

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

Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company, Enterprise Irrigation District; Klamath Hills District Improvement Co. ; Malin Irrigation District; Midland District Improvement Co.; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC;	AMENDED PROPOSED ORDER
Contestants	Case No. 260
	Claim: 79
	Contests: 4 and 3470 ¹

vs.

Rodney N. Murray;
Claimant/Contestant.

This AMENDED PROPOSED ORDER is issued pursuant to OAR 137-003-0655(3), and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. This AMENDED PROPOSED ORDER incorporates the Proposed Order, issued on August 22, 2003, except to the extent that it is modified as described herein. Per OAR 137-003-0655, the Oregon Water Resources Department ("OWRD") provides an explanation for any "substantial" modifications to the Proposed Order.

¹ Don Vincent voluntarily withdrew from Contest 3470 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3470 on June 24, 2002. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3470 on January 15, 2004.

A. ADDITIONAL FINDINGS OF FACT

This Amended Proposed Order makes the following findings of fact in addition to those made in the Proposed Order ("Order"):

1. On January 3, 1991, RODNEY N. MURRAY (Claimant) timely submitted a Statement and Proof of Claim (Claim 79) to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication, as a non-Indian successor to allotted Klamath Reservation lands, claiming a vested and inchoate Indian reserved water right (Walton claim) under the Treaty of October 14, 1864, 16 Stat. 707.
2. The claimed priority date is October 14, 1864.
3. RODNEY N. MURRAY signed Claim 79 attesting that the information contained in the claim is true.
4. On October 4, 1999, following investigation of the evidence submitted, the Adjudicator issued a Summary and Preliminary Evaluation of Claims (Preliminary Evaluation) stating the claim was denied because the required elements for a Walton right were not established.
5. The claimed water use was not developed at the time of transfer from Indian ownership.
6. Beneficial use of water for domestic use and irrigation of 1.0 acre began no later than 1960. (OWRD Ex. 1, pp. 33, 35.)
7. The four-year gap between transfer from Indian ownership and development of the claimed water use constitutes reasonably diligent development.
8. Because there is no evidence in the record to the contrary, the duty and limit for irrigation are based on the Department's standard, as set forth in Appendix A of the Preliminary Evaluation, being 3.5 acre feet per acre and the limit for irrigation is 1/40 cubic foot per second per acre.

Reason for Modifications: To more fully set forth the evidence in the record; to make findings relevant to the *Walton* elements as modified herein.

B. MODIFICATIONS TO THE FINDINGS OF FACT

1. Findings of Fact # 2 is modified as follows to reflect the record (additions are shown in underlined text; deletions are shown in ~~striketrough~~ text):

On May 10, ~~1959~~ 1977, Percy Murray and Rodney N. Murray filed a Notice of Intention to File a Claim with the OWRD regarding Five Mile Creek and Five Mile Springs. ~~They identified the property appurtenant to that notice as being~~ The property appurtenant to that notice is located in Township 34S, Range 13E, Section 36. They also identified the date beneficial use of water began as 1959. (OWRD Ex. 1 at 35.)

2. Findings of Fact # 4 is modified as follows to reflect the record:

There was no development on the property before two cabins were built ~~in the 1960s around 1960~~. The cabins are now ~~provided~~ providing water for domestic use and irrigation by two unnamed springs ~~for which Claim 79 was filed~~. (OWRD Ex. 1, pg 33.) Claim 79 was filed for use of water from one of the unnamed springs located within the SE¼ NE¼ , Section 36, Township 34 South, Range 13 East, W.M., for domestic use for a cabin on the east side of Fivemile Creek, and for irrigation of 1.0 acre. (OWRD Ex. 1, pgs. 1-4, 9, and 19.) Based on the Claimant's statement that beneficial use of water began in 1959, and on the statement that two cabins were built around 1960, beneficial use of water for irrigation and domestic use began no later than 1960.

Reasons for modifications: To more fully set forth the evidence in the record; to correct findings not supported by a preponderance of evidence in the record.

C. MODIFICATIONS TO CONCLUSIONS OF LAW

The Order's Conclusions of Law section is deleted and replaced with the following

1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and was allotted to Hobson Lynch, a member of the Klamath tribe. (See Order, Finding of Fact No. 1.)
2. The allotted land was transferred from allotment by the United States to the Ellingson Lumber Company, a non-Indian.
3. Under the circumstances of the case, development of the claimed water use within four years of transfer from Indian ownership constitutes reasonably diligent development.
4. The inchoate portion of a Walton water right developed with reasonable diligence after transfer from Indian ownership is entitled as a matter of law to a *Walton* water right, provided that the other elements of a *Walton* right are satisfied. If the claimed use is developed with reasonable diligence, subsequent transfers of ownership occurring during the period established for reasonable diligence do not affect the validity of the claim.

5. There is no evidence supporting a lack of continued use following development of the claimed use.
6. The elements of a *Walton* claim are established.

Reasons for modifications: The conclusions have law have been modified to reflect the modified and additional findings of fact. Reasons for modification of the findings of fact are provided in the Findings of Fact section. In addition, the conclusions of law have been modified to reflect OWRD's conclusions concerning the elements of a *Walton* rights. These conclusions are described in the Opinion section, below.

D. MODIFICATIONS TO OPINION

1. Paragraphs 1 through 5 of the Order's Opinion section are modified as follows (additions are shown in underlined text; deletions are shown in ~~striketrough~~ text):

Claim 79 is a claim for water rights for lands within the boundaries of the former Klamath Indian Reservation. Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986) (*Walton III*).

Mr. Murray had the burden of establishing the claim by a preponderance of the evidence. See ORS 539.110; ORS 183.450(2); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). ~~He did not meet his burden.~~

Elements of a *Walton* claim that must be proven include:

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

If these elements ~~had been~~ are proven, the claim ~~would have been~~ is assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.²

The only evidence in the record of this contested case was OWRD's Exhibit 1. The greater weight of the evidence established the Bureau of Indian Affairs (BIA) transferred property included in the allotment of Hobson Lynch from the United States of America to Ellingson Lumber Company on March 1, 1956. (OWRD Exhibit 1, pg. 31.) Ellingson Lumber Company sold that property to Percy and Rodney Murray on May 25, 1959. ~~With this evidence, it appears that Mr. Murray could easily have met the first two of the requirements as little additional testimony would be needed to lead to an inference that land transferred by the BIA as part of an allotment was on land formerly part of the Klamath Reservation and that the allottee was a member of an Indian tribe. The claim fails for lack of proof on the other elements.~~ This evidence establishes the first two elements of a Walton claim.

With regard to the third Walton element, there is no evidence that water use was occurring on property appurtenant to Claim 79 at the time of transfer from Indian ownership, or that water use was developed by the first non-Indian owner. To the contrary, the evidence suggests that the first non-Indian owner, Ellingson Lumber Company, bought the land for timber, logged the property, and sold it to the Murrays without making any improvements to the property. (OWRD Exhibit 1, pg. 15.) At any rate, there is no evidence suggesting that Ellingson Lumber Company developed any water use relevant to Claim 79. ~~Also, statements by Mr. Murray clearly show that there had been no development before two cabins were built in the 1960s. (OWRD exhibit 1, pg. 33.)~~

2. Paragraph 6 of the Order's Opinion section is deleted and replaced with the following:

Because the Claimant cannot establish that the claimed use was developed at the time of transfer from Indian ownership, the Claimant must establish that the claimed use was developed with reasonable diligence following transfer from Indian ownership. The Order, however, concludes that the inchoate component of a *Walton* water right must be developed with reasonable

² The Klamath Reservation was established on October 14, 1864. *Treaty between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians*, October 14, 1864, 16 stat. 707. "The priority date of Indian rights to water for irrigation and domestic purposes is 1864 [date of reservation creation] * * * For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians." *United States v. Adair*, 478 F. Supp. 336, 350 (D. Or. 1979) (*Adair I*).

diligence by the *first* non-Indian owner of the underlying property, or it will be lost to succeeding owners, regardless of the first non-Indian owner's period of ownership. (PROPOSED ORDER, dated August 22, 2003, at 5). OWRD disagrees with this conclusion, and for the following reasons concludes that as long as the inchoate portion of the right is developed with reasonable diligence, as measured from the initial transfer to a non-Indian, the inchoate right properly vests and intervening transfers to subsequent non-Indians are irrelevant.

The Order does not explain the basis for a first non-Indian owner requirement. However, in proposed orders in similar cases in the Adjudication, the requirement was based on the following statement in *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981) (*Walton II*):

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 continued use, it is lost to the non-Indian successor.

Walton II, 647 F2d at 51. Presumably, the Order reasons that the use of "he or she" in this passage is indicative of a requirement that the first non-Indian owner must develop the inchoate portion of a *Walton* right, or the right will be lost to subsequent purchasers. When considered as a whole, however, the *Walton* line of cases does not establish a first non-Indian owner requirement. Rather, the *Walton* cases borrow from western water law principles to require that the inchoate portion of a *Walton* right either be developed with reasonable diligence, as measured from the date of initial transfer to non-Indian ownership, or be lost. Because the language in *Walton II* and *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985) (*Walton III*) is not entirely clear on this issue, it is necessary to undertake a detailed review of the *Walton* line of cases, beginning with *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*).³

The district court in *Walton I* found the following facts pertaining to ownership and development of the parcels at issue:

The allotments now owned by the Waltons passed from Indian ownership in 1942. The former Indian allottees had not irrigated these lands. In 1946, this land was again sold, and although the purchaser was Indian, he was not a member of the Colville Tribes. When Walton bought the property in 1948, approximately 32 acres were under irrigation.

³ Although *United States v. Adair*, 478 F Supp 336, 348-349 (D Or 1979) (*Adair I*), *United States v. Adair*, 723 F2d 1394 (9th Cir 1983) (*Adair II*) and *United States v. Anderson*, 736 F2d 1358 (9th Cir 1984) touch on this issue, they do not add appreciably to the analysis. The following discussion focuses on the *Walton* line of cases. OWRD does note, however, that in *Adair I* the court found that "once land passes out of Indian ownership, all subsequent conveyances are subject to the doctrine of prior appropriation." 478 F Supp at 348-49. This doctrine, as commonly understood throughout the arid West, requires only that water be applied with reasonable diligence following an initial intent to appropriate, and does not require that development be completed by the initial appropriator.

Id. at 1324. The Waltons were therefore not the second non-Indian owners, but the third.⁴ Likely because the *Walton I* court concluded that water rights based on the reservation did not transfer from Indian allottees to non-Indian owners, the court did not provide a more detailed history of development.

On review, the *Walton II* court did not take issue with the above findings of fact, but reversed the *Walton I* court's determination on the issue of alienability of allottee rights. The court first found that "[t]he general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history." The court then concluded that the allottee's reserved water right would be reduced in value if the allottee could only convey the portion of the right already appropriated. The court characterized this restriction on transferability as a diminution of Indian rights requiring a clear inference of Congressional intent. Finally, the court found no Congressional intent to limit the alienability of the allottee's reserved water right. *Walton II*, 647 F2d at 50.

The court then considered specific aspects of the allottee's rights. Among them, the court found:

Third, the 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 continued 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 the Indian may convey. We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-a-vis other water users, may not retain the right to that quantity of water despite non-use.

...

The district court's holding that Walton has no right to share in water reserved when the Colville reservation was created is reversed. On remand, it will need to determine the number of irrigable acres Walton owns, and the amount of water *he* appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

⁴ The 1946 purchaser, although an Indian, is considered a "non-Indian owner" for the purposes of this analysis, because only members of the Colville Tribes were entitled to allottee status for rights arising from the Colville Indian Reservation.

Id. at 51 (Emphasis added). The *Walton II* court was aware that the Waltons were not the first, or the second, non-Indian purchasers of the parcel at issue. Had it intended to create a first non-Indian purchaser rule, the court's remand instructions would have been quite different. First, there would have been no need to determine the amount Walton appropriated with reasonable diligence. The question would have been irrelevant. Second, there would have been a maximum of 32 acres eligible for a *Walton* right. The only question would have been whether the 32 acres had been developed with reasonable diligence prior to the sale to the second non-Indian owner in 1946.

Additionally, the court's rationale for extending the allottee's reserved right to non-Indian successors was to prevent diminution of the allottee's right by restrictions on its alienability. The court viewed the imposition of a reasonable diligence requirement as a restriction on alienability that did not amount to a diminution, because the non-Indian purchaser was viewed to be on an equal footing with "other water users"- i.e., non-Indians appropriating under state water laws. The logic was that appropriations under state law were expected to be completed with reasonable diligence, so an equivalent restriction on non-Indian purchasers of allottee rights would not cause the non-Indian purchaser to discount the value of the allottee right.

If the court had established a first non-Indian owner restriction, however, it would have taken away that equal footing. A prospective non-Indian purchaser would have to discount the value of the allottee's inchoate right by the risk that the purchaser might sell the parcel prior to development, even if under state law the period of reasonable diligence would have not yet run. A first non-Indian owner rule would be a restriction on alienability that would diminish the value of the allottee's right, as compared to appropriations under state law, and run counter to the court's rationale.

Walton II thus established a requirement that water be applied with reasonable diligence after transfer to non-Indian ownership, irrespective of the number of ownership transfers during the period of reasonable diligence. Unfortunately, by referring in its remand instructions only to the acres that Walton appropriated with reasonable diligence, the court created confusion by suggesting that the actions of Walton's predecessors were irrelevant to the analysis.

As a result, on remand the district court considered its duty to determine only Walton's diligence. August 31, 1983, Memorandum Decision at 5-6 ("the Circuit is abundantly clear in its mandate: this court is to determine 'the amount of water he [Walton] appropriated with reasonable diligence.' There is no mention whatever of the weight to be accorded performance or non-performance of intervening owners....") (Attachment 1). The district court also engaged in additional factfinding. The court concluded that the parcels left Indian ownership not in 1942, but in 1921 and 1925. *Id.* at 6.

The difficulty with district court's interpretation of *Walton II* is that it would have allowed any distant purchaser of allottee lands to attain a new reasonable diligence period, regardless of the actions of his or her predecessors. If allowed to stand, this interpretation would have undermined the principle of reasonable diligence as it has been understood throughout the arid West, and granted non-Indian purchasers of allottee rights, whom the *Walton II* court had determined did not

need any special advantages, a significant advantage over non-Indians developing water rights pursuant to state law.

In *Walton III*, the circuit court corrected this error, and required that the reasonable diligence period begin running upon transfer to non-Indian ownership and *continue* running despite subsequent transfers to other non-Indians. The *Walton III* court did not, however, create a first non-Indian owner requirement.

In clarifying the Ninth Circuit's mandate to the district court, the *Walton III* court stated that "the immediate grantee of the original allottee must exercise due diligence...." The court then elaborated:

Calculating Walton's share required an investigation into the diligence with which the immediate grantee from the Indian allottees appropriated water, and the extent to which successor grantees, up to and including Walton, continued to use the water thus appropriated. Otherwise, any remote purchaser could appropriate enough water to irrigate all irrigable acreage with a priority date as of the creation of the Reservation. The reasonable diligence requirement of *Walton II* would be meaningless.

Walton III, 752 F2d at 402. From this passage, it is evident that the court's concern was to uphold the reasonable diligence principle by rejecting the district court's view that "any remote purchaser" would be entitled to a new reasonable diligence period. The court explicitly refers to the "reasonable diligence requirement of *Walton II*." A first non-Indian owner rule would not, of course, be necessary to uphold the reasonable diligence principle. All that is necessary to make a reasonable diligence rule effective is to begin measuring the diligence period with the immediate grantee from the Indian allottees, and to continue measuring the period despite any subsequent transfers. It is in this sense that "calculating Walton's share required an investigation into the diligence with which the immediate grantee from the Indian allottees appropriated water...."⁵

Creation of a first non-Indian owner rule would, on the contrary, render the reasonable diligence principle equally meaningless. Such a rule would create the possibility that, in the case of an immediate conveyance from the first to the second non-Indian owner, the period of reasonable diligence would begin and end instantaneously. This would also be at odds with "reasonable diligence" as it had been understood throughout the arid West. OWRD concludes that, after coming to the defense of the reasonable diligence principle, the *Walton III* court did not then choose to undermine it in a different manner.

Further evidence of the *Walton III* court's intent is demonstrated by its reliance on Washington state's law of reasonable diligence as a sufficient limit on development following

⁵ Under the reasonable diligence standard, an analysis of the immediate grantee's diligence in appropriating water is necessary, and depending on diligence of the immediate grantee and the length of the immediate grantee's ownership, may be dispositive.

transfer to a non-Indian. After citing to a Washington case supporting the principle of reasonable diligence,⁶ the court stated:

The tests developed to determine whether or not an appropriator has been sufficiently diligent in applying water to a beneficial use to justify relating the priority date back to the initial diversion are appropriate to determine how much water Walton's predecessors appropriated with reasonable diligence, after the passage of title.

Id. at 402.

Additionally, although there had been more than one non-Indian owner prior to Walton's purchase, the court referred to the amount of "water Walton's *predecessors* appropriated with reasonable diligence...." The court then proceeded to analyze the intent and diligence of all the non-Indian owners prior to Walton's ownership, rather than just that of the Whams, the first non-Indian owners. *See id.* at 402-03. The court concluded that the reasonable diligence period had run prior to Walton's purchase in 1948. *Id.* at 403 ("We are unable to infer an intent to appropriate an increasing amount of water from over two decades of relatively static irrigation practices"). The court's decision is based on the lack of development over a period of time, and not on the number of intervening non-Indian owners.

The Waltons requested rehearing of *Walton III*. The court denied the request and Judge Sneed wrote a concurrence to the denial. *Colville Confederated Tribes v. Walton*, 758 F2d 1324 (9th Cir 1985). In other cases where the first non-Indian owner issue has arisen, the United States has argued that Judge Sneed was recognizing the existence of, although disagreeing with, the first non-Indian owner rule. A review of Judge Sneed's concurrence shows that his disagreement was with the imposition of *any* type of reasonable diligence requirement on non-Indian successors. Judge Sneed does not mention a first non-Indian owner requirement. The concurrence states:

The opinion rejects the trial court finding that 'Walton exercised reasonable diligence in irrigating a minimum of 104 acres.' This is done on the ground that the record lacks 'sufficient evidence that the non-Indian owners preceding Walton had the requisite intent to irrigate any additional acreage.' I agree with this conclusion. I write only to point out that an Indian allottee who remains in possession of his allotment is treated much more generously. Such an allottee is entitled to sufficient water to meet his essential agricultural needs 'when those needs arise.' The full measure of his rights need not be exercised immediately. The court in *Adair* refused to extend this generous treatment to a non-Indian successor to an Indian allottee because of [*Walton II*]. The combined effect of *Walton II*, as explicated by this case, *Walton III*, and *Adair*, is to have made impossible the transfer by an Indian allottee to a non-Indian successor the full economic value of the allotment. There is a

⁶ The cited case, *Longmire v. Smith*, 26 Wash 439, 67 P 246 (1901), involved initial development by the plaintiff's predecessors and the expansion of that development by the plaintiff. The court did not restrict the scope of the right to the development accomplished by plaintiff's predecessors, but rather included within the right the plaintiff's reasonably diligent expansion.

serious question whether this properly reflects congressional intent.

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. Equal treatment of Indian allottees and non-Indian successors in interest of Indian allottees would better serve the interests of justice.

Id. (Internal citations omitted). Judge Sneed's concern was that non-Indians were not receiving "full economic value of the allotment" because non-Indians do not have the luxury of waiting to make beneficial use until the need arises: they must develop the inchoate rights with reasonable diligence. Rather than suggesting the existence of a first non-Indian owner rule, if anything the concurrence supports the opposite inference. Despite Judge Sneed's concern about the diminishment in value of the allotment, the concurrence makes no attempt to describe the additional diminishment that would occur if the non-Indian purchaser not only had to comply with a reasonable diligence requirement but also had to take the risk that the parcel would be sold without completion of development prior to the running of the reasonable diligence period.

For the above-stated reasons, OWRD concludes that *Walton II* and *III* do not create a first non-Indian owner rule. Instead, the decisions require that water be developed and applied with reasonable diligence upon transfer from Indian ownership. OWRD also concludes that *Walton II* and *III* provide a role for state law in defining reasonable diligence for *Walton* claims. In *Walton III*, the court determined that where there are not governing federal law principles, "[i]t is appropriate to look to state law for guidance." *Walton III*, 752 F2d at 400. The *Walton III* court then relied upon Washington State's law pertaining to reasonable diligence in determining Walton's claim.

In this case, the evidence shows that development of the claimed use of water occurred no later than four years following the transfer from Indian ownership. Given the facts of this case, under Oregon law this constitutes reasonably diligent development of the claim.

Finally, the Order includes the following as an element of a *Walton* claim that a claimant must prove: After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors. While "continued use" is relevant to the determination of a *Walton* claim, the ALJ's characterization of "continued use" as an *element* of a *Walton* claim is not accurate. As discussed below, once a *Walton* right has been put to beneficial use, it, like a right appropriated under state law, is subject to loss for nonuse. As is the case under state-law appropriations, contestants bear the burden of proving that the developed right has been lost by nonuse. Therefore, continuous use after development is not an element that must be proved in the first instance by a claimant, but rather an affirmative defense that a contestant may assert if the elements of the claim have been established.

Walton rights must be "maintained by continued use." *Colville Confederated Tribes v. Walton*, 647 F2d 42, 51 (1981) ("*Walton II*"). As described below, OWRD concludes that the "continued use" requirement refers to the principle that, in a prior appropriation system, water rights may be lost through nonuse. There are two standards for determining loss of a water right

through nonuse: abandonment and forfeiture. Under either standard, the burden of proof lies initially with the proponent of abandonment or forfeiture (in the case of a *Walton* claim, the contestant(s) to the claim). Abandonment is the appropriate standard for determining loss of unadjudicated water rights in Oregon. Abandonment was the common standard during the time period in which most Indian reservations were established in the area of the western states (the date of reservation is considered to be the date of appropriation, and thus the priority date, for *Walton* rights). Abandonment remains an applicable standard for determining loss of water rights in several states with prior appropriation systems. For these reasons, OWRD concludes that abandonment is the appropriate standard for determining whether a *Walton* right has been lost as a result of nonuse.

The “continued use” requirement has not been described in detail by the *Walton* cases or by subsequent decisions. In order to further define the requirement, OWRD looks to the method the *Walton* courts used in announcing the requirements of establishing and maintaining a *Walton* right.

The *Walton* decisions adopted the prior appropriation doctrine and relied heavily on state law in determining the requirements of a *Walton* right. Although *Walton* rights are federal water rights, and not dependent upon state law, the court in *Walton III* acknowledged that it looked to state law “for guidance.” *Colville Confederated Tribes v. Walton*, 752 F2d 397, 400 (1985) (“*Walton III*”). For example, the court explicitly acknowledged its reliance on state law in incorporating the principles of reasonable diligence and water duty in determining and quantifying *Walton* rights. *Id.* at 402-03. Given this reliance on state law principles in formulating the *Walton* requirements, we conclude that it is similarly appropriate to look to state law for guidance in defining the “continued use” requirement.

It is a generally accepted principle of the doctrine of prior appropriation that water rights may be lost through nonuse. Most states that apply the doctrine of prior appropriation determine nonuse based on the concepts of abandonment or forfeiture, or a combination of both. In order to find that a water right has been abandoned, “there must be a concurrence of the intention to abandon it and actual failure in its use.” *Hough v. Porter*, 51 Or 318, 434 (1909). The burden of establishing the intent to abandon and the failure of use lies with the proponent of the abandonment (in this case, the contestant(s) to the claim). *Id.* (noting the failure to establish that the water user intended to abandon the right). Intent to abandon may be inferred by the actions of the water right holder, including failure to use water over an extended period of time. *See, e.g., In the Matter of the Clark Fork River*, 902 P2d 1353 (Mont 1996).

In contrast, forfeiture is based solely on the non-use of water over a statutorily defined period of time, regardless of the intent of the water right holder. In Oregon, a rebuttable presumption of forfeiture is established “whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years.” ORS 540.610. The burden of proving the nonuse that establishes the rebuttable presumption of forfeiture lies with the proponent of the forfeiture. *Rencken v. Young*, 300 Or 352, 364 (1985). If this burden is met, the water right holder has the burden of establishing that one or more of a list of statutory excuses for nonuse applies. If the water right holder is unable to do so, the water right will be considered forfeited, and the right will be cancelled.

In Oregon, forfeiture applies to “perfected and developed” water rights. A “developed” right is one that has been applied to the intended beneficial use. *Green v. Wheeler*, 254 Or 424 (1969) defined the term “perfected” as it is used in Oregon’s Water Code. The court explained that prior to the enactment of the water code, appropriation of water was sufficient to establish a “vested” interest in the use of water. At 430. In contrast, a water right acquired under the Water Code is not “vested” until the “appropriation has been perfected.” *Id.* “Perfection,” as defined by the court, requires appropriation of water, the fulfillment of conditions specified in or authorized by the Water Code, and a determination by the Water Resources Department that the right has been perfected. *Id.* at 430-31; *see also Hale v. Water Resources Department*, 184 Or App 36, 41 (2002) (citing to *Green*, and holding that “whether an appropriation has been ‘perfected’ within the meaning of ORS 537.250(1) is expressly left ‘to the satisfaction of the department’”).

Green cited to several instances of the term “perfected” in reaching this conclusion, including ORS 537.250 and ORS 537.630. The court did not cite to ORS 540.610. There are no textual or contextual bases for interpreting “perfected,” as that term is used in ORS 540.610, differently than *Green* interpreted it.

Perfection, then, requires an administrative determination of the validity of the right. An unadjudicated right, which has not been subject to administrative determination, is not a perfected right for the purposes of ORS 540.610.

When ORS 540.610 applies, it supersedes the common-law abandonment doctrine. *Rencken v. Young*, 300 Or 352, 361 (1985). However, where a common-law doctrine has not been superseded by statute, it remains applicable. *See, e.g., Olsen v. Deschutes County*, 204 Or App 7, 13-17 (2006). Because ORS 540.610 does not apply to unadjudicated rights initiated under state law, the abandonment doctrine does.

Since *Walton* rights are federal rights, and rely upon state law for guidance only, OWRD must also determine whether it is appropriate to apply the abandonment doctrine also to unadjudicated *Walton* rights, or whether there is a compelling rationale for treating unadjudicated *Walton* rights differently than state-initiated, unadjudicated rights, and applying the forfeiture doctrine instead.

For the following reasons, OWRD concludes that abandonment is the more appropriation doctrine to be applied to unadjudicated *Walton* rights. First, it is the doctrine that is applied to unadjudicated, state-initiated water rights. Consistency with state water law principles has significant value. The court in *United States v. Anderson*, 736 F2d 1358, 1362 (9th Cir 1984), found a Congressional policy of ensuring the “full economic benefit” of the allotment to the Indian allottee. This policy provided the rationale for the decision to allow Indian allottees to transfer their water rights to non-Indians.

Non-Indian purchasers of Indian allotments would have understood *Walton* rights in terms of the benefits and conditions of state-initiated water rights. The possibility that *Walton* rights would have different, unknown benefits and restrictions would cause non-Indian purchasers of

Indian allotments to account for this risk by discounting the value of the allotment. This discounting process would interfere with the intent to provide Indian allottees with the full economic benefit of their allotments.

The second reason for applying the abandonment doctrine to unadjudicated *Walton* rights is that abandonment was the common standard during the time period in which most Indian reservations were established in the area of the western states (the date of reservation is considered to be the date of appropriation, and thus the priority date, for *Walton* rights). See 2 Waters and Water Rights § 17.03 (Robert E. Beck ed., 1991 Edition, 2001). Although the terms and conditions of water rights can be changed in certain respects after the priority date for the right, the general rule is that terms and conditions remain consistent through time.

Third, abandonment remains an applicable standard for determining loss of water rights in several states with prior appropriation systems. See 2 Waters and Water Rights § 17.03 (Robert E. Beck ed., 1991 Edition, 2001). Forfeiture is now the more common standard, but it has not entirely superseded abandonment. Given that there is no universally consistent standard for determining loss of water rights for nonuse in states following the prior appropriation system, and given the other reasons for favoring the applicability of abandonment in this context, OWRD concludes that abandonment is the more appropriate standard for determining whether an unadjudicated *Walton* right has been lost as a result of nonuse.

Finally, OWRD notes two limits on the applicability of abandonment in the context of *Walton* rights. First, abandonment is only applicable where a *Walton* right has been developed, but then suffers a period of nonuse. In cases where a *Walton* right has remained undeveloped for a lengthy period following transfer from Indian ownership, the diligent development principle, and not abandonment, will apply. Second, OWRD concludes only that abandonment applies to *unadjudicated Walton* rights. OWRD expresses no opinion as to whether abandonment or forfeiture applies following an order of determination or a decree determining a *Walton* right.

As described above, the Claimant has proven each of the elements of a *Walton* claim. The Contestants have not proven that the claimed use was abandoned after its initial development.

Reasons for modifications to the Opinion section: To set forth the appropriate legal standards for determining the validity of *Walton* water right claims; to apply these standards to the Findings of Fact; to more fully set forth the facts in the record; to make corrections to the Opinion section to make the Opinion section consistent with the Findings of Fact.

E. MODIFICATIONS TO ORDER

The “Proposed Order” section of the Order is deleted and replaced with the following:

1. A water right for Claim 79 should be confirmed as set forth in the following Water Right Claim Description:

Water Right Claim Description

CLAIM NO. 79

FOR A VESTED WATER RIGHT

CLAIM MAP REFERENCE:

OWRD INVESTIGATION MAP – T 34 S, R13 E THRU T 36 S, R 16 E (DETAIL SHEET #5)

CLAIMANT: RODNEY N. MURRAY

1945 PAINTER ST

KLAMATH FALLS, OR 97601

SOURCE OF WATER: An UNNAMED SPRING, tributary to FIVEMILE CREEK

PURPOSE OR USE:

DOMESTIC FOR ONE HOUSEHOLD AND IRRIGATION OF 1.0 ACRES

RATE OF USE:

UP TO 20 GALLONS PER MINUTE (GPM) MEASURED AT THE POINT OF DIVERSION AS FOLLOWS:

NOT TO EXCEED 10 GPM FOR DOMESTIC, AND

NOT TO EXCEED 10 GPM FOR IRRIGATION

DUTY:

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

LIMIT:

1/40 CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE:

Use	Period
Domestic	February 1 - November 30
Irrigation	May 1 - October 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q
34 S	13 E	WM	36	SE NE

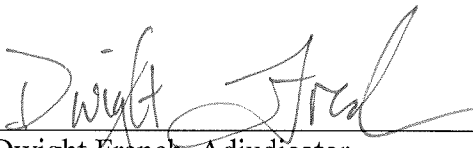
THE PLACE OF USE IS LOCATED AS FOLLOWS:

DOMESTIC				
Twp	Rng	Mer	Sec	Q-Q
34 S	13 E	WM	36	SE NE

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	13 E	WM	36	SE NE	1.0

Reasons for modifications to the Order section: To reflect the modifications made to the Findings of Fact, Conclusions of Law and Opinion sections.

Dated at Salem, Oregon on July 21, 2011


 Dwight French, Adjudicator
 Klamath Basin General Stream Adjudication

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

EXCEPTIONS: Parties may file exceptions to this Amended Proposed 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 contained within this Amended Proposed Order. 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 Amended Proposed 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 Amended Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

**Dwight French, Adjudicator
 Oregon Water Resources Department
 725 Summer Street NE, Suite A
 Salem, OR 97301**

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2011, I mailed a true copy of the following: AMENDED PROPOSED ORDER, by first class mail with first class postage prepaid thereon, and addressed to:

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