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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

WATERS OF THE KLAMATH RIVER BASIN.

Case No. WA1300001

ORDER ON MOTIONS TO RESOLVE
REMAINING EXCEPTIONS TO WALTON
AND KLAMATH TERMINATION ACT
CLAIMS (PHASE 3, PART 3, GROUP A)

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.

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

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

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

16 NOW THEREFORE, IT IS HEREBY ORDERED that

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

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_00621
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

Dated this 23rd day of March, 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) OPINION RE MOTIONS TO RESOLVE
BASIN) 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 cases¹ -- 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

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 allottee, 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 ACFOD 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

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 Tompkins 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 ACFOD'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 appraisal 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 ACFOD'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 Appraisal 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 Appraisal 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_ACFOD_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

²² KBA_ACFOD_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 Appraisal 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. McAuliffe 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 Appraisal 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.

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.

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_ACFOD_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 ACFOD 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* right 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_ACFOD_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_ACFOD_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

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

⁴¹ See Duarte's Response at 15 (citing KBA_ACFOD_01890-891).

⁴² See KBA_ACFOD_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

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_ACFOD_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.

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 allottees 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_ACFOD_05855 (describing history).

⁵⁷ KBA_ACFOD_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 Tribes⁶⁰

(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 NE $\frac{1}{4}$ NW $\frac{1}{4}$, 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

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_ACFOD_05807 (describing ownership); KBA_ACFOD_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"

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

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

⁸² OWRD0344637.

⁸³ OWRD0344660.

⁸⁴ OWRD0344478.

⁸⁵ Bonanza's Response at 8-9.

⁸⁶ KBA_ACFOD_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)

⁹¹ KBA_ACFOD_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_ACFOD_05810-11

⁹⁶ KBA_ACFOD_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

⁹⁸ See Klamath Tribes' Motion at 11-13.

⁹⁹ KBA_ACFOD_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

¹⁰² KBA_ACFOD_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.

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

¹⁰⁷ Bonanza's Response at 10 (citing KBA_ACFOD_05794, 796).

¹⁰⁸ *Id.* (citing KBA_ACFOD_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

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_ACFOD_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 F.2d 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.

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

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 it 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.

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 Apache Tribe*, 462 US 324, 335 (1983), and *McClanahan v. Arizona State Tax*

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_ACFOD_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. Cougar 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 Cougar 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

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.*

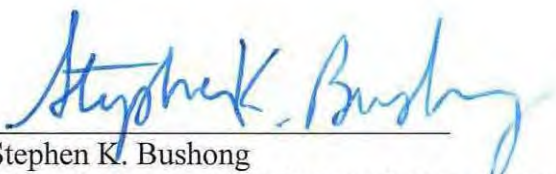
Here, the incorporators of Hi Robbins Corporation formed it as an Oregon corporation, obtained the benefits of Oregon law, including its treatment of corporations as separate entities and the protection of corporate shareholders from the corporation's debts. Assuming that Hiram Robbins had a valid, inchoate *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*

IN THE CIRCUIT COURT OF THE STATE OF OREGON

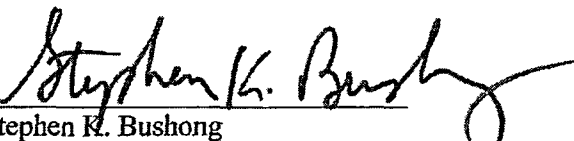
FOR THE COUNTY OF KLAMATH

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)	SUPPLEMENT TO OPINION RE MOTIONS
BASIN)	TO RESOLVE REMAINING EXCEPTIONS
)	TO <i>WALTON</i> 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)	PARTIAL ORDER OF
THOMAS J. SHAW)	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 AMENDED¹ 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 OVERFLOW WITH INCIDENTAL 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