

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; 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.; Reames Golf and Country
Club; Van Brimmer Ditch Company; Plevna
District Improvement Company; Collins Products,
LLC;

Contestants

vs.

Cecil R. and Mildred K. Sommers; Nora L. Flynn;
LaVina Arlene Anderson; Robert U. Burch;
Claimants/Contestants.

**AMENDED PROPOSED
ORDER**

Case No. 83

Claim: 676

Contests: 1756 and 3563¹

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 April 2, 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.

¹ Don Vincent voluntarily withdrew from Contest 3563 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3563 on June 24, 2002. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3563 on January 15, 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 as a claim by a Klamath Indian holding parts of several allotments of land from the Klamath Indian Reservation, claiming an amount of water put to beneficial use as of the date of the claim, plus an amount of water sufficient to irrigate the allotments' share of the Klamath Tribe's "practically irrigable acreage" (PIA). At least part of the property in question was later sold to non-Indians. As to that property, Claimants Cecil R. and Mildred K. Sommers, and Claimant Nora L. Flynn seek a water right as non-Indian successors to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the allotments' share of the Tribe's PIA.² As presently stated the portion of this claim for land held by persons who participated in this case is for 3.1 acre-feet of water per acre for irrigation of approximately 156 acres of land either under irrigation while in Indian ownership or developed after the filing of the claim (60 acres for Claimant Flynn, and 96 acres for Claimants Cecil and Mildred Sommers). One other parcel subject to the original claim is held by Claimant LaVina Arlene Anderson (2 acres).³ The claimed period of use is April 26 through October 18. The claimed priority date is October 14, 1864.⁴

Claimant Anderson did not appear in these proceedings, but is shown in the record as successor to Norman Miller Anderson, the original claimant. Although the claim maps include a parcel presently owned by Robert U. Burch, the metes and bounds description of the property transferred to Norman Miller Anderson by the estate of George Anderson, a Klamath Indian, on April 4, 1973 did not include Burch's property, and describe it as having been previously conveyed by deed. (Ex. C-22.) All subsequent conveyances exclude Burch's property, as well. While the legal description of the claim in the Statement and Proof of Claim filed January 31, 1991 would seem to include it (OWRD Ex. 1 at 46), there is no evidence that Norman Miller Anderson owned Burch's property at the time he filed the claim. Therefore, Burch's property was not properly part

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

³ Claimant Anderson did not appear in these proceedings, but is shown in the record as successor to Norman Miller Anderson, the original claimant. Although the claim maps include a parcel presently owned by Robert U. Burch, and the legal description of the claim in the Statement and Proof of Claim filed January 31, 1991 would seem to include it (OWRD Ex. 1 at 46), the metes and bounds description of the property transferred to Norman Miller Anderson by the estate of George Anderson, a Klamath Indian, on April 4, 1973 did not include Burch's property, and, indeed, described it as having been previously conveyed by deed. (Ex. C-22.) All subsequent conveyances exclude Burch's property, as well. There is no evidence that Norman Miller Anderson owned Burch's property at the time he filed the claim. Therefore, Burch's property was not properly part of this claim, and will not be discussed further.

⁴ This is the priority date for all allowed Allottee or *Walton* claims, as the date on which the Klamath Indian Reservation was created by treaty.

of this claim, and will not be discussed further.

On January 31, 1991, Norman Miller Anderson, a Klamath Indian, filed Claim 676 as a Klamath Indian Allottee. Subsequently, Claimants Nora L. Flynn, Cecil R. and Mildred Sommers and LaVina Arlene Anderson acquired portions of the property. On October 4, 1999, Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation preliminarily approving the claim for a lesser quantity of water and acreage than claimed. Contest 1756 was filed in support of the Claim on May 3, 2000. 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; (hereafter collectively called Klamath Project Water Users or KPWU) filed Contest 3563 on May 8, 2000.

OWRD referred the matter for hearing to the Office of Administrative Hearings (OAH). The OAH issued a Hearing Notice on June 1, 2006. KPWU filed its Amended Statement of Contest on June 28, 2006.

A hearing was held pursuant to the hearing notice by telephone on July 11, 2006, beginning at 9:00 a.m., with Administrative Law Judge Donna Brann presiding. The following participated: Ron Yockim representing Claimants Nora L. Flynn, and Cecil R. and Mildred K. Sommers; Andrew Hitchings representing the Klamath Project Water Users (KPWU); and Jesse Ratcliffe representing the Oregon Water Resources Department (OWRD). No testimony was taken at this hearing, but evidentiary issues were discussed and resolved.

Pursuant to a schedule arrived-at during the hearing on July 11, 2006, the various participants supplemented the record with corrected exhibits and testimony, and submitted closing, response and reply briefs. The record closed on November 15, 2006.

After the record closed, the case was assigned to ~~me~~ Administrative Law Judge Maurice L. Russell, II to prepare ~~this~~ the Proposed Order issued on April 2, 2007. ~~I have~~ He reviewed the entire record, including the record of the telephone hearing and all argument, prior to preparation of ~~this~~ that order.

EVIDENTIARY RULINGS

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

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

Direct Testimony of Ronald S. Yockim, including Exhibits C-1 through C-29.⁵
Direct Testimony of John Flynn.
Direct Testimony of Cecil Sommers.
Corrected Direct Testimony of Mildred Sommers.⁶

KPWU argued that the two Natural Resource Consulting Engineers, Inc. (NCRE) reports included in OWRD Exhibit 1 as pages 3 through 17 and 68 through 88, were hearsay and, being unsigned, lacked foundation. Therefore, KPWU argued, these reports are inadmissible and may not form the basis for a determination of practicable irrigable acreage in this claim. This objection was overruled at hearing, subject to consideration of the appropriate weight to be given the documents.

ISSUES

1. **Whether there is sufficient evidence to support the right claimed.**
2. **Whether the required elements are established for an Allottee water right with a priority date of October 14, 1864.**
3. **Whether the record indicates the practicably irrigable acreage claimed or that it would be technically possible or economically feasible to develop an irrigation system to serve such acreage.**
4. **Whether there is sufficient title information to establish a *Walton* right on portions of the claimed place of use.**
5. **Whether irrigation of portions of the claimed place of use was developed by the Indian owner before the land was transferred to the first non-Indian owner.**
6. **Whether irrigation of portions of the claimed place of use was developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.**
7. **Whether irrigation of portions of the claimed place of use was developed with reasonable diligence by the non-Indian owner(s) after the first non-Indian purchaser from an Indian owner.**
8. **Whether irrigation of portions of the claimed place of use has been continuous.**

⁵ Exhibit C-29 was submitted after hearing under agreement by the participants

⁶ The Corrected Testimony of Mildred Sommers was filed after the hearing under agreement by the participants.

9. Whether the total acreage in the claimed place of use exceeds the irrigated acreage supported by the evidence.
10. Whether the irrigation season of use can be more than the season of use claimed; and whether the claimed irrigation season of use exceeds the actual season of use supported by the evidence for portions of the claimed place of use.
11. Whether the diversion rate for any lands awarded a water right should be greater than one cfs per forty acres.
12. Whether the water duty should be more than 3.5 acre-feet per acre for any part of the claimed place of use awarded a water right.
13. Whether the record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use and/or acreage claimed.

FINDINGS OF FACT

- 1) The original claim in this case was submitted for 708 acre-feet of water per year from Brown Creek and tributary springs, tributary to the Sprague River, being 47.3 acre-feet (0.28 cfs) for current irrigation for on 11.0 acres of land, 47.3 acre-feet for livestock watering of 20 head of livestock, and 660.6 acre-feet for future irrigation of 213.1 acres of PIA. (OWRD Ex. 1 at 4-7 3 - 9.) After non-Indians acquired the property, they asserted that additional acres had been diligently developed either while in Indian ownership, or soon after the property passed into non-Indian hands. (Direct Testimony of John Flynn; Direct Testimony of Cecil Sommers; Corrected Direct Testimony of Mildred Sommers.). **Reason for Modifications:** To more fully set forth the facts in the record.
- 2) ~~For all allowed water rights in Claim 676, the Rate is 0.0165 cfs/acre. (OWRD Ex. 1 at 87.)~~ The duty and rate claimed is 4.3 acre-feet per acre for 11 acres of current irrigation at a rate of 0.28 cfs, and 3.1 acre-feet of water per acre per year for irrigation of 213.1 acres of practicably irrigable acreage, with no rate specified. (Id. at 80; OWRD Ex. 1 at 3-9.) The period of use claimed for irrigation is April 26 March 1 through October 18 16. (Id. at 24 33.) The claimed priority date is October 14, 1864.⁷ Two points of diversion were claimed on Brown Creek/Ditch, being within the NE¼ SW¼, Section 14, and SE¼ NE¼, Section 15, T36S, R12 E, W.M. (Id. at 9, 29.) **Reasons for Modifications:** To correct findings of fact that were not supported by a preponderance of evidence in the record; to more fully set forth the facts in the record.
- 3) The land subject to this claim was originally two parcels composed of portions of lots

⁷ The date of the Klamath Indian Treaty, October 14, 1864, was held to be the priority date for agricultural rights reserved by that treaty in the *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).
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9, 11, 12, and 13 and all of lots 10, 14, 15 and 16, located in S½ N½ Section 15, T36S, R12E, W.M., and portions of lots 21, 27, 28, 29 and 30 and all of lots 18, 19, 20 and 22, located in SW¼ Section 14, T36S, R12E, W.M. (*Id.* at 22.) All parcels were part of the Klamath Indian Reservation and parts of allotments allotted to several different Klamath Indians. (Ex. C-2, C-11, C-12.) The parcels remained in Indian ownership until the early 1990s, after Norman Miller Anderson, the last Indian owner, had filed this claim. In 1992 Anderson sold all of the property in Section 15 to Claimant Nora Flynn, a non-Indian, except 2.2 acres that were retained by Anderson and subsequently transferred to LaVina Arlene Anderson, his wife. (Ex. C-23.) In 1993 Anderson sold all the property in Section 14 to Claimants Cecil R. and Mildred K. Sommers, also non-Indians. (OWRD Ex. 1 at 49, 55-59.) **Reason for Modification:** To correct findings of fact that were not supported by a preponderance of evidence in the record; to more fully set forth the facts in the record; to provide additional citation to the record.

- 4) Although Norman Miller Anderson was a Klamath Indian (OWRD Ex. 1 at 18), there is no evidence in the record that LaVina Arlene Anderson is also an Indian. (Ex. C-6.) There is no evidence of irrigation on the property held by LaVina Anderson.
- 5) Beginning in 1916 the Indian Irrigation Agency constructed the Spring Creek Project, including ~~the Brown Ditch~~ two canals which diverts water from springs, ~~at the head of Spring Creek.~~ The canals originate within the SW¼ Lot 9, SE¼ NE¼ Section 23, T36S R12E.W.M., and the west canal passes through both the parcels in this claim. (OWRD Ex. 1 at 120; Ex.C-28 at 5.) The west canal is also known as Brown Creek, or Brown Ditch. It begins at the confluence of Spring Creek and Mineral Creek located within Lot 10, SW¼ NE¼, Section 23, T36S, R12 E, W.M. (OWRD Ex. 1 at 31.) The ~~ditches were~~ west canal was completed through both parcels by 1920. (Ex. C-25 at 4, 8; and Ex. C-28 at 5.) **Reasons for Modifications:** To correct findings of fact that were not supported by a preponderance of evidence in the record; to more fully set forth the facts in the record; to provide additional citations to the record.
- 6) At the time Nora Flynn purchased the property in Section 15 in 1993, pipes were in place in the Brown Ditch to allow irrigation of the property. Although this system was in disrepair, Flynn's son, John Flynn, repaired the system and irrigated 60 acres between the Brown Ditch and a railroad track the first year. This property has ~~been~~ continued to be irrigated continuously since that time. (Direct Testimony of John Flynn.) These 60 acres are located in the following quarter-quarters within Section 15, T36S, R12E, W.M.: 9.7 acres within the SW¼ NE¼ , 9.3 acres in the SE¼ NE¼, 17.4 acres in the SW¼ NW¼ , and 23.6 acres in the SW¼ NW¼. (Direct Testimony of John Flynn; OWRD Ex. 1 at 9.) The only evidence of an appropriate rate of diversion for these acres comes from OWRD's Appendix A to the Preliminary Evaluation. (OWRD Ex. 1 at 211.) **Reason for modifications:** To more fully set forth the facts in the record.
- 7) At the time Cecil and Mildred Sommers purchased the property in Section 14 in 1992,

11 acres were irrigated from the Brown Ditch. Five acres were ~~watered~~ irrigated by a springs located in the northwest corner of ~~on~~ the Sommers' property. Anderson had also irrigated 80 acres with a tractor-mounted pump. Claimants Sommers continue to irrigate the 11 acres from Brown Ditch but have not irrigated the 80-acre parcel since 1992. Since purchasing the property, the Sommers have continued to irrigate the 5 acres that are irrigated from the springs. It is unclear whether the five acres are watered by natural flow from the springs or has been diverted. The evidence does not include a description of any diversion works. (Direct Testimony of Cecil Sommers; Corrected Direct Testimony of Mildred Sommers.) The only evidence of an appropriate rate for the 5 acres currently irrigated from the springs comes from OWRD's Appendix A to the Preliminary Evaluation. (OWRD Ex. 1 at 211.) **Reasons for Modifications:** To correct findings of fact that were not supported by a preponderance of evidence in the record; to more fully set forth the facts in the record.

- 8) Although Norman Miller Anderson grazed 20 head of cattle on the property (OWRD Ex. 1 at 3), there is no evidence of use of water for livestock since he sold the property in 1992 and 1993.

CONCLUSIONS OF LAW

1. **There is sufficient evidence to support some of the right claimed.**
2. **The required elements are not established for an Allottee water right with a priority date of October 14, 1864.**
3. **While the record indicates the practicably irrigable acreage claimed, only 65 acres much of that acreage has not been diligently developed with reasonable diligence since passage of the property from Indian ownership, to non-Indian ownership.**
4. **There is sufficient title information to establish a *Walton* right with a priority date of October 14, 1864 on portions of the claimed place of use.**
5. **Irrigation of portions of the claimed place of use was developed by the Indian owner before the land was transferred to the first non-Indian owner.**
6. **Irrigation of portions of the ~~claimed~~ place of use originally claimed as PIA was developed with reasonable diligence by ~~the first non-Indian owners after purchaser~~ from an Indian owner.**
7. **~~The first Non-Indian purchasers from an Indian owners~~ remain in title to the property.**

8. ~~Irrigation has continued on~~ of portions of the claimed place of use. has been continuous.
9. The total acreage in the claimed place of use exceeds the irrigated acreage supported by the evidence.
10. The irrigation season of use cannot be more than the season of use claimed, being March 1 to October 16; and the claimed irrigation season of use does not exceed the actual season of use supported by the evidence for portions of the claimed place of use.
11. ~~The diversion rate for any lands awarded a water right should be less than one cfs per forty acres.~~ The record supports a limit of 1/40 cubic foot per acre irrigated during the irrigation season each year.
12. ~~The record supports the water duty should be less than 3.5 acre-feet per acre for any part of the claimed place of use awarded a water right.~~ as claimed, being 4.3 acre-feet for the acreages that were developed under Indian ownership; and 3.1 acre-feet for the acreages that were originally claimed as PIA, but developed with reasonable diligence by non-Indian owners.
13. While the record supports the existence of a water right, it does not support the rate, duty, all the actual uses, place of use, and nor the total acreage as claimed. The record does support some of the two points of diversion and re-diversion, and the season of use, the sources of water, the priority date, a portion of the place of use, the rate, and the duty as claimed.
14. Irrigation based on natural overflow may, as a matter of law, form the basis for a *Walton* water right.
15. The record supports a *Walton* right for irrigation of 71 acres with water from Brown Creek/Ditch, and irrigation of 5 acres by natural overflow from spring water.

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* rights. 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.

At this point, there is no evidence that an Indian owns any part of the property. Although LaVina Arlene Anderson was Norman Miller Anderson's wife, this does not, of itself, show she is an Indian. She is not listed on the part of the Final Roll of the Klamath Tribe prepared in 1956 that was entered into the record. Consequently, all water use on the property will be analyzed as claims to water by non-Indian successors to Klamath Indian Allottees, also called *Walton* claims.

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

1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe;
2. The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor;
3. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except that:
4. The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first purchaser of land from an Indian owner.
5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

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

~~I adopt~~ ALJ Young's formulation is adopted with the following modifications to Items 4 and 5:

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 ~~the~~ first non-Indian purchasers of the 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.~~

As discussed below, there is no dispute that the present claimants are the first non-Indian owners of the property, so the existence or non-existence of a “first non-Indian owner” requirement is not at issue in this case, and it is unnecessary to discuss this issue in greater detail.

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 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

Use of Natural Overflow as the Basis of a *Walton* Right

~~In addition, unlike some other types of water rights subject to this adjudication, *Walton* rights cannot be based upon appropriations using natural overflow or subirrigation, but must be supported by an artificial diversion of water. As stated by Administrative Law Judge Ken Betterton in Klamath Adjudication Case 157:~~

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

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

Oregon law provides that while the natural overflow as a method of irrigation is only a privilege, beneficial use of natural overflow may nonetheless give rise to a vested water right. The Department concludes that this principle is equally applicable to *Walton* claims made subject to the Department's jurisdiction. The *Walton* line of cases did not create federal law on the subject of natural overflow; therefore, it is appropriate for the Department to rely on Oregon law.

"Natural overflow" refers to the presence of surface water on land without the use of a physical diversion structure or implement. "Subirrigation," as the term was used in the *Walton* line of cases, refers to the ability to use groundwater for irrigation without a well due to an unusually high groundwater table. *Colville Confederated Tribes v. Walton*, Memorandum Opinion at 19 n4 (E.D. Wash. August 30, 1983, Docket Nos. 3421, 3831). Subirrigation may also refer to the use of water that seeps from a stream a lake through the adjacent banks.

The *Walton* litigation did not involve natural overflow. To the extent that *Walton III* holds that subirrigation may not form the basis for a *Walton* right, it is not at all clear that the court would have intended the same conclusion to apply to natural overflow. In fact, under Oregon law, while beneficial use of natural overflow may form the basis for a valid pre-1909 right, subirrigation may not.

Unlike a subirrigator, a beneficial user of natural overflow may take steps to improve the efficiency of irrigation, by preventing the natural overflow from occurring on the property and instead making a diversion from the stream. The ability to improve efficiency when competing demands for water require it is one of the primary reasons for Oregon's recognition that beneficial use of natural overflow may form the basis of a vested right. In *Warner Valley Stock Co. v. Lynch*, 215 Or 523, 538 (1959), the court acknowledged that beneficial use of natural overflow was sufficient to acquire a vested pre-1909 water right. The court held, however, that "the method of diversion by way of

natural overflow is a privilege only and cannot be insisted upon by the objectors if it interferes with the appropriation by others of the waters for a beneficial use.” *Id.* at 537. In other words, the ability to make a call – one of the central attributes of a water right – is not available to the user of natural overflow until the method of irrigation is improved. Since the user of subirrigation does not have the ability to improve the method of irrigation, the logic of *Warner Valley* dictates that subirrigation may never form the basis for a call, and thus may not form the basis for a vested water right.⁸

The analysis in *Walton III* pertaining to appropriation of water was based on Washington state law. Nearly all of the court’s citations to case law in the “Appropriation” and “Intent/Due Diligence” subsections of the opinion (in which the issue of subirrigation is discussed) are to Washington state court decisions. Even the one cite to a federal district court opinion cites both to the opinion and the “cases cited therein interpreting Washington law.” *Walton III*, 752 F2d 397, 402 (1985) (emphasis added). Under Washington law, a diversion is a required element of a valid appropriation. See 1891 Wash Laws 142, *R.D. Merrill Co. v. Pollution Control Hearings Board*, 969 P 2d 459, 468-469 (1999), *Ellis v. Pomeroy Improvement Co.*, 21 P 27, 29 (1889) (requiring an “open, physical demonstration” of intent to take water for some valuable use). Because subirrigation and natural overflow do not require a diversion, they may not form the basis for a valid appropriation under Washington law. Even assuming the court had held that, under Washington law, subirrigation or natural overflow could not form the basis for a right held by a non-Indian successor to an allottee, the court gave no indication that it intended to use Washington law to form the basis for federal law on these issues.⁹

Where no governing federal law principles exist with respect to an issue related to the determination of a *Walton* right, “[i]t is appropriate to look to state law for guidance.” *Walton III*, 752 F2d at 400. The *Walton* line of cases did not create federal law with respect to either beneficial use of natural overflow or subirrigation. Therefore, the Department relies on Oregon law principles governing natural overflow as a method of beneficial use.

More specifically, the Department relies on the pre-1909 principles governing natural overflow as a method of beneficial use. The law relevant to the determination of whether a claimant has established a vested water right is, generally speaking, the law in

⁸ Note that depending on the circumstances, under Oregon law subirrigation that is created by an artificial diversion work (e.g., a dam that causes water levels to rise and increases the area of land being subirrigated) may form the basis for a valid pre-1909 or *Walton* right. In such a case, the irrigation is being caused by a diversion. In addition, if circumstances require the diversion method may be improved to increase efficiency.

⁹ Indeed, it would have been inappropriate for the court to simply rely on Washington law in creating federal law, at least with respect to use of natural overflow. The western states are divided on the question of whether natural overflow could have formed the basis of a valid appropriation for irrigation use initiated prior to the enactment of the respective state’s modern water code. Colorado and Montana, in addition to Oregon, are examples of states that have answered the question in the affirmative. *Matter of the Adjudication Missouri River Drainage Area*, 55 P3d 396, 406 (Mont 2002); *Humphreys Tunnel & Mining Co. v. Frank*, 105 P 1093, 1095 (Colo 1909). Nevada, New Mexico, and Washington have required a manmade diversion for irrigation use. *Steptoe Livestock Co. v. Gulley*, 295 P 772, 774-775 (Nev 1931); *State ex rel. Reynolds v. Miranda*, 493 P.2d 409, 411 (N.M. 1972).

place at the time the appropriation is initiated, rather than when water is first applied to beneficial use. See 539.010(4).¹⁰

Under Oregon's pre-1909 common law, an appropriator was entitled to relate the priority date of the right back to the date of first intent to appropriate. Similarly, if the other elements of the claim are proven, *Walton* claimants are entitled to relate the priority date of their rights back to the October 16, 1864 date of the Klamath Treaty. The Klamath Treaty provides the best analog to the "intent" element of Oregon's pre-1909 common law. Through the Klamath Treaty, Congress effectively established its intent to reserve water for certain uses by the Klamath Tribes and their members. Therefore, it is more appropriate to apply pre-1909 principles with respect to the issue of beneficial use of natural overflow.

Oregon law provides that while the natural overflow as a method of irrigation is only a privilege, beneficial use of natural overflow may nonetheless give rise to a vested water right, where the appropriation was initiated prior to the enactment of the Water Code in 1909.

A "diversion from the natural channel by means of a ditch, canal or other structure" is generally a required element of a pre-1909 water right. *In re Silvies River*, 115 Or 27 (1925). However, no diversion is required where the appropriator's land is "naturally irrigated" and the appropriator "in some substantial way indicates that it is his intention to reap the benefit of the fruit of the irrigation." *Id.* at 66. In such a case, the priority date is "deemed to be when the proprietor of the land accepts the gift made by nature..." *Id.* This principle was affirmed and clarified in *Warner Valley Stock Co. v. Lynch*, 215 Or 523 (1959). While acknowledging that vested rights could be acquired by the beneficial use of natural overflow, the *Warner Valley* court clarified that "the method of diversion by way of natural over-flow is a privilege only and cannot be insisted upon by the objectors if it interferes with the appropriation by others of the waters for a beneficial use."¹¹ *Id.* at 537-38 (emphasis added). Similarly, in *Masterson v. Pacific Livestock Company*, the court found that prior to the adjudication, the defendants had only irrigated their lands by means of natural overflow. 144 Or 397, 401-2 (1933). The *Masterson* court found that, although the decree had not provided the quantity of water to be taken under the right, the natural irrigation equaled no more than five acres "in the regular way." 144 Or at 406-8.

Thus, while a vested right may be acquired through beneficial use of natural overflow, the acquired right has unique limits. If the holder of such a right persists in irrigating with natural overflow, the holder may not call for regulation of use by junior water right holders. In order to take advantage of the ability to call junior water right

¹⁰ ORS 539.010(4) provides, in part: "The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act (as defined in ORS 537.010) where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion."

¹¹ In 1909, the Oregon Supreme Court reached a similar conclusion in *Hough v. Porter*, 51 Or 318, 420 (1909). The *Hough* court found that "wasteful methods so common with early settlers can...be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and no right to such methods of use was acquired thereby." *Id.* (emphasis added).

holders, the holder of such a right must construct works that allow for the artificial diversion of water.

For the reasons discussed above, the Department concludes that beneficial use of natural overflow may form the basis for a *Walton* right, but that the natural overflow method of irrigation is a privilege only, and cannot be insisted on by the holder of the right. If the holder of such a right wants to be able to call for regulation of use by junior water right holders, the holder of such a right must construct works that allow for the artificial diversion of water.

Indian Ownership

The parties did not argue that Klamath Indian Allottees did not own the property up until Norman Miller Anderson sold the property in 1992 and 1993. Hence the present claimants are the first non-Indian owners of the property.

Indian Beneficial Use

In 1991, the field inspector found only 11 acres being irrigated. (OWRD Ex. 1 at 26, 27.) This acreage is also evidenced by the NRCE report issued in 1992. (OWRD Ex. 1 at 4.) However, as Claimants point out, that inspection was conducted in November, after the irrigation season. Moreover, because an Indian still held the property, the inspection is only relevant to show what acreage the Indian owner was irrigating at the time. The field inspection does not show what acreage might have once been irrigated, or what acreage could be practically irrigated.

Non-Indian Beneficial Use and Development

The sworn testimony of John Flynn shows that Norma Nora Flynn began irrigating 60 acres from Brown Ditch immediately after she acquired the property in Section 15, and continues to do so. John Flynn's Direct Testimony states: "When the water from these sources is not adequate to irrigate these lands, I use the wells that were drilled by Mr. Anderson to supplement the irrigation water." His use of the present tense shows continued irrigation of the 60 acres. He also testified that when he first came on the property, the works for irrigating the 60 acres were installed, but in disrepair. This is not inconsistent with the field inspection, although the inspector never mentioned such works. However, given that Flynn, the first non-Indian owner, irrigated the 60 acres within a year after Anderson sold the property, and continues to do so today, the evidence is sufficient to allow that portion of the claim. (Direct Testimony of John C. Flynn.) Neither the Flynn's nor their predecessor submitted evidence of the appropriate rate of irrigation for these acres, so the standard rate which is based on a limit of 1/40 cfs/acre provided by OWRD in its Appendix A to the Preliminary Evaluation applies (OWRD Ex. 1 at 211), resulting in a rate of diversion of 1.5 cfs for the 60 acres.

The Sommers testified that they have continued to irrigate 11 acres from Brown Ditch and 5 acres from springs since they acquired the property in Section 14 from Anderson. Although they testified that Anderson irrigated 80 acres out of Brown Ditch

from a tractor-mounted pump, they did not testify that they have done so since they acquired the property, 14 years ago. (Direct Testimony of Cecil Sommers; Corrected Direct Testimony of Mildred Sommers). In addition, the testimony that Anderson irrigated 80 acres out of Brown Ditch conflicts with the original claim, which stated that all but 11 acres of the claim were filed based on *future* use. It also conflicts with supplemental information filed subsequent to the claim, which indicated 49.3 acres of present irrigation as of August 26, 1991. (OWRD Ex. 1 at 35.) In any event, the absence of irrigation beyond the 16 acres described herein since acquisition of the property 14 years ago would constitute evidence of abandonment of that additional irrigation, even if it had been at one time developed. Thus, they Sommers cannot be found to have diligently developed or continuously subsequently irrigated the 80 acres previously noted.¹² Of the 16 acres to which the Sommers testified, the field inspector reported 11 acres were being irrigated from Brown Creek. (OWRD Ex. at 26, 27.) ~~The other five acres are not evidenced as irrigated anywhere else in the record. The Sommers' testimony in regard to the five acres is equivocal as to whether the springs water irrigate the five acres through natural overflow or sub-irrigation or are by artificially diverted diversion. Their testimony makes no mention of diversion. Instead, they say: "Further there were Five [sic] acres that were irrigated by springs in the Northwest corner of the property," and "[S]ince we purchased the property we have continued to irrigate . . . the 5 acres that are irrigated from the springs," (Direct Testimony of Cecil Sommers; Corrected Direct Testimony of Mildred Sommers) (emphasis added). The greater weight of the evidence indicates that the five acres in question are irrigated by natural overflow. The phrase "were irrigated by springs" leaves open the question whether this water is diverted or not. As noted above, these claimants have the burden of proving by a preponderance of the evidence all the elements of a *Walton* claim. That would include evidence of a diversion. The Sommers' testimony leaves this question in equipoise. It does not reach the level of a preponderance. Therefore, as to the five acres, Claimants Sommers have not met their burden of proof. The northwest corner of the Sommers' property is located in the SW¼ NW¼, Section 14, T36S R12E.W.M. In this quarter-quarter, 29.2 acres were claimed for PIA, of which it has been shown that 5 acres have been developed with reasonable diligence, and continued to be irrigated by the non-Indian owner by natural overflow from the springs located within the SW¼ NW¼. Neither the Sommers nor their predecessor submitted evidence of the appropriate rate of irrigation for these 5 acres, so the standard rate which is based on a limit of 1/40 cfs/acre provided by OWRD in its Appendix A to the Preliminary Evaluation applies (OWRD Ex. 1 at 211), resulting in a rate of diversion of 0.12 cfs for the 5 acres. This rate of diversion would be applicable to any artificial diversion works constructed to serve these acres in the future.~~

Practically Irrigable Acreage

Given that by the time of the hearing 13 or 14 years had passed since the properties passed out of Indian ownership, the amount of practically irrigable acreage is

¹² This conclusion only applies to surface water. In 1994 the Sommers applied for a permit to irrigate 116 acres in Section 14 from groundwater that is not subject to this adjudication. (OWRD Ex. 1 at 115.)

no longer an issue, as any acreage beyond what is currently irrigated has not been diligently developed.

Reasons for Modifications to 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.

ORDER

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

1. A water right for Claim 676 should be confirmed as set forth in the following Water Right Claim Description.
2. The confirmation of a water right for Claim 676 is contingent upon the claimants submitting a map which meets OWRD’s standards as described in OAR 690-310-0050, to be submitted within 30 days of the service date of this Amended Proposed Order.

Water Right Claim Description

CLAIM NO. 676
FOR A VESTED WATER RIGHT

CLAIM MAP REFERENCE: CLAIM # 676, PAGE 9

PARCEL: FLYNN

SOURCE OF WATER: BROWN CREEK/DITCH, tributary to the SPRAGUE RIVER

PURPOSE or USE:
IRRIGATION OF 60.0 ACRES FROM BROWN CREEK/DITCH (POD 1)

RATE OF USE:
1.5 CUBIC FEET PER SECOND (CFS) FOR IRRIGATION, MEASURED AT THE POINT OF DIVERSION

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

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

PERIOD OF ALLOWED USE: MARCH 1 – OCTOBER 16

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot
POD 1	36 S	12 E	WM	15	SE NE	9

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION FROM POD 1						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
36 S	12 E	WM	15	SW NW	12, 13	17.4
36 S	12 E	WM	15	SE NW	11, 14	23.6
36 S	12 E	WM	15	SW NE	10, 15	9.7
36 S	12 E	WM	15	SE NE	9, 16	9.3

PARCEL: SOMMERS

SOURCE OF WATER:

BROWN CREEK/DITCH, tributary to the SPRAGUE RIVER, and
UNNAMED SPRINGS, tributary to BROWN CREEK/DITCH

PURPOSE or USE:

IRRIGATION OF 11.0 ACRES FROM BROWN CREEK/DITCH (POD 2), AND
IRRIGATION OF 5.0 ACRES FROM UNNAMED SPRINGS BY NATURAL
OVERFLOW

RATE OF USE:

0.40 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

0.28 CFS FROM POD 2 FOR IRRIGATION, MEASURED AT THE POINT OF
DIVERSION; AND

0.12 CFS FOR IRRIGATION BY NATURAL OVERFLOW

DUTY:

FROM BROWN CREEK/DITCH:

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

FROM NATURAL OVERFLOW BY UNNAMED SPRINGS:

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

LIMIT:

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

PERIOD OF ALLOWED USE: MARCH 1 – OCTOBER 16

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Source	Twp	Rng	Mer	Sec	Q-Q	GLot	Remarks
POD 2	Brown Creek/Ditch	36 S	12 E	WM	14	NE SW	22	
Natural Overflow	Unnamed Springs	36 S	12 E	WM	14	NW SW		No specific point of diversion; Natural Overflow

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION FROM POD 2						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
36 S	12 E	WM	14	NW SW	20, 21	5.3
36 S	12 E	WM	14	NE SW	22	4.3
36 S	12 E	WM	14	SE SW	27	1.4

IRRIGATION BY NATURAL OVERFLOW FROM UNNAMED SPRINGS					
Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	12 E	WM	14	NW SW	5.0

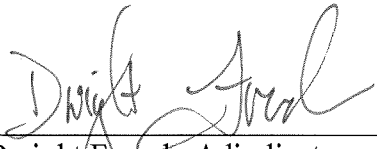
FURTHER LIMITATIONS:

THE METHOD OF DIVERSION BY WAY OF NATURAL OVERFLOW IS A PRIVILEGE ONLY AND CANNOT BE INSISTED UPON IF IT INTERFERES WITH THE APPROPRIATION OF THE WATERS FOR BENEFICIAL USE BY OTHERS.

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 Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

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

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

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

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



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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Adjudications Specialist
Oregon Water Resources Department

