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

United States of America; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC; Contestants	**AMENDED PROPOSED ORDER** Case No. 248 Claim: 279 Contests: 3558[1], 3815, and 4209[2]

vs.

Ambrose McAuliffe; Susan McAuliffe;
Claimants.

After fully considering the entire record, the Adjudicator issues this AMENDED PROPOSED ORDER pursuant to OAR 137-003-0655(3). This AMENDED PROPOSED ORDER modifies the PROPOSED ORDER issued on February 20, 2007 by Administrative Law Judge Maurice L. Russell, II, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. Modifications to the PROPOSED ORDER are shown as follows: additions are shown in underlined text; deletions are shown in ~~strikethrough~~ text. Per OAR 137-003-0655, OWRD provides an explanation for any "substantial" modifications to the PROPOSED ORDER.

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[1] Don Vincent voluntarily withdrew from Contest 3558 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contest 3558 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3558 on January 15, 2004.

[2] The Klamath Tribes voluntarily withdrew Contest 4209. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST (August 3, 2004).

HISTORY OF THE CASE

THIS PROCEEDING under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

This claim was originally filed on January 31, 1991 by Paul Wilson as a claim by a Klamath Indian Allottee for a water right, including acreage under irrigation and sufficient water to irrigate additional land as "practicably irrigable acreage" (PIA). Subsequently, Claimants Ambrose McAuliffe and Susan McAuliffe purchased the property. Claimants seek a water right as non-Indian successors to a Klamath Indian Allottee, claiming an amount of water put to beneficial use prior to transfer from Indian ownership, as well as sufficient water to irrigate the allotment's share of the Tribe's PIA[3] as to additional property. This *Walton* claim is for 174.8 acre-feet of water for irrigation of approximately 26.2 acres presently irrigated, an additional. 19.9 practicably irrigable acres (PIA) of land, and for livestock use for 20 head of cattle. The claimed period of use is March 1 through October 16 for irrigation, and year-round for livestock. Crooked Creek is the only claimed source of water. (OWRD Ex. 1 @ 16-21, 47, 58, 66.) The claimed point of diversion from Crooked Creek, tributary to Wood River, is located within the SW ¼ NE ¼, Section 26 T33S R 7½ E, W.M. (*Id.*; OWRD Ex. 1 at 17)

Oregon Water Resources Department (OWRD) issued its preliminary evaluation of the claim on October 4, 1999, preliminarily denying the claim.

Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC; (hereinafter collectively called Klamath Project Water Users or KPWU) filed Contest 3558 on May 8, 2000. The United States of America filed Contest 3815 on May 8, 2000. Klamath Tribes filed Contest 4209 on May 8, 2000 as well, but this contest was subsequently withdrawn.

On November 29, 2005, Claimants and the United States entered into ~~a stipulation~~ the STIPULATION BETWEEN AMBROSE MCAULIFFE, SUSAN MCAULIFFE, AND THE UNITED STATES AND WITHDRAWAL OF CONTEST BY THE UNITED STATES ("Stipulation"), whereby the United States agreed to withdraw Contest 3815 in return for an agreement from Claimants as to maximum rate and duty to be allowed. The Stipulation is part of the record of this proceeding.

This matter came on for hearing on December 19, 2005, before Administrative Law Judge Maurice L. Russell, II. Claimants Ambrose and Susan McAuliffe appeared through their counsel, Ronald Yockim. Contestant the United States of America appeared through its attorney, Larry A. Brown. Contestant KPWU appeared through attorney Jacqueline L. McDonald. The

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

Oregon Water Resources Department appeared through Jesse Ratcliffe, Assistant Attorney General.

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 Ambrose W. McAuliffe
Direct Testimony of Douglas E. Atkins

Prior to the hearing, Claimants' attorney Ron Yockim filed a corrected exhibit list, correctly listing the exhibits that Claimants offered in evidence. This offer was accepted and the exhibits therein listed were admitted into the record. Those exhibits were Exhibits AMc2 through AMc55, AMc94 through AMc96.

Contestant KPWU objected on relevancy grounds to Exhibits AMc5, AMc9, AMc11, AMc13 through AMc20, and AMc21. After argument, however, KPWU withdrew its objection, and these exhibits were admitted subject to consideration as to weight. The record closed on the date of the hearing.

ISSUES[4]

1) Whether there is sufficient evidence to support the right claimed.

2) Whether the required elements are established for an Allottee [now *Walton*] water right with a priority date of October 14, 1864.

3) Whether the claimed source was previously adjudicated and Claimants present issues that can be legally redetermined.

FINDINGS OF FACT

1) For all allowed water rights for irrigation <u>from Crooked Creek</u> in Claim 279, the rate is <u>0.78 cfs, limited to</u> 1/40th cubic foot per second (cfs) per acre <u>for 31.4 acres.</u> For a portion of the property (26.2 acres) the <u>d</u>uty for irrigation is 3.5 acre feet per acre per year. For the remainder of the allowed irrigation acres, <u>being 5.2 acres originally claimed as PIA</u>, the <u>d</u>uty is 3.1 acre-feet per acre per year. The <u>p</u>eriod of <u>u</u>se for irrigation is March 1 through October 16. For livestock watering, the rate is 240 gallons per day <u>from Crooked Creek for 20 head of livestock</u>, the <u>d</u>uty is 0.3 acre-feet per year, and the period of use is January 1 through December 31. For all uses the priority date is October 14, 1864. (Stipulation between Ambrose McAuliffe, Susan McAuliffe,

[4] Other issues were originally raised in this case, but as the parties that presented them have withdrawn their contests, the issues are no longer before me and will not be discussed.

and the United States and Withdrawal of Contest by the United States at 2, 3.)[5] (hereafter "Stipulation")

2) This property was first allotted to Mary Wilson, a Klamath Indian, as Allotment No. 96. It is composed of the W½ of the NE½ and the E½ of the NW½ of Section 35, T33S, R7½ E, W.M. originally totaling 160 acres. (OWRD Ex. 1 at 30.) Prior to the claim, a portion of the property was transferred, resulting in a total parcel subject to this claim of 59 acres. (*Id.* at 14.) The property remained in Indian ownership until 2001. (Direct Testimony of Ambrose McAuliffe at 2.) Of this parcel, 26.2 acres were being irrigated while the property was in Indian ownership.

3) On March 14, 2001 Myona Wilson, widow of Paul Wilson and last Indian owner of the property, transferred the property by deed to Will J. McAuliffe, the present Claimants' son, for $110,000. (*Id.* at 92.) Will J. McAuliffe transferred the property the same day, March 14, 2001, to his parents, by a deed reciting consideration for the transfer as "Love and Affection." (OWRD Ex. 1 at 94.) In purchasing the property from Myona Wilson, Will J. McAuliffe was acting as agent for Ambrose McAuliffe and Susan McAuliffe, his parents, who supplied the consideration for the purchase of the property. (Direct Written Testimony of Ambrose McAuliffe at 2.)

4) Subsequent to their purchase of the property, between 2001 and 2005, Claimants developed irrigation works for an additional 15.5 acres (which were originally claimed as PIA) on the property. (Direct Testimony of Ambrose McAuliffe at 4, 5.) A portion of the additional acreage, 5.2 acres, is irrigated from the diversion point on Crooked Creek noted above. (*Id.*) The remainder, 10.3 acres, is irrigated from a diversion point on Fort Creek, located in the SW¼ NW¼ Section 26, T33S, R7½ E,W.M. (*Id.*) All irrigation works for the claimed property were in place by the end of 2005. (*Id.*) McAuliffe testified that " I initially designed the system to pump the water out of Cooked Creek, however, in discussing the matter with my neighbors they preferred that I take the water out of the Fort Creek for most of the PIA lands [for Claims 242 and 279]." An invoice dated 11-29-2002 reflects the installation of the intake and pump at Fort Creek. (*Id.*)

Reason for modifications: To more fully set forth the evidence in the record.

CONCLUSIONS OF LAW

1) With the exception of 10.3 acres of PIA developed with water from Fort Creek, ~~T~~there is sufficient evidence to support the right claimed.

2) The required elements are established for a water right with a priority date of October 14, 1864.

[5] Although KPWU was not a party to this Stipulation, it relied upon it's enforceability in its argument, and did not contest the rate and duty. Consequently, the rate and duty for the allowed portions of the claim are those agreed upon in the Stipulation.

3) The claimed source was not previously adjudicated as to this parcel[6].

Reasons for modifications to the Conclusions of Law section: 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* right and the permissibility of claim amendments. These conclusions are described in the Opinion section, below.

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.

This case was originally a claim based upon ownership by a Klamath Indian Allottee. In 2001, however, the property was transferred to a non-Indian. Consequently, the claim is to be analyzed as a claim by a non-Indian successor to an Indian owner, also called a *Walton* right, after the line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985). 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:

> 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.

[6] No evidence was presented on this issue, and no argument raised at closing. Consequently, the issue is resolved against Contestant, which had the burden of proof. ORS 183.450(2)

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

~~I adopt~~ With the following modifications to Items 4 and 5, that formulation is adopted as the correct interpretation of the *Walton* line of cases~~.~~:

4. The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that ~~the additiona~~l 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.~~

The reasons for these modifications are described as follows.

Development of Water Use Following Transfer from Indian Ownership

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 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. 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 Case 272, and in other 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*).[7]

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.

Id. at 1324. The Waltons were therefore not the second non-Indian owners, but the third.[8] 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.

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[7] 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.

[8] 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.

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.

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 fact-finding. 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…."[9]

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 transfer to a non-Indian. After citing to a Washington case supporting the principle of reasonable diligence,[10] 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.

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9 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.

10 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.

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 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.

"Continued Use" of Water Following Transfer from Indian Ownership and Reasonably Diligent Development

The Order concludes that a *Walton* claimant must prove the following element to establish a *Walton* right: 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* intepreted 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 conclude 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.

Walton Elements as Applied to the Facts in this Case

KPWU argues that the claim should be limited to the amount agreed upon in the Stipulation. ~~Since~~ Claimants agreed to the Stipulation, and KPWU does not object to its terms, except in one particular to be discussed later~~,~~. ~~and since, for the most part,~~ except for the irrigation of 10.3 acres from Fort Creek, ~~the terms of the Stipulation are congruent with the claim as proven by evidence, this issue is resolved by allowing the claim in the amount specified in the Stipulation.~~ With one exception, the terms of the Stipulation are supported by the evidence. The evidence shows that 10.3 acres are being irrigated from Fort Creek, which was not claimed as a source of irrigation water. As described below, these 10.3 acres are denied because use from Fort Creek was not properly claimed, and because the period for reasonably diligent development of these acres from the properly claimed source (Crooked Creek) has passed. The claim is otherwise allowed as specified in the Stipulation.

~~However,~~ KPWU ~~also~~ argues that 15.5 acres claimed were not developed by the last Indian owner or the first non-Indian owner. Since the property was first transferred to Will McAuliffe, KPWU argues, the current claimants, who developed the irrigation on the 15.5 acres at issue, are the second non-Indian owners, and should not receive the benefit of the 1864 priority date for this acreage. As discussed above, to the extent that use of PIA has not been developed by an Indian allottee, use must be developed with reasonable diligence after transfer of the property from Indian ownership. But there is no requirement that the use be developed by the *first* non-Indian owner.

~~In other cases in this adjudication, when an Allotment was purchased by a non-Indian and transferred to a second non-Indian a short time after, it has been held that the inchoate right to develop irrigation does not passes to the second non-Indian purchase, following the *Walton* cases noted above. However, in those cases there has been no evidence that the second transaction was not an arms-length transaction between seller and buyer. Likewise, in cases in which an entity such as a trust or partnership has acquired an Allotment from an Indian and some time later transferred the Allotment to a non-Indian who previously held an interest in the entity, no evidence has been offered that would show that the entity was holding the property for the individual the entire time.[7] In the absence of such evidence, it is inferred that the ordinary course of business has been followed, and that the entity originally acquired the property for its own account. ORS 40.135(L), (m)~~[8]

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[7] ~~See, for example, Proposed Order in Klamath Adjudication Case 272, issued December 5, 2006.~~

[8] ~~Although the Oregon Evidence code, ORS Chapter 40, is not binding in administrative proceedings, its provisions are nonetheless persuasive, and form the basis for proper inferences.~~

~~In this case, however, contrary evidence is to be found in the record. Will McAuliffe, the first non-Indian purchaser of record, acquired the property as agent for his parents, who supplied the consideration and immediately took title themselves, and not for his own account. Consequently, while the title passed through Will McAuliffe to Claimants, ownership was vested in Claimants from the moment the property was transferred by the last Indian owner. *Barnes v. Eastern and Western Lumber Co.*, 205 Or 553 (1955); *John I. Haas, Inc. v. Tax Com.* 227 Or 179, 180-81 (1961). In reality, then,~~

¶ Of the 15.5 acres of PIA, Claimants were ~~the first~~ non-Indian ~~owners~~ successors of the property, and ~~developed~~ made beneficial use of water from Crooked Creek for irrigation on ~~the remaining 15.5 acres of irrigated land during that ownership~~ 5.2 acres and for livestock watering for 20 head with reasonable diligence. Irrigation with incidental livestock watering was developed on the remaining 10.3 acres from Fort Creek.

The claim filed in 1991 lists Crooked Creek as the source of water for both developed acres and PIA. There is no evidence of intent to claim use of water from Fort Creek until the submission of testimony by Ambrose McAuliffe, in November 2005. OAR 690-030-0085 prohibits "any alteration or amendment of the original claim after the period for inspection has commenced." The period for open inspection of claims in the Klamath Adjudication began on October 4, 1999. The amendment of the source of water for the 10.3 acres of PIA is untimely.[11]

Ten years have now passed since the transfer of the PIA acres from Indian ownership. Even if Crooked Creek were now developed as the source of water use for the 10.3 acres of PIA, the period for reasonably diligent development of use from Crooked Creek has passed.

With the exception of irrigation with incidental livestock watering from Fort Creek on the 10.3 acres of PIA, ~~Based upon the foregoing, I conclude that~~ the claim should be allowed according to the terms of the Stipulation.

> **Reasons for Modifications to Opinion Section**: To set forth the appropriate legal standards for determining the validity of *Walton* water right claims and the permissibility of claim amendments; 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.

ORDER

The "Order" section of the Order is deleted and replaced with the following:

[11] The amendment is also untimely under ORS 539.210, which requires that claims be filed "at the time and in the manner required by law," and that untimely claims are barred. The claim filing deadline for this claim was February 1, 1991. OWRD has interpreted ORS 539.210 to prohibit amendments to claims after the claim filing deadline that are significant enough as to constitute new, untimely claims. An attempted change in the claimed source constitutes a new claim, and is not allowed after the claim filing deadline.

1. A water right for Claim 279 should be confirmed as set forth in the following Water Right Claim Description.

2. The confirmation of a water right for Claim 279 is contingent upon the claimants submitting a map which meets OWRD's standards as described in OAR 690-310-0050, to be submitted within 60 days of the service date of this Amended Proposed Order.

Water Right Claim Description

CLAIMANT: AMBROSE W. MCAULIFFE
SUSAN J. MCAULIFFE
PO BOX 456
KLAMATH FALLS OR 97626

SOURCE OF WATER:
CROOKED CREEK, tributary to the WOOD RIVER

PURPOSE OR USE:
IRRIGATION OF 31.4 ACRES; LIVESTOCK WATERING OF 20 HEAD

RATE OF USE:
0.7804 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

0.78 CFS FROM CROOKED CREEK POD FOR IRRIGATION OF 31.4 ACRES, MEASURED AT THE POINT OF DIVERSION; AND

0.0004 CFS FROM CROOKED CREEK INCLUDING ITS DITCHES FOR LIVESTOCK WATERING MEASURED AT THE PLACE OF USE, NOT TO EXCEED 240 GALLONS PER DAY.

DIVERSION OF STOCK WATER TO THE PLACE OF USE IS LIMITED TO THAT WHICH HAS BEEN HISTORICALLY DIVERTED FOR BENEFICIAL USE AND IS REASONABLY NECESSARY TO TRANSPORT THE WATER, AND TO PREVENT THE WATERCOURSE FROM BEING COMPLETELY FROZEN WHEN TRANSPORTING WATER OUTSIDE OF THE IRRIGATION SEASON.

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

DUTY:
CROOKED CREEK POD:

3.1 ACRE-FEET PER ACRE FOR 5.2 ACRES IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

3.5 ACRE-FEET PER ACRE FOR 26.2 ACRES IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

0.3 ACRE-FEET PER YEAR FOR LIVESTOCK WATERING

PERIOD OF ALLOWED USE:

Use	Period
Irrigation	March 1 – October 16
Livestock Watering from Crooked Creek	January 1 - December 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q
Crooked Creek POD	33 S	7.5 E	WM	26	SW NE

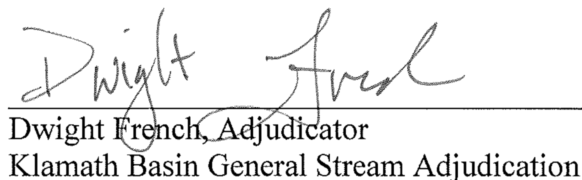
THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION and LIVESTOCK WATERING FROM CROOKED CREEK					
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**Acres**
33 S	7.5 E	WM	35	NW NE	22.3
33 S	7.5 E	WM	35	NE NW	9.1

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

IT IS SO ORDERED.

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:

Barbara Scott-Brier
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Portland, Or 97232

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