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; The Klamath Tribes, Contestants	**AMENDED PROPOSED ORDER**
v.	
Edward D. Tompkins and Merrie L. Tompkins, as Trustees of the Don and Merrie L. Tompkins Family Revocable Trust dated July 13, 1998; Willis Stanley Tompkins, Claimants/Contestants	Case No. 168 Claim No. 21 Contests 14, 15, 3723, and 4079

This AMENDED PROPOSED ORDER is issued pursuant to OAR 137-003-0655(3), and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. This AMENDED PROPOSED ORDER incorporates the Proposed Order (Order) issued February 23, 2006, except to the extent that it is modified as described herein. Per OAR 137-003-0655, the Oregon Water Resources Department ("OWRD") provides an explanation for any "substantial" modifications to the Proposed Order.

This proceeding, under the provisions of ORS Chapter 539, is part of a general stream adjudication to determine the relative rights of the parties to the waters of the various streams and reaches within the Klamath River Basin.

A. MODIFICATIONS TO THE "HISTORY OF THE CASE"

Within the section titled "History of the Case" of the Order, the first Paragraph is modified as follows (additions are shown in "underline" text):

On January 31, 1991, Claimants or their predecessors-in-interest filed the above-entitled claim as non-Indian successors to a Klamath Indian Allottee,[1] claiming 3 acre-feet per acre for

[1] Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

irrigation of 2,631.1 acres of land with incidental uses for livestock and wildlife. The claimed period of use is June 15 to November 15 for irrigation, and April 15 to November 15 for livestock. Claimants further stated that the land is irrigated by natural overflow and that the actual season varies with weather conditions. (OWRD Ex. 1 at 1, 4.)

Reason for Modification: To clarify the claimed season of use.

A. MODIFICATIONS TO THE FINDINGS OF FACT

Findings of Fact #8, 9 and 10 of the Order are modified as follows to reflect the record (additions are shown in underlined text; deletions are shown in ~~strikethrough~~ text):

(8) There are numerous allotments involved in this claim. With respect to allotments 183, 185, 186, 198, 536, 535, 643, 1201, 1494, 252, and 434, Claimants' parents, Henry Willis and Mabel Tompkins were the first non-Indian purchasers. These allotments total 1,325.2 acres. Most of these allotments were purchased between 1955 and 1959. Allotment 1494 was purchased in 1964, while allotments 183, 185, and 186 were purchased January 7, 1971. (U.S. Ex. 168E00040000: Table 1 attached to Affidavit and Testimony of Ross Waples.) A description of the claim within each allotment is as follows:

a. **Allotment 183 (113.8 acres claimed):**
S½SW¼, Section 22; N½NW¼ , Section 27; T. 30 S, R. 8 E, W.M.

b. **Allotment 185 (8.8 acres claimed):**
NE¼NE¼, Section 28, T. 30 S, R. 8 E, W.M.

c. **Allotment 186 (160.0 acres claimed):**
S½NW¼, N½SW¼, Section 27, T. 30 S, R. 8 E, W.M.

d. **Allotment 198 (135.2 acres claimed):**
S½NE¼, N½SE¼, Section 28, T. 30 S, R. 8 E, W.M.

e. **Allotment 536 (61.5 acres claimed):**
SW¼, (N½SW¼, Government Lots 1, 2) Section 28, T. 30 S, R. 8 E, W.M.

f. **Allotment 535 (134.2 acres claimed):**
SW¼SE¼, Section 28; NW¼NE¼, N½NW¼ (Government Lots 1-3), Section 33; T. 30 S, R. 8 E, W.M.

g. **Allotment 643 (160.0 acres claimed):**
SE¼SE¼, Section 28; NE¼NE¼, Section 33; N½NW¼ , Section 34; T. 30 S, R. 8 E, W.M.

h. **Allotment 1201 (80.0 acres claimed):**
SE¼NW¼, NE¼SW¼, Section 34, T. 30 S, R. 8 E, W.M.

i. **Allotment 1494 (159.6 acres claimed):**
SW¼NW¼, NW¼SW¼, S½SW¼ (Government Lots 1, 2), Section 34, T. 30 S, R. 8 E, W.M.

j. **Allotment 252 (152.1 acres claimed):**
NW¼ (Government Lots 3, 4, S½ NW¼), Section 4, T. 31 S, R. 8 E, W.M.

k. **Allotment 434 (160.0 acres claimed):**
SW¼, Section 4, T. 31 S, R. 8 E, W.M.

(9) With respect to allotments 538, 45, 130, 164, 4, 569, 250, 196, 249, and 433, Claimants' parents were not the first non-Indian purchasers. These allotments total 1,305.9 acres. These allotments passed out of Indian ownership between 1914 and 1958. (*Id.*) ~~There is no evidence that owners prior to Claimants' parents did anything other than take advantage of the naturally marshy land.~~ Findings of fact for each allotment are as follows:

a. **Allotment 538 (7.2 acres claimed):**
NW¼, Section 28, T. 30 S, R. 8 E, W.M. This allotment left Indian ownership in June 1958 and was subsequently transferred to H. Willis and Mabel Tompkins in December 1958. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) A 1957 U.S. Bureau of Indian Affairs APPRAISAL REPORT states that the "[s]ubject allotment consists of 160 acres of nearly level meadow land and is fenced on the West side and the East side has cedar posts set but no fencing. There is a strip through the center of ownership where some lodgepole pines are growing . . . they do provide good shelter for the cattle and this area, as well as the remainder, supports a good growth of board--leaf grass and native grasses. Subject is utilized in conjunction with similar adjoining lands." (U.S. Ex. 168E00040031 at 40.) In the same report the allotment is noted as being partially fenced. (*Id* at 43.) Beneficial use of water by the method of natural overflow was made on this parcel prior to transfer from Indian ownership.

b. **Allotment 45 (29.4 acres claimed):**
NE¼, Section 32, T. 30 S, R. 8 E, W.M. This allotment left Indian ownership in July 1914 and was subsequently transferred to H. Willis and Mabel Tompkins in May 1957. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) There is no evidence in the record of beneficial use of water on this allotment until after purchased by Tompkins in 1957.

c. **Allotment 130 (157.4 acres claimed):**
SE¼ (Government Lots 2, 5, 9, 10), Section 32, T. 30 S, R. 8 E, W.M. This allotment left Indian ownership in 1943 and was subsequently transferred to H. Willis and Mabel Tompkins in May 1957. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) There is no evidence in the record of beneficial use of water on this allotment until after purchased by Tompkins in 1957.

d. **Allotment 164 (160.0 acres claimed):**
S½N½, Section 33, T. 30 S, R. 8 E, W.M. This allotment left Indian ownership in March 1923 and was subsequently transferred to H. Willis and Mabel Tompkins in May 1957. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) There is no evidence in the record of beneficial use of water on this allotment until after purchased by Tompkins in 1957.

e. **Allotment 4 (159.7 acres claimed):**
SW¼ (N½SW¼, Government Lots 4, 5), Section 33, T. 30 S, R. 8 E, W.M. This allotment left Indian ownership in March 1957 and was subsequently transferred to H. Willis and Mabel Tompkins in May 1957. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) An APPRAISAL REPORT (from an onsite inspection made August 26, 1956) indicates that "[t]he subject tract consists of meadow land utilized at the present for the grazing of cows with calves at their side in conjunction with similar adjoining lands. The tract has a four strand barbed wire on the south side." (U.S. Ex. 168E00040001 at 5.) The report also notes that "[t]he subject tract is leased to an adjoining owner for grazing purposes for a cash rental of $350.00 per year." (*Id.* at 9.) Beneficial use of water by the method of natural overflow was made on this parcel prior to transfer from Indian ownership.

f. **Allotment 569 (159.7 acres claimed):**
SE¼ (N½SE¼, Government Lots 6, 7), Section 33, T. 30 S, R. 8 E, W.M. This allotment left Indian ownership in December 1922 and was subsequently transferred to H. Willis and Mabel Tompkins in May 1957. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) There is no evidence in the record of beneficial use of water on this allotment until after purchased by Tompkins in 1957.

g. **Allotment 250 (152.5 acres claimed):**
NE¼ (Government Lots 1, 2, S½NE¼,), Section 4, T. 31 S, R. 8 E, W.M. This allotment left Indian ownership in July 1944 and was subsequently transferred to H. Willis and Mabel Tompkins in May 1957. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) A letter dated July 16, 1943, from B.G. Courtright, Superintendent of Klamath Indian Agency to the Commissioner of Indian Affairs in Chicago, IL states that "Mr. Merritt proposes to sell the allotment of Hattie M. Merritt, Allottee No. 250, which he has inherited, to Mr. Eldon Brattain, the present lessor of the allotment. The present annual rental is $75.00. However, this is the first year the land has rented for that figure, the rental never having exceeded $50.00 per year before. Mr. Brattain is a white man who has other Indian and Tribal lands under lease for use as grazing lands. The land proposed to be sold is described as Lots 1 and 2, S/2-NE/4 of Section 4, Range 31 S, Twp. 8.E. Willamette Meridian, in Oregon." (U.S. Ex. 168E00040012 at 5.) Beneficial use of water by the method of natural overflow was made on this parcel prior to transfer from Indian ownership.

h. **Allotment 196 (160.0 acres claimed):**
SE¼, Section 4, T. 31 S, R. 8 E, W.M. This allotment left Indian ownership in November 1955 and was subsequently transferred to Edward D. Tompkins and Merrie L. Tompkins in June 1985. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) On a CERTIFICATE OF APPRAISEMENT (from an onsite inspection made October 11, 1928) this allotment was described as ". . . strictly a grazing allotment." (U.S. Ex. 168E00040009 at 2.) A 1955 U.S. Bureau of Indian Affairs PETITION FOR THE SALE OF INHERITED INDIAN LAND, Item 10: states that the allotment was leased to Yamsey Land &

Cattle Co. until February 28, 1958 with an annual rental $250. (*Id.* at 6.) A 1955 CERTIFICATE OF APPRAISEMENT noted a "fence that surrounds the land." (*Id.* at 8.) On a U.S. Bureau of Indian Affairs APPRAISAL REPORT for a nearby allotment (249), within the section for "Market Data" for Allotment 196 it was noted that the "[t]he subject tract consists of meadow land utilized at the present time for grazing purposes." (U.S. Ex. 168E00040011 at 49.) Beneficial use of water by the method of natural overflow was made on this parcel prior to transfer from Indian ownership.

i. **Allotment 249 (160.0 acres claimed):**
NW¼ (Government Lots 3, 4, S½ NW¼,), Section 5, T. 31 S, R. 8 E, W.M. This allotment left Indian ownership in June 1923 and was subsequently transferred to Edward D. Tompkins and Merrie L. Tompkins in June 1985. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) There is no evidence in the record of beneficial use of water on this allotment until after it was purchased by Tompkins in 1985.

j. **Allotment 433 (160.0 acres claimed):**
SE¼, Section 5, T. 31 S, R. 8 E, W.M. This allotment left Indian ownership in February 1925 and was subsequently transferred to Edward D. Tompkins and Merrie L. Tompkins in June 1985. (U.S. Ex. 168E00040000, Table 1; Edward Tompkins Ex. 168E00030100, Attachment "A".) On a CERTIFICATE OF APPRAISEMENT (from an onsite inspection made July 18, 1924) this allotment was characterized as 160 grazing acres and 160 irrigated acres. (U.S. Ex. 168E00040014 at 2.) Beneficial use of water was made on this parcel prior to transfer from Indian ownership.

(10) All the land included in Claim 21 is irrigated by natural overflow of Big Springs Creek, Cow Creek, Pothole Springs[2], and unnamed springs located on or about the land included in this claim. All are tributary to the Williamson River, which is tributary to the Klamath River. The specific locations of sixteen springs contributing to natural overflow on the claimed lands have been identified by Claimant Willis Tompkins on a map of the claimed property. (Edward Tompkins Ex. 168E00030100 at 5; Willis Tompkins Ex. 168E00030101: Direct Testimony of Willis Tompkins at 2, 3, 5, and Attachment "A".)

Reasons for Modifications: (1) To provide additional evidence from the record to substantiate beneficial use of water by the method of natural overflow and controlled subirrigation. (2) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership.(3) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by non-Indian successors after transfer from Indian ownership. (4) To add clarification and to fully set forth the evidence on the record. (5) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ's original finding was not supported by a preponderance of evidence in the record.

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[2] Two of the springs marked on the Willis Tompkins Attachment "A" coincide with two springs each labeled "Pothole Spring" on the OWRD Field Investigation Map (OWRD Ex. 1 at 49).

B. ADDITIONAL FINDINGS OF FACT

This Amended Proposed Order makes the following two findings of fact in addition to those made in the Order (additions are shown in "underline" text):

(15) The record supports a duty of 3.0 acre-feet acre as claimed for irrigation, and a rate of 1/40 of one cubic foot per second per acre when water is diverted. (OWRD Ex. 1 at 1, 6, 98, 103.)

(16) The original claimants did not include payment of the fee required by ORS 539.081 for livestock use by the January 31, 1991 deadline for filing a Statement and Proof of Claim. (OWRD Ex. 1 at 5.) No separate rate is allowed for livestock watering.

Reasons for Modifications: To include findings of fact regarding the duty and rate, and to show that the record does not support a separate rate being allowed for livestock watering.

C. MODIFICATIONS TO THE "CONCLUSIONS OF LAW"

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

1. Beneficial use of water for irrigation by the method of natural overflow, as a matter of law, is a valid basis for a *Walton* water right. The entire claimed place of use is subject to natural overflow from the claimed sources, being Cow Creek, Big Springs Creek, and sixteen unnamed springs.

2. The Claimants have not provided sufficient evidence to demonstrate beneficial use of water made with reasonable diligence on Allotments 45, 130, 164, 569, and 249.

3. Beneficial use of water for irrigation with incidental livestock watering by the method of natural overflow was made on Allotments 538, 4, 250, 196, and 433 prior to transfer from Indian ownership. The claimant has established a *Walton* water right for 639.4 acres in these allotments.

4. Beneficial use of water for irrigation with incidental livestock watering by the method of natural overflow and a system of control drains and canals was made with reasonable diligence after the transfer of property from Indian ownership to non-Indian ownership on Allotments 183, 185, 186, 198, 536, 535, 643, 1201, 1494, 252, and 434. The claimant has established a *Walton* water right for 1,325.2 acres in these allotments.

5. The record supports an irrigation season with incidental livestock watering of March 15 through November 15.

6. There is sufficient evidence to support a privilege to accept the benefits of natural overflow from November 16 through March 14, that period of time outside of the irrigation season.

7. The duty for irrigation during the irrigation season is 3.0 acre feet per acre irrigated. If diversion system(s) are installed in the future, a rate of $1/40^{th}$ cfs per acre during the irrigation season would apply.

8. The record does not support a separate rate of water for livestock watering.

9. Incidental livestock watering is limited to 750 head for 1964.6 acres.

10. Wildlife is not a valid purpose of a *Walton* right derived from the 1864 Klamath Treaty.

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

D. MODIFICATIONS TO THE "OPINION"

The Order's "Opinion" section is modified as described herein. OWRD has not incorporated the ALJ's discussions regarding natural overflow and subirrigation of water as a basis for a *Walton* claim. The deleted paragraphs are noted below as "*****". For all other modifications, additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text.

Because Claimants are claiming water rights as non-Indian successors to a Klamath Indian Allottee, the water right is governed by the *Colville Confederated Tribes v. Walton* line of cases[3] and is commonly referred to as a *Walton* water right. The Order adopted the elements necessary to establish a *Walton* right as identified by ~~As stated by~~ Administrative Law Judge William D. Young in *Nicholson et al. v. United States*, OAH Case No. 272.~~, in the context of the Klamath Basin Adjudication, stated that the following elements must be proved to establish a Walton water right:~~ OWRD adopts those conclusions with the following modifications:

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;

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[3] *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*), *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*), *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

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~~ put to beneficial use 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.~~

OAH Case No. 272, Ruling on United States' Motion for Ruling on Legal Issues at 9 (August 4, 2003).

OWRD describes the reasons for its modifications to the ALJ's determination of the elements of a *Walton* right below. OWRD also describes the reasons for concluding that beneficial use of natural overflow may serve as the basis for a *Walton* right.

Development of Water Use Following Transfer from Indian Ownership

For certain allotments the Claimant cannot establish that the claimed use was developed at the time of transfer from Indian ownership. Therefore, 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*).[4]

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.[5] Likely because the *Walton I* court concluded that water rights based on the reservation did not transfer from Indian allottees to non-Indian owners, the court did not provide a more detailed history of development.

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

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

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[4] 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.

[5] 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.

> 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.
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> 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.
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> . . .
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> 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 factfinding. The court concluded that the parcels left Indian ownership not in 1942, but in 1921 and 1925. *Id.* at 6.

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

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

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

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

Walton III, 752 F2d at 402. From this passage, it is evident that the court's concern was to uphold the reasonable diligence principle by rejecting the district court's view that "any remote purchaser" would be entitled to a new reasonable diligence period. The court explicitly refers to the "reasonable diligence requirement of *Walton II*." A first non-Indian owner rule would not, of

course, be necessary to uphold the reasonable diligence principle. All that is necessary to make a reasonable diligence rule effective is to begin measuring the diligence period with the immediate grantee from the Indian allottees, and to continue measuring the period despite any subsequent transfers. It is in this sense that "calculating Walton's share required an investigation into the diligence with which the immediate grantee from the Indian allottees appropriated water…."[6]

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,[7] the court stated:

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

Id. at 402.

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

The Waltons requested rehearing of *Walton III*. The court denied the request and Judge Sneed wrote a concurrence to the denial. *Colville Confederated Tribes v. Walton*, 758 F2d 1324 (9th Cir 1985). In other cases where the first non-Indian owner issue has arisen, the United States

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[6] 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.

[7] 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.

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* interpreted reted 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

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*

[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.

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 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).

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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).

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."

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 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.

Application of Modified *Walton* Elements to the Facts in this Case

Claimants have the burden of establishing the claim by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); *see also Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). 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. Claimants did not meet their burden of proof for Allotments 45, 130, 164, 249, and 569.

1. Former Indian allotments conveyed to non-Indian ownership.

There is no dispute that the land appurtenant to Claim 21 was formerly part of the Klamath Indian Reservation, that the land was allotted to members of an Indian tribe, and that

[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).

the land was transferred to non-Indian successors. (Edward Tompkins Ex. 168E00030100 at 3, 4; U.S. Ex. 168E00040000, Table 1.)

2. Natural Overflow and controlled subirrigation.

¶ Claimants assert a water right of three acre-fee per acre for irrigation of 2,631.1 acres used for grass hay and pasture for livestock. Claimants stated that the irrigation method is overflow and controlled sub-irrigation.~~,~~ All the land included in Claim 21 is subject to natural overflow of comingled water from the claimed sources, Cow Creek, Big Springs Creek and sixteen unnamed springs on or about the land; ~~and that~~ there are no discrete points where water is diverted from the claimed sources. ~~of Cow Creek, Big Springs Creek, Pothole Spring, and unnamed springs on Claimants' property.~~ (Willis Tompkins Ex. 168E00030101 at 2, 3, 5, and Attachment "A"; OWRD Ex. 1 at 1, 4, 6, 91-95). The land is very flat and water from natural overflow or surface water retained on the land when head gates are closed spreads over a large area. (OWRD Ex 1 at 92, Edward Tompkins Ex. 168E00030100 at 4; Willis Tompkins Ex. 168E00030101 at 4.) Because the upper soil profile is porous, controlled subirrigation also may result from the closing of the head gates when water is managed using the system of canals and drains. (Edward Tompkins Ex. 168E00030100 at 4.)

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3. Tompkins' development of canal and drain system.

In 1956 Claimants' predecessors, Henry Willis and Mabel Tompkins, started building drains/canals on the land. (Edward Tompkins Ex. 168E00030100 at 4, 5 ; OWRD Ex. 1 at 91.) ~~Claimants explained that during the period when the land is irrigated by natural overflow (generally November 15 to June 15, or earlier in the spring), the drains/canals serve to help drain the land. During the period June 15 to November 15, the headgates on the drains/canals are closed or blocked to raise the water table and water level in the drains, in order to sub-irrigate the pastures.~~

Claimants testified that the drains/canals serve a two fold purpose. First they are used to remove water that has naturally overflowed onto the land. The drains/canals remove water more efficiently than simply allowing it to flow across the surface of the ground or evaporate. As the land dries and the water table drops, the drains/canals are then used to back up water behind "check dams" created by closing head gates. When the head gates are closed the water is backed up in the drains/canals, which forces the water to spread out through openings in the drains/canals onto the surrounding land. This practice results in irrigation and controlled subirrigation of the pastures. The practice of closing head gates and backing up the water begins as early as March 15 and continues to November when the cattle are typically removed. If the head gates were not closed to retain the water, it would flow across the Claimants' land in an easterly direction toward Big Springs, a tributary of the Williamson River. The use and maintenance of the drain/irrigation system has continued without interruption since 1956. (OWRD Ex 1 at 4, 6, 91-95, 98, 102; Edward Tompkins Ex. 168E00030100 at 4, 5; Willis Tompkins Ex. 168E00030101 at 2, 3, 4.)

¶ ~~The diversion works – *i.e.*,~~ The drains or canals built by Claimants' father divert only the water that has naturally overflowed the banks of Big Springs Creek and Cow Creek; they do not divert water directly from either stream. As Claimants have repeatedly acknowledged, there are no points of diversion from the streams. In a similar fashion, the drains/canals divert water that bubbles up on Claimants' lands from naturally occurring springs. ~~The drains/canals simply capture and spread out naturally occurring surface water to make more efficient use of the water.~~

The United States' witnesses, Ross Waples and Ralph Saunders, offered the opinion that the drainage ditches re-direct ground water onto lower lands, the source of the water for the area served by the drainage ditches is groundwater, and no surface water is being diverted into the drainage ditches for redistribution. These opinions are not supported by the evidence and testimony of Claimants. ~~Therefore, I do not find that~~ The ditches are not re-directing groundwater. Rather, they help to redistribute natural overflow from Big Springs Creek and Cow Creek, as well as redistribute water from naturally occurring springs on the land.

4. Analysis by Allotment

Allotments 183, 185, 186, 198, 536, 535, 643, 1201, 1494, 252, 434

These allotments passed out of Indian ownership in between 1955 and 1971. The first non-Indian purchasers of each allotment were Henry Willis and Mabel Tompkins. Beginning in 1956, the Tompkins began constructing a system of control drains and canals used to control natural overflow of the comingled waters of Cow Creek, Big Springs Creek and unnamed springs. Beneficial use of water for irrigation was made with reasonable diligence after the transfer of each of these allotments from Indian ownership to non-Indian ownership. Claimants have established a *Walton* water right for 1964.6 acres in Allotment~~s~~ 183, 185, 186, 198, 536, 535, 643, 1201, 1494, 252 and 434, 4, 196, 250, 433, and 538.

Allotment 4

An Appraisal Report for Allotment 4 made prior to the initial transfer from Indian ownership shows that the land had been leased for cattle gazing. Beneficial use of water by the method of natural overflow was established prior to the initial transfer from Indian ownership. This land left Indian ownership in March 1957, and was subsequently transferred to Henry Willis and Mabel Tompkins before the end of that year. Tompkins developed and utilized a system of control drains and canals to control natural overflow of the comingled waters of Cow Creek, Big Springs Creek and unnamed springs, further demonstrating that the water claimed for irrigation on this parcel was put to beneficial use with reasonable diligence. Claimants have continued to use this system of control drains and canals to control natural overflow for irrigation on this parcel. Claimants have established a *Walton* water right for 159.7 acres in Allotment 4.

Allotment 196

Two Certificates of Appraisal, one in 1928 and the other in 1955, and a 1955 Appraisal Report for a nearby allotment (249), all prior to the initial transfer from Indian ownership, make references to grazing and existing fences on Allotment 196. On a 1955 Petition for the Sale of Inherited Indian Land, reference to a grazing lease to Yamsey Land and Cattle Company on this allotment shows the lease spanning at least three years. Beneficial use of water by the method of natural overflow was established prior to the initial

transfer from Indian ownership. This land left Indian ownership in 1955. Claimants have continued to irrigate this parcel using a system of control drains and canals to control natural overflow. Claimants have established a *Walton* water right for 160.0 acres in Allotment 196.

Allotment 250

A 1943 letter from the Klamath Indian Agency written to the Commission of Indian Affairs prior to the initial transfer from Indian ownership stated that Allotment 250 was currently under a grazing lease agreement with Eldon Brittain. Beneficial use of water by the method of natural overflow was established prior to the initial transfer from Indian ownership. This land left Indian ownership in 1944. Claimants have continued to irrigate this parcel using a system of control drains and canals to control natural overflow. Claimants have established a *Walton* water right for 152.5 acres in Allotment 250.

Allotment 433

On a 1924 CERTIFICATE OF APPRAISEMENT for Allotment 433 made prior to the initial transfer from Indian ownership, the land was characterized as 160 grazing acres and 160 irrigated acres. Beneficial use of water by the method of natural overflow was established prior to the initial transfer from Indian ownership. This land left Indian ownership in March 1925. Claimants have continued to irrigate this parcel using a system of control drains and canals to control natural overflow. Claimants have established a *Walton* water right for 160.0 acres in Allotment 433.

Allotment 538

An 1957 APPRAISAL REPORT for Allotment 538 made prior to the initial transfer from Indian ownership shows that the land had been fenced on the west side and cedar posts were set on the east side. The report also mentioned a wooded area that provided good shelter for cattle, indicating the presence of cattle on the allotment. Beneficial use of water by the method of natural overflow was established prior to the initial transfer from Indian ownership. This land left Indian ownership in June 1958, and was subsequently transferred to Henry Willis and Mabel Tompkins before the end of that year. Tompkins developed and utilized a system of control drains and canals to control natural overflow of the comingled waters of Cow Creek, Big Springs Creek and unnamed springs, further demonstrating that the water claimed for irrigation on this parcel was put to beneficial use with reasonable diligence. Claimants have continued to use this system of control drains and canals to control natural overflow for irrigation on this parcel. Claimants have established a *Walton* water right for 7.2 acres in Allotment 538.

Allotments 45, 130, 164, 249, and 569

Based on evidence on the record, Claimants have failed to provide sufficient evidence of the beneficial use of water by the Indian seller, or beneficial use of water having been made with reasonable diligence by non-Indian successors within these five allotments.

Allotment 45 left Indian ownership in 1914. The earliest evidence in the record of beneficial use of water on this allotment is in 1957 when purchased by Henry Willis and Mabel Tompkins, 43 years after transfer from Indian ownership. Beneficial use of water was not made with reasonable diligence.

Allotment 130 left Indian ownership in 1943. The earliest evidence in the record of beneficial use of water on this allotment is in 1957 when purchased by Henry Willis and Mabel Tompkins, 14 years after transfer from Indian ownership. Beneficial use of water was not made with reasonable diligence.

Allotment 164 left Indian ownership in 1955. The earliest evidence in the record of beneficial use of water on this allotment is in 1985 when purchased by Edward Tompkins and Merrie Tompkins, 30 years after transfer from Indian ownership. Beneficial use of water was not made with reasonable diligence.

Allotment 249 left Indian ownership in 1923. The earliest evidence in the record of beneficial use of water on this allotment is in 1985 when purchased by Edward Tompkins and Merrie Tompkins, 62 years after transfer from Indian ownership. Beneficial use of water was not made with reasonable diligence.

Allotment 569 left Indian ownership in 1922. The earliest evidence in the record of beneficial use of water on this allotment is in 1957 when purchased by Henry Willis and Mabel Tompkins, 35 years after transfer from Indian ownership. Beneficial use of water was not made with reasonable diligence.

Thus, the Claimants failed to establish a *Walton* water right on the basis of water use made with reasonable diligence following transfer from Indian ownership on 666.5 acres in Allotments 45, 130, 164, 249, and 569.

Summary

Claimants have established a *Walton* water right for 1964.6 acres in Allotments 183, 185, 186, 198, 536, 535, 643, 1201, 1494, 252, 434, 4, 196, 250, 433, and 538.

5. Rate, duty, and season of use for irrigation

Based on the claimed duty and testimony of the claimants the duty is 3.0 acre-feet per acre per year. (OWRD Ex. 1 at 1, 6, 98, 103; Edward Tompkins Ex. 168E00030100 at 6; Willis Tompkins Ex. 168E00030101 at 2, 3.)

If diversion works are constructed or installed in the future, the rate of diversion should be the 1/40th cfs per acre as asserted by the claimants in their contests. (OWRD Ex 1 at 98, 103).

The season of use for irrigation, both by natural overflow and by use of the drain/canal system, varies significantly from year to year based on the weather during that year. In some years the natural irrigation water has receded and therefore necessary to irrigate the land by checking up the head gates of the drain/canal system as early as March 15. Typically use of the drain/canal system ends in November when the cattle are removed from the property ((Edward Tompkins Ex.168E00030100 at 6; Willis Tompkins Ex. 168E00030101 at 1, 3, 6.) Therefore, it is reasonable for the season of use for irrigation be set from March 15 through November 15.

6. Incidental Irrigation of Livestock

Although the Claimants asserted the need for 12 gallons per head per day for livestock watering in their contests (OWRD Ex 1 at 97-105), a separate rate for livestock watering was not originally claimed and a separate fee for livestock use was not paid. Therefore, livestock watering is limited to that which is incidental to irrigation during the claimed period for livestock watering, being April 15 through November 15. OWRD Ex. 1 at 4.) The claimant's claim for separate rights of use for livestock watering is denied, because Claimant failed to timely submit fees for livestock uses. ORS 539.210 provides that "it shall be the duty of all claimants . . . to appear and submit proof of their respective claims, *at the time and in the manner required by law.*" (Emphasis added) Otherwise they will be "barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings." ORS 539.210. The payment of fees by a set deadline is required by law as a component of a claim in the Klamath Basin Adjudication; therefore, the scope of a claim can only extend to the amount of fees timely paid. *See* ORS 539.081; OAR 690-028-0028(1); OAR 690-028-0065(5). For Claimants, the deadline for the filing of claims, and therefore the deadline for payment of fees, was February 1, 1991. Because OWRD did not receive payment for separate rights of use for livestock watering and wildlife by the deadline, these portions of Claimant's claim must be denied.

Claimants testified that the claimed land is used as cattle pasture and has a carrying capacity between 700 and 1000 head of livestock, depending on the year (Edward Tompkins Ex. 168E00030100 at 4.) The incidental livestock watering is limited to a maximum of 750 head[12] on the 1964.5 acres.

7. Acceptance of Natural Overflow from November 16 through March 14

The acceptance of natural overflow outside of the approved irrigation season is a privilege only and as such cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others, and no priority date, rate or duty shall attach to such privilege. This privilege may not be transferred to any other property, and may not be altered by the use of any physical means to modify the manner in which natural overflow occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural overflow. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150.

8. Wildlife Use

The United States also argued that Claimants' claimed wildlife use should be denied. ~~, and that Claimants failed to prove that the first non-Indian owners installed artificial irrigation on 1,305.9 acres of the claimed place of use.~~ The United States' arguments ~~are~~ is well-taken. ~~However, because I recommend that the claim be denied in its entirety, I do not address these specific arguments.~~ Wildlife is not a valid purpose of a *Walton* right derived from the 1864 Klamath Treaty.

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[12] One thousand head is the maximum carrying capacity on total acres claimed, being 2631.1 acres. The number of head prorated for the approved 1964.5 acres is 750 head.

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

E. MODIFICATIONS TO THE "PROPOSED ORDER"

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

1. The use of water for a portion of Claim 21 as specified in Paragraphs 2.a.-k., below, is a privilege only.

   a. This privilege is limited to the acceptance of natural overflow on 1964.6 acres.

   b. This privilege has a season of use November 16 through March 14.

   c. This privilege cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others, and no priority date, rate or duty shall attach to such privilege.

   d. This privilege may not be transferred to any other property.

   e. This privilege may not be altered by the use of any physical means to modify the manner in which natural subirrigation occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural subirrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150.

   f. This privilege to use water as specified in Paragraphs 2.a.-k., below, does not constitute a water right; as such, OWRD will not issue a certificate for this portion of Claim 21.

2. The portion of Claim 21 that is a privilege only should be confirmed as set forth below:

   a. **CLAIM NO.** 21

   b. **CLAIM MAP REFERENCE:**
   OWRD INVESTIGATION MAPS – T 30 S, R 8 E and T 31 S, R 8 E

   c. **CLAIMANTS:**
   EDWARD D. TOMPKINS AND MERRIE L. TOMPKINS,
   AS TRUSTEES OF THE DON AND MERRIE L. TOMPKINS
   FAMILY REVOCABLE TRUST DATED JULY 13, 1998
   PO BOX 22
   GUINDA, CA 95637

   WILLIS STANLEY TOMPKINS
   HC 63 BOX 328
   CHILOQUIN, OR 97624

d. **SOURCE OF WATER:**
COW CREEK, tributary to BIG SPRINGS CREEK;
BIG SPRINGS CREEK, tributary to the WILLIAMSON RIVER; and
SIXTEEN UNNAMED SPRINGS, tributary to the WILLIAMSON RIVER

e. **PURPOSE OR USE:**
IRRIGATION OF 1964.6 ACRES

f. **RATE OF USE:**
UNSPECIFIED – MAY ACCEPT THE NATURAL OVERFLOW ON 1964.6 ACRES

g. **PERIOD OF ALLOWED USE:** November 16 – March 14

h. **DATE OF PRIORITY:** NONE

i. **NO SPECIFIC POINT OF DIVERSION:**
COMINGLED WATERS FROM COW CREEK, BIG SPRINGS CREEK, AND SIXTEEN SPRINGS, ALL BY NATURAL OVERFLOW

j. **THE PLACE OF USE IS LOCATED AS FOLLOWS:**

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	8 E	WM	22	SW SW		1.80
30 S	8 E	WM	22	SE SW		38.40
30 S	8 E	WM	27	NE NW		40.00
30 S	8 E	WM	27	NW NW		33.60
30 S	8 E	WM	27	SW NW		40.00
30 S	8 E	WM	27	SE NW		40.00
30 S	8 E	WM	27	NE SW		40.00
30 S	8 E	WM	27	NW SW		40.00
30 S	8 E	WM	28	NE NE		8.80
30 S	8 E	WM	28	SW NE		18.40
30 S	8 E	WM	28	SE NE		36.80
30 S	8 E	WM	28	SE NW		7.20
30 S	8 E	WM	28	NE SW		36.00
30 S	8 E	WM	28	NW SW		10.40
30 S	8 E	WM	28	SW SW		0.70
30 S	8 E	WM	28	SW SW	2	14.40
30 S	8 E	WM	28	NE SE		40.00
30 S	8 E	WM	28	NW SE		40.00
30 S	8 E	WM	28	SW SE		36.80
30 S	8 E	WM	28	SE SE		40.00
30 S	8 E	WM	33	NE NE		40.00
30 S	8 E	WM	33	NW NE		40.00
30 S	8 E	WM	33	NE NW	3	36.00
30 S	8 E	WM	33	NW NW	2	21.40
30 S	8 E	WM	33	NE SW		40.00
30 S	8 E	WM	33	NW SW		40.00
30 S	8 E	WM	33	SW SW	4	39.80
30 S	8 E	WM	33	SE SW	5	39.90
30 S	8 E	WM	34	NE NW		40.00
30 S	8 E	WM	34	NW NW		40.00

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
30 S	8 E	WM	34	SW NW		40.00
30 S	8 E	WM	34	SE NW		40.00
30 S	8 E	WM	34	NE SW		40.00
30 S	8 E	WM	34	NW SW		40.00
30 S	8 E	WM	34	SW SW	1	39.90
30 S	8 E	WM	34	SE SW	2	39.70
31 S	8 E	WM	4	NE NE	1	36.30
31 S	8 E	WM	4	NW NE	2	36.20
31 S	8 E	WM	4	SW NE		40.00
31 S	8 E	WM	4	SE NE		40.00
31 S	8 E	WM	4	NE NW	3	36.10
31 S	8 E	WM	4	NW NW	4	36.00
31 S	8 E	WM	4	SW NW		40.00
31 S	8 E	WM	4	SE NW		40.00
31 S	8 E	WM	4	NE SW		40.00
31 S	8 E	WM	4	NW SW		40.00
31 S	8 E	WM	4	SW SW		40.00
31 S	8 E	WM	4	SE SW		40.00
31 S	8 E	WM	4	NE SE		40.00
31 S	8 E	WM	4	NW SE		40.00
31 S	8 E	WM	4	SW SE		40.00
31 S	8 E	WM	4	SE SE		40.00
31 S	8 E	WM	5	NE SE		40.00
31 S	8 E	WM	5	NW SE		40.00
31 S	8 E	WM	5	SW SE		40.00
31 S	8 E	WM	5	SE SE		40.00

k. **FURTHER LIMITATIONS:**
FROM NOVEMBER 16 THROUGH MARCH 14, 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, MAY NOT BE TRANSFERRED TO ANY OTHER PROPERTY, AND MAY NOT BE ALTERED BY THE USE OF ANY PHYSICAL MEANS.

3. A water right for Claim 12 should be confirmed as set forth in the following Water Right Claim Description.

CLAIM NO. 21
FOR A VESTED WATER RIGHT

CLAIM MAP REFERENCE:
OWRD INVESTIGATION MAPS – T 30 S, R 8 E and T 31 S, R 8 E

CLAIMANTS:
EDWARD D. TOMPKINS AND MERRIE L. TOMPKINS,
AS TRUSTEES OF THE DON AND MERRIE L. TOMPKINS
FAMILY REVOCABLE TRUST DATED JULY 13, 1998
PO BOX 22
GUINDA, CA 95637

WILLIS STANLEY TOMPKINS
HC 63 BOX 328
CHILOQUIN, OR 97624

SOURCE OF WATER:
COW CREEK, tributary to BIG SPRINGS CREEK;
BIG SPRINGS CREEK, tributary to the WILLIAMSON RIVER; and
SIXTEEN UNNAMED SPRINGS, tributary to the WILLIAMSON RIVER

PURPOSE OR USE:
IRRIGATION OF 1964.6 ACRES FROM THE COMINGLED WATERS OF COW CREEK, BIG SPRINGS CREEK, AND SIXTEEN SPRINGS, ALL BY NATURAL OVERFLOW, WITH INCIDENTAL LIVESTOCK WATERING OF 750 HEAD

RATE OF USE:
49.13 CFS FOR IRRIGATION BY NATURAL OVERFLOW

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

PERIOD OF ALLOWED USE: MARCH 15 – NOVEMBER 15

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Source	Twp	Rng	Mer	Sec	Q-Q	Remarks
Cow Creek	30 S	8 E	WM			No specific point of diversion; Comingled water from all sources by natural overflow.
	31 S	8 E	WM			
Big Springs Creek	30 S	8 E	WM			
	31 S	8 E	WM			
Unnamed Spring	30 S	8 E	WM	27	SE SW	
Unnamed Spring	30 S	8 E	WM	28	SW NE	
Unnamed Spring	30 S	8 E	WM	29	NE NE	
Unnamed Spring	30 S	8 E	WM	29	NW NE	
Unnamed Spring	30 S	8 E	WM	32	SE SW	
Unnamed Spring	30 S	8 E	WM	32	NW SE	
Two Unnamed Springs	30 S	8 E	WM	33	SW NE	
Unnamed Spring	30 S	8 E	WM	34	SE NW	
Unnamed Spring	30 S	8 E	WM	34	NW SW	
Unnamed Spring	30 S	8 E	WM	34	SW SW	
Unnamed Spring	31 S	8 E	WM	4	SE NW	
Unnamed Spring	31 S	8 E	WM	4	SE SE	
Unnamed Spring	31 S	8 E	WM	5	NE NW	
Unnamed Spring	31 S	8 E	WM	5	NW SE	
Unnamed Spring	31 S	8 E	WM	8	NE NE	

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION BY NATURAL OVERFLOW WITH INCIDETNAL LIVESTOCK WATERING						
Twp	**Rng**	**Mer**	**Sec**	**Q-Q**	**GLot**	**Acres**
30 S	8 E	WM	22	SW SW		1.80
30 S	8 E	WM	22	SE SW		38.40
30 S	8 E	WM	27	NE NW		40.00
30 S	8 E	WM	27	NW NW		33.60
30 S	8 E	WM	27	SW NW		40.00
30 S	8 E	WM	27	SE NW		40.00
30 S	8 E	WM	27	NE SW		40.00
30 S	8 E	WM	27	NW SW		40.00
30 S	8 E	WM	28	NE NE		8.80
30 S	8 E	WM	28	SW NE		18.40
30 S	8 E	WM	28	SE NE		36.80
30 S	8 E	WM	28	SE NW		7.20
30 S	8 E	WM	28	NE SW		36.00
30 S	8 E	WM	28	NW SW		10.40
30 S	8 E	WM	28	SW SW		0.70
30 S	8 E	WM	28	SW SW	2	14.40
30 S	8 E	WM	28	NE SE		40.00
30 S	8 E	WM	28	NW SE		40.00
30 S	8 E	WM	28	SW SE		36.80
30 S	8 E	WM	28	SE SE		40.00
30 S	8 E	WM	33	NE NE		40.00
30 S	8 E	WM	33	NW NE		40.00
30 S	8 E	WM	33	NE NW	3	36.00
30 S	8 E	WM	33	NW NW	2	21.40
30 S	8 E	WM	33	NE SW		40.00
30 S	8 E	WM	33	NW SW		40.00
30 S	8 E	WM	33	SW SW	4	39.80
30 S	8 E	WM	33	SE SW	5	39.90
30 S	8 E	WM	34	NE NW		40.00
30 S	8 E	WM	34	NW NW		40.00
30 S	8 E	WM	34	SW NW		40.00
30 S	8 E	WM	34	SE NW		40.00
30 S	8 E	WM	34	NE SW		40.00
30 S	8 E	WM	34	NW SW		40.00
30 S	8 E	WM	34	SW SW	1	39.90
30 S	8 E	WM	34	SE SW	2	39.70
31 S	8 E	WM	4	NE NE	1	36.30
31 S	8 E	WM	4	NW NE	2	36.20
31 S	8 E	WM	4	SW NE		40.00
31 S	8 E	WM	4	SE NE		40.00
31 S	8 E	WM	4	NE NW	3	36.10
31 S	8 E	WM	4	NW NW	4	36.00
31 S	8 E	WM	4	SW NW		40.00
31 S	8 E	WM	4	SE NW		40.00
31 S	8 E	WM	4	NE SW		40.00
31 S	8 E	WM	4	NW SW		40.00
31 S	8 E	WM	4	SW SW		40.00
31 S	8 E	WM	4	SE SW		40.00

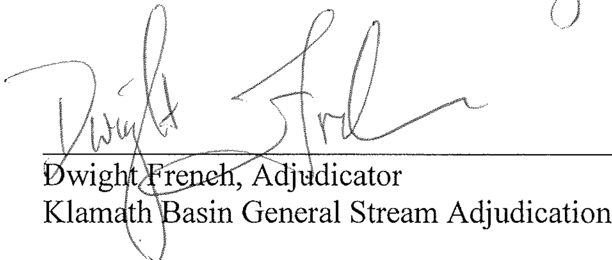
IRRIGATION BY NATURAL OVERFLOW WITH INCIDETNAL LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
31 S	8 E	WM	4	NE SE		40.00
31 S	8 E	WM	4	NW SE		40.00
31 S	8 E	WM	4	SW SE		40.00
31 S	8 E	WM	4	SE SE		40.00
31 S	8 E	WM	5	NE SE		40.00
31 S	8 E	WM	5	NW SE		40.00
31 S	8 E	WM	5	SW SE		40.00
31 S	8 E	WM	5	SE SE		40.00

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.

Reasons 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 January 6th, 2012



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 January 6, 2012, I mailed a true copy of the following: **AMENDED PROPOSED ORDER** (Claim 21), by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first class postage prepaid thereon, and addressed to:

Bruce Bernard
United States Dept. of Justice
Suite 945, North Tower
999 18th St
Denver, CO 80202

William Ganong
Attorney at Law
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Klamath Falls, OR 97601

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David Negri
United States Department of Justice, ENRD
c/o U.S. Attorney's Office, District of Idaho
Washington Group Plaza IV
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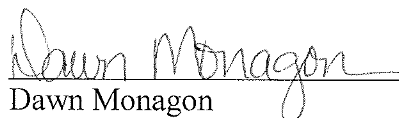

Dawn Monagon
Adjudications Specialist
Oregon Water Resources Department