.0
30 S	9 E	WM	10	SW NW		34.8
30 S	9 E	WM	10	SE NW		40.0
30 S	9 E	WM	10	NE SW		20.4
30 S	9 E	WM	10	NW SW		8.0
30 S	9 E	WM	10	SE SW		33.0

CLAIM NO. 303

FOR A VESTED WATER RIGHT

CLAIMANT: UNITED STATES DEPARTMENT OF INTERIOR,
U.S. FISH AND WILDLIFE SERVICE
911 NE 11TH AVE
PORTLAND OR 97232

CLAIM MAP REFERENCE: CLAIM # 303, PAGE 5

SOURCE OF WATER: The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE: IRRIGATION OF 69.4 ACRES

RATE OF USE:

1.73 CUBIC FEET PER SECOND (CFS) FROM POD 4, MEASURED AT THE POINTS OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.0 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
POD 4	30 S	10 E	WM	19	NW NW	160 FEET SOUTH & 800 FEET EAST FROM NW CORNER, SECTION 19

THE PLACE OF USE IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	10 E	WM	19	NE NW		40.0
30 S	10 E	WM	19	NW NW	1	29.4

CLAIM NO. 304

FOR A VESTED WATER RIGHT

CLAIMANT: UNITED STATES DEPARTMENT OF INTERIOR,
U.S. FISH AND WILDLIFE SERVICE
911 NE 11TH AVE
PORTLAND OR 97232

CLAIM MAP REFERENCE: CLAIM # 304, PAGE 6

SOURCE OF WATER: The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE: IRRIGATION OF 160.0 ACRES

RATE OF USE:

4.0 CUBIC FEET PER SECOND (CFS) FROM POD 4, MEASURED AT THE POINTS OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.0 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
POD 4	30 S	10 E	WM	19	NW NW	160 FEET SOUTH & 800 FEET EAST FROM NW CORNER, SECTION 19

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
30 S	9 E	WM	12	SW SW	40.0
30 S	9 E	WM	12	SE SW	40.0
30 S	9 E	WM	13	NE NW	40.0
30 S	9 E	WM	13	NW NW	40.0

CLAIM NO. 305
FOR A VESTED WATER RIGHT

CLAIMANT: UNITED STATES DEPARTMENT OF INTERIOR,
U.S. FISH AND WILDLIFE SERVICE
911 NE 11TH AVE
PORTLAND OR 97232

CLAIM MAP REFERENCE: CLAIM # 305, PAGE 6

SOURCE OF WATER: The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE: IRRIGATION OF 320.0 ACRES

RATE OF USE:
UP TO 8.0 FROM POD 3 AND/OR UP TO 5.8 CFS FROM POD 4, NOT TO EXCEED A COMBINED RATE OF 8.0 CUBIC FEET PER SECOND (CFS), MEASURED AT THE POINTS OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:
3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name		Twp	Rng	Mer	Sec	Q-Q	Measured Distances
POD 3	ROCK ISLAND DAM	30 S	9 E	WM	24	NE NW	
POD 4		30 S	10 E	WM	19	NW NW	160 FEET SOUTH & 800 FEET EAST FROM NW CORNER, SECTION 19

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
30 S	9 E	WM	13	SW SW	40.0
30 S	9 E	WM	13	SE SW	40.0
30 S	9 E	WM	24	NW NE	40.0
30 S	9 E	WM	24	SW NE	40.0
30 S	9 E	WM	24	NE SE	40.0
30 S	9 E	WM	24	NW SE	40.0
30 S	9 E	WM	24	SW SE	40.0
30 S	9 E	WM	24	SE SE	40.0

CLAIM NO. 306
FOR A VESTED WATER RIGHT

CLAIMANT: UNITED STATES DEPARTMENT OF INTERIOR,
U.S. FISH AND WILDLIFE SERVICE
911 NE 11TH AVE
PORTLAND OR 97232

CLAIM MAP REFERENCE: CLAIM # 306, PAGE 6

SOURCE OF WATER: The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE: IRRIGATION OF 319.0 ACRES

RATE OF USE:

7.98 CUBIC FEET PER SECOND (CFS) FROM POD 3, MEASURED AT THE POINT OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.0 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name		Twp	Rng	Mer	Sec	Q-Q
POD 3	ROCK ISLAND DAM	30 S	9 E	WM	24	NE NW

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
30 S	9 E	WM	28	NW NW	39.0
30 S	9 E	WM	28	SW NW	40.0
30 S	9 E	WM	29	NE NE	40.0
30 S	9 E	WM	29	SW NE	40.0
30 S	9 E	WM	29	SE NE	40.0
30 S	9 E	WM	29	SE NW	40.0
30 S	9 E	WM	29	NE SW	40.0
30 S	9 E	WM	29	NW SE	40.0

CLAIM NO. 307

FOR A VESTED WATER RIGHT

CLAIMANT: UNITED STATES DEPARTMENT OF INTERIOR,
U.S. FISH AND WILDLIFE SERVICE
911 NE 11TH AVE
PORTLAND OR 97232

CLAIM MAP REFERENCE: OWRD INVESTIGATION MAPS – T 30 S, R 8 E and T 31 S, R 8 E

SOURCE OF WATER:

LENZ CREEK (A.K.A. BIG SPRINGS CREEK), tributary to the WILLIAMSON RIVER

PURPOSE OR USE: IRRIGATION OF 521.0 ACRES

RATE OF USE:

3.61 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION (Note: The rate is limited due to the claimed diversion capacity)

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/80 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q
30 S	8 E	WM	35	SE NW

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**
30 S	8 E	WM	35	NE NE		40.0
30 S	8 E	WM	35	NW NE		39.8
30 S	8 E	WM	35	SW NE		36.2
30 S	8 E	WM	35	SE NE		40.0
30 S	8 E	WM	35	NE SE		40.0
30 S	8 E	WM	35	NW SE		40.0
30 S	8 E	WM	35	SW SE	3	39.3
30 S	8 E	WM	35	SE SE	4	39.3
30 S	8 E	WM	36	NE SW		20.3
30 S	8 E	WM	36	NW SW		38.1
30 S	8 E	WM	36	SW SW	1	39.4
30 S	8 E	WM	36	SE SW	2	20.0

IRRIGATION						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**
31 S	8 E	WM	2	NE NE	5	6.8
31 S	8 E	WM	2	NW NE	6	16.4
31 S	8 E	WM	2	SW NE		25.4
31 S	8 E	WM	2	SE NE		40.0

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of BONANZA CONSERVATION, LLC	))))	PARTIAL ORDER OF DETERMINATION
		Water Right Claim 703

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS TO THE AMENDED PROPOSED ORDER

1. Claim 703 (submitted by THE NATURE CONSERVATION TRUST) and its associated contests (1693, 3073, 3511, 3817, and 4242) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 253.

2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claims 703 and 704 on March 28, 2007.

3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) The Nature Conservation Trust and (2) the United States of America.

4. The exceptions filed to the Proposed Order along with opposition and responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 703.

5. On January 6, 2012, the Adjudicator issued an AMENDED PROPOSED ORDER (Amended Proposed Order) to modify original Proposed Order to (1) correct and clarify the amounts of acreage irrigated by various sources of water and diversion points, (2) recognize beneficial use of water prior to transfer from Indian ownership, (3) recognize beneficial use of water by the method of natural overflow, (4) recognize development with reasonable diligence by non-Indian successors, (5) recognize the appropriate standard for determining loss of a right through nonuse, and (6) correct the season of use approved for irrigation. With respect to the portions of the 2007 Proposed Order that pertained to

Claim 703, and except as modified, the Amended Proposed Order fully incorporated the 2007 Proposed Order.

6. On March 15, 2012, the claim was transferred to the BONANZA CONSERVATION, LLC (Claimant). *See* STATUTORY WARRANTY DEED (September 27, 2011), and CHANGE OF OWNERSHIP FORM (March 15, 2012).

7. Exceptions were filed to the Amended Proposed Order within the exception filing deadline by the Claimant Bonanza Conservation, LLC, the United States of America and the Klamath Project Water Users (KPWU).

8. The exceptions filed to the Amended Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 703. The exceptions are found to be persuasive, in part, and therefore, modifications are made to the Amended Proposed Order as described ~~in Sections A.10, and A.11,~~ below.

9. As set forth below in Sections A.10 and A.11, ~~T~~the 2012 Amended Proposed Order is adopted and incorporated ~~in its entirety~~ as if set forth fully herein, only with respect to Allotment Nos. 441, 442, 701~~2,~~ 794, 795, 833, 836, 837, 838, 839, 1018, 1139, and the unallotted tribal land and is modified with respect to Allotment No. 851. ~~with two exceptions: (1) the section titled "B. Modifications to the 'Findings of Fact'" is adopted with modifications, as set forth in Section A.10, below, and (2) the section titled "D. Modifications to the 'Opinion'" is adopted with modifications, as set forth in Section A.11, below.~~ With respect to the remaining allotments, the 2007 ~~The outcome of the Amended~~ Proposed Order is not modified~~without modification as to the remaining allotments~~.

10. **"B. Modifications to the 'Findings of Fact.'"**

a. Within the Amended Proposed Order's section titled "B. Modifications to the 'Findings of Fact,'" the modifications to the Proposed Order in sections (1), (3), (6), (9), (10), (11), (16), (21), (22) are all rejected and the Proposed Order shall not be modified as provided for in those sections.

~~a.~~b. Within the Amended Proposed Order's section titled "B. Modifications to the 'Findings of Fact,'" the first paragraph of Finding of Fact #13 pertaining to Allotment 794 (Amended Proposed Order at 18) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

> This allotment, located in NE¼ NW¼, NW¼ NE¼ of Section 21, T36S R10E, W.M., was allotted to Eda Jackson (Cole), a Klamath Indian, by instrument dated November 19, 1920. (OWRD Ex. 1 at 77.) The property was conveyed to Klamath Indian Hiram Richard Robbins on February 27, 1940 (Ex. U6 at 14; U9 at 17). The property was transferred from Klamath

Indians Rayson Colde Tupper, Clint Strom Tupper, Tana Lee Tupper Walker, Richard Keane Tupper, Rachael Robbins Tupper, and the Estate of Berva D. Tupper to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13; U9.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (~~*Id.*~~ U8 at 14-15.)

~~b.~~c. Within the Amended Proposed Order's section titled "B. Modifications to the 'Findings of Fact,'" the first paragraph of Finding of Fact #14 pertaining to Allotment 795 (Amended Proposed Order at 18) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

This allotment, located in SE¼ SW¼, SW¼ SE¼ of Section 16 (Allotment 795-North) (Claim 703), and E½ E½ NE¼ of Section 28, T36S R10E, W.M. (Allotment 795-South) (Claim 704), was allotted to Birdie Jackson, a Klamath Indian, by instrument dated February 11, 1921. (OWRD Ex. 1 at 78; OWRD Ex. 2 at 60.) The property appurtenant to Allotment 795 North (Claim 703) was conveyed to Klamath Indian Hiram Richard Robbins on February 27, 1940 (Ex. U6 at 14; U9 at 17). The property was transferred from Klamath Indians Rayson Colde Tupper, Clint Strom Tupper, Tana Lee Tupper Walker, Richard Keane Tupper, Rachael Robbins Tupper, and the Estate of Berva D. Tupper to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13; U9.) ~~The property was apparently conveyed to Hiram Robbins, also a Klamath Indian, at some time before 1978, when it was conveyed by Robbins' heirs to the Hi Robbins Corporation, an Oregon Corporation. (Ex. U8 at 5-13.)~~ The property was subsequently conveyed to Alan B. Tyler, also a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

Reason for Modifications: The 2012 Amended Proposed Order failed to fully set forth the evidence on the record with regards to modifications made to the ALJ's Proposed Order Findings of Facts 13 and 14.

d. Within the Amended Proposed Order's section titled "B. Modifications to the 'Findings of Fact,'" the paragraphs of Finding of Fact #21 pertaining to Allotment 851 (Amended Proposed Order at 27-28) are modified as follows (additions are shown in "**bold**" text, deletions are shown in "~~strikethrough~~" text):

The claim is for ~~13.2 acres, being 6.2 acres irrigated by the method of natural overflow from the Sprague River and~~ 7.0 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex.1 at 6, 9-10, 14.) ~~The part of the property claimed within this allotment which is subject to natural overflow is 6.2 acres within the NE ¼ NE ¼, Section 8. (OWRD Ex. 1 at 9-10, 193, 203 ; Ex. U38; Ex. U41.)~~

~~Farming and Grazing Leases for Allotment 851 range in date from 1932 to 1937. Several leases were conditioned to keep fences in good repair and stockproof condition. Manuel Vieira was the lessee in 1931, and Mrs. Manual Vieira was the lessee in 1932. (Exs. C45, C46, C47, C48, C53.) A Certificate of Appraisement (from an onsite inspection made December 17, 1943) indicates the character of the land as being 125 acres of grazing and 35 acres of irrigable land. (Ex. C51.)~~

Phil Tupper began irrigating this property after finishing the western ditch from Diversion Point #1 in the 1960s. (Declaration of Phil Tupper.) Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 851 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 193, 200; Ex. C101.)

The elements necessary for a *Walton* claim for **7.0~~13~~.2** acres in Allotment 851 have been established. ~~Water rights granted for irrigation of 6.2 acres on the basis of beneficial use of water by the method of natural overflow from the Sprague River should be with a rate of 0.16 cfs when diverted.~~ Water rights granted for irrigation of 7.0 acres should have diversion rate of 0.18 cfs from Point of Diversion #1 on the Sprague River, located within the NW ¼ NW ¼, Section 9.

11. **"D. Modifications to the 'Opinion.'"**

a. Within the Amended Proposed Order's section titled "D. Modifications to the 'Opinion,'" all of the modifications to the Proposed Order are rejected, except for the

modifications with respect to Allotment Nos. 441, 442, 701, 794, 795, 833, 836, 837, 838, 839, 1018, 1139, and the unallotted tribal lands.~~and within subsection "4. Application of *Walton* Elements to Each Allotment," the last sentence in paragraph for "Allotment 216" (Amended Proposed Order at 57) is modified as follows (additions are shown in "underline" text, deletions are shown in "strikethrough" text):~~

~~Irrigation of the 72.1 71.3 acres claimed within this allotment should be allowed, of which 63.3 60.2 acres are irrigated by the method of natural overflow from the Sprague River.~~

~~Within the Amended Proposed Order's section titled "D. Modifications to the 'Opinion,'" and within subsection "4. Application of *Walton* Elements to Each Allotment," the last sentence in paragraph for "Allotment 669" (Amended Proposed Order at 59-60) is modified as follows (additions are shown in "underline" text, deletions are shown in "strikethrough" text):~~

~~Irrigation of the 156.4 157.2 acres claimed within this allotment is allowable, of which 26.0 29.1 acres are irrigated by the method of natural overflow from the Sprague River.~~

~~**Reason for Modifications:** The 3.1 acres irrigated by natural overflow were mistakenly added to the natural overflow acreage for Allotment 216 instead of Allotment 699. Both allotments are located within the same quarter-quarter.~~

b. Within the Amended Proposed Order's section titled "D. Modifications to the 'Opinion,'" and within subsection "4. Application of *Walton* Elements to Each Allotment," the paragraph for "Allotment 795" (Amended Proposed Order at 61) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

Allotment 795:

The first evidence of non-Indian ownership on Allotment 795 is when it passed from Indian ownership ~~(Hiram Robbins)~~ in 1978, to the Hi Robbins Corporation. It was divided between Claim 703 and 704. In their exceptions to the Amended Proposed Order, the United States pointed to a title schematic in the record (OWRD Ex. 1 at 23, bottom, right hand corner) to "reasonably infer that the first non-Indian owner of this allotment was Dan Wann is 1925." (CONTESTANT UNITED STATES' EXCEPTIONS TO THE AMENDED PROPOSED ORDER at 83.) OWRD gives little weight to this hand written schematic,

especially since it does not agree with the title documents that are included in the record. The title schematic illustrates that a "Deed Non Compt Indian Lands" transferred lands in Section 16 to Nathaniel Jackson prior to its transfer to Hiram Robbins. The 1940 unrestricted deed (Ex. U6 at 14) shows the property transferred from the Klamath Agency directly to Hiram Robbins without an intermediary transfer to Nathaniel Jackson, raising doubt that the title schematic referred to by the United States pertains to Allotment 795. The United States is correct that there is a gap in the chain of title between the property's initial allotment and its reversion back to the United States, which must have occurred at some time prior to 1940. However, the fact that the property did revert back to the United States means that it is more likely than not that the property did not pass out of Indian ownership prior to 1940. Allotment 795 then continued in Indian ownership (Hiram Robbins), and was ultimately conveyed by Indian owners to the Hi Robbins Corporation in 1978.

¶ The portion that is subject to Claim 703 was irrigated while still in Indian ownership beginning in the 1960s when Phil Tupper installed check dams to control water for irrigation. Water is backed up to flood-irrigate behind the dams, while controlled subirrigation (as a result of the check dams) and seepage occurs below the dams; water perks down through the meadows. The record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. This portion of the claim, 22.8 acres, should be allowed. The additional 5.2 acres claimed in 1999 are not allowable.

Reason for Modifications: The evidence supports ownership conveyed to Hi Robbins Corporation, not from Hiram Robbins in 1978, but from multiple Indians listed in

Findings of Facts #13 and #14 as amended in this partial Order of Determination in Section A.10.a and b., above.

c. Within the Amended Proposed Order's section titled "D. Modification to the 'Opinion,'" and within subsection "4. Application of *Walton* Elements to Each Allotment," the paragraph for "Allotment 851" (Amended Proposed Order at 64-65) is modified as follows (additions are shown in "**bold**" text, deletions are shown in "strikethrough" text):

This allotment was in Indian ownership until 1978 when Hi Robbins Corporation acquired it. It was under irrigation ~~by the method of natural overflow and~~ from Diversion Point #1 while still in Indian ownership. Phil Tupper installed a headgate near the north end of Riddle Field in the early 1970s to irrigate this property via the West Ditch. The record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence **by the first non-Indian owner**. This part of the claim, **7.0**~~13.2~~ acres~~, of which 6.2 acres are irrigated by the method of natural overflow from the Sprague River,~~ should be allowed.

B. DETERMINATION

1. The Amended Proposed Order is adopted and incorporated ~~in its entirety~~ as if set forth fully herein only with respect to Allotment Nos. 441, 442, 701, 794, 795, 833, 836, 837, 838, 839, 1018, 1139, and the unallotted tribal lands. The Amended Proposed Order is adopted and incorporated as modified above in Sections A.10 and A.11 with respect to Allotment No. 851., ~~with two exceptions: (1) the section titled "B. Modifications to the 'Findings of Fact'" is adopted with modifications, as set forth in Section A.10, above, and (2) the section titled "D. Modifications to the 'Opinion'" is adopted with modifications, as set forth in Section A.11, above. The outcome of the Amended Proposed Order is without modification.~~ Otherwise, the determination contained within the Proposed Order as to the remaining allotments is adopted and incorporated.

2. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.

3. The Klamath Tribes Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 et seq. for an Indian reserved water right is a valid basis for a portion of this claim. The elements of a Klamath Termination Act claim are established for 2.1 acres within the SW¼ SW¼, SECTION 9, TOWNSHIP 36 SOUTH, RANGE 10 EAST, W.M. The GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS is incorporated as if set forth fully herein.

~~4. Beneficial use of water by the method of natural overflow is shown to be established for portions of this claim.~~

~~5.~~4. Based on the file and record herein, IT IS ORDERED that Claim 703 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 703

CLAIM MAP REFERENCE:
CLAIM # 703, PAGES 9-10; OWRD INVESTIGATION MAP – T 36 S, R 10 E

CLAIMANT: BONANZA CONSERVATION, LLC
31895 VILLAGE CREST LANE
WILSONVILLE, OR 97070

SOURCES OF WATER:
UNNAMED STREAM, tributary to CHERRY CREEK,
CHERRY CREEK, tributary to the SPRAGUE RIVER,
UNNAMED STREAM, tributary to the SPRAGUE RIVER, and
The SPRAGUE RIVER, tributary to the WILLIAMSON RIVER

PURPOSE OR USE:
IRRIGATION OF 188.5~~810.1~~ ACRES, ~~BEING 167.4 ACRES BY THE METHOD OF NATURAL OVERFLOW OF THE SPRAGUE RIVER~~, 71.8~~467.2~~ ACRES FROM POD 1, 76.3 ACRES FROM POD 2, 6.2~~8.4~~ ACRES FROM POD 3, 24.8 ACRES FROM POD 4, AND 9.4~~66.0~~ ACRES FROM COMMINGLED WATER FROM PODS 3 AND 4.

RATE OF USE FROM PODS
4.71~~16.07~~ CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION, BEING 1.795 CFS~~11.68~~ FROM POD 1, 1.91 CFS FROM POD 2, 0.16~~0.21~~ CFS

FROM POD 3, 0.62 CFS FROM POD 4, AND 0.23~~1.65~~ CFS FROM COMMINGLED WATER FROM PODS 3 AND 4.

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY OF WATER APPLIED FROM PODS:
3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

PERIOD OF ALLOWED OF WATER APPLIED FROM PODS: MAY~~MARCH~~ 1 - OCTOBER 16

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINTS OF DIVERSION IS LOCATED AS FOLLOWS:

Pod Name	Source	Twp	Rng	Mer	Sec	Q-Q	Remarks
POD 1	The Sprague River	36 S	10 E	WM	9	NW NW	
POD 2	Unnamed Stream	36 S	10 E	WM	17	SW SE	Tributary to the Sprague River
POD 3	Cherry Creek	36 S	10 E	WM	16	SW SE	
POD 4	Unnamed Stream	36 S	10 E	WM	21	NE NW	Tributary to Cherry Creek
Commingled Water from PODS 3 & 4	Cherry Creek, and Unnamed Stream tributary to Cherry Creek	36 S	10 E	WM	16	SW SE	
					21	NE NW	
	~~The Sprague River~~	~~No Specific Point of Diversion – Natural Overflow~~					

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**Acres**	**Authorized POD**
~~36 S~~	~~10 E~~	~~WM~~	~~4~~	~~SW SE~~	~~19.0~~	~~NATURAL OVERFLOW FROM SPRAGUE RIVER~~
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~NE SW~~	~~2.4~~	
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~NW SW~~	~~33.1~~	
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~SW SW~~	~~8.6~~	
~~36 S~~	~~10 E~~	~~WM~~	~~8~~	~~NE NE~~	~~6.2~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NE NE~~	~~26.0~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NW NE~~	~~16.1~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NE NW~~	~~28.2~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NW NW~~	~~27.8~~	
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~NE SW~~	~~32.8~~	POD 1
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~NW SW~~	~~1.1~~	
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~SW SW~~	~~19.4~~	
~~36 S~~	~~10 E~~	~~WM~~	~~5~~	~~SE SW~~	~~19.6~~	
36 S	10 E	WM	8	NE NE	0.8	
36 S	10 E	WM	8	SE NE	6.2	
36 S	10 E	WM	8	NE NW	14.3	
36 S	10 E	WM	8	SE NW	15.6	
36 S	10 E	WM	8	NE SW	12.4	
36 S	10 E	WM	8	SE SW	6.5	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NE NE~~	~~14.0~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NW NE~~	~~16.4~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~SW NE~~	~~40.0~~	POD 1

IRRIGATION						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**Acres**	**Authorized POD**
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~SE NE~~	~~40.0~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NE NW~~	~~8.8~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NW NW~~	~~10.0~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~SW NW~~	~~34.0~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~SE NW~~	~~38.5~~	
36 S	10 E	WM	9	NE SW	1.7~~13.5~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NW SW~~	~~16.8~~	
36 S	10 E	WM	9	SW SW	2.1	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NE SE~~	~~40.0~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~NW SE~~	~~38.6~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~SW SE~~	~~0.3~~	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~SE SE~~	~~13.3~~	
36 S	10 E	WM	17	NW NE	6.0	
36 S	10 E	WM	17	NE NW	4.6	
36 S	10 E	WM	17	NE SW	1.6	
36 S	10 E	WM	8	NE SW	2.7	POD 2
36 S	10 E	WM	8	SW SW	9.7	
36 S	10 E	WM	8	SE SW	14.3	
36 S	10 E	WM	17	NE NW	6.1	
36 S	10 E	WM	17	NW NW	12.4	
36 S	10 E	WM	17	NE SW	10.0	
36 S	10 E	WM	17	NW SW	2.2	
36 S	10 E	WM	17	SE SW	18.9	
~~36 S~~	~~10 E~~	~~WM~~	~~16~~	~~SW NE~~	~~1.2~~	POD 3
~~36 S~~	~~10 E~~	~~WM~~	~~16~~	~~SE NE~~	~~1.0~~	
36 S	10 E	WM	16	SE SW	3.5	
36 S	10 E	WM	16	SW SE	1.4	
36 S	10 E	WM	16	SE SE	1.3	
36 S	10 E	WM	16	SE SW	8.5	POD 4
36 S	10 E	WM	21	NE NW	16.3	
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~SW SE~~	~~13.6~~	COMMINGLED WATER FROM PODS 3 AND 4
~~36 S~~	~~10 E~~	~~WM~~	~~9~~	~~SE SE~~	~~2.8~~	
~~36 S~~	~~10 E~~	~~WM~~	~~16~~	~~NE NE~~	~~1.2~~	
~~36 S~~	~~10 E~~	~~WM~~	~~16~~	~~NW NE~~	~~25.5~~	
~~36 S~~	~~10 E~~	~~WM~~	~~16~~	~~SW NE~~	~~5.3~~	
~~36 S~~	~~10 E~~	~~WM~~	~~16~~	~~NE NW~~	~~1.1~~	
~~36 S~~	~~10 E~~	~~WM~~	~~16~~	~~SE NW~~	~~7.1~~	
36 S	10 E	WM	16	SE SW	9.4	

~~**FURTHER LIMITATIONS TO THE RIGHT TO USE OF WATER BY NATURAL OVERFLOW:**~~

~~BENEFICIAL USE OF WATER MADE FROM THE METHOD OF NATURAL OVERFLOW IS A PRIVILEGE ONLY. AS LONG AS BENEFICIAL USE OF WATER BY NATURAL OVERFLOW CONTINUES, THE HOLDER OF THIS VESTED WATER RIGHT CANNOT MAKE A CALL ON WATER APPROPRIATED UNDER ANY OTHER WATER RIGHTS.~~

~~ANY CONVERSION FROM BENEFICIAL USE OF WATER BY NATURAL OVERFLOW TO BENEFICIAL USE OF THE SAME WATER FROM A SYSTEM RELYING ON A POINT(S) OF DIVERSION WILL BE CONSIDERED A CHANGE IN POINT OF DIVERSION SUBJECT TO APPROVAL OF A TRANSFER OF WATER RIGHT IN COMPLIANCE WITH THE PROVISIONS OF ORS 540.505 TO 540-587. NOTWITHSTANDING APPROVAL OF A CHANGE IN POINT OF DIVERSION, THE FOLLOWING CONDITIONS WILL APPLY TO ANY APPROVED POINT OF DIVERSION TRANSFER: THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR. THE DUTY FOR IRRIGATION MAY NOT EXCEED 3.0 ACRE FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR~~

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

_____

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

CERTIFICATE OF SERVICE

On April 10, 2026, I caused to be served copies of OWRD'S AMENDED PROPOSED ORDER ON MOTIONS TO RESOLVE REMAINING EXCEPTIONS TO WALTON AND KLAMATH TERMINATION ACT CLAIMS (PHASE 3, PART 3, GROUP A) in accordance with the current service list updated by Oregon DOJ and provided to Klamath County Circuit Court on August 29, 2025 (a copy of which is attached hereto), as follows: by using the Oregon Judicial Department Odyssey File and Serve system for those persons marked "E-serve" in the "format" column.

DATED April 10, 2026.

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174	DOMINIC	CAROLLO	CAROLLO LAW GROUP	PO BOX 2456	ROSEBURG	OR	97470	NBCC, LLC; Mary Anna & Steven Napier; Tillie L. Goold Trust, James Goold; Caldwell Family Trust; Sharline J. & Glen R. Crouch; Lisa Griffith; Douglas & Judy Parker; Thomas Griffith; Lynne Richardson Cabral;Hickey Ranches; David "Kent" & Gail Patton; Con. J. Flynn; Nora Flynn and John Flynn; Whiskey Creek Ranch; William L. Gallagher; Robert R. Rathborne; Jan & Michael Hester; Constance Klus Colas as Trustee of Allan Cedric Klus Living Trust; John & Barbara Fugatt; Greg Harris; Robert Cook; Mosby Family Trust (Steve Mosby Trustee); Jack Owens Ranch (Jerry Hawkins); Owens & Hawkins; Roger Nicholson; Wayne Ranch LLC; MODOC Point Irrigation District; Mary A. Rabe & Estate of Clifford Rabe; Estate of Tony Pierce; Duane Martin; Five Mile Ranch. LLC; David P. & Kathleen R. Mastagni; Sprague River Cattle Company; Richard Duarte; Wilks Ranch Oregon, Ltd.; Jaqueline R. Graham & Gregory B. Bulkley; Frank and Susan Anderson; Lewis E. Furber; Magic Duck Club, LLC; Keno Irrigation District; Allan Moates; Karen Tucker & Sandra Tucker; Flowers Bros Inc.; Christy Flowers; Tule Smoke, Inc.; Jan & Michael Hester; John K Lilly; Shirley & E. Martin Kerns; Nora Flynn; Bonanza Conservation LLC; Ausaymus Cattle Co.; BK Ranch, Lillian Hill and Vincent Hill; C and A Vogt Community Property Trust; David M. & Theresa Cowan; Duarte Livestock; E.G. Kerns Ranch LLC; Goose Nest Ranch; James Hadyn-Myer; John R. Briggs; Lon Brooks; Martin Nicholson; Michael La Grande; Modoc Point Irrigation District; River Springs Ranch Co.; Productive Timberland LLC; Harlowe Ranch LLC; Randall Kizer; TP Bar Ranch; T&B Ranch; Newman Enterprises; Agri Water, Joe Murphy and Lori Murphy, Trustees of the Murphy Family, Barnes Lake County, LLC;	E-serve
175	GREGORY	YOUNG		3339 WATERFOWL WAY	DRIGGS	ID	83422-1236		mail
176	JOHN	YOUNG, TRUSTEE	YOUNG FAMILY TRUST	26 ARASTRADERO ROAD	PORTOLA VALLEY	CA	94028		mail
177			CITY OF KLAMATH FALLS	PO BOX 237	KLAMATH FALLS	OR	97601-0361		mail
178			CURRENT RESIDENT	238 RIVERSIDE DR	KLAMATH FALLS	OR	97601		mail
179			CURRENT RESIDENT	300 RIVERSIDE DR	KLAMATH FALLS	OR	97601		mail
180			DOUBLE K RANCH	1696 COVE POINT ROAD	KLAMATH FALLS	OR	97601		mail
181			CURRENT RESIDENT	616 CONGER AVENUE	KLAMATH FALLS	OR	97301		mail
182			GEARY BROS CALEDONIA RANCH	12981 HWY 140W	KLAMATH FALLS	OR	97601-9100		mail
183			LELAND WOODS TRUST	14121 MATNEY ROAD	KLAMATH FALLS	OR	97601		mail
184			MATHIS FAMILY TRUST	7650 HIGHWAY 1 #C	LOMPOC	CA	93436		mail
185			REDDING FOUNDATION	PO BOX 990160	REDDING	CA	96099		mail
186			RUSSELL J CENTANNI TRUST	11120 24TH PL SE	LAKE STEVENS	WA	98258-5154		mail
187			ROBINSON BEST LLC	PO BOX 769	ARBUCKLE	CA	95912		mail

	A	B	C	D	E	F	G	H	I
188			SEVENMILE CREEK RANCH LLC	760 SW NINTH AVENUE, SUITE 2300	PORTLAND	OR	97205		mail
189			SOUTH SUBURBAN SANITARY DISTRICT	2201 LAVERNE AVENUE	KLAMATH FALLS	OR	97603		mail
190			SOUTHERN OREGON UNIVERSITY FOUNDATION	1250 SISKIYOU BLVD	ASHLAND	OR	97520-5034		mail
191		MORGANA HUNTER LOVING TRUST	C/O ANNA BENNETT	PO BOX 436	CHILOQUIN	OR	97624		mail
192			WATERWATCH OF OREGON INC	213 SW ASH STREET STE 208	PORTLAND	OR	97204		mail
193			WOOD RIVER DIC	C/O HOLLIE CANNON 409 PINE ST., SUITE 311	KLAMATH FALLS	OR	97601		mail
194			WOKSAM VIEW LLC	132 LUNA GRANDE CIRCLE, #103	SACRAMENTO	CA	95834		mail