

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

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

The United States; The Klamath Tribes;
Contestants

PROPOSED ORDER

Case No. 160

vs.

Claim: 9

TPC, LLC, an Oregon Limited Liability Co.;
Claimant, and
Hart Estate Investment Company,
Claimant/Contestant.

Contests: 2815¹, 3262, 3715, and 4071

HISTORY OF THE CASE

Claimants seek a water right as non-Indian successors to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the allotments' share of the Tribe's "practically irrigable acreage" ("PIA").² This *Walton* claim is for 589.3 cubic feet per second (cfs) of water for irrigation of approximately 2333.8 acres of land, and for livestock use. The claimed period of use is February through October.

On January 24, 1991, Boyd P. Braren Trust, Boyd P. Braren, Trustee, filed Claim 9. Subsequently, EIH Two, Inc., purchased a portion of the property identified in Claim 9. On October 4, 1999, OWRD issued its Preliminary Evaluation for this claim preliminarily approving the claim, with a priority date of October 14, 1864³. WaterWatch of Oregon, Inc. (WaterWatch) filed contest 2815 to this claim on May 8, 2000⁴. Hart Estate Investment Company filed Contest 3262 on May 8, 2000. The United States filed Contest 3715 on May 8, 2000. Also on May 8, 2000, the Klamath Tribes filed Contest 4071. At various times after the claim was filed, different parts of the property changed hands. The property is currently in two parcels, owned by TPC, LLC, an Oregon Limited Liability Co., and Hart Estate Investment Company. Both current owners have been substituted as claimants.

¹ WaterWatch of Oregon, Inc. voluntarily withdrew, without prejudice, Contest 2815 on February 20, 2003.

² Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397, 402 (9th Circuit, 1985).

³ This is the priority date of all allowed *Walton* claims in the Klamath Adjudication, as it is the date on which the Klamath Reservation was formed by treaty.

⁴ WaterWatch withdrew Contest No. 2815 on February 20, 2003.

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This matter came on for hearing on March 2 and 3, 2004, before Administrative Law Judge William Young. Claimant Hart Investment Company appeared through its counsel, Carol Skerjanec and William E. Schroeder. Claimant TPC, LLC appeared through its counsel, Laura Schroeder. Contestant the United States of America appeared through its attorney, Bruce Bernard. Contestants the Klamath Tribes appeared through counsel, Lorna Babby, by telephone. The Oregon Water Resources Department appeared through Justin Wirth, Assistant Attorney General. Robert M. Cook, Clinton Basey, Boyd P. Braren, Kenneth Hufford and David Shaw testified on behalf of Claimants. Ross Waples testified on behalf of the United States.

After the hearing, the case was reassigned to me to prepare this Proposed Order, Judge Young being unavailable. I have reviewed the entire record, including the record of the hearing and all argument, prior to preparation of this order.

EVIDENTIARY RULINGS

The following exhibits, written testimony and affidavits were admitted into the record at hearing.

OWRD Exhibit 1 including the Affidavit and Testimony of Teri Hranac.

Direct Testimony of Kenneth Hufford (marked as Ex. 30001.)

Direct Testimony of Clinton Basey (marked as Ex. 30002.)

Corrections to the Direct Testimony of Clinton Basey.

Direct and Rebuttal Testimony of David B. Shaw (marked as Ex. 30003.)

Exhibits 30004 through 30012.

The Affidavit and Testimony of Ross Waples, marked as Exhibit 40001, together with Exhibits 40002 through 40034, attached thereto.

Objections were sustained to Exhibits 40036 and 40037. Exhibits 40036 and 400367 were not admitted into the record in this case.

Direct Testimony of Robert Cook, together with Exhibits 60001 through 60073, and 60083 through 60093, attached thereto. Demonstrative Exhibits 60096 through 60128 were admitted over the objections of Contestants, in aid of testimony.

Corrections to the Direct Testimony of Robert M. Cook, with exhibits attached thereto, as to corrections to previously submitted testimony. Objections as to references in the Corrections to documents not in the record, particularly related to documents in the chain of title to the various allotments, were sustained.

Supplemental Direct Testimony of James P. Lynch, with exhibits attached thereto.

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Direct Testimony of Boyd Braren, except paragraph 5 thereof, which was stricken on motion of the United States.

Affidavit of Therese A. Ure in support of Authentication of Photographs.

At hearing, the Kittredge Family History was offered into evidence. The United States objected, but subsequent to the hearing withdrew its objection, reserving the right to address relevance, materiality and weight as to any use of the Exhibit. The Kittredge Family History is admitted.

Exhibits 60129 through 60138 submitted on Claimant's Motion. These documents were offered after hearing, as newly discovered evidence. On November 18, 2004, I granted a motion to reopen the record to admit these exhibits subject to the right of the United States to depose any person with respect to any matter contained or referred to in the exhibits. In conformity with this order, the United States deposed Donovan Nicol and Clinton Basey. These two depositions were admitted for the limited purpose of testing the reliability and evaluating the appropriate weight to be given Exhibits 60129 through 60138.

ISSUES

1. **Whether the period of use for livestock should be January 1 through December 31. (Hart Estate Investment)**
2. **Whether there is sufficient title information to establish a *Walton* right. (United States, Klamath Tribes)**
3. **Whether there is sufficient information on the development or continuous use of water on this Place of Use to establish a *Walton* right. (United States, Klamath Tribes)**
4. **Whether the total acreage in the Place of Use exceeds the irrigated acreage supported by the evidence. (United States, Klamath Tribes)**
5. **Whether the diversion rate is too large for the valid number of irrigated acres within the Place of Use. (United States, Klamath Tribes)**
6. **Whether there is sufficient information to support a period of use outside of March 1 to October 31. (United States, Klamath Tribes)**

FINDINGS OF FACT

- 1) For all allowed water rights in Claim 9, the Rate is 1/80th cfs/acre⁵. The Duty is 3.5

⁵ The rate allowed is based on a certificate of water right obtained by William Kittredge with a priority of April 16, 1930, which specified a rate of 1/80th cfs per acre. (OWRD Ex. 1 at 59.) The duty is based on the duty specified in Appendix A of the Preliminary Evaluation for those cases where a different duty does not apply. (*Id.* at 131.) Season of Use is also as specified in Appendix A, except as to livestock. Claimant did not specify a season of use for

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acre feet per acre per year. The Period of Use for irrigation is March 1 through October 31. The Priority date is October 14, 1864. (OWRD Ex. 1 at 59, 131.)

2) Beginning in 1912, William Kittredge began leasing properties that had formerly been part of the Klamath Reservation, and had been allotted to individual Klamath Indians. He later bought a number of the allotments as they became available. The property subject to this claim is part of the property acquired by Kittredge between 1917 and 1931. Beginning in 1917, Kittredge began developing irrigation systems throughout his property, which was, and is still, used for pasture and hay. (Ex. 60138.)⁶ In 1918, Kittredge built a diversion dam across the Williamson River called the Big Wire Dam, located in the NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M. Several ditches were then built upstream from this dam to provide irrigation for much of the property subject to this claim. (OWRD Ex. 1 at 63, Ex. 60138 at 4.) By 1930, an additional dam had been built downstream on the Williamson River, at the SW ¼ SW ¼ Section 18, T 30 S, R 10 E.W.M. (OWRD Ex. 1 at 59, Supplemental Direct Testimony of James P. Lynch, Ex. 1.)

3) Upstream from Kittredge's holdings, George Mayfield acquired a number of properties, also formerly Indian allotments. In 1924, Mayfield built a diversion and ditch to draw water from the Williamson River to irrigate some of his properties. (Ex. 60138 at 5.) This diversion reduced the availability of water for irrigation of Kittredge's holdings downstream. (*Id.*) A few years later, William Kittredge bought out Mayfield's holdings, and discontinued the use of this diversion. (*Id.*)

4) It is possible that before 1918 part of this property was subject to flooding from temporary dams. However, the evidence is not sufficient to establish when this practice was carried out, how often it was done, or what land benefited from the dams.

5) Allotment 54

This allotment, composed of 160 acres located in S ½ S ½ Section 8, T 30 S, R 10 E.W.M., was confirmed to Evangeline Blow, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40013.) In 1910 the property was described as having no improvements except fencing. (*Id.* at 18.) The property was conveyed to William Kittredge, a non-Indian, on July 7, 1926. (Ex. 60045.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, on May 20, 1944. (Ex. 60047.)

The claim is for 28.8 acres irrigated from Jack Creek, and 57.5 acres irrigated from the Williamson River with a diversion point at the NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M. (OWRD Ex. 1 at 8, 11, 13, 25.) William Kittredge obtained a Certificate of Water Right for 67.1 acres in Section 8, T 30 S, R 10 E.W.M. with a point of diversion from the Williamson River located in NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930.

livestock only, in the claim document, but only stated that the period of use was "Feb through Oct." (*Id.* at 23.) OWRD asked for clarification of the season of use for livestock, but did not receive a response. Consequently, the season of use for livestock is limited to the season claimed, February through October. Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

⁶ Although the exhibits were marked with a 12-digit number, the first seven digits did not change from exhibit to exhibit. For ease of reference only the last five digits of the exhibit numbers will be cited in this order.

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(*Id.* at 25, 57, 59, 60, 63.) At hearing, the United States conceded that the Water Right Certificate established the elements of a *Walton* right for irrigation from the Williamson River. (Transcript at 39.) The remaining irrigated acreage claimed was not described in this water right certificate, and was developed at a later date by a subsequent non-Indian owner.

6) Allotment 153

This allotment, composed of 160 acres located in NE ¼ Section 9, T 30 S, R 10 E.W.M., was confirmed to Luty Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40018.) In 1920 the property was described as having no ditch for irrigation. (*Id.* at 6.) The property was conveyed to George Mayfield, a non-Indian, on August 2, 1923. (Ex. 60057.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on April 19, 1924. (Ex. 60056.)

The claim is for 132 acres irrigated by water diverted from the combined flow of Jack Creek, Long Prairie Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (OWRD Ex. 1 at 62.) There is no evidence of a diversion of water to this property prior to transfer of ownership to William Mayfield, the second non-Indian owner, in 1924. As of 1978, the property was watered for the most part by natural overflow from Jackson Creek, a source not included in this claim, and by return flow from a diversion by an upstream user. (*Id.*)

7) Allotment 158

This allotment, composed of 160 acres located in SW ¼ Section 9, T 30 S, R 10 E.W.M., was confirmed to Horace Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40022.) In 1920 the property was described as having no ditch. (*Id.* at 4.) The property was conveyed to J.W. McCoy, a non-Indian, on August 6, 1920. (Ex. 60052.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60055.)

This claim is for 107.2 acres irrigated by water diverted from Jack Creek. (OWRD Ex. 1 at 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5.) A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (*Id.* at 62.) There is no evidence of a diversion of water to this property prior to transfer of the property to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

8) Allotment 154

This allotment, composed of 160 acres located in SE ¼ Section 9, T 30 S, R 10 E.W.M., was confirmed to Eva Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40019.) The property was conveyed to Charles Pitcher, a non-Indian, on November 29, 1918. (Ex. 60053.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on April 20, 1920. (Ex. 60054.)

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The claim is for 80.2 acres irrigated from the combined waters of Jack Creek, Long Prairie Creek, and return flow from an upstream user, and 28 acres irrigated from a diversion on Jack Creek. (OWRD Ex. 1 at 7, 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5.) A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

9) Allotment 264

This allotment, composed of 160 acres located in NE ¼ Section 10, T 30 S, R 10 E.W.M., was confirmed to Jack Palmer (Kane), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40025.) The property was conveyed to A.C. Beal and J.W. McCoy, non-Indians, on April 22, 1920. (Ex. 60010.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60014, 60015.)

This claim is for 78 acres irrigated from a diversion in Long Prairie Creek, and 36.8 acres irrigated from the combined waters of Long Prairie Creek, Jack Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7, 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5.) A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

10) Allotment 156

This allotment, composed of 160 acres located in NW ¼ Section 10, T 30 S, R 10 E.W.M., was confirmed to Frank Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40020.) In 1920 the property was described as having no irrigation. (*Id.* at 3.) The property was conveyed to George Mayfield, a non-Indian, on June 13, 1923. (Ex. 60057.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on April 19, 1924. (Ex. 60056.)

This claim is for 128.9 acres, with diversion for 15.6 acres from Long Prairie Creek, and the remainder from combined waters of Long Prairie Creek, Jack Creek and return flow from an upstream user. (OWRD Ex. 1 at 7.) At some unknown date prior to 1977 diversions were built on Long Prairie Creek or Jack Creek, which were intermittent creeks, to divert an unknown amount of water. (*Id.* at 5.) A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 62.) There is no evidence of irrigation on this property prior to its acquisition by the second non-Indian owner. As of 1978, the property was watered for the most part by natural overflow from Jackson Creek, not a source under this claim, and by return flow from a diversion by an upstream user. (Ex. 600138 at 5.)

11) Allotment 157

This allotment, composed of 160 acres located in SW ¼ Section 10, T 30 S, R 10 E.W.M., was confirmed to Hampton Howard, a Klamath Indian, by instrument dated March 3,

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1910. (Ex. 40021.) This property was described in 1920 as having no ditches. (*Id.* at 4.) The property was conveyed to A.C. Beal, a non-Indian, on August 13, 1920. (Ex. 60009.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60014.)

The claim is for 136.8 acres irrigated from the combined waters of Long Prairie Creek, Jack Creek and return flow from an upstream user. (OWRD Ex. 1 at 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5.) A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

12) Allotment 265

This allotment, composed of 160 acres located in SE ¼ Section 10, T 30 S, R 10 E.W.M., was confirmed to Lillie Palmer (Kane), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40026.) The property was conveyed to Klamath Cattle Co. a non-Indian, on August 25, 1926. (Ex. 60018.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 3, 1927. (Ex. 60006.)

The claim is for 159.3 acres irrigated from the combined waters of Jack Creek, Long Prairie Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7, 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5.) A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 62.) There is no evidence as to when water was first diverted to this property.

13) Allotment 152

This allotment, composed of 160 acres located in NW ¼ Section 11, T 30 S, R 10 E.W.M., was confirmed to Jason Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40017.) In 1916 this property was described as having no irrigation and no water supply. The property was mostly in wild grass, uncultivated and without a water right. (*Id.* at 8 through 11.) The property was conveyed to George Mayfield, a non-Indian, on April 4, 1924. (Ex. 60002.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on November 19, 1924. (Ex. 60056.)

The claim is for 82.5 acres irrigated from the combined waters of Jack Creek, Long Prairie Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5.) A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 62.) As of 1978, the property was watered for the most part by natural overflow from Jackson Creek, and by return flow from a diversion by an upstream user. (Ex. 60138 at 5.)

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14) Allotment 18

This allotment, composed of 160 acres located in NW ¼ Section 16, T 30 S, R 10 E.W.M., was confirmed to Logan Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40006.) The property was conveyed to William Kittredge, a non-Indian, on January 29, 1923. (Ex. 60017.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, also a non-Indian, on May 20, 1944. (Ex. 60047.).

The claim is for 101.2 acres irrigated from two points of diversion on the Williamson River (94.4 acres from a diversion on the South side of the river and 6.8 acres from a diversion on the North side of the river, both located in NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M.), and 14 acres irrigated from Jack Creek. (OWRD Ex. 1 at 8, 9.) William Kittredge obtained a Certificate of Water Right to irrigate 118 acres in NW ¼ Section 16, T 30 S, R 10 E.W.M. from two diversions from the Williamson River in NE ¼ NW ¼, and NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) The acreage claimed to be watered from Jack Creek was not described in this water right certificate, and may have been developed at a later date by a subsequent non-Indian owner.

15) Allotment 20

This allotment, composed of 160 acres located in the SW ¼ Section 16, T 30 S, R 10 E.W.M., was confirmed to Grover Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40007.) In 1921 the property was described as having no irrigation. (*Id.* at 5.) The property was conveyed to William Kittredge, a non-Indian, on May 31, 1921. (Ex. 60001.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, also a non-Indian, on May 20, 1944. (Ex. 60047.).

The claim is for irrigation of 129.6 acres from the Williamson River. William Kittredge obtained a Certificate of Water Right to irrigate 128.1 acres in SW ¼ Section 16, T 30 S, R 10 E.W.M. from one diversion point on the Williamson River in the NE ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) The additional 1.5 acres may have been developed subsequently.

16) Allotment 52

This allotment, composed of 160 acres located in NE ¼ Section 17, T 30 S, R 10 E.W.M., was confirmed to Jennie Blow (Blew), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40011.) In 1914 the property was described as having no improvements. (*Id.* at 11.) The property was sold on contract to Alex Davis, a non-Indian, in 1916. On March 9, 1920 a patent was issued in Davis' name. (Ex. 60022.) Prior to this patent, William Kittredge, also a non-Indian, had apparently agreed to purchase the property, and was making Davis' payments on the contract as early as May 1917. (Ex. 40011 at 4, 5.) William Kittredge received title to the property on October 2, 1922. (Ex. 60027.)

The claim is for 31.1 acres irrigated from the Williamson River, and 3.6 acres irrigated from Jack Creek. (OWRD Ex. 1 at 11.) William Kittredge obtained a Certificate of Water Right to irrigate 151 acres in NE ¼ Section 17, T 30 S, R 10 E.W.M. from two diversion points on the Williamson River in the NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M. with a priority date of

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April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) The diversion from Jack Creek may have been developed by a subsequent owner.

17) Allotment 53

This allotment, composed of 160 acres located in NW $\frac{1}{4}$ Section 17, T 30 S, R 10 E.W.M., was confirmed to Elvira Blow (Blew), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40012.) The property was conveyed to William Kittredge, a non-Indian, on June 26, 1920. (Ex. 60024, 60026.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 21, 1955. (Ex. 60049.)

The claim is for 148.4 acres irrigated from the Williamson River. (OWRD Ex. 1 at 11.) William Kittredge obtained a Certificate of Water Right to irrigate 160 acres in NW $\frac{1}{4}$ Section 17, T 30 S, R 10 E.W.M. from one diversion point on the Williamson River in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.)

18) Allotment 78

This allotment, composed of 160 acres located in SW $\frac{1}{4}$ Section 17, T 30 S, R 10 E.W.M., was confirmed to Golliep Elksnat, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40016.) The property was conveyed to George Mayfield, a non-Indian, on August 9, 1920. (Ex. 60023.) The property was subsequently conveyed to William Kittredge, also a non-Indian, on October 30, 1920. (Ex. 60025.)

The claim is for 150.2 acres irrigated from the Williamson River. (OWRD Ex. 1 at 9.) Kittredge obtained a Certificate of Water Right to irrigate 152.4 acres in SW $\frac{1}{4}$ Section 17, T 30 S, R 10 E.W.M. from one diversion point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.)

19) Allotment 174

This allotment, composed of 160 acres located in SE $\frac{1}{4}$ Section 17, T 30 S, R 10 E.W.M., was confirmed to Silas Jackson, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40024.) In 1916 the property was described as having no irrigation installed. (*Id.* at 3.) The property was conveyed to William Kittredge, a non-Indian, on November 11, 1917. (Ex. 60013.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.)

The claim is for 159.8 acres irrigated from the Williamson River. (OWRD Ex. 1 at 10.) William Kittredge obtained a Certificate of Water Right to irrigate 160 acres in SE $\frac{1}{4}$ Section 17, T 30 S, R 10 E.W.M. from one diversion point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.)

20) Allotment 24

The total allotment is located in several parcels, only 80 acres of which is subject to this claim. That portion is located in E $\frac{1}{2}$ NE $\frac{1}{4}$ Section 18, T 30 S, R 10 E.W.M., and was confirmed to Fannie Ball, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40009.) In 1918 the property was described as subject to "some private wild flooding" but having no

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constructed irrigation ditches. (*Id.* at 8, 9.) The property was conveyed by Fannie Ball (under the name "Mrs. Lion Hart") to William Kittredge, a non-Indian, on April 29, 1921. (Ex. 60032.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.).

The claim is for 54.4 acres irrigated from the Williamson River. (OWRD Ex. 1 at 11.) William Kittredge obtained a Certificate of Water Right to irrigate 52.7 acres in E ½ NE ¼ Section 18, T 30 S, R 10 E.W.M. from one diversion point in the NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.)

21) Allotment 25

The total allotment is composed of 160 acres, only 80 of which are subject to this claim. That portion, located in W ½ SE ¼ Section 18, T 30 S, R 10 E.W.M., was confirmed to Eddie Ball, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40010.) The property was conveyed to A.A. Bellman, a non-Indian, on October 13, 1917. (Ex. 60020.) The property was subsequently conveyed to Charles Worden, also a non-Indian, on October 16, 1917. (Ex. 60021.).

The claim is for 0.2 acres irrigated in the NW ¼ SW ¼ Section 18, T 30 S, R 10 E.W.M., and 24 acres irrigated in the SW ¼ SW ¼ Section 18, T 30 S, R 10 E.W.M. (OWRD Ex. 1 at 10.) William Kittredge obtained a Certificate of Water Right for 29 acres in SW ¼ SE ¼ Section 18, T 30 S, R 10 E.W.M. from one diversion point in the SW ¼ SE ¼ Section 18, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.)

22) Allotment 77

The total allotment includes a number of different parcels, only 80 acres of which are subject to this claim. That portion, located in E ½ SE ¼ Section 18, T 30 S, R 10 E.W.M., was confirmed to Irene Skellock, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40015.) The property was conveyed to William Kittredge, a non-Indian, on April 20, 1921. (Ex. 60030.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.).

The claim is for 62 acres irrigated from one diversion point on the Williamson River, located in NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M., and 3.6 acres irrigated from a second diversion point on the Williamson River located in SW ¼ SE ¼ Section 18, T 30 S, R 10 E.W.M. William Kittredge obtained a Certificate of Water Right for 71.3 acres in E ½ SE ¼ Section 18, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.)

23) Allotment 75

This allotment, composed of 160 acres located in NE ¼ Section 19, T 30 S, R 10 E.W.M., was confirmed to Mamie Skellock, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40014.) The property was conveyed to William Kittredge, a non-Indian, on March 10, 1926. (Ex. 60034.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.).

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The claim is for 105.8 acres irrigated from a single diversion point on the Williamson River located in NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M.. (OWRD Ex. 1 at 10, 63.) William Kittredge obtained a Certificate of Water Right for 110.4 acres in NE¼ Section 19, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) At hearing, the United States conceded that the Water Right Certificate established the elements of a *Walton* right for irrigation from the Williamson River. (Transcript at 39.)

24) Allotment 173

This allotment, composed of 160 acres located in NE ¼ Section 20, T 30 S, R 10 E.W.M., was confirmed to Emma Jackson, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40023.) The property was conveyed to Robert Wilson and Nora Bernice Wilson, non-Indians, by an unrecorded transfer. (Ex. 60066.) The property was subsequently conveyed to William Kittredge, also a non-Indian, on April 4, 1931. Ex. 60066.)

The claim is for 97 acres irrigated from a single diversion point on the Williamson River located in NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M. (OWRD Ex. 1 at 10, 63.) William Kittredge obtained a Certificate of Water Right for 93.0 acres in NE¼ Section 20, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.)

25) Allotment 21

This allotment, composed of 160 acres located in NW ¼ Section 21, T 30 S, R 10 E.W.M., was confirmed to Nannie Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40008.) In 1923 this property was described as mostly in timber, with about 40 acres of flat meadow ground. (*Id.* at 3.) The property was conveyed to William Kittredge, a non-Indian, on January 23, 1924. (Ex. 60065.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 21, 1955. (Ex. 60049.)

The claim is for 71.2 acres irrigated from a single diversion point located in NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M.. (OWRD Ex. 1 at 10.) William Kittredge obtained a Certificate of Water Right for 66.5 acres in NW ¼ Section 21, T 30 S, R 10 E.W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.)

CONCLUSIONS OF LAW

- 1. The period of use for livestock should be February 1 through October 31.**
- 2. There is sufficient title information to establish a *Walton* right for some, but not all of the property subject to this claim.**
- 3. There is sufficient information on the development or continuous use of water on this Place of Use to establish a *Walton* right for a portion of the property subject to this claim.**
- 4. The total acreage claimed in the Place of Use exceeds the irrigated acreage supported by the evidence.**

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5. **The diversion rate as claimed is too large for the valid number of irrigated acres within the Place of Use.**
6. **There is not sufficient information to support a period of use outside of March 1 to October 31.**

OPINION

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

Claimant has raised several arguments which must be addressed before a consideration of the allowable scope of the appropriation can be determined. These have to do with the elements of a *Walton* claim.

First, Claimants assert that the *Walton* line of cases is distinguishable on its facts from the present case with respect to the limitation on the appropriation of water to the first non-Indian appropriator. Claimants suggest that the court in the *Walton* cases was not confronted by the situation presented in this case, where property changed hands twice in a very short period of time. However, *Walton* rights are a creature of federal law. While the decision by the Ninth Circuit Court of Appeals limiting such rights may be open to question, and could someday be reversed, the decision is very clear,⁷ is binding precedent at this point, and may not be revisited in these proceedings. Moreover, it is not entirely clear that the Ninth Circuit would rule as Claimants suggest. In the *Walton* cases the court was concerned about preserving the value to the Indian allottees of an undeveloped water right with an early priority date. The court had no such interest in preserving that value to the non-Indian successors.

Second, Claimant argues that a *Walton* right may be established through natural overflow of water, without any artificial diversion works. Claimant argues that the *Walton* line of cases has been misconstrued, and does not actually prevent appropriation of water from natural overflow.

I am persuaded by the opinion of Administrative Law Judge Ken Betterton in Klamath Adjudication Case 157, which was noted in the arguments of the United States, that subirrigation and natural overflow are not contemplated as a basis for a *Walton* right under federal law. As Judge Betterton noted:

⁷ See the concurring opinion of Judge Sneed, reported in *Colville Confederated Tribes v. Walton*, 757 F2d 1324 (9th Cir. 1985), wherein Judge Sneed noted the possibility that limiting the appropriation to the first non-Indian owner could reduce the ability of Indians to maximize the economic value of their allotments, but concluded: "However, the law of this court is adequately clear, and the existence of a contrary congressional intent sufficiently uncertain, to require that I concur in the court's opinion." *Colville Confederated Tribes*, 758 F2d at 1324.

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It is clear to me after reading the District Court's Memorandum Decision in *Colville Confederated Tribes v. Walton*, No. 3421 (D E Wash, filed December 31, 1983, which *Walton III* [*Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985)] reversed and remanded with a mandate in 1985, and the District Court's Order, *Colville Confederated Tribes v. Walton*, No. C-3421-RJM (D E Wash, filed June 25, 1987), based on the Ninth Circuit's mandate in *Walton III*, that sub-irrigation does not constitute a valid *Walton* water right. (Note omitted.)

Klamath Adjudication Case 157, *Amended Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues*, December 10, 2004, at pages 3, 4.

In *Walton III*, the Ninth Circuit concluded that 40 acres of land that had been subject to subirrigation, could not be included as land subject to a federally reserved water right. The court noted:

Walton argues that each preceding owner has farmed the water-saturated or subirrigated portion of his allotments, near the granitic lip. This, he urges, demonstrates reasonable diligence for purposes of perfecting a reserved right to water for irrigating other areas of his land.

We find his argument unpersuasive. The record indicates that this same acreage is subirrigated today. *See, e.g.*, Reporter's Transcript, May 7, 1982, p. 612 (testimony of Walton, Sr.). Thus, assuming arguendo that the subirrigated acreage may give rise to an entitlement, it is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation.

Colville Confederated Tribes v. Walton, 752 F2d at 403.

Reserved rights are 'federal water rights' and 'are not dependent upon state law or state procedures.' *Cappaert v. United States*, 426 U S 128, 145 ***(1976); (citations omitted). It is appropriate to look to state law for guidance*** although the "volume and scope of particular reserved rights... [remain] federal questions." *Colorado River Water Conservation Dist. v. United States*, 424 U S 800, 813 (1976).

Id. at 400.

Based on the foregoing, I agree with Judge Betterton that subirrigation cannot form the basis for a *Walton* claim. I further conclude that natural overflow likewise cannot form the basis for a *Walton* right. Natural overflow is legally indistinguishable from subirrigation in this respect. Both natural overflow and subirrigation put water on the land without any action or intent by the property owner, and both can be changed by the development of diversion works. It is apparent from the passage from the Ninth Circuit decision quoted above, that the court was not inclined to allow a *Walton* right based on land that already had water applied to it naturally.

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In any event, there is no logical basis for allowing a right based on either natural irrigation or subirrigation with a priority date of 1864. The only reason such a right is allowed at all on pre-1909 claims is because the owner of the land showed the requisite intent to appropriate the water by harvesting the crop the water nurtured. *In re Silvies River*, 115 Or 27, 66 (1925). In this case, such an intent could not be formed until after the property was allotted to individual Indians, and would logically have a priority no earlier than the date the allotment was created, not 1864. The water must have been artificially diverted in order for it to form the basis for a *Walton* right.

Claimant has also argued that to the extent the property subject to this claim is not eligible for treatment as a *Walton* claim, some parts of it could be subject to a pre-1909 water right under state law.⁸ In order to establish such a water right, Claimant must show that (1) prior to February 24, 1909, the appropriator had an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) water was subsequently diverted from the natural channel by means of a ditch, channel or other structure; and (3) water was applied within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930). Contestants have vigorously opposed this suggestion, arguing that it is untimely, and outside the proper scope of the case. It is unnecessary to decide whether, in the proper case, such a change of legal theory could be allowed, however, because none of the properties qualifies for treatment as pre-1909 claims under state law. The property was all previously part of the Klamath Indian Reservation. It was allotted to various individual members of the tribe in 21 separate parcels. Those allotments were confirmed to their original allottees in March 1910.

While it is possible that the land was subject to use by the tribe as a whole, or members of the tribe, it was held, so far as the evidence shows, in the tribal equivalent of the public domain, and not held exclusively by any tribal members before the allotments were confirmed in 1910. Even the evidence of the use by the Tribe is scant, and not sufficiently specific to determine the extent of the use, or which properties were subject to it. It has been held that harvesting of hay and other products nurtured by natural overflow of water and subirrigation of land can be sufficient water use to establish a pre-1909 appropriation. *In re Silvies River*, at 66. However, under Oregon law as it existed prior to 1909, use of water could not form the basis for a water right until it coincided with evidence of a claim of right in the land to which the water was applied. *Hough v. Porter*, 51 Or 318, 421 (1909). Since there was no claim of right in the land except by the tribe as a whole until after 1909, no pre-1909 water right can be found on the evidence in this case.

I turn now to the analysis of the specific claims. In his Ruling on United States' Motion for Ruling on Legal Issues in Klamath Case 272, Administrative Law Judge William Young stated the elements of a *Walton* claim as follows:

⁸ ORS 539.010(4) provides: "The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act (as defined in ORS 537.010) where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and in compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter."

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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 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 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.

Ruling on United States' Motion for Ruling on Legal Issues, Klamath Adjudication Case 272, August 4, 2003, at 9.

I adopt that formulation as the correct interpretation of the *Walton* line of cases.

Unlike many of the cases in the Adjudication, in this case we have the advantage of sworn statements made by a percipient witness to many of the events of significance, Oscar Kittredge. While Contestants have been able to raise questions as to the reliability of some of the other affidavits placed in this record, there is no clear evidence suggesting that Kittredge's affidavit marked as Ex. 60138 is not reliable.

To the contrary, I consider this affidavit, with limited corroboration from another Kittredge affidavit dated in 1977 and attached to the Supplemental Direct Testimony of James P. Lynch, to be of particular value for several reasons:

Kittredge was born in 1900, and was 12 years old when he came to the Klamath Marsh area. He was an adult, or nearly so, when many of the events described in his affidavits occurred. He made his affidavits in 1978 and 1979, in the course of different litigation. The *Walton* cases were not published until the mid-1980s. Thus, particularly with regard to the "successor non-Indian" rule, and the artificial diversion rule, the principles stated in the *Walton* case could not have been in the contemplation of either Kittredge or his counsel when the affidavits were produced. No parties have suggested that Kittredge's affidavits are unreliable. To the contrary, all parties have relied upon different parts of his affidavits as support for their positions.

Although both affidavits are in the record, the shorter affidavit Kittredge signed in 1979 is primarily useful in clarifying statements contained in the longer and more

detailed affidavit he prepared in 1978⁹. For example, reading the two affidavits together, it is clear that the "diversion in the Big Wire Field" mentioned in the earlier affidavit is the "Big Wire Dam" that was in existence in the 1970s.

For these reasons I have relied on Kittredge's affidavits in much of the fact-finding in this case. While there is other evidence from which inferences could be made that contradict Kittredge's affidavits,¹⁰ I am not prepared to ignore otherwise apparently reliable statements by a percipient witness in favor of possible, but not necessary, contrary inferences that could be drawn.

As discussed below, the various allotments have different histories. Those different histories control the outcome as to each parcel. Several general statements can be made, however, that control the way the various portions of the claim are analyzed.

Long Prairie Creek and Jack Creek

The only eyewitness evidence as to the construction of any diversion of water to the Mayfield properties from the Williamson River was contained in the affidavit of Oscar Kittredge, who was present in 1924 when Mayfield constructed a diversion from the Williamson River at Rocky Ford. However, that testimony does not establish that water from that diversion was ever applied the property Mayfield sold to Kittredge. Although David Shaw speculated that the diversions on Long Prairie Creek and Jack Creek would logically have been built before the 1924 diversion, the evidence is insufficient to prove this occurred. Shaw noted that "The Long Prairie and Jack Creek water supplies probably spread over much of the Mayfield place without construction of ditches and diversion facilities***." (Rebuttal Testimony of David B. Shaw at 4.) Shaw draws from this that it would be logical for diversions to be developed on these creeks before a diversion on the Williamson River, because of the comparative ease with which the creek diversions could be accomplished.

However, it is also possible that the early property owners would see no need to change the natural pattern of water dispersion if water was reaching the points at which it was needed with no additional effort by the owners. In any event, Oscar Kittredge stated in his affidavit in 1978 that at that time the former Mayfield properties were largely irrigated by overflow from Jackson Creek, a source that is not part of this claim. I find it also telling that the Kittredges, who had acquired the Mayfield property by 1930, did not include that property in the application

⁹ The Department has noted that there appear to have been some alterations in this exhibit after it was signed, and questions its reliability. (cf. Oregon Water Resources Department's Response to Robert Cook and TPC, LLC's Motion to admit Exhibit 160E00060129 through 160E00060138**** dated August 27, 2004) In view of the points the Department has made, I have treated this document with some care. However, the only portion for which it was considered is a list of dams contained on the same page as Kittredge's notarized signature, which seems sufficiently reliable to merit consideration.

¹⁰ For example, the Big Wire Dam is located in a parcel that was owned by Logan Pompey in 1918, the year Kittredge says his father built the dam. It could be inferred from this that Kittredge was mistaken, and the dam was built after 1923, when William Kittredge bought the property. This is not a necessary inference, though, as there are other explanations possible. William Kittredge, after all, leased a number of Indian allotments in the area, and, as his son put it "the water development had been instigated on many of the allotments prior to the date of actual acquisition of title and while the same were under lease." (Ex. 60138 at 6.)

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for a water right with a 1930 priority. One would suppose that if water was being applied by the Kittredge family through an artificial diversion by that time, the property would have been included in the certificate.

On this record it is not possible to determine when the diversions on Long Prairie and Jack Creek were constructed. It is therefore not possible to determine whether those diversions were constructed before the property transferred to the second non-Indian owner. Even if it were found that the diversions were developed before transfer to the second non-Indian owner, it would not be possible to quantify the various diversions, given that, as noted above, the property was largely watered by overflow from a source that is not subject to this claim, and the amount of water attributable to each stream has never been established. Consequently, I have concluded that those parts of the claim where the point of diversion is on Jack Creek and Long Prairie Creek cannot be allowed as a *Walton* right.

Combined Flows: Jack Creek, Long Prairie Creek, Return Flow

Part of the claim is based on a combination of water from Jack Creek, Long Prairie Creek, and return flow diverted from the Williamson River by an upstream user. I am not convinced that a claim based on return flow is allowable in this adjudication in any event. Even if such a claim could be allowed, however, the evidence in this case is not sufficient to establish one. As discussed above, the claimed diversion from Jack Creek and Long Prairie Creek cannot be allowed. Claimants have not provided evidence from which it could be determined how much of the combined flow can be derived from each source. Without that information, the amount of return flow claimed cannot be quantified. This part of the claim cannot be allowed.

Big Wire Dam and Reasonable Diligence

Contestants argue that, absent evidence of special circumstances, the correct measurement of due diligence would require irrigation to have been developed within five years of the acquisition of the property by the first non-Indian owner. Contestants also argue that this five-year period should be found to end on the priority date of Kittredge's water right certificate, April 16, 1930. In this case, Contestants' position would require me to disallow a *Walton* right as to all properties that Kittredge acquired before April 16, 1925, since Kittredge could not be found to have developed the irrigation with reasonable diligence as to those parcels.

While a five-year rule might be a useful rule of thumb, no rule or statute requires it. To the contrary, the only governing rule on the subject, OAR 690-028-0045(1) defines reasonable diligence as: "that which is usual and ordinary with persons performing similar projects." Such a determination must be made on a case-by-case basis. OAR 690-028-0045(2). Contestants' argument assumes that the "reasonable diligence" standard should be applied to each allotment separately without regard to its context. As each allotment was acquired, it became but part of a much larger property, for which an irrigation system was being constructed. Oscar Kittredge stated in his affidavit that William Kittredge built the Big Wire Dam in 1918, and began moving water into ditches behind the dam soon thereafter. Since the Big Wire Dam was one of the Points of Diversion noted in the 1930 Water Right Permit, it is apparent that Kittredge was developing his irrigation system well before 1930. Thus, 1930 is not the appropriate bench-mark from which to measure reasonable diligence in developing the irrigation system on these properties. To the contrary, 1930 would better be treated as the end-point, by which at least the

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basic outlines of the irrigation system had been completed. Considering the extensive system of ditches that was constructed between 1918 and 1930¹¹, it is not surprising that it would take 12 years to complete. The gauge of reasonable diligence for a system as extensive as that involved here could logically be considerably longer than five years. Considering the property as a whole, I conclude that 12 years was a reasonable time in which to construct the irrigation system, and that William Kittredge exercised reasonable diligence in doing so.

I turn now to the several allotments.

Allotment 54

Of this portion of the claim, 28.8 acres are based on a diversion from Jack Creek. For the reasons discussed above, the evidence is insufficient to establish a *Walton* claim for water diverted from Jack Creek. However, the Contestants conceded that the portion of the claim (57.5 acres) diverted from the Williamson River was allowable as a *Walton* claim, since William Kittredge, the first non-Indian owner, acquired the property less than five years before the approved priority date on a water permit Kittredge was later granted. Although Kittredge's permitted right was for 67.1 acres, only 57.5 acres was claimed from the Williamson River in this proceeding, so only 57.5 acres can be allowed.

Allotment 153

This portion of the claim is based on diversion of the combined flow of Jack Creek, Long Prairie Creek, and return flow from an upstream user. As discussed above, a diversion from this combined source cannot be allowed as a *Walton* right. In any event, there is no evidence of a diversion prior to conveyance out of Indian ownership, and it is unlikely that a diversion was constructed in the seven months between George Mayfield's acquisition of the property and his transfer to William Mayfield in April 1924. The evidence does not support a finding of development before transfer to the second non-Indian user, or continuous use of the water thereafter. No *Walton* right exists respecting this allotment.

Allotment 158

In 1920 this property was described as having no ditch. It is unlikely that irrigation was developed in the three months between acquisition by J.W. McCoy, the first non-Indian owner, and transfer to George Mayfield, the second non-Indian owner. There is no evidence that J.W. McCoy constructed any diversions. Although Mayfield is recorded as having constructed diversions in this area, he was the second non-Indian owner, so any irrigation he developed would not qualify for treatment under a *Walton* claim. No *Walton* right can be found on this record.

Allotment 154

There is no clear evidence that Charles Pitcher constructed any diversion facilities in the area. The earliest record of a diversion by George Mayfield was in 1924, and this was from the Williamson River, not the source claimed here. In any event, Mayfield was the second non-Indian owner of the property. The record will not support a *Walton* right.

¹¹ I take judicial notice that a section is composed of one square mile. (*Webster's Third New International Dictionary* (1986) at page 2052) The allotments are spread over several sections. Consequently, the ditches required to irrigate the several allotments would span several miles in length.

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Allotment 264

As in the case of Allotment 158, there is no evidence that the first non-Indian owner constructed any diversions on this property in the three months before George Mayfield, the second non-Indian owner, acquired it. Moreover, the claimed sources, Jack Creek, Long Prairie Creek, and combined water with return flow from an upstream user, cannot form the basis of a *Walton* right, as discussed above. No *Walton* right can be found.

Allotment 156

The circumstances of this allotment are similar to those for Allotment 153. There is no evidence that the claimed sources of the water, Jack Creek and Long Prairie Creek, were developed before the property was transferred to William Mayfield, the second non-Indian owner. No *Walton* right can be found.

Allotment 157

As in the case of Allotment 154, there is nothing in the record suggesting that the first non-Indian owner, in this case A.C. Beal, ever constructed any diversion facilities. While George Mayfield is known to have done so, he was the second non-Indian owner, so any development he might have done would not qualify for a *Walton* right. Moreover, the sources of this water, the combined flow of Jack Creek, Long Prairie Creek, and return flow, will not support a *Walton* right.

Allotment 265

Again, the claimed source of water, Long Prairie Creek and Jack Creek, has not been shown to have been developed before George Mayfield, the second non-Indian owner, acquired this property.

Allotment 152

Like Allotment 153, George Mayfield acquired this property in April 1924, and transferred it to William Mayfield in November of the same year. As the claimed source is Jack Creek, Long Prairie Creek, and return flow, and there is no evidence for development of these sources as early as 1924, no *Walton* right can be found.

Allotment 18

Of this portion of the claim, 14 acres are based on a diversion from Jack Creek. However, the evidence is not sufficient to establish when water was diverted from Jack Creek, or whether that portion of the claim was developed with reasonable diligence.

As to the remainder of the claim, William Kittredge built the Big Wire Dam in 1918. That dam is currently located in this allotment. While Kittredge acquired the property seven years before he obtained a Water Right Certificate including it, this does not establish that the irrigation system of which the Big Wire Dam was a part was not developed with reasonable diligence. It is likely that Kittredge would have applied water to the land closest to the dam as soon as he acquired title, if not before. A *Walton* right in 101.2 acres irrigated from the Williamson River should be allowed. However, that portion of the claim from Jack Creek should not be allowed, as the evidence does not show when the diversion was constructed.

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Allotment 20

This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930. As discussed above, 12 years was a reasonable amount of time in which to have built such an extensive system. A *Walton* right in 128.1 acres, the amount developed with reasonable diligence by 1930, should be allowed. The remaining 1.5 acres should not be allowed, as the evidence does not show that it was developed with reasonable diligence.

Allotment 52

While William Kittredge is known to have constructed a diversion on the Williamson River as early as 1918, and may have had some interest in this property in 1917 when he made a payment on behalf of Alex Davis, the first non-Indian owner, the evidence does not show that water was applied to this property prior to Kittredge's obtaining title in 1922 as the second non-Indian owner. Unlike the case of Allotment 18, where it is known that Kittredge constructed works on the parcel before he acquired title to it, the record is silent as to the development of irrigation on this parcel while in another non-Indian's title. A *Walton* right should not be allowed.

Allotment 53

Irrigation of this allotment was developed between 1918 and 1930 as part of the system William Kittredge constructed during that period. A *Walton* right should be allowed for 148.4 acres, the amount claimed.

Allotment 78

William Kittredge was the second non-Indian owner of this parcel. There is no evidence that George Mayfield, the first non-Indian owner, developed irrigation to the property in the two months before he transferred it to Kittredge. A *Walton* right should not be allowed.

Allotment 174

The circumstances of this allotment are similar to those of Allotments 18, 20 and 53. Likewise, a *Walton* right should be allowed for 159.8 acres, the amount claimed.

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Allotment 24

The circumstances of this allotment are similar to those of Allotments 18, 20, 53 and 174. Likewise, a *Walton* right should be allowed for 52.7 acres, the amount allowed in Kittredge's 1930 water permit. The remainder should not be allowed, as it has not been shown to have been developed with reasonable diligence.

Allotment 25

There is no evidence that irrigation was developed on this property by its Indian owners. Nor is there evidence that A.A. Bellman, the first non-Indian owner, developed irrigation on this property in the three days before he transferred the property to Charles Worden. A *Walton* right should not be allowed.

Allotment 77

Like Allotment 174, a *Walton* right should be allowed in 65.6 acres, the amount claimed.

Allotment 75

At hearing, Contestants conceded that a *Walton* right existed for water to this parcel from the Williamson River. A *Walton* right should be allowed in 105.8 acres, as claimed.

Allotment 173

Because of a break in the chain of title, the identity of the first non-Indian owner cannot be determined. While it is possible that the Wilsons were the first non-Indian owners, there is no evidence that the Wilsons developed irrigation to the property before it was transferred to William Kittredge in 1931. A *Walton* right should not be allowed.

Allotment 21

Like Allotment 24, a *Walton* right should be allowed in 66.5 acres, the amount allowed to William Kittredge in 1930. The remaining 4.5 acres should not be allowed, as not shown to have been diligently developed.

Neither party addressed the question of livestock watering. These allotments were used for grazing well before transfer out of Indian ownership, and have been either grazed or cut for hay ever since. There is ample support for the livestock watering portion of this claim.

ORDER

I propose that the Adjudicator issue the following order:

Claim 9 is allowed in part as follows:

Stock Water for 2400 head of cattle, between March 1 and October 31.

Irrigation use as follows:

Season of Use (all parcels): March 1 to October 31.

Purpose of Use (all parcels): Irrigation
Source: Williamson River, a tributary to Upper Klamath Lake.
Priority Date: (all parcels) October 14, 1864

Allotment 54

Rate: 0.72 cfs
Duty: 201.25 acre-feet
Acres: 57.5
Place of Use: S $\frac{1}{2}$ S $\frac{1}{2}$ Section 8, T 30 S, R 10 E.W.M.
Point of Diversion: NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M.

Allotment 18

Rate: 1.27 cfs
Duty: 354.2 acre-feet
Acres: 101.2
Place of Use: NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M.
Points of Diversion: Two, both located in NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M.

Allotment 20

Rate: 1.6 cfs
Duty: 448.35 acre-feet
Acres: 128.1
Place of Use: SW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M.
Point of Diversion: NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M.

Allotment 53

Rate: 1.9 cfs
Duty: 519.4 acre-feet
Acres: 148.4
Place of Use: NW $\frac{1}{4}$ Section 17, T 30 S, R 10 E.W.M.
Point of Diversion: NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M.

Allotment 174

Rate: 2 cfs
Duty: 559.3 acre-feet
Acres: 159.8
Place of Use: SE $\frac{1}{4}$ Section 17, T 30 S, R 10 E.W.M.
Point of Diversion: NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M.

Allotment 24

Rate: 0.66 cfs
Duty: 184.45 acre-feet
Acres: 52.7
Place of Use: E $\frac{1}{2}$ NE $\frac{1}{4}$ Section 18, T 30 S, R 10 E.W.M.
Point of Diversion: NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E.W.M.

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Allotment 77

Rate: 0.82 cfs
Duty: 229.6 acre-feet
Acres: 65.6
Place of Use: E ½ SE ¼ Section 18, T 30 S, R 10 E.W.M.
Point of Diversion: NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M.---62 acres
SW ¼ SE ¼ Section 18, T 30 S, R 10 E.W.M.---3.6 acres

Allotment 75

Rate: 1.32 cfs
Duty: 370.3 acre-feet
Acres: 105.8
Place of Use: NE ¼ Section 19, T 30 S, R 10 E.W.M.
Point of Diversion: NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M.

Allotment 21

Rate: 0.83 cfs
Duty: 232.75 acre-feet
Acres: 66.5
Place of Use: NW ¼ Section 21, T 30 S, R 10 E.W.M.
Point of Diversion: NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M.

Total allowed claim

Rate: 11.07 cfs
Duty: 3099.6 acre-feet
Acres: 885.6
Places of Use:
S ½ S ½ Section 8, T 30 S, R 10 E.W.M.
NW ¼ Section 16, T 30 S, R 10 E.W.M.
SW ¼ Section 16, T 30 S, R 10 E.W.M.
NW ¼ Section 17, T 30 S, R 10 E.W.M.
SE ¼ Section 17, T 30 S, R 10 E.W.M.
E ½ NE ¼ Section 18, T 30 S, R 10 E.W.M.
E ½ SE ¼ Section 18, T 30 S, R 10 E.W.M.
NE ¼ Section 19, T 30 S, R 10 E.W.M.
NW ¼ Section 21, T 30 S, R 10 E.W.M.

Points of Diversion:


NW ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M.
SW ¼ SE ¼ Section 18, T 30 S, R 10 E.W.M.
NE ¼ NW ¼ Section 16, T 30 S, R 10 E.W.M.

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The remaining portions of the claim should be denied.



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

Dated: January 19, 2007

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Administrative Law Judge. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Proposed Order.

Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dwight W. French, Adjudicator
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2007, I sent by electronic and first class mail a true copy of the following: **PROPOSED ORDER**, to all parties by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Dwight W. French / Teri Hranac
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
dwight.w.french@wrд.state.or.us
teri.k.hranac.wrd.state.or.us

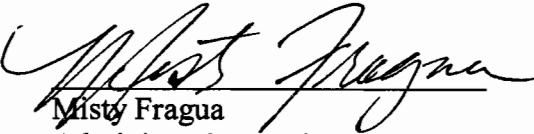
Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624
Phone: 541-783-3081
Fax: 541-783-2609
bullman@earthlink.com

Bruce D. Bernard
United States Dept. of Justice
Environment & Natural Resources Division
1961 Stout Street – 8th Floor
Denver, CO 80294
Phone: 303-844-1361
Fax: 303-844-1350
bruce.bernard@usdoj.gov

Laura A. Schroeder
Schroeder Law Offices, P.C.
PO Box 12527
Portland, OR 97212
Phone: 503-281-4100
Fax: 503-281-4600
counsel@water-law.com

Carol DeHehaven Skerjanec
Attorney at Law
PO Box 220
Vale, OR 97918
Phone: (541) 473-3141
Fax: (541) 473-2651
Skерjanec@valelawyers.com

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-378-4500
Fax: 503-378-3802
Jesse.d.ratcliffe@doj.state.or.us


Misty Fragua
Administrative Assistant

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