

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

~~WaterWatch of Oregon, Inc.~~; United States of America; ~~the Klamath Tribes~~; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC;
Contestants

AMENDED PROPOSED ORDER

Case No. 253

Claim: 703

Contests: 1692, ~~3073~~¹, 3511², 3817, and 4242³

vs.

Nature Conservation Trust;
Claimant/Contestant.

This AMENDED PROPOSED ORDER is issued pursuant to OAR 137-003-0655(3), and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. This AMENDED PROPOSED ORDER un-consolidates Case 253, and addresses only Claim 703. As a result, it incorporates only the portions of the Proposed Order, issued on March 28, 2007, that pertain to Claim 703. With respect to the portions of the Proposed Order that pertain to Claim 703, this AMENDED PROPOSED ORDER incorporates the Proposed Order 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 portions of the Proposed Order that address Claim 703.

¹ WaterWatch of Oregon, Inc.’s Contests 3073 was dismissed. *See* ORDER DISMISSING WATERWATCH OF OREGON, INC.’S CONTESTS, May 20, 2003

² Don Vincent voluntarily withdrew from Contest 3511 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3511 on June 24, 2002. On January 15, 2004, Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3511.

³ The Klamath Tribes voluntarily withdrew Contest 4242. *See*, KLAMATH TRIBES’ VOLUNTARY WITHDRAWAL OF CONTEST (CORRECTED) dated April 4, 2005.

A. MODIFICATIONS TO THE “HISTORY OF THE CASE”

Within the section titled “History of the Case” of the Proposed Order, the first Paragraph is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

Claimant seeks a water right as a non-Indian successor to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the allotments’ share of the Tribe’s “practically irrigable acreage” (“PIA”).⁴ Claim 703 is for 10,145.85 acre-feet of water per year at a total rate of 22.24 cfs for irrigation of 889.6 acres of land. (OWRD Ex. 1 at 3.) Claim 704 is for 26.23 acre-feet of water per year at a total rate of 0.06 cfs for irrigation of 2.3 acres of land. (OWRD Ex. 2 at 3.) Other claimed uses are domestic, stock and other non-agricultural uses. (OWRD Ex. 1 at 3; OWRD Ex. 2 at 3.) The claimed period of use for both claims is ~~May 3~~ March 1 through October 16 for irrigation and “year-round” for all other uses. (OWRD Ex. 1 at 4; OWRD Ex. 2 at 4.) The claimed priority date is October 14, 1864.⁵

Reasons for Modifications: Using evidence on the record, to provide more specific information with reference to what was claimed; the ALJ’s proposed finding of fact failed to fully set forth the evidence on the record; to provide corrected and additional citations to the record. In addition, OWRD has determined that the ALJ’s finding that a begin date of May 3 for the claimed period of use is not supported by a preponderance of evidence on the record; in the Claimant’s Statement and Proof of Claim the “Current Annual Period of Use of Water” is clearly described as beginning on March 1.

B. MODIFICATIONS TO THE “FINDINGS OF FACT”

The Proposed Order’s “Findings of Fact” section is modified as shown below. Additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the general reasons for modification is provided here. In addition, certain of the modifications to Findings of Fact #14 remove, for clarity, findings that pertain solely to Claim 704.

Summary of Reasons for Modification of Findings of Fact: (1) To correct and clarify the amounts of acreage irrigated with various sources of water and diversion points, an issue raised in exceptions. (2) To provide evidence from the record to substantiate beneficial use of water by

⁴ Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985).

⁵ This is the priority date of all allowed *Walton* claims in the Klamath Adjudication, as it is the date on which the Klamath Reservation was formed by treaty.

the method of natural overflow, an issue raised in exceptions. (3) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions. (4) 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, an issue raised in exceptions. (5) To provide evidence from the record to substantiate continued use of water by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions. (6) To modify the ALJ's finding with respect to the appropriate season of use for the valid part of the claim. (7) 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.

The Amended Proposed Order's Findings of Fact

- 1) For all allowed water rights in Claims 703 and 704, the Rate is 1/40th cfs per acre. The Duty is 3 acre-feet per acre per year.⁶ The Period of Use for irrigation is ~~May 3 through October 18~~ March 1 through October 16. (OWRD Ex. 1 at ~~4~~ 4; OWRD Ex. 2 at ~~4.~~ 4.) The Priority date is October 14, 1864.⁷

Reason for Modification: OWRD has determined that the ALJ's finding that the period of use is May 3 through October 18 is not supported by a preponderance of evidence on the record. The ALJ's finding appears to have been based on evidence in the record pertaining to the growing season for a specific type of crop. Use of water for irrigation is not limited to the growth a specific crop (pasture grass). OWRD finds that the season for use claimed, March 1 through October 16, is supported by a preponderance of evidence on the record. In addition, the modification provides corrected and additional citations to the record.

- 2) The property subject to ~~these~~ Claims 703 was originally part of the Klamath Indian Reservation. ~~It~~ Claim 703 is composed of 19 parcels that were allotted to Klamath Indians, and one parcel of 2.1 acres that was conveyed directly by the Klamath Tribe. (Book Direct at 11; Ex. U3.) The property was subsequently transferred to non-Indian ownership, as discussed in more detail, below.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to provide an additional citation to the record.

⁶ The original claim sought a duty in excess of 11 acre-feet per acre, but no evidence justifying that duty was submitted or argued. ~~I have~~ Therefore, the ~~adopted the rate and~~ duty is as proposed by the United States, and supported by the testimony of Dale Book. (Affidavit and Correction to Direct Testimony of Dale Book at 3.) **Reason for modification of footnote:** The duty as claimed calculates to 11.4 acre-feet per acre (10145.85 ac-ft / 889.6 acres), and the rate as claimed calculates to 1/40 of one cfs per acre (889.6 acres / 22.24 cfs). Thus the rate is as claimed, and the duty is as proposed by the United States.

⁷ This is the date the Klamath Indian Reservation was created by treaty. Proven *Walton* rights relate back to the date of the Indian treaty that reserved the water rights in the tribes. *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985).

3) The property subject to Claim 703 receives water from four sources: Sprague River; an unnamed stream that flows north to the Sprague River through Allotments 441, 442, 836, 837, and 838; Cherry Creek, which flows north through Allotments 465, 701, 794, 795, 1016 (lower portion) and 1139-East⁸ to the Sprague River; and an unnamed stream that flows through Allotment 794 before joining Cherry Creek in Allotment 795-North.⁹ A portion of the claimed lands are subject to natural overflow from the Sprague River. (OWRD Ex. 1 at 9-10, 203; Ex. U38, U41.) The Panky-Skeen Dam was constructed in the 1920s in Section 3, and water was intentionally backed up behind the dam and utilized, in part, for flood irrigation of Section 9 (Ex. C85; Gould Deposition Ex. C103 at 29-34, 42-49, Deposition Exs. 2, 4; Gould Direct at 3; Gould Rebuttal at 3) until a box pump was installed in Section 10 in the 1940s. (Gould Deposition Ex. C103 at 42-49, Deposition Ex. 3; Declaration of Phil Tupper; Ex. U27, Ex. U56.) In the late 1940s, the Indian Agency constructed a ditch from the Sprague River south to the middle of Allotment 835. (OWRD Ex. 1 at 166; Declaration of Phil Tupper.) The point where this ditch diverts from Sprague River is “Diversion Point #1” located in the NW¼ NW¼, Section 9, T36S R10E, W.M. Phil Tupper then constructed ditches east (East Ditch) and west (West Ditch) from the terminus of this ditch. Several years before 1968, Phil Tupper placed a pump in the junction of the three ditches. Construction of the ditches began in the 1950’s and were completed in 1968, stretching east to the eastern end of Allotment 1016 (East Ditch), and west to Allotment 836 (West Ditch). A headgate was installed in the western terminus in the 1970s to allow water to flow north, as well as south into Riddle Field. (Declaration of Phil Tupper.) In the late 1960s and early 1970s Phil Tupper built a check dam in Allotment 441 on the unnamed creek to back water up to flood-irrigate parts of Allotments 441 and 442, and to irrigate meadows below the dam using an overflow/spreader ditch located just above the check dam and a headgate located at the bottom of the check dam, and by controlled subirrigation (as a result of the check dam), so that the meadow to the north is irrigated up to the next check dam in

⁸ Allotment 1139 is in two non-contiguous parcels, a west parcel (Allotment 1139-West) and an east parcel (Allotment 1139-East). **Reason for addition of footnote:** to provide clarification of Allotment 1139.

⁹ Allotment 795 is in two non-contiguous parcels, a north parcel (Allotment 795-North) and a south parcel (Allotment 795-South). The north parcel is a part of Claim 703, and the south parcel is Claim 704. **Reason for addition of footnote:** to provide clarification of Allotment 795; it appears in two separate claims.

Section 8. (Gould Deposition Ex. C103 at 108-116, Deposition Ex. 4; Declaration of Phil Tupper; Cummins Deposition Ex. C104 at 97-99; OWRD Ex. 1 at 166-169.) The point where the unnamed creek is diverted is “Diversion Point #2,” located in the SW¼ SE¼, Section 17, T36S R10E, W.M. (~~Id.~~ Declaration of Phil Tupper; OWRD Ex. 1 at 9-10, 166-169.) Tupper also built ~~three~~ two check dams on Cherry Creek in Allotments 701 and 795 and one check dam on the unnamed tributary to Cherry Creek in Allotment 794 in order to back control the water, to flood irrigate parts of those allotments. Water is backed up to flood-irrigate behind the dams, while controlled subirrigation (as a result of the check dams) and seepage occurs below the dams in order to irrigate the meadows within Allotments 794, 795, 1139-East, 701, 465, and the 16.4 acres in Allotment 1016 south of the East Ditch. The water perks down through the meadows and eventually reaches the East Ditch in Section 9. (Gould Deposition Ex. C103 at 91-106, Deposition Ex. 4; Cummins Deposition Ex. C104 at 33-35, 84-96, Deposition Ex. 2; OWRD Ex. 1 at 165- 169.) The diversion on Cherry Creek is “Diversion Point #3,” located in the SW¼ SE¼, Section 16, T36S R10E, W.M. The Diversion on the unnamed tributary to Cherry Creek is “Diversion Point #4,” located in NE¼ NW¼, Section 21, T36S R10E, W.M. (Declaration of Phil Tupper; OWRD Ex. 1 at 9-10, 166-169.) Prior to 1986, an owner of Allotment 836 built a check dam on the unnamed creek to back water for flood-irrigating Allotments 836, 837 and 838. (~~Id.~~ OWRD Ex. 1 at 9-10, 14, 166-169, 187; Cummins Deposition C104 at 97-99, and Deposition Ex. 2.) This dam washed out and was repaired in 1991. (Ex. U40 at 97-98.)

Rayson Tupper, on behalf of the Estate of Hiram R. Robbins made application for a water right. As a result, Permit S-43051 was issued for irrigation of 1310.5 acres with a priority date of August 13, 1973. (Ex. U26; Ex. C101; OWRD Ex. 1 at 32.) An OWRD field inspection report dated October 26, 1986 describes the permit acreage as “substantially more than what I found to be irrigated.” (OWRD Ex. 1 at 169.) It was noted in a memo written by the same person who conducted the 1986 field inspection that the permit was cancelled in 1983 by Special Order Volume 37, Pages 33-38 “due to failure to return proof of appropriation.” It was also noted in the memo that “[m]y field inspection showed development and use on most of the land under the permit. Tupper evidently just never sent anything back to us.” (Ex. C101.)

Of the 1310.5 acres shown on Permit S-43051, OWRD found the 889.6 acres appurtenant to Claim 703 were irrigated as marked on 1979 aerial photographs and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 190-200). The south ditch shown on the permit was the only proposed enhancement not completed. (OWRD Ex. 1 at 9-10, 32, 165-169; Cummins Deposition C104 at 92-93, 109-110.)

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record.

4) Prior to the date when the original claim was filed, Klamath Allottee Water Users, an association chartered by the Klamath Tribes (OWRD Ex. 1 at 135-138; OWRD Ex. 2 at 119-122), entered into a stipulation with OWRD whereby the tribal members could file their claims in stages, with all required information and fees to be filed no later than November 2, 1992. (~~Id.~~ OWRD Ex. 1 at 145-150.) Claimant timely filed the original claim for 28,219 acre-feet of water for 3,100 acres irrigation and "non-agricultural uses" on January 31, 1991. (*Id.* at 11.) Within the time allowed, the original claimant paid \$989.60 in fees for 889.6 acres of irrigation in Claim 703, and \$30 for the minimum fee for irrigation in Claim 704. (*Id.* at 145.) Because the original claimant lost the property through bankruptcy, counsel for the claimant sent a letter to the Department on October 30, 1992 purporting to withdraw the claims. The Department accepted this withdrawal and provided a credit for the fees paid, thus effectively refunding them. (*Id.* at 149.) On May 13, 1999, the Department sent a letter to TJ Lindbloom and Tim Cummins, who were at that time the owners of the property, advising that the purported withdrawal of the claims had been invalid, as the withdrawal was not filed by the owner of the property. Consequently, the Department allowed Lindbloom and Cummins to continue processing the claims, provided fees were again paid. (~~Id.~~ OWRD Ex. 1 at 40; OWRD Ex. 2 at 26.)

Reason for Modifications: To provide additional citations to the record.

5) By letter of July 31, 1999, counsel for the predecessors of the current claimant sought to amend the claim by adding 100.6 acres in Allotments 441, 442, 833, 836, 837, and 838 for an area known as Riddle Field. This area had been omitted from the original

claim. In this letter, counsel clarified that the “non-agricultural uses” claimed were for wildlife. (~~Id.~~ OWRD Ex. 1 at 46.) The same letter also sought to include a storage right for an additional 20.5 acres in Allotments 794, 795 and 1139 that had not been claimed in the original claim. (*Id.* at 47-49.) On August 31, 1999, \$200 was paid for livestock use. (*Id.* at 51.) After checks for irrigation fees had been returned once for insufficient funds, \$990 was paid for irrigation in Claim 703 and \$30 was paid for irrigation in Claim 704 on September 1, 1999. (Ex. U44.)

Reason for Modification: To provide clarification to a citation to the record.

6) **Allotment 216 (71.3 acres claimed)**

This allotment, located in S½ SW¼ SE¼, Section 4, T36S, R10E, W.M. and NE¼ NW¼ and N½ NW¼ NE¼, Section 9, T36S R10E, W.M., was allotted to Allie Skellock, a Klamath Indian, by instrument dated March 3, 1910. (Ex. U6 at 1.) The property was conveyed to Manuel Vieira, a non-Indian, on May 15, 1924. (OWRD Ex. 1 at 80.) The property may have been conveyed to Rose Vieira, also a non-Indian, at an unknown date prior to December 8, 1943, but was held by James Vieira and Joseph Vieira, non-Indians, on that date.¹⁰ (Ex. U80 at 1, 2.)

The United States noted that within Allotment 216, 60.2 acres were originally claimed as irrigated by the method of natural overflow (Ex. U38; Ex. U41.) According to maps on the record, 19.0 of these 60.2 acres are within the S½ SW¼ SE¼, Section 4, and 28.2 acres within the NE¼ NW¼, Section 9. (OWRD Ex. 1 at 199, 200, 203.) The remaining 13.0 acres irrigated by the method of natural overflow would be located within the N½ NW¼ NE¼.¹¹ The United States also noted that within Allotment 216, 11.1 acres were originally claimed as irrigated from Diversion Point #1 (Ex. U38; Ex. U41.)

¹⁰ Rose Vieira executed a quit-claim deed to James Vieira and Joseph M. Vieira on December 8, 1943. Because a quit-claim deed does not warrant title to the property, but only conveys whatever interest the grantor had to convey on the date of the instrument (ORS 93.865) it is not clear evidence that Rose Vieira had any interest in the property. It could, for example, have been executed to remove a potential cloud on title incident to the probate of Manuel Vieira’s estate. Without recourse to additional documents, such as probate filings, which are not presently in the record, the interest conveyed by this instrument cannot be ascertained.

¹¹ A total of 16.1 acres were claimed as irrigated by the method of natural overflow within the NW¼ NE¼: 13.0 acres within Allotment 216 (N½ NW¼ NE¼) and 3.1 acres within Allotment 699 (S ½ NW¼ NE¼).
Reason for addition of footnote: to show the distribution of acres between Allotment 216 and 699 within the NW¼ NE¼.

According to maps on record, within Allotment 216, 8.8 of these 11.1 acres are within the NE¼ NW¼, Section 9. (OWRD Ex. 1 at 199, 200, 203.) The remaining 2.3 would be within the N½ NE¼ NW¼, Section 9.¹² Thus, the claim in Allotment 216 is for 71.3 acres, being 60.2 acres irrigated by the method of natural overflow from the Sprague River and 11.1 acres irrigated by water diverted down the western ditch from Diversion Point #1. (Ex.U3; OWRD Ex. 1 at 6, 9-10, 14, 199, 200, 203.) The part of the property north of the Sprague River as well as a small portion of property south of the Sprague River was subject to natural overflow.

¶ A Certificate of Appraisement (from an onsite inspection made August 24, 1923) indicates irrigated and irrigable acreage within allotment 216 while under Indian ownership; “some” acres were characterized as irrigated, and 70 acres as irrigable. (Ex. U6 at 2-6.)

¶ As evidenced by a letter from the Klamath Agency to the Commissions of Indian Affairs dated July 9, 1930, Manuel Vieira was established by 1930, as a stockman grazing cattle on parcels of land he owned, being Allotments 216, 835, and 1016 [see OWRD Ex. 1 at 68, 76, 80], and on parcels he leased [see Ex. C47, C53]. The letter states, in part: "Forwarded herewith is a grazing permit [see Grazing Permit at Ex. C57 at 1-4] which has been drawn in favor of Manuel Vieira ... for the 1930 grazing season. The permit covers 200 acres of tribal land [in Sections 9 and 16] which is entirely surrounded by allotted lands, some of which are fee patented and some trust and restricted. . . Mr. Vieira owns considerable land adjacent to and near by this tribal tract, and leases most of the balance of it, so there would not be danger of his trespassing on other lands. The reason for Mr. Vieira desiring to have the permit granted to him is that some of the fences on the land which he owns and leases are in poor shape and his stock are liable to wander onto this tribal land and trespass." (C57 at 5.) It is more likely than not that Vieira was making beneficial use of water by the method of natural overflow on the 63.3 acres subject to natural overflow from the Sprague River with reasonable diligence after the passage of the property from Indian ownership.

¹² A total of 16.4 acres were claimed within the NW¼ NE¼ as irrigated from Diversion Point #1: 2.3 acres within Allotment 216 (N½ NW¼ NE¼) and 14.1 acres within Allotment 699 (S ½ NW¼ NE¼). Reason for addition of footnote: to show the distribution of acres between Allotment 216 and 699 within the NW¼ NE¼.

¶ Evidence which shows early beneficial use of water on the 11.1 acres not subject to natural overflow within the NE¼ NW¼, Section 9, was presented in James Gould's testimony. Ken Vieira, "a grandson of one of the old owners of Section 9" (Gould Deposition Ex. C103 at 32-33), told Gould that the land in Section 9 was irrigated by means of flooding every year from water backed up behind a dam in Section 3. Ken Vieira was a long-time resident of the area, likely born and raised the property. (Cummins Deposition Ex. C104 at 32-33.) As Gould understood it, the water backed up all through the Kirk property just east of Section 9 [onto Section 10] reaching as far as the Sprague River Bridge, and also "backed it up all the way through Section 9 and the old ditches," irrigating all of Section 9. (Gould Deposition Ex. C103 at 29-34, Deposition Exs. 2, 4; Gould Direct at 3; Gould Rebuttal at 3.) The Panky-Skeen Dam was constructed in the 1920's in Section 3. (Ex. C85.) The "Old Ditch" indicated by Gould on his exhibit map can be seen on the earliest available (1940) aerial photograph. (Compare Ex. U14 and Gould Deposition Ex. C103 at Ex. 4.)

¶ A box pump was used to irrigate within Allotment 216 in the 1940s. (OWRD Ex. 1 at 165; Gould Deposition Ex. C103 at 42-49, Deposition Ex. 3; Declaration of Phil Tupper; Ex. U27; Ex. U56.) While owned by Hi Robbins, the area in Allotment 216 south of the Sprague River ~~it~~ was also irrigated by an 8-inch pipe (U56; Declaration of Phil Tupper) beginning prior to 1946, but has not been irrigated since at least 1996. The part of the property south of the Sprague River was not irrigated until at least 1991. Parts of Allotment 216 were irrigated by pumps or ditches when Mr. Tupper began working the lands in 1946, and he believes these irrigation works were put in by Hi Robbins or his predecessor, Mr. Vieira. (Declaration of Phil Tupper; Ex. U40 at 83-84.) Gould also testified that the portion of Allotment 216 within Section 4 has been irrigated from water delivered through the Cabrel Ditch (a.k.a. Panky Ditch, see Ex. C85) originating at the "Cabrel Pump" located on the Sprague River in Section 3 where the Panky-Skeen dam had once been located. (Gould Deposition Ex. C103 at 66-70, Deposition Ex. 3.) The Cabrel/Panky Ditch can be seen on aerial photographs from 1940 to 1969 (Book Direct at 34.)

When Mr. Gould leased the land from 1995 to 2002, and in 2005 when Mr. Gould maintained the ditches, all the lands in Section 9 between the West - East Ditches

and north to the Sprague River [Allotments 1018, portions of 216, 835, 1016, and most of most of 699] were being irrigated with water from Point of Diversion #1. (Gould Deposition Ex. C103 at 39-41.) In Allotment 216, this would be the 11.1 acres within the NW¼ NE¼ south of the Sprague River. Otherwise, the claimed acres within this Allotment were being irrigated by the method of natural overflow. (OWRD Ex. 1 at 165, 199, 200, 203.)

Water rights granted for irrigation of 60.2 acres on the basis of beneficial use of water by the method of natural overflow from the Sprague River should be with a rate of 1.5 cfs when diverted. Water rights granted for irrigation of 11.1 acres should be with a diversion rate of 0.28 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: Using evidence on the record, to provide more specific information with reference to what was claimed; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record. In addition, the statements that the part of the property north of the Sprague River has not been irrigated since at least 1996, and the part of the property south of the Sprague River was not irrigated until at least 1991 were stricken because they are not supported by a preponderance of the evidence on the record.

7) Allotment 441 (32.7 acres claimed)

This allotment, located in the SW¼ Section 17, T36S R10E, W.M., was allotted to Frank Riddle, a Klamath Indian, by instrument dated March 7, 1910. (OWRD Ex. 1 at 69.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The original claim was for 32.7 acres, being 31.1 acres irrigated by water diverted from Diversion Point 2, on an unnamed creek, and 1.6 acres from Diversion Point 1 on the Sprague River. (Ex. U3; OWRD Ex. 1 at 7, 9-10, 14.) Claimant attempted to add 0.2 acres by letter in 1999. (OWRD Ex. 1 at 47-49.) Phil Tupper installed the first diversion facilities for irrigating this property, a check dam located in the NE¼ SW¼, Section 17, in the late 1960s and early 1970s, prior to conveyance to Hi Robbins Corporation in 1978. (Declaration of Phil Tupper.) The meadows above the check dam are flood irrigated, and the meadows below the check dam are sub-irrigated as a result of the check

dam and/or flood irrigated from an overflow/spreader ditch. (Gould Deposition Ex. C103 at 108-116, Deposition Ex. 4; Declaration of Phil Tupper; Cummins Deposition Ex. C104 at 97-99; OWRD Ex. 1 at 166-169.) The 1.6 acres in the Riddle field were irrigated from Diversion Point #1 from 1968 on. (Declaration of Phil Tupper.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) The check dam (labeled redistribution check) is shown on the 1978 revised application map. (OWRD Ex. 1 at 32.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 441 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 9-10, 190, 203; Ex. C101.)

Water rights granted for 32.7 acres of irrigation should have a diversion rate of 0.82 cfs, being 0.78 cfs from Point of Diversion #2 on an unnamed stream, tributary to the Sprague River, located within the SW¼ SE¼, Section 17; and 0.04 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

8) **Allotment 442 (22.2 acres claimed)**

This allotment, located in SE¼ Section 17, T36S R10E, W.M., was allotted to Toby Riddle, a Klamath Indian, by instrument dated March 7, 1910. (Ex. U6 at 10.) The property was conveyed to Dan Wann, a non-Indian, on May 23, 1925. (Ex. U8 at 25.) The property was subsequently conveyed to Minerva Brown, a Klamath Indian, on September 29, 1941. (*Id.* at 26-27.) Hiram Robbins, also a Klamath Indian, acquired the property from Minerva Brown and her husband Harry by deed executed on September 25, 1941 but recorded after September 29, 1941. (*Id.* at 28-29.)

The original claim was for 22.2 acres irrigated by water diverted from Diversion Point #2 on an unnamed stream (11.7 acres), and from the Sprague River, Diversion Point #1, mixed with water from the unnamed creek Diversion Point #2 (10.5 acres).

(Ex. U3; OWRD Ex. 1 at 7, 9-10, 14.) Claimant attempted to add 13.4 acres by letter in 1999. (OWRD Ex. 1 at 47-49.)

¶ In an Application for a Patent in Fee for Allotment 442, Jefferson Davis Riddle, sole heir of Toby Riddle, was identified as having business experience in farming and stockraising and an occupation of raising cattle and horses, and it was noted that his lands were fenced with post and four wires. (Ex. C17.) A Certificate of Appraisement (from an onsite inspection made January 31, 1923) indicates the land within Allotment 442 was best suited for agriculture, grazing and timber, and noted improvements that included a barn and fencing. (Ex. C18.)

¶ Phil Tupper installed the first diversion facilities for irrigating this property from the unnamed stream in the late 1960s and early 1970s, prior to conveyance to Hi Robbins Corporation in 1978. He finished the western ditch (West Ditch) from Diversion Point #1 in 1968 to irrigate Riddle Field. (Declaration of Phil Tupper.)

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide an additional citation to the record.

9) **Allotment 465 (42.4 acres claimed)**

This allotment, located in W $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 16, T36S R10E, W.M., was allotted to Dora Grant Walker, a Klamath Indian, by instrument dated February 4, 1926. (OWRD Ex. 1 at 67.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 42.4 acres, being 40.2 acres irrigated by commingled water diverted from Point of Diversion #3 on Cherry Creek and Diversion Point #4 on an unnamed stream, tributary to Cherry Creek, and 2.2 acres irrigated from Point of Diversion #3 on Cherry Creek. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) ~~No diversion facilities were constructed until at least 1991, when the property passed to the second non-Indian owner.~~

Farming and Grazing Leases for Allotment 465, beginning in 1908 and ending with a lease to Hiram Robbins in 1954, were conditioned to keep fences in repair and stock

proof condition, and several noted the lessees as being “a stockman of good reputation”. (Ex. C4, C5, C6, C7, C10, C11.)

Cherry Creek joined by an unnamed stream is controlled by check dams built by Mr. Tupper in the 1960s. (Declaration of Phil Tupper.) The water is utilized to irrigate the meadows on the easterly side of Section 16 and in the southeast portion of Section 9 south of the East Ditch. The water flows northward through Allotment 465 and passes through a culvert under the Skeen Ranch Road (between Allotments 465 and 1016) until it catches the East Ditch in Allotment 1016. (Gould Deposition Ex. C103 at 91-106, Deposition Ex. 4.) Water escapes from behind the check dams by seepage, irrigating the downstream meadows. (Gould Deposition Ex. C103 at 98; Cummins Deposition Ex. C104 at 33-35, 84-96, Deposition Ex. 2; OWRD Ex. 1 at 165-169.)

One of the check dams is located in the SW¼ SE¼, Section 16, and backs up water into a natural bowl (Birdy Bob). (Cummins Deposition Ex. C104 at 85 and Deposition Ex. 2.) Mr. Tupper raised this check dam enough to flow water north across a low ridge in the SE¼ SE¼, Section 16, to also irrigate the meadow which extends north from Allotment 1139-East into Allotments 701 and 465. The water meanders through the meadow areas which are sub-irrigated as a result of the raised check dam. (Oct 28, 1986 Supplemental Field Report, OWRD Ex 1 at 165.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) The check dams (labeled redistribution checks) are shown on the 1978 revised application map. (OWRD Ex. 1 at 32.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 465 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 191, 200; Ex. C101.)

Water rights granted for irrigation of 42.4 acres should have diversion rate of 1.06 cfs of water, being 1.00 cfs of commingled water from Point of Diversion #3 on Cherry Creek, located within the SW¼ SE¼, Section 16, and Point of Diversion #4 on an

unnamed stream, tributary to Cherry Creek, located within the NE¼ NW¼, Section 21; and 0.06 cfs from Point of Diversion #3 on Cherry Creek.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide an additional citation to the record. In addition, the statement that no diversion facilities were constructed until at least 1991, when the property passed to the second non-Indian owner was stricken because it is not supported by a preponderance of the evidence on the record.

10) **Allotment 565 (117.0 acres claimed)**

This allotment, located in SW¼ Section 5, T36S R10E, W.M., was allotted to Ellen Miller (Hecocta), a Klamath Indian, by instrument dated August 13, 1920. (OWRD Ex. 1 at 63.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 117.0 acres, being 44.1 acres irrigated by the method of natural overflow from the Sprague River and 72.9 acres irrigated by water diverted down the western ditch from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14, 194, 200.) The part of the property claimed within this allotment which is subject to natural overflow is 2.4 acres within the NE¼ SW¼, 33.1 acres within the NW¼ SW¼ and 8.6 acres within the SW ¼ SW¼, Section 5. (OWRD Ex. 1 at 9-10, 194, 203; Ex. U38; Ex. U41.) This property was not irrigated until after it was transferred to Alan B. Tyler in 1991. (Declaration of Phil Tupper.)

The United States concedes that most of this allotment appears irrigated in 1968 and 1969 aerial photographs. (Book Direct at 48; Ex. U19; Ex. U20.) Prior to the when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) Although the permit was cancelled in 1983 for "failure to return proof of appropriation" (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 565 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 194, 200; Ex. C101.)

At one time irrigation water was supplied to portions of this allotment through a ditch originating at the "Beal Pump" located on the Sprague River in Section 4. In 1974, Mr. Gould repaired this ditch for use by a lessee of Allotment 565. (Gould Deposition Ex. C103 at 53-62, 137, Deposition Exs. 2 and 4.) Although not irrigated by Tupper's family, (Phil Tupper Declaration, para 5), according to an interview with Mr. Tupper, the lands in the SW¼ of Section 5 were sharecropped at one time, and the tenant irrigated the land by pumping water from the Sprague River from a location within the SE¼ SE¼, Section 6, and continued this practice as late as 1981. (OWRD Ex. 1 at 165.) The portion of the allotment lying south of the river was irrigated by James Gould between 1995 and 2002 using water delivered from the West Ditch which flows into westerly and northeasterly channels after crossing the Skeen Ranch road on the south side of the allotment. (Gould Deposition Ex. C103 at 50-52, 60, 80, 137, Deposition Ex. 2.) Timothy Cummins reported irrigating all the lands in this allotment during the late 1990s using a combination of water from a portable pump on the Sprague River and water delivered from the West Ditch. (Cummins Deposition Ex. C104 at 77-83, Deposition Ex. 2.)

Water rights granted for irrigation of 44.1 acres on the basis of beneficial use of water by the method of natural overflow from the Sprague River, should be with a rate of 1.10 cfs when diverted. Water rights granted for irrigation of 72.9 acres should have a diversion rate of 1.82 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record. In addition, the statement that this property was not irrigated until after it was transferred to Alan B. Tyler in 1991 was stricken because it is not supported by a preponderance of the evidence on the record.

11) **Allotment 699 (157.2 acres claimed)**

This allotment, located in the E½ NE¼, N½ NE¼ SE¼, SW¼ NE¼, S½ NW¼ NE¼ of Section 9, T36S R10E, W.M., was allotted to James Copperfield, a Klamath Indian, prior to August 6, 1920. (OWRD Ex. 1 at 75.) The property was conveyed to A.C. Beals, a non-Indian, on August 6, 1920. (*Id.*) The property was subsequently conveyed to Manuel Vieira, also a non-Indian, prior to December 8, 1943. (Ex.U8 at 1-2.)

The United States noted that within Allotment 699, 29.1 acres were originally claimed as irrigated by the method of natural overflow (Ex. U38; Ex. U41.) According to maps on the record, 26.0 of these 29.1 acres are within the NE¼ NE¼, Section 9. (OWRD Ex. 1 at 199, 200, 203.) The remaining 3.1 acres irrigated by the method of natural overflow would be located within the S½ NW¼ NE¼ (Allotment 699). The United States also noted that within Allotment 699, 128.1 acres were originally claimed as irrigated from Diversion Point #1 (Ex. U38; Ex. U41.) According to maps on record, within Allotment 699, 14.0 of these 128.1 acres are within the NE¼ NE¼, 40.0 acres within the SE¼ NE¼, 40.0 acres within the SW¼ NE¼, and 20.0 acres within the N½ NE¼ SE¼. (OWRD Ex. 1 at 199, 200, 203.) The remaining 14.1 acres would be within the S½ NE¼ NW¼, Section 9. Thus, the claim in Allotment 699 is for 157.2 acres, being 29.1 acres irrigated by the method of natural overflow from the Sprague River and 128.1 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14, 199, 200, 203.)

¶ Allotment 699 was irrigated in the 1920s along with other properties within Section 9 by flooding created by backing up water behind the Panky-Skeen Dam. (Ex. C85; Gould Deposition Ex. C103 at 29-34, Deposition Exs. 2, 4; Gould Direct at 3; Gould Rebuttal at 3.) Parts of Allotment 699 were being irrigated by pumps or ditches by the time Mr. Tupper began working the lands in 1946. This property was irrigated, beginning before By 1946, there was by a box pump installed at the northeast boundary used to irrigate about the northern two-thirds of the allotment. Either Manuel Vieira or a subsequent owner installed that pump. (Declaration of Phil Tupper; Gould Deposition Ex. C103 at 42-49, Deposition Ex. 3; Ex. U27; Ex. U56.) After the pump was installed in Diversion Point #1 and the eastern ditch completed in the 1960s, irrigation was changed to that facility; Phil Tupper installed a pump at the end of the ditch/canal that had been constructed by the Indian Agency in Allotment 835 in the late 1940s, and began irrigating this property in the 1960s with water conveyed by this ditch from Point of Diversion #1. (Id. Declaration of Phil Tupper.) When Mr. Gould leased the land from 1995 to 2002, and in 2005 when Mr. Gould maintained the ditches, all the lands in Section 9 between the West - East Ditches and north to the Sprague River (Allotments

1018, portions of 216, 835, 1016, and most of most of 699) were being irrigated with water from Point of Diversion #1. (Gould Deposition Ex. C103 at 39-41.)

Water rights granted for irrigation of 29.1 acres on the basis of beneficial use of water by the method of natural overflow from the Sprague River should be with a rate of 0.73 cfs when diverted. Water rights granted for irrigation of 128.1 acres should have a diversion rate of 3.2 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

12) **Allotment 701 (17.1 acres claimed)**

This allotment, located in N½ SW¼, N½ SE¼ of Section 16, T36S R10E, W.M., was allotted to Mary Clinton, a Klamath Indian, by instrument dated March 7, 1910. (Ex. U6 at 13.) The property was conveyed to Dan Wann and B. Wolford, non-Indians, on June 16, 1925. (Ex. U8 at 32.) Dan Wann's wife, Catherine Wann, also a non-Indian, acquired an undivided interest in the property prior to October 6, 1938 when the Wanns transferred it to Hiram Robbins. (*Id.* at 33-34.)

The claim is for 17.1 acres, being 8.0 acres irrigated by water diverted from Cherry Creek at Diversion Point #3, and 9.1 acres irrigated by commingled water from Points of Diversions #3 and #4. (Ex. U3; OWRD Ex. 1 at 6, 7, 9-10, 14.) Phil Tupper installed the first diversion facilities, a series of check dams, in the 1960s and 1970s. (Declaration of Phil Tupper.) Water is backed up to flood-irrigate behind the dams, while controlled subirrigation (as a result of the check dams) and seepage occurs below the dams; water perks down through the meadows. (Tupper Declaration; Gould Deposition Ex. C103 at 91-106, Deposition Ex. 4; Cummins Deposition Ex. C104 at 33-35, 84-96, and Deposition Ex. 2; OWRD Ex 1 at 165- 169.)

One of the check dams is located in the SW¼ SE¼, Section 16, and backs up water into a natural bowl (Birdy Bob). (Cummins Deposition Ex. C104 at 85 and Deposition Ex. 2.) Mr. Tupper raised this check dam enough to flow water north across a low ridge in the SE¼ SE¼, Section 16, to also irrigate the meadow which extends north

from Allotment 1139 (east) into Allotments 701 and 465. The water meanders through the meadow areas which are sub-irrigated as a result of the raised check dam. (Oct 28, 1986 Supplemental Field Report, OWRD Ex 1 at 165.)

Beneficial use of water with reasonable diligence after transfer from Indian ownership has not been demonstrated on this parcel.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

13) **Allotment 794 (16.3 acres claimed)**

This allotment, located in NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21, T36S R10E, W.M., was allotted to Eda Jackson (Cole), a Klamath Indian, by instrument dated November 19, 1920. (OWRD Ex. 1 at 77.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim was originally for 16.3 acres irrigated by water diverted from Diversion Point #4, the unnamed stream tributary to Cherry Creek. (Ex. U3; OWRD Ex. 1 at 7, 9-10, 14.) Claimant attempted to add 12.0 acres by letter in 1999. (OWRD Ex. 1 at 47-49.) Phil Tupper installed the first irrigation facilities, a series of check dams to back water for irrigation of this property, in the 1960s and 1970s. (Declaration of Phil Tupper.) Within this allotment, the check dam on the unnamed tributary to Cherry Creek located in SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16, backs up water to flood-irrigate an area referred to as Blue Eye. (Cummins Deposition Ex. C104 at 33-35, 84-96, and Deposition Ex. 2.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) The check dam (labeled redistribution check) is shown on the 1978 revised application map. (OWRD Ex. 1 at 32.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 794 were

irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 191, 200; Ex. C101.)

Water rights granted for irrigation of 16.3 acres should have a diversion rate of 0.41 cfs of water from Point of Diversion #4 on an unnamed stream, tributary to Cherry Creek, located within the NE¼ NW¼, Section 21.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record.

14) Allotment 795 (22.8 acres claimed)

This allotment, located in SE¼ SW¼, SW¼ SE¼ of Section 16 (Allotment 795-North) (Claim 703), and E½ E½ NE¼ of Section 28, T36S R10E, W.M. (Allotment 795-South) (Claim 704), was allotted to Birdie Jackson, a Klamath Indian, by instrument dated February 11, 1921. (OWRD Ex. 1 at 78; OWRD Ex. 2 at 60.) The property was apparently conveyed to Hiram Robbins, also a Klamath Indian, at some time before 1978, when it was conveyed by Robbins' heirs to the Hi Robbins Corporation, an Oregon Corporation. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, also a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The portion of the property subject to Claim 703 is composed of 22.8 acres, being 4.9 acres irrigated by water diverted from Diversion Point #3 on Cherry Creek, 8.5 acres irrigated by water diverted from Diversion Point #4 on an unnamed stream, tributary to Cherry Creek, and 9.4 acres irrigated by commingled water from Points of Diversions #3 and #4. (Ex. U3; OWRD Ex. 1 at 6, 7, 9-10, 14.) Claimant attempted to add 5.2 acres to Claim 703 by letter in 1999. (OWRD Ex. 1 at 47-49.) ~~The portion of the property subject to Claim 704 is composed of 2.3 acres irrigated by water from the only Diversion Point for Claim 704, diverted from a pool and ditch constructed at a spring at the headwaters of Cherry Creek some time before 1986,¹³ when the pond and an "old ditch" were observed.~~ (Ex. U3; OWRD Ex. 2 at 6, 14.)

¶ In the late 1960s or early 1970s, Phil Tupper installed the first irrigation facilities for the part of the property subject to original Claim 703, a two check dams on Cherry Creek and one check dam on an unnamed stream. ~~to back water for flood irrigation.~~

¹³ This is the Diversion Point for Claim 704, located in the SW ¼ NE ¼ Section 28, T36S, R10E. W.M. *The Nature Conservation Trust* (253)
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(Declaration of Phil Tupper.) Water is backed up to flood-irrigate behind the dams, while controlled subirrigation (as a result of the check dams) and seepage occurs below the dams; water perks down through the meadows. (Declaration of Phil Tupper; Gould Deposition Ex. C103 at 91-106, Deposition Ex. 4; (Cummins Deposition Ex. C104 at 33-35, 84-96, and Deposition Ex. 2.); OWRD Ex 1 at 165- 169.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) The check dams (labeled redistribution checks) are shown on the 1978 revised application map. (OWRD Ex. 1 at 32.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Claim 703 within Allotment 795 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 191, 200; Ex. C101.)

Water rights granted for irrigation of 22.8 acres should have a diversion rate of 0.57 cfs, being 0.12 cfs from Point of Diversion #3 on Cherry Creek, located within the SW¼ SE¼, Section 16; 0.21 cfs from Point of Diversion #4 on an unnamed stream, tributary to Cherry Creek, located within the NE¼ NW¼, Section 21; and 0.24 cfs of commingled water from Point of Diversions #3 and #4.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record. In addition, the portions of this finding that pertain exclusively to Claim 704 were stricken for the sake of clarity.

15) **Allotment 833 (10.2 acres claimed)**

This allotment, located in SE¼, Section 8, T36S R10E, W.M., was allotted to Jefferson Davis Riddle, a Klamath Indian, by instrument dated September 27, 1918. (OWRD Ex. 1 at 41.) The property was conveyed to Dan Wann, a non-Indian, on June 17, 1925. (Ex U8 at 36.) The property was subsequently conveyed to Hiram Robbins, a Klamath Indian, on September 25, 1941. (*Id.* at 28-29.)

The claim is for 10.2 acres irrigated by water diverted from Diversion Point #1 on the Sprague River via the West Ditch. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) Claimant

attempted to add 13.7 acres to the claim by letter in 1999. (OWRD Ex. 1 at 47-49.) Diversion facilities were not developed on this property until the late 1960s, when the Riddle Field was developed. (Declaration of Phil Tupper.)

Beneficial use of water with reasonable diligence after transfer from Indian ownership has not been demonstrated on this parcel.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

16) **Allotment 835 (127.1 acres claimed)**

This allotment, located in W½ NW¼, NW¼ SW¼, SE¼ NW¼ of Section 9, T36S R10E, W.M., was allotted to Anna May Riddle (Copperfield), a Klamath Indian, by instrument dated November 21, 1919. (OWRD Ex. 1 at 74.) The property was conveyed to Manuel^a Vieira, a non-Indian, on May 5, 1920. (Ex. U7 at 4.) The property was subsequently conveyed to Hiram Robbins, a Klamath Indian, on February 11, 1947. (Ex. U8 at 3-4.)

The claim is for 127.1 acres, being 27.8 acres irrigated by the method of natural overflow from the Sprague River and 99.3 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) The part of the property claimed within this allotment which is subject to natural overflow is 27.8 acres within the NW¼ NW¼, Section 9. (OWRD Ex. 1 at 9-10, 199, 200, 203 ; Ex. U38; Ex. U41.)

¶ As evidenced by a letter from the Klamath Agency to the Commissions of Indian Affairs dated July 9, 1930, Manuel Vieira was established by 1930, as a stockman grazing cattle on parcels of land he owned, being Allotments 216, 835, and 1016 [see OWRD Ex. 1 at 68, 76, 80], and on parcels he leased [see Ex. C47, C53]. The letter states, in part: "Forwarded herewith is a grazing permit [see Grazing Permit at Ex. C57 at 1-4] which has been drawn in favor of Manuel Vieira ... for the 1930 grazing season. The permit covers 200 acres of tribal land [in Sections 9 and 16] which is entirely surrounded by allotted lands, some of which are fee patented and some trust and restricted. . . Mr. Vieira owns considerable land adjacent to and near by this tribal tract, and leases most of the balance of it, so there would not be danger of his trespassing on

other lands. The reason for Mr. Vieira desiring to have the permit granted to him is that some of the fences on the land which he owns and leases are in poor shape and his stock are liable to wander onto this tribal land and trespass.” (C57 at 5.) It is more likely than not that Vieira was making beneficial use of water by the method of natural overflow on the 27.8 acres subject to natural overflow from the Sprague River with reasonable diligence after the passage of the property from Indian ownership.

¶ The other portions of Allotment 835 were irrigated in the 1920s along with other properties within Section 9 by flooding created by backing up water behind the Panky-Skeen Dam (Ex. C85; Gould Deposition Ex. C103 at 29-34, Deposition Exs. 2, 4; Gould Direct at 3; Gould Rebuttal at 3), and in the 1940s from a box pump (Gould Deposition Ex. C103 at 42-49, Deposition Ex. 3; Declaration of Phil Tupper; Ex. U27; Ex. U56). After Phil Tupper installed ~~that~~ a pump at the end of the ditch/canal that had been constructed by the Indian Agency in the late 1940s and built the western ditch, he began irrigating this property in the 1960s with water conveyed by this ditch from Point of Diversion #1. (Declaration of Phil Tupper.) When Mr. Gould leased the land from 1995 to 2002, and in 2005 when Mr. Gould maintained the ditches, all the lands in Section 9 between the West - East Ditches and north to the Sprague River [Allotments 1018, portions of 216, 835, 1016, and most of most of 699] were being irrigated with water from Point of Diversion #1. (Gould Deposition Ex. C103 at 39-41.)

Water rights granted for irrigation of 27.8 acres on the basis of beneficial use of water by the method of natural overflow from the Sprague River should be with a rate of 0.70 cfs when diverted. Water rights granted for irrigation of 99.3 acres should have a diversion rate of 2.48 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ’s proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

17) **Allotment 836 (45.6 acres claimed)**

This allotment, located in SW¼ Section 8, T36S R10E, W.M., was allotted to Emanuel George Riddle, a Klamath Indian, by instrument dated March 7, 1910. (OWRD

Ex. 1 at 85.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 45.6 acres irrigated by water diverted from the Sprague River at Diversion Point #1 (~~35.9~~ 18.9 acres, of which 12.4 acres are within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and 6.5 acres are within the SE $\frac{1}{4}$ SW $\frac{1}{4}$) and the unnamed creek at Diversion Point #2 (~~9.7~~ 26.7 acres, of which 2.7 acres are within the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 9.7 acres are within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ and 14.3 acres are within the SE $\frac{1}{4}$ SW $\frac{1}{4}$). (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) Claimant attempted to add 5.9 acres to the claim by letter in 1999. (OWRD Ex. 1 at 47-49.) Phil Tupper installed the first diversion facilities (located in Allotment 441) for irrigating this property, a check dam located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 17, in the late 1960s and early 1970s, prior to conveyance to Hi Robbins Corporation in 1978. (Declaration of Phil Tupper.) This check dam is used to irrigate meadows below the dam using an overflow/spreader ditch located just above the check dam and a headgate located at the bottom of the check dam, and by controlled subirrigation (as a result of the check dam), so that the meadow to the north is irrigated up a second check dam in Section 8. (Gould Deposition Ex. C103 at 108-116, Deposition Ex. 4; Declaration of Phil Tupper; Cummins Deposition Ex. C104 at 97-99; OWRD Ex. 1 at 166-169.) A portion of the property, ~~9.7 acres,~~ was first irrigated This second check dam, located in Allotment 836 in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ was installed some time prior to 1986 when a check dam it was observed on the unnamed stream on this allotment. (~~Id.~~ OWRD Ex. 1 at 187.) In addition, a headgate was installed in the early 1970s to irrigate a portion of this property from Diversion Point #1. (Declaration of Phil Tupper.) This headgate feeds a ditch that runs north from Riddle Field. Spreader ditches then disperse water for irrigation of meadows below the check dam in Section 8 within Allotments 836 and 839. (Gould Deposition Ex. C103 at 78, 82-86, Deposition Exs. 3 and 4; Cummins Deposition Ex. C104 at 58-62, Deposition Ex. 2.) The parts of the property included in the Riddle field (6.5 acres) were irrigated from Diversion Point #1 from 1968 on. (Declaration of Phil Tupper.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to

Claim 703. (Ex. U26.) The check dams (labeled redistribution checks) are shown on the 1978 revised application map. (OWRD Ex. 1 at 32.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 836 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 190, 193, 200; Ex. C101.)

Water rights granted for irrigation of 45.6 acres should have a diversion rate of 1.14 cfs, being 0.47 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9; and 0.67 cfs from Point of Diversion #2 on an unnamed stream, tributary to the Sprague River, located within the SW¼ SE¼, Section 17.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record.

18) **Allotment 837 (29.1 acres claimed)**

This allotment, located in N½ N½ of Section 17, T36S R10E, W.M., was allotted to Birdie Riddle, a Klamath Indian, by instrument dated March 7, 1924. (OWRD Ex. 1 at 71.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 29.1 acres irrigated by water diverted from the Sprague River at Diversion Point #1 (10.6 acres) and the unnamed creek at Diversion Point #2 (18.5 acres). (Ex. U3; OWRD Ex. 1 at 7, 9-10, 14.) Claimant attempted to add 32.3 acres to this claim by letter in 1999. (OWRD Ex. 1 at 47-49.) Phil Tupper installed the first diversion facilities (located in Allotment 441) for irrigating this property, a check dam located in the NE¼ SW¼, Section 17, in the late 1960s and early 1970s, prior to conveyance to Hi Robbins Corporation in 1978. (Declaration of Phil Tupper.) This check dam is used to irrigate meadows below the dam using an overflow/spreader ditch located just above the check dam and a headgate located at the bottom of the check dam, and by controlled subirrigation (as a result of the check dam), so that the meadow to the

north is irrigated up to the next check dam in Section 8. (Gould Deposition Ex. C103 at 108-116, Deposition Ex. 4; Declaration of Phil Tupper; Cummins Deposition Ex. C104 at 97-99; OWRD Ex. 1 at 166-169.) Part of the property was first also irrigated from the unnamed creek at some time prior to 1986 when the check dam was installed in Allotment 836 to back water for irrigation of part of this property. (~~Id.~~ OWRD Ex. 1 at 187.) The remainder is part of the Riddle Field, which was irrigated beginning in 1968. (Declaration of Phil Tupper.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) The check dams (labeled redistribution checks) are shown on the 1978 revised application map. (OWRD Ex. 1 at 32.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 837 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 190, 193, 200; Ex. C101.)

Water rights granted for irrigation of 29.1 acres should have a diversion rate of 0.73 cfs, being 0.27 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9; and 0.46 cfs from Point of Diversion #2 on an unnamed stream, tributary to the Sprague River, located within the SW¼ SE¼, Section 17.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

19) **Allotment 838 (30.0 acres claimed)**

This allotment, located in S½ N½ of Section 17, T36S R10E, W.M., was allotted to Sim Riddle, a Klamath Indian, by instrument dated February 11, 1921. (OWRD Ex. 1 at 62.) The property was conveyed to Dan Wann, a non-Indian, on June 17, 1925. (Ex. U8 at 36.) The property was subsequently conveyed to Minerva Brown, a Klamath Indian, on March 29, 1941. (*Id.* at 26-27.)

The claim is for 30.0 acres irrigated by water diverted from the Sprague River at Diversion Point #1 (16.4 acres) and the unnamed creek at Diversion Point #2 (13.6

acres). (Ex. U3; OWRD Ex. 1 at 7, 9-10, 14.) Claimant attempted to add 35.1 acres to this claim by letter in 1999. (OWRD Ex. 1 at 47-49.) Phil Tupper installed the first diversion facilities (located in Allotment 441) for irrigating this property, a check dam located in the NE¼ SW¼, Section 17, in the late 1960s and early 1970s, prior to conveyance to Hi Robbins Corporation in 1978. (Declaration of Phil Tupper.) This check dam is used to irrigate meadows below the dam using an overflow/spreader ditch located just above the check dam and a headgate located at the bottom of the check dam, and by controlled subirrigation (as a result of the check dam), so that the meadow to the north is irrigated up to the next check dam in Section 8. (Gould Deposition Ex. C103 at 108-116, Deposition Ex. 4; Declaration of Phil Tupper; Cummins Deposition Ex. C104 at 97-99; OWRD Ex. 1 at 166-169.) Part of the property was ~~first~~ also irrigated from the unnamed creek at some time prior to 1986 when the check dam was installed in Allotment 836 to back water for irrigation of part of this property. (~~Id.~~ OWRD Ex. 1 at 187.) The remainder is part of the Riddle Field, which was irrigated beginning in 1968.

Beneficial use of water with reasonable diligence after transfer from Indian ownership has not been demonstrated on this parcel.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

20) **Allotment 839 (29.9 acres claimed)**

This allotment, located in NW¼ Section 8, T36S R10E, W.M., was allotted to Bidwell J. Riddle, a Klamath Indian, by instrument dated March 7, 1910. (OWRD Ex. 1 at 87.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 29.9 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) Phil Tupper installed a headgate in the early 1970s to irrigate this property from Diversion Point #1 by the western ditch. (Declaration of Phil Tupper.) This headgate feeds a ditch that runs north from Riddle Field. Spreader ditches then disperse water for irrigation of meadows within

Allotments 836 and 839. (Gould Deposition Ex. C103 at 78, 82-86, Deposition Exs. 3 and 4; Cummins Deposition C104 at 58-62, Deposition Ex. 2.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 839 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 193, 200; Ex. C101.)

Water rights granted for irrigation of 29.9 acres should have a diversion rate of 0.75 cfs of water from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

21) **Allotment 851 (13.2 acres claimed)**

This allotment, located in NE¼ Section 8, T36S R10E, W.M., was allotted to Lizzie Schonchin, a Klamath Indian, by instrument dated March 7, 1910. (OWRD Ex. 1 at 89.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 13.2 acres, being 6.2 acres irrigated by the method of natural overflow from the Sprague River and 7.0 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) The part of the property claimed within this allotment which is subject to natural overflow is 6.2 acres within the NE¼ NE¼, Section 8. (OWRD Ex. 1 at 9-10, 193, 203 ; Ex. U38; Ex. U41.)

¶ Farming and Grazing Leases for Allotment 851 range in date from 1932 to 1937. Several leases were conditioned to keep fences in good repair and stockproof condition. Manuel Vieira was the lessee in 1931, and Mrs. Manuel Vieira was the lessee in 1932.

(Exs. C45, C46, C47, C48, C53.) A Certificate of Appraisalment (from an onsite inspection made December 17, 1943) indicates the character of the land as being 125 acres of grazing and 35 acres of irrigable land. (Ex. C51.)

¶ Phil Tupper began irrigating this property after finishing the western ditch from Diversion Point #1 in the 1960s. (Declaration of Phil Tupper.) Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 851 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 193, 200; Ex. C101.)

The elements necessary for a *Walton* claim for 13.2 acres in Allotment 851 have been established. Water rights granted for irrigation of 6.2 acres on the basis of beneficial use of water by the method of natural overflow from the Sprague River should be with a rate of 0.16 cfs when diverted. Water rights granted for irrigation of 7.0 acres should have diversion rate of 0.18 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

22) **Allotment 1016 (100.4 acres claimed)**

This allotment, located in S½ SE¼, S½ NE¼ SE¼, E½ NE¼ SW¼, NW¼ SE¼, of Section 9, T36S R10E, W.M., was allotted to Mary Ann Copperfield, a Klamath Indian, by instrument dated March 15, 1915. (Ex. U6 at 18.) The property was conveyed to Manuel Vieira, a non-Indian, on August 6, 1920. (OWRD Ex. 1 at 76.) The property was subsequently conveyed to James and Joseph Vieira, also non-Indians, on or before December 8, 1943. (Ex. U8 at 1-2.)

The claim is for 100.4 acres, being 84.0 acres irrigated by water diverted from the Sprague River at Diversion Point #1, and 16.4 acres irrigated by commingled water from

Point of Diversion #3 on Cherry Creek and Point of Diversion #4 on an unnamed stream, tributary to Cherry Creek. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) This property was not irrigated until the pump was installed at Diversion Point #1 in the 1960s. (Declaration of Phil Tupper.)

A Farming and Grazing Lease between Allottee Mary Ann Copperfield and lessee William Bassett, dated May 15, 1909, was made for 80 acres within T36 R10, Section 9 in the County of Klamath for the purpose of grazing cattle. (Ex. C54.) A Grazing Lease between Allottee Mary Ann Copperfield and lessee Daniel D. Liskey, dated Feb. 28, 1916, was made for 160 acres within T36S, R10E, Section 9 in the County of Klamath for the purpose of grazing cattle and horses. The lease indicated that the lessor reserved "all tilable [sic] land fenced off to itself . . . for her own use" and would "furnish a partition fence of six barded wires" for which the lessee was to "be responsible for damages in the event that his cattle break through and destroy crops." (Ex. C55.)

As evidenced by a letter from the Klamath Agency to the Commissions of Indian Affairs dated July 9, 1930, Manuel Vieira was established by 1930, as a stockman grazing cattle on parcels of land he owned, being Allotments 216, 835, and 1016 [see OWRD Ex. 1 at 68, 76, 80], and on parcels he leased [see Ex. C47, C53]. The letter states, in part: "Forwarded herewith is a grazing permit [see Grazing Permit at Ex. C57 at 1-4] which has been drawn in favor of Manuel Vieira . . . for the 1930 grazing season. The permit covers 200 acres of tribal land [in Sections 9 and 16] which is entirely surrounded by allotted lands, some of which are fee patented and some trust and restricted. . . Mr. Vieira owns considerable land adjacent to and near by this tribal tract, and leases most of the balance of it, so there would not be danger of his trespassing on other lands. The reason for Mr. Vieira desiring to have the permit granted to him is that some of the fences on the land which he owns and leases are in poor shape and his stock are liable to wander onto this tribal land and trespass." (C57 at 5.)

Allotment 1016 was irrigated in the 1920s along with other properties within Section 9 by flooding created by backing up water behind the Panky-Skeen Dam. (Ex. C85; Gould Deposition Ex. C103 at 29-34, Deposition Exs. 2, 4; Gould Direct at 3; Gould Rebuttal at 3.) A box pump was used to irrigate parcel in the 1940s. (Gould Deposition Ex. C103 at 42-49, Deposition Ex. 3; Declaration of Phil Tupper; Ex. U27;

Ex. U56.) Phil Tupper installed a pump in the SW¼ NW¼ of Section 9 at the end of the ditch/canal that had been constructed by the Indian Agency in Allotment 835 in the late 1940s, and began irrigating this property in the 1960s with water conveyed by this ditch from Point of Diversion #1. (Declaration of Phil Tupper.) When Mr. Gould leased the land from 1995 to 2002, and in 2005 when Mr. Gould maintained the ditches, all the lands in Section 9 between the West - East Ditches and north to the Sprague River (Allotments 1018, portions of 216, 835, 1016, and most of most of 699) were being irrigated with water from Point of Diversion #1. (Gould Deposition Ex. C103 at 39-41.) The parcel south of the East Ditch is irrigated using commingled water from Cherry Creek and an unnamed stream controlled by check dams. This source is utilized to irrigate the meadows on the easterly side of Section 16 and the southeast portion of Section 9 below the East Ditch. The water flows through Allotment 465 and passes through a culvert under the Skeen Ranch Road (between Allotments 465 and 1016), until it catches the East Ditch in Allotment 1016. (Gould Deposition Ex. C103 at 91-106, Deposition Ex. 4.)

Water rights granted for 100.4 acres should have diversion rate of 2.51 cfs, being 2.10 cfs from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9; and 0.41 cfs of commingled water from Point of Diversion #3 on Cherry Creek, located within the SW¼ SE¼, Section 16, and Point of Diversion #4 on an unnamed stream, tributary to Cherry Creek, located within the NE¼ NW¼, Section 21.

Reasons for Modifications: To provide more specific information with reference to what was claimed, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record. In addition, the statement that this property was not irrigated until the pump was installed at Diversion Point #1 in the 1960s was stricken because it is not supported by a preponderance of the evidence on the record.

23) **Allotment 1018 (1.7 acres claimed)**

This allotment, located in W½ NE¼ SW¼, Section 9, T36S R10E, W.M., was allotted to Gilbert Copperfield, a Klamath Indian, by instrument dated March 15, 1915. (OWRD Ex 1 at 72.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 1.7 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) Phil Tupper began irrigating this property after the eastern ditch from Diversion Point #1 was completed in the 1960s. (Declaration of Phil Tupper.) Allotment 1018 was irrigated in the 1920s along with other properties within Section 9 by flooding created by backing up water behind the Panky-Skeen Dam (Ex. C85; Gould Deposition Ex. C103 at 29-34, Deposition Exs. 2, 4; Gould Direct at 3; Gould Rebuttal at 3), and in the 1940s from a box pump (Gould Deposition Ex. C103 at 42-49, Deposition Ex. 3; Declaration of Phil Tupper; Ex. U27; Ex. U56). Phil Tupper installed a pump at the end of the ditch/canal that had been constructed by the Indian Agency in Allotment 835 in the late 1940s, and began irrigating this property in the 1960s with water conveyed by this ditch from Point of Diversion #1. (Declaration of Phil Tupper.) When Mr. Gould leased the land from 1995 to 2002, and in 2005 when Mr. Gould maintained the ditches, all the lands in Section 9 between the West - East Ditches and north to the Sprague River (Allotments 1018, portions of 216, 835, 1016, and most of most of 699) were being irrigated with water from Point of Diversion #1. (Gould Deposition Ex. C103 at 39-41.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 1018 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 199, 200; Ex. C101.)

Water rights granted for irrigation of 1.7 acres should have a diversion rate of 0.04 cfs of water from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record. In addition, the statement that Phil Tupper began irrigating this property after the eastern ditch from Diversion Point #1 was completed in the 1960s was stricken because it is not supported by a preponderance of the evidence on the record.

24) **Allotment 1139 (1.3 acres claimed)**

This allotment, located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 16 and NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 21, (1139-West), and in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 16 and NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 21, (1139-East) T36S R10E, W.M., was allotted to Nathaniel Jackson, a Klamath Indian, by instrument dated March 15, 1915. (OWRD Ex. 1 at 73.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 1.3 acres irrigated by water diverted from Cherry Creek. (Ex. U3; OWRD Ex. 1 at 6, 7, 9-10, 14.) Claimant attempted to add 3.3 acres to this claim by letter in 1999. (OWRD Ex. 1 at 47-49.) ~~No diversion of water occurred respecting the portion of the property originally claimed until at least 1991, when the property passed to Alan Tyler, the second non-Indian owner. (Declaration of Phil Tupper.)~~ This parcel was irrigated after Mr. Tupper raised the check dam in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16 enough to flow water north across a low ridge in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 16, to irrigate the meadow to the north from there - which extends north from Allotment 1139-East into Allotments 701 and 465. The water meanders through the meadow areas which are sub-irrigated as a result of the raised check dam. (Oct 28, 1986 Supplemental Field Report, OWRD Ex 1 at 165.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) The check dam (labeled redistribution check) is shown on the 1978 revised application map. (OWRD Ex. 1 at 32.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to Allotment 1139-East were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 191, 200; Ex. C101.)

Water rights granted for irrigation of 1.3 acres should have a diversion rate of 0.03 cfs of water from Point of Diversion #3 on Cherry Creek, located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 16.

Reasons for Modifications: To provide more specific information with reference to the location of the allotment, using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record. In addition, the statement that no diversion of water occurred respecting the portion of the property originally claimed until at least 1991, when the property passed to Alan Tyler, the second non-Indian owner was stricken because it is not supported by a preponderance of the evidence on the record.

25) **Unallotted Tribal Land (2.1 acres claimed)**

This parcel, located in W½ NW¼, W½ E½ NW¼ of Section 16, and S½ SW¼ of Section 9, T36S R10E, W.M., was conveyed by the United States, as trustee for the Klamath Tribe, to Rachel Tupper, a Klamath Indian, on April 7, 1959. (OWRD Ex. 1 at 83-84.) The property was then conveyed to Hiram Robbins, a Klamath Indian, in 1965. (Ex. U8 at 52.)

The claim is for 2.1 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 9-10, 14.) The parcel was irrigated from the West Ditch after the pump at Diversion Point #1 was installed in the mid-1960s at the end of the ditch/canal that had been constructed by the Indian Agency in Allotment 835 in the late 1940s; water is conveyed by this ditch from Point of Diversion #1. (Declaration of Phil Tupper.)

Prior to when the property was transferred out of Indian ownership, an application was made in 1973 for water right Permit No. 43051 which included lands appurtenant to Claim 703. (Ex. U26.) The West Ditch is shown on the 1978 revised application map. (OWRD Ex. 1 at 32.) Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage described on the permit under irrigation (OWRD Ex. 1 at 165-169); OWRD found the acres appurtenant to these unallotted tribal lands were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 1 at 193, 200; Ex. C101.)

Water rights granted for 2.1 acres should have a diversion rate of 0.05 cfs of water from Point of Diversion #1 on the Sprague River, located within the NW¼ NW¼, Section 9.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide additional citations to the record.

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C. MODIFICATIONS TO THE “CONCLUSIONS OF LAW”

Within the Proposed Order’s “Conclusions of Law” section, Conclusions #7, 19, 21, 27, 28, 29, 30, 32, and 34 are modified as follows: (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

a. Conclusion 7:

The record does not support the ~~rate and~~ duty claimed, but does support the rate, some of the actual use, points of diversion and re-diversion, places of use, season of use, and/or acreage claimed.

b. Conclusion 19:

Irrigation by the method of natural flooding /sub-irrigation/ natural overflow can constitute a valid water right in some cases, but cannot form the is a valid basis for a *Walton* right, ~~such as the claims in this case~~ and beneficial use of water by the method of natural overflow is established on 167.4 acres within portions of Allotments 216, 565, 835, 851, and 699.

c. Conclusion 21:

There is sufficient information on ~~the development or continuous use~~ beneficial use of water having been made with reasonable diligence on a portion of the place of use to establish a *Walton* right.

d. Conclusion 27:

Beneficial use of water for irrigation of on portions of the claimed place of use was ~~developed~~ made by the Indian owner before the land was transferred to ~~the first~~ non-Indian ~~owner~~ successors.

e. Conclusion 28:

Beneficial use of water for irrigation of on portions of the claimed place of use was ~~developed~~ made with reasonable diligence ~~by the first non-Indian purchaser from an Indian owner~~ following transfer from Indian ownership to non-Indian ownership.

f. Conclusion 29:

Beneficial use of water for Any irrigation not developed made with reasonable diligence after transfer of the property ~~from the first to~~ non-Indian owner successors cannot be allowed as the basis for a *Walton* claim.

g. Conclusion 30:

Irrigation ~~of~~ has been continued on portions of the claimed place of use, ~~has been continuous.~~

h. Conclusion 32:

Any use of water on portions of the claimed place of use that ~~is wasteful~~ was not put to beneficial use with reasonable diligence is not part of the allowed claim.

i. Conclusion 34:

Water provided to the claimed place of use by the method of natural overflow, ~~means (flooding in the spring or through sub-irrigation) and although~~ not through a diversion system created by humans, ~~cannot be the~~ is a valid basis for development ~~of a Walton right or constitute irrigation under a Walton right.~~

Reasons for Modifications: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports conclusions other than those in the 2007 Proposed Order.

D. MODIFICATIONS TO THE “OPINION”

The Proposed Order’s “Opinion” section is modified as described herein. OWRD has not incorporated the ALJ’s discussions regarding the first non-Indian purchaser rule, and 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 “~~striketrough~~” text. In addition, the last paragraph under the heading “Allotment 795” is deleted (shown in “~~striketrough~~” text) for clarity, because it pertains solely to Claim 704.

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, *The Nature Conservation Trust* (253)

considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

Claimant seeks a water right under two somewhat different categories. Originally, individual Indians owned most of the property, under an allotment of reservation land by the Federal Government. The property then transferred to non-Indians, who acquired the water rights held by the Indians, with some limitation. These are called *Walton* claims. The tribe itself, however, held a small part, and transferred that property in fee after the allotment system had been terminated. This is called a Klamath Termination Act claim. These two types of claims have similar, but slightly different attributes.

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.

~~Although, as discussed below, Claimant takes issue with these elements, I adopt ALJ Young's formulation as the correct interpretation of the *Walton* line of cases. 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 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.~~

The Klamath Termination Act claim, however, was not allotted to or conveyed by a member of the Klamath Tribe, but by the Tribe, itself. Thus, this claim is distinguishable from a *Walton* claim. However, this does not end the matter. The policies underlying the decisions in the *Walton* cases, together with peculiarities within the Klamath Termination Act, require recognition of a water right similar to a *Walton* right, and having the same priority date, October 14, 1864.

Generally, a person acquiring land from the public domain does not acquire a water right by virtue of that acquisition. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158-162 (1935). This is true even if the land was previously part of an Indian Reservation, so long as it has been treated as surplus and returned to the public domain. *United States v. Anderson* 736 F2d 1358, 1362 (9th Cir. 1984). However, in this case, the property was not treated as surplus and returned to the public domain. To the contrary, under the Klamath Termination Act, 25 USC Section 564a, the Tribes retained parts of the Klamath Indian Reservation not previously allotted to individual members of the Tribes. The Tribes, or a trustee on behalf of the Tribes, conveyed the property directly, with the proceeds distributed to the Tribal members pro-rata. 25 USC §564d. The Termination Act also retained the ownership of the water rights in the Tribes until the property was transferred. *Id.*

In the *Walton* line of cases, the federal courts concluded that Congress, in the General Allotment Act, ch. 119, 24 Stat. 388, intended that Indians allotted a portion of the reservation should be able sell the allotment with its accompanying water rights, thereby maximizing its value to the Indians. *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir. 1981), *cert den* 454 U.S. 1092 (1981). Only after allotments come into non-Indian hands is the protection afforded by treaty and federal oversight changed in any way. Once a non-Indian acquires the property, the *Walton* courts have concluded that ~~the first non-Indian owner~~ successors obtains

the rights of the Indian seller, but must use diligence in developing beneficial use of the water in order to retain the benefit acquired, ~~and may not sell the undeveloped right to another.~~ *Walton*, 647 F.2nd at 51. The same factors are present with respect to land retained by the Klamath Tribes, and sold directly by the Tribes. Particularly in cases such as this, where Congress has expressed the intent to preserve the Tribes' interest in a water right appurtenant to Tribally-owned properties, it should be concluded that Congress also intended that the Tribes be able to transfer that water right, as a way of maximizing the value of the property to the members of the Tribe. Once the property has passed from Tribal ownership, there is no particular reason to distinguish the water right obtained from the water rights obtained from allottees. In both cases, the federal interest in protecting the water right is limited to the means necessary to assure that the Tribes received the appropriate value for their properties.¹⁴ Consequently, ~~I conclude that the~~ property subject to Claim 703 that was transferred directly from the Tribes into private ownership, should be treated in a fashion analogous to a *Walton* right, with the following required elements:

- a. The property must have been part of the Klamath Indian Reservation.
- b. The property must have been transferred by or on behalf of the Klamath Tribes or an Indian successor to the Tribes to a non-Indian purchaser, without becoming part of the public domain.
- c. 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:
- d. The claim may include water use based on the Tribes' undeveloped irrigable land, to the extent that ~~the additional water use was developed~~ put to beneficial use with reasonable diligence by the first non-Indian purchaser of the land following transfer from Indian ownership.
- e. ~~After initial development, the water claimed must have been continuously used by the first non-Indian purchasers and by all subsequent successors.~~

¹⁴ In this case the purchaser was also a member of the tribe. In cases where Klamath Indians purchased an allotment, rather than inheriting it, however, the land has been considered to be still in Indian ownership for *Walton* purposes, and no-one has argued differently in this case. Thus, when the Tribe sells Termination Act property to its members, the property will continue to be treated as Indian owned until it passes to a non-Indian purchaser.

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).¹⁵

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.¹⁶ 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

¹⁵ 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.

¹⁶ 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.

Congressional intent to limit the alienability of the allottee's reserved water right. *Walton II*, 647 F2d at 50.

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

Third, the Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey. We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-a-vis other water users, may not retain the right to that quantity of water despite non-use.

...

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

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
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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...”¹⁷

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,¹⁸ 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-

¹⁷ 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.

¹⁸ 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.

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Indian owners. See id. at 402-03. The court concluded that the reasonable diligence period had run prior to Walton's purchase in 1948. Id. at 403 ("We are unable to infer an intent to appropriate an increasing amount of water from over two decades of relatively static irrigation practices"). The court's decision is based on the lack of development over a period of time, and not on the number of intervening non-Indian owners.

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

The opinion rejects the trial court finding that 'Walton exercised reasonable diligence in irrigating a minimum of 104 acres.' This is done on the ground that the record lacks 'sufficient evidence that the non-Indian owners preceding Walton had the requisite intent to irrigate any additional acreage.' I agree with this conclusion. I write only to point out that an Indian allottee who remains in possession of his allotment is treated much more generously. Such an allottee is entitled to sufficient water to meet his essential agricultural needs 'when those needs arise.' The full measure of his rights need not be exercised immediately. The court in *Adair* refused to extend this generous treatment to a non-Indian successor to an Indian allottee because of [*Walton II*]. The combined effect of *Walton II*, as explicated by this case, *Walton III*, and *Adair*, is to have made impossible the transfer by an Indian allottee to a non-Indian successor the full economic value of the allotment. There is a 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 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.¹⁹

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

¹⁹ 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.

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.²⁰

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).²¹

²⁰ 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).

²¹ 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.”

The Nature Conservation Trust (253)

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.”²² *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.

²² 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 Nature Conservation Trust* (253)

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.

Claimant has also argued that to the extent the property subject to this claim is not eligible for treatment as a *Walton* claim, some parts of it could be subject to a pre-1909 water right under state law.²³ There is not sufficient evidence in the record to support this contention. In order to establish such a water right, Claimant must show that (1) prior to February 24, 1909, the appropriator had an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) water was subsequently diverted from the natural channel by means of a ditch, channel or other structure; and (3) water was applied within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930). Contestants have vigorously opposed this suggestion, arguing that it is untimely, and outside the proper scope of the case. It is unnecessary to decide whether, in the proper case, such a change of legal theory could be allowed because none of the properties qualifies for treatment as a pre-1909 claim under state law. The property was all previously part of the Klamath Indian Reservation. It was allotted to various individual members of the tribe in 19 separate parcels. Those allotments were confirmed to their original allottees no earlier than March 1910.

While it is possible that the land was subject to use by the Tribes as a whole, or their members, the Tribes held the property, so far as the evidence shows, in the tribal equivalent of the public domain. No tribal member held an exclusive interest before the allotments were confirmed in 1910. It has been held that harvesting of hay and other products nurtured by natural overflow of water and sub-irrigation of land can be sufficient water use to establish a pre-1909 appropriation. *In re Silvies River*, at 66. However, under Oregon law as it existed prior to 1909, use of water could not form the basis for a water right until it coincided with evidence of a claim of right in the land to which the water was applied. *Hough v. Porter*, 51 Or 318, 421

²³ ORS 539.010(4) provides: "The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act (as defined in ORS 537.010) where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and in compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter."

~~(1909). Since there was no claim of right in the land except by the tribe as a whole until after 1909, no pre-1909 water right can be found on the evidence in this case.~~

Application of Walton Elements to the Modified Proposed Order Findings of Fact

1. Natural Flooding/Natural Overflow

A *Walton* right may be established through beneficial use of the natural overflow of water, without any artificial diversion works. There is no dispute that 167.4 acres of the claimed lands are subject to natural overflow from the Sprague River. (OWRD Ex. 1 at 14, 203; Ex. U38, U41.)

2. Hi Robbins Corporation, an Oregon Corporation

The property in question in this case was pieced together by Hiram Robbins, a Klamath Indian, over a period of years. Robbins acquired some of the property from allottees, or their Indian successors. He obtained other parcels from non-Indian purchasers. After Robbins died, his heirs transferred their various interests in the property into Hi Robbins Corporation, an Oregon Corporation. While there is some indication that the heirs formed the corporation to hold their various interests, the quit-claim deeds from the heirs to the corporation recite substantial consideration for their conveyances. Moreover, the corporation is recited in these conveyances as “an *Oregon* corporation.” Consequently the existence and incidents of the corporation are controlled by Oregon law, rather than the law of the tribe. Generally speaking, a corporation is a separate entity from its shareholders, such that, for example, the shareholders have no liability for corporate actions other than the value of their shares. *Amfac v. International Systems*, 294 Or 94, 108 (1982); ORS 60.151. Thus, the fact that a corporation has been formed by, or held exclusively by, Klamath Indians, does not make it an Indian owner. In any event, the claimants have the burden of proof in this case. The evidence is not sufficient to show the governance of the corporation or who its shareholders were, apart from a general statement by Phil Tupper that “The Hi Robbins Corp. was all owned by my family members, who are members of the Klamath Tribe.” (Declaration of Phil Tupper.) When the heirs of Hiram Robbins sold their inherited properties to the corporation, they transferred the property out of Indian ownership, triggering the requirement of due-diligence, and causing any inchoate rights

conveyed to the corporation to be cut off, at the latest, when the property was subsequently transferred to Alan Tyler in 1991.

3. Amendment of the Original Claim

In 1999, Claimant sent OWRD a letter seeking to increase the acreage included in the claim. Claimant argues that this increase was effective. The United States argues that any attempt to increase the claim after the deadline was invalid. OWRD agrees, but in addition notes that fees were only timely paid for the 889.6 acres originally claimed in Claim 703 and the 2.3 acres claimed in Claim 704. Consequently, OWRD opines, the claim is limited to 889.6 acres for Claim 703, and 2.3 acres for 704, and any increase in acreage over acres in the places of use claimed prior to the deadline may not be allowed.

Both the United States and OWRD are correct. ORS 539.210 provides that a claim must be filed “at the time and in the manner required by law.” If a claim is not filed within the time provided, the claimant is “barred and estopped from subsequently asserting any rights theretofore acquired.” ORS 539.210. Additionally, OAR 690-030-0085 expressly prohibits the Water Resources Director from permitting any alteration or amendment of the claim after the commencement of the period of open inspection. In this case, OWRD entered into a stipulation with the Klamath Allottee Water Users Association, providing for a staged filing of claims, with the last part of the required information to be filed no later than November 2, 1992. To the extent Claimant’s letter of 1999 sought to include land not previously included in filings prior to November 2, 1992, it was not effective. Moreover, as noted, the original claimant only paid fees enough for the number of acres originally claimed, and no fees for livestock. Although OWRD refunded those fees by mistake, the Department allowed Lindbloom and Cummins to pay the same fees to revive the claim. Even though Claimant attempted to pay additional fees to secure a livestock claim, those additional fees cannot be held to have permitted an upward amendment of the claim, or a claim for livestock that was not filed within the time allowed. Thus, the claim as discussed below will only include the property described in the initial claim. All property and uses described in the 1999 letter but not in the initial claim will be denied as outside the claim.²⁴

²⁴ The original claim also sought a *Walton* right for fish and wildlife. However, this was not pursued in any of the briefs submitted by the parties, and in any case cannot be allowed. The Ninth Circuit held, in *United States v. Adair*, 723 F2d at 1418, that water rights for fish and wildlife reserved to the Tribes by treaty are still held by the Tribes, and are not transferable.

With the forgoing principles in mind, ~~I will now consider~~ the situation of each of the separate properties will be considered in Section 4, directly below.

4. Application of *Walton* Elements to Each Allotment

Allotment 216:

Allotment 216 was transferred out of Indian ownership in 1924. It passed to the second non-Indian owner in 1943 at the latest. ~~Although there was evidence that the part of the property north of the Sprague River was irrigated for some time prior to 1946, the evidence is insufficient to show that irrigation occurred soon enough after 1924 to be considered diligent development, or, in any case, before 1943 when it was transferred out of the ownership of the first non-Indian owner. In any event, irrigation of that part of the property was discontinued in 1996. There is no evidence of irrigation south of the Sprague River until at least 1991. The claim cannot be allowed as to this allotment. There is evidence that some beneficial use of water occurred prior to transfer from Indian ownership. After transfer from Indian ownership to non-Indian successors, water by natural overflow from the Sprague River and from water backed up behind the Panky-Skeen dam was put to beneficial use with reasonable diligence. A southward ditch as sketched on the application map from the Panky-Skeen dam apparently was never constructed as originally planned (Ex. U30 at 3; Ex. C85), however, the method of irrigation described by Gould as told to him by Ken Vieira would not have relied on this southward ditch. Although the methods of diversion have changed over time, beneficial use of water has continued as claimed. (OWRD Ex. 1 at 165-169, 199, 200, 203; Gould Deposition Ex. C103 at 39-41; Cummins Rebuttal.) Irrigation of the 72.1 acres claimed within this allotment should be allowed, of which 63.3 acres are irrigated by the method of natural overflow from the Sprague River.~~

Allotment 441:

Allotment 441 passed out of Indian ownership in 1978, when it was transferred into the Hi Robbins Corporation. Prior to that date, however, a ~~series of~~ check dams had been installed in the unnamed stream, causing water to back up and flood irrigate this parcel, and to irrigate meadows below the dam using an overflow/spreader ditch and/or a headgate, and by controlled subirrigation (as a result of the check dam). The evidence establishes that beneficial use of water occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water

right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring one year within transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. Consequently, 32.7 acres of irrigation is allowable. The additional .2 acres claimed in 1999 is not allowable.

Allotment 442:

Allotment 442 was transferred out of Indian ownership in 1920 1925. In 1941 it was transferred again, to someone who was a Klamath Indian. As has been noted, the fact that the second owner was a Klamath Indian is not significant. Although there is evidence this parcel was grazed was under Indian ownership, given the lack of evidence that lands within this allotment are subject to natural overflow, beneficial use of water by the method of natural overflow has not been established. Moreover, irrigation on this parcel was not commenced until the 1960s following the installation of a check dam on the unnamed stream, more than 40 35 years after it passed from Indian ownership. The water claimed for irrigation was not put to beneficial use with reasonable diligence. The claim as to this parcel cannot be allowed.

Allotment 465:

Allotment 465 remained in Indian ownership until 1978, when it was transferred to the Hi Robbins Corporation. ~~The first non-Indian owner did not construct diversion facilities during the 13 years before the property passed to the second successor in 1991. Thus, the first non-Indian owner did not diligently develop the right, and it was cut off when the property transferred. This portion of the claim cannot be allowed.~~ Prior to that date, check dams had been installed on the unnamed stream and Cherry Creek, causing water to back up which escapes from behind the check dams by seepage, irrigating the downstream meadows. The evidence establishes that beneficial use of water occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same

as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring one year within transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. Irrigation of the 42.4 acres claimed within this allotment is allowable.

Allotment 565:

Allotment 565 remained in Indian ownership until 1978, when it was transferred to the Hi Robbins Corporation. ~~The first non-Indian owner did not construct diversion facilities during the 13 years before the property passed to the second successor in 1991. Thus, the first non-Indian owner did not diligently develop the right, and it was cut off when the property transferred. This portion of the claim cannot be allowed.~~ Aerial photographs show most of the allotment was being irrigated prior to that date. The record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring one year within transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. Although the methods of diversion have changed over time, beneficial use of water has continued as claimed. (OWRD Ex. 1 at 165, 194, 200, 203; Gould Deposition Ex. C103 at 53-62, 80, 137; Cummins Rebuttal.) Irrigation of the 117.0 acres claimed within this allotment is allowable, of which 44.1 acres are irrigated by the method of natural overflow from the Sprague River.

Allotment 699:

Allotment 699 passed out of Indian ownership in 1920. It passed to the second successor, Manuel Vieira, some time prior to December 8, 1943. After transfer from Indian ownership to non-Indian successors, water by natural overflow from the Sprague River and irrigation from water backed up behind the Panky-Skeen dam was put to beneficial use with reasonable diligence. A southward ditch as sketched on the application map from the Panky-Skeen dam apparently was never constructed as originally planned (Ex. U30 at 3; Ex. C85),

however, the method of irrigation described by Gould as told to him by Ken Vieira would not have relied on this southward ditch. A box pump irrigated the property from an overflow channel from the Sprague River in 1946, after Hiram Robbins acquired it. It is unknown, however, exactly when that box pump was installed. As the property had been out of Indian ownership since 1920, as many as 26 years could have passed before irrigation was developed. Consequently, diligent development of irrigation has not been shown, and a *Walton* right cannot be allowed. Although the methods of diversion have changed over time, beneficial use of water has continued as claimed. (OWRD Ex. 1 at 165-169, 199, 200, 203; Gould Deposition Ex. C103 at 39-41; Cummins Rebuttal.) Irrigation of the 156.4 acres claimed within this allotment is allowable, of which 26.0 acres are irrigated by the method of natural overflow from the Sprague River.

Allotment 701:

Allotment 701 passed out of Indian ownership in 1925. The first non-Indian purchaser transferred the property to Hiram Robbins on October 6, 1938. Phil Tupper installed the first diversion facilities, check dams to back water for irrigation, in the 1960s, more than 35 years after the property passed from Indian ownership. The water claimed for irrigation was not put to beneficial use with reasonable diligence. This portion of the claim cannot be allowed.

Allotment 794:

Allotment 794 passed out of Indian ownership when it was transferred into the Hi Robbins Corporation in 1978. A portion of it, 16.3 acres, was irrigated while still in Indian ownership, beginning in the 1960's when Phil Tupper installed check dams to back water for irrigation. Thus, the record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. This part of the claim for 16.3 acres should be allowed.

Allotment 795:

The first evidence of non-Indian ownership on Allotment 795 is when it passed from Indian ownership (Hiram Robbins) in 1978, when it was acquired by to the Hi Robbins Corporation. It was divided between Claim 703 and 704. Most of that The portion that is subject to Claim 703 was irrigated while still in Indian ownership beginning in the 1960s when Phil Tupper installed check dams to back control water for irrigation. Water is backed up to flood-irrigate behind the dams, while controlled subirrigation (as a result of the check dams) and seepage occurs below the dams; water perks down through the meadows. The record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. This portion of the claim, 22.8 acres, should be allowed. The additional 5.2 acres claimed in 1999 are not allowable.

~~The portion subject to claim 704 was irrigated by a diversion from a small spring at the head of Cherry Creek, prior to 1986, while held by the first non-Indian owner, Hi Robbins Corporation. Given its description as an "old ditch," it is likely that this diversion was put in place some time before, either while the property was in Indian ownership or soon after it was transferred to the Corporation. Thus, the portion of the property subject to Claim 704, 2.3 acres, should be allowed.~~

Allotment 833:

Allotment 833 was transferred to Dan Wann, the first non-Indian owner, in 1925. Wann transferred the property to Hiram Robbins in 1941. It was not irrigated until the 1960s, more than 35 years after passing from Indian ownership. Therefore, beneficial use of water for irrigation was neither diligently developed, made with reasonable diligence nor developed made

prior to transfer to the second non-Indian owner. This portion of the claim should not be allowed.

Allotment 835:

Allotment 835 was transferred to the first non-Indian owner, Manuel Vieira, in 1920. Hiram Robbins acquired it in 1947. ~~The property was not irrigated until the mid 1960s, 40 years after passing out of Indian ownership, when a pump was installed in a ditch dug across this allotment by the Indian Agency. Thus, irrigation was neither diligently developed, nor developed prior to the transfer to the second successor. This part of the claim should not be allowed.~~ After transfer from Indian ownership to non-Indian successors, water by natural overflow from the Sprague River and irrigation from water backed up behind the Panky-Skeen dam was put to beneficial use with reasonable diligence. A southward ditch as sketched on the application map from the Panky-Skeen dam apparently was never constructed as originally planned (Ex. U30 at 3; Ex. C85), however, the method of irrigation described by Gould as told to him by Ken Vieira would not have relied on this southward ditch. Although the methods of diversion have changed over time, beneficial use of water has continued as claimed. (OWRD Ex. 1 at 165-169, 199, 200, 203; Gould Deposition Ex. C103 at 39-41; Cummins Rebuttal.) Irrigation of the 127.1 acres claimed within this allotment is allowable, of which 27.8 acres are irrigated by the method of natural overflow from the Sprague River.

Allotment 836:

Allotment 836 was held in Indian ownership until Hi Robbins Corporation acquired it in 1978. A check dam was installed in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, prior to 1986 to back water up on a portion of this property. Another check dam in Allotment 441 is used to irrigate meadows below the dam using an overflow/spreader ditch and/or a headgate, and by controlled subirrigation (as a result of the check dam). A headgate and spreader ditches are used to control water for irrigation of the meadows north of Riddle Field. These facilities were in place by the 1970s. The 1978 revised application map for Permit S-43051 shows both check dams as described by Phil Tupper and as noted in the 1986 OWRD Field Inspection Reports. (Declaration of Phil Tupper; OWRD Ex. 1 at 32, 165-169, 190, 200; Ex. U26.) ~~Because Hi Robbins Corporation, the first non-Indian owner, held the property until 1991, and this check~~

~~dam was in existence in 1986, it was probably installed some time earlier, either while the land was in Indian ownership, or soon after the corporation acquired it. The record establishes that remainder of the original claimed acres was were under irrigation when Hi Robbins Corporation acquired the allotment, or soon after the corporation acquired it. Because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. This portion of the claim, 45.6 acres, should be allowed. The additional 5.9 acres claimed in 1999 are not allowable.~~

Allotment 837:

Allotment 837 was in Indian ownership until 1978 when the Hi Robbins Corporation acquired it. A portion of the property was in irrigation, as a result of the check dam in Allotment 441, when the corporation acquired it. The remainder It was also irrigated from the check dam that was constructed in Allotment 836 prior to 1986. Since That check dam was constructed while the land was in Indian ownership or soon after, under the first non-Indian ownership. The 1978 revised application map for Permit S-43051 shows both check dams as described by Phil Tupper and as noted in the 1986 OWRD Field Inspection Reports. (Declaration of Phil Tupper; OWRD Ex. 1 at 32, 165-169, 190, 200; Ex. U26.) The record establishes that the original claimed acres were under irrigation when Hi Robbins Corporation acquired the allotment, or soon after the corporation acquired it. Because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. This portion of the claim, 29.1 acres, should be allowed. The additional 32.3 acres claimed in 1999 are not allowable.

Allotment 838:

Allotment 838 passed out of Indian ownership in 1925. No part of it was irrigated until the 1960s, approximately 40 years later, after it had passed through several subsequent owners. Irrigation was not developed either diligently, or prior to conveyance to the second successive owner. The water claimed for irrigation was not put to beneficial use with reasonable diligence. This portion of the claim should not be allowed.

Allotment 839:

Allotment 839 was in Indian ownership until 1978 when Hi Robbins Corporation acquired it. It was under irrigation when acquired by the Corporation; Phil Tupper installed a headgate in the early 1970s to irrigate this property from Diversion Point #1 via the West Ditch. The record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. This portion of the claim, 29.9 acres, should be allowed.

Allotment 851:

This allotment was in Indian ownership until 1978 when Hi Robbins Corporation acquired it. It was under irrigation by the method of natural overflow and from Diversion Point #1 while still in Indian ownership. Phil Tupper installed a headgate near the north end of Riddle Field in the early 1970s to irrigate this property via the West Ditch. The record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same

as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. This part of the claim, 13.2 acres, of which 6.2 acres are irrigated by the method of natural overflow from the Sprague River, should be allowed.

Allotment 1016:

Manuel Vieira acquired this allotment in 1920. It was subsequently transferred to James and Joseph Vieira in 1943. ~~It was not irrigated until the 1960s when Point of Diversion #1 was developed, more than 40 years after it passed from Indian ownership. This part of the claim was not, therefore, diligently developed and cannot be allowed.~~ Farming and Grazing leases indicate irrigation was more likely than not occurring while still in Indian ownership. After transfer from Indian ownership to non-Indian successors, irrigation from water backed up behind the Panky-Skeen dam was put to beneficial use with reasonable diligence. A southward ditch as sketched on the application map from the Panky-Skeen dam apparently was never constructed as originally planned (Ex. U30 at 3; Ex. C85), however, the method of irrigation described by Gould as told to him by Ken Vieira would not have relied on this southward ditch. Although the methods of diversion have changed over time, beneficial use of water has continued as claimed. (OWRD Ex. 1 at 165-169, 199, 200, 203; Gould Deposition Ex. C103 at 39-41; Cummins Rebuttal.) Irrigation of the 100.1 acres claimed within this allotment is allowable.

Allotment 1018:

This property was in Indian ownership until 1978 when Hi Robbins Corporation acquired it. It was first under irrigation while still in Indian ownership from water backed up behind the Panky-Skeen dam, and later in the early 1970s with water from Point of Diversion #1 on the Sprague River via the East Ditch. The record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of

transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. Thus, this part of the claim, 1.7 acres, should be allowed.

Allotment 1139:

Allotment 1139 was in Indian ownership until 1978. ~~However, there is no evidence of development of irrigation on the property included in the original claim until after it had passed 13 years later to Alan Tyler, the second non-Indian owner, in 1991. Therefore, it was neither diligently developed nor developed before transfer to the second successive owner. This part of the claim cannot be allowed. This parcel was irrigated after Mr. Tupper raised the check dam in the SW¼ SE¼ of Section 16 enough to flow water north across a low ridge in the SE¼ SE¼, Section 16, to irrigate the meadow which extends north from there. The 1978 revised application map for Permit S-43051 shows the check dam as described by Phil Tupper and as noted in the 1986 OWRD Field Inspection Reports. (Ex. U26; Declaration of Phil Tupper; OWRD Ex. 1 at 32, 165-169, 191, 200; Ex. U26.) The evidence establishes that beneficial use of water occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. Beneficial use of water has continued as claimed. (OWRD Ex. 1 at 165-169, 191, 200, 203; Gould Deposition Ex. C103 at 91-106; Cummins Rebuttal.) Irrigation of the 1.3 acres claimed within this allotment is allowable. The additional 3.3 acres claimed in 1999 are not allowable.~~

Unallotted Tribal Land:

This property was held in trust for the Tribe until 1959, when it was sold to a Klamath Indian. It stayed in Indian ownership until 1978, when it was acquired by Hi Robbins Corporation. Phil Tupper irrigated the property from at least the mid-1960s when the pump was installed at in a canal that conveyed water from Diversion Point #1. The record establishes that

beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership.
There is also evidence that irrigation was occurring by 1979, within one year of transfer to non-
Indian ownership, which also demonstrates that the water claimed for irrigation in this parcel
was put to beneficial use with reasonable diligence. This part of the claim, 2.1 acres, should be allowed.

Reasons for Modification: To correct and clarify the elements of a *Walton* right; to correct and clarify the elements of a Klamath Termination Act right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership and beneficial use of water being made with reasonable diligence after transfer to non-Indian successors; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

E. MODIFICATIONS TO THE "ORDER"

The "Order" section of the March 28, 2007 Proposed Order is deleted and replaced with the following:

1. A water right for Claim 703 should be confirmed as set forth in the following Water Right Claim Description:

[Beginning of Water Right Claim Description]

CLAIM NO. 703

CLAIM MAP REFERENCE:

CLAIM # 703, PAGES 9-10; OWRD INVESTIGATION MAP – T 36 S, R 10 E

CLAIMANT: THE NATURE CONSERVATION TRUST

PO BOX 298
ROSEBURG, OR 97470

SOURCES OF WATER:

UNNAMED STREAM, tributary to CHERRY CREEK,
CHERRY CREEK, tributary to the SPRAGUE RIVER,
UNNAMED STREAM, tributary to the SPRAGUE RIVER, and
The SPRAGUE RIVER, tributary to the WILLIAMSON RIVER

PURPOSE OR USE:

IRRIGATION OF 810.1 ACRES, BEING 167.4 ACRES BY NATURAL OVERFLOW OF THE SPRAGUE RIVER, 467.2 ACRES FROM POD 1, 76.3 ACRES FROM POD 2, 8.4 ACRES FROM POD 3, 24.8 ACRES FROM POD 4, AND 66.0 ACRES FROM COMMINGLED WATER FROM PODS 3 AND 4.

RATE OF USE:

20.25 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION, BEING 4.18 CFS BY NATURAL OVERFLOW FROM THE SPRAGUE RIVER, 11.68 FROM POD 1, 1.91 CFS FROM POD 2, 0.21 CFS FROM POD 3, 0.62 CFS FROM POD 4, AND 1.65 CFS FROM COMMINGLED WATER FROM PODS 3 AND 4.

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 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	Remarks
Natural Overflow	The Sprague River	36 S	10 E	WM			No specific point of diversion - irrigation by natural overflow
POD 1	The Sprague River	36 S	10 E	WM	9	NW NW	
POD 2	Unnamed Stream	36 S	10 E	WM	17	SW SE	Tributary to the Sprague River
POD 3	Cherry Creek	36 S	10 E	WM	16	SW SE	
POD 4	Unnamed Stream	36 S	10 E	WM	21	NE NW	Tributary to Cherry Creek
Commingled Water from PODS 3 & 4	Cherry Creek, and Unnamed Stream tributary to Cherry Creek	36 S	10 E	WM	16	SW SE	
					21	NE NW	

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD	
36 S	10 E	WM	4	SW SE	19.0	NATURAL OVERFLOW FROM SPRAGUE RIVER	
36 S	10 E	WM	5	NE SW	2.4		
36 S	10 E	WM	5	NW SW	33.1		
36 S	10 E	WM	5	SW SW	8.6		
36 S	10 E	WM	8	NE NE	6.2		
36 S	10 E	WM	9	NE NE	26.0		
36 S	10 E	WM	9	NW NE	16.1		
36 S	10 E	WM	9	NE NW	28.2		
36 S	10 E	WM	9	NW NW	27.8		
36 S	10 E	WM	5	NE SW	32.8		POD 1
36 S	10 E	WM	5	NW SW	1.1		
36 S	10 E	WM	5	SW SW	19.4		
36 S	10 E	WM	5	SE SW	19.6		
36 S	10 E	WM	8	NE NE	0.8		
36 S	10 E	WM	8	SE NE	6.2		
36 S	10 E	WM	8	NE NW	14.3		
36 S	10 E	WM	8	SE NW	15.6		

The Nature Conservation Trust (253)

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD	
36 S	10 E	WM	8	NE SW	12.4	POD 1	
36 S	10 E	WM	8	SE SW	6.5		
36 S	10 E	WM	9	NE NE	14.0		
36 S	10 E	WM	9	NW NE	16.4		
36 S	10 E	WM	9	SW NE	40.0		
36 S	10 E	WM	9	SE NE	40.0		
36 S	10 E	WM	9	NE NW	8.8		
36 S	10 E	WM	9	NW NW	10.0		
36 S	10 E	WM	9	SW NW	34.0		
36 S	10 E	WM	9	SE NW	38.5		
36 S	10 E	WM	9	NE SW	13.5		
36 S	10 E	WM	9	NW SW	16.8		
36 S	10 E	WM	9	SW SW	2.1		
36 S	10 E	WM	9	NE SE	40.0		
36 S	10 E	WM	9	NW SE	38.6		
36 S	10 E	WM	9	SW SE	0.3		
36 S	10 E	WM	9	SE SE	13.3		
36 S	10 E	WM	17	NW NE	6.0		
36 S	10 E	WM	17	NE NW	4.6		
36 S	10 E	WM	17	NE SW	1.6		
36 S	10 E	WM	8	NE SW	2.7		POD 2
36 S	10 E	WM	8	SW SW	9.7		
36 S	10 E	WM	8	SE SW	14.3		
36 S	10 E	WM	17	NE NW	6.1		
36 S	10 E	WM	17	NW NW	12.4		
36 S	10 E	WM	17	NE SW	10.0		
36 S	10 E	WM	17	NW SW	2.2		
36 S	10 E	WM	17	SE SW	18.9		
36 S	10 E	WM	16	SW NE	1.2	POD 3	
36 S	10 E	WM	16	SE NE	1.0		
36 S	10 E	WM	16	SE SW	3.5		
36 S	10 E	WM	16	SW SE	1.4		
36 S	10 E	WM	16	SE SE	1.3		
36 S	10 E	WM	16	SE SW	8.5	POD 4	
36 S	10 E	WM	21	NE NW	16.3		
36 S	10 E	WM	9	SW SE	13.6	COMMINGLED WATER FROM PODS 3 AND 4	
36 S	10 E	WM	9	SE SE	2.8		
36 S	10 E	WM	16	NE NE	1.2		
36 S	10 E	WM	16	NW NE	25.5		
36 S	10 E	WM	16	SW NE	5.3		
36 S	10 E	WM	16	NE NW	1.1		
36 S	10 E	WM	16	SE NW	7.1		
36 S	10 E	WM	16	SE SW	9.4		


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.

[End of Water Right Claim Description]

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 703), by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first class postage prepaid thereon, and addressed to:

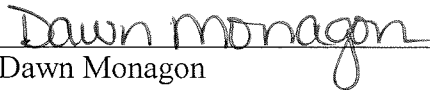
Ronald S. Yockim
Attorney at Law
430 SE Main Street
PO Box 2456
Roseburg, OR 97470

Paul S. Simmons/Andrew M.
Hitchings
Somach, Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310

William M. Ganong
Attorney at Law
514 Walnut Street
Klamath Falls, OR 97601

David W. Harder
United States Department of Justice, ENRD
Indian Resources Section
1961 Stout Street – 8th Floor
Denver, CO 80294


Dawn Monagon
Adjudications Specialist
Oregon Water Resources Department