

**BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of)	CORRECTED PARTIAL ORDER OF
JERRY L. NEFF AND LINDA R. NEFF;)	DETERMINATION
ROBERT M. COOK - T P C, LLC, AN)	
OREGON LIMITED LIABILITY CO.)	
_____)	Water Right Claim 9

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

**A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS
TO THE PROPOSED ORDER**

1. Claim 9 (Claimants: JERRY L. NEFF AND LINDA R. NEFF¹; ROBERT M. COOK - T P C, LLC, AN OREGON LIMITED LIABILITY CO.) and its associated contests (2815, 3262, 3715, and 4071) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 160.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 9 on January 19, 2007.
3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) T P C, LLC, (2) Jerry L. and Linda Neff, and (3) the United States of America.
4. The exceptions filed to the Proposed Order along with opposition and responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 9. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.6, A.7, A.8, A.9, A.10, below.
5. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
 - a. The "History of the Case" is adopted with modifications, as set forth in Section A.6, below.
 - b. The "Evidentiary Rulings" is adopted in its entirety.

¹ On Nov. 3, 2004, the portion of the property appurtenant to Claim 9 that was previously owned by HART ESTATE INVESTMENT COMPANY was transferred to JERRY L. AND LINDA R. NEFF. See CHANGE OF OWNERSHIP FORM and CERTIFICATE OF SERVICE (February 9, 2005.)

- c. The “Issues” is adopted in its entirety.
 - d. The “Findings of Fact” is adopted with modifications, as set forth in Section A.7, below.
 - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.8, below.
 - f. The “Opinion” is adopted with modifications, as set forth under Section A.9, below.
 - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 9. Consistent with Sections A.7, A.8, A.9, below, the outcome of the Order has been modified to recognize a right for irrigation on an additional 584.7 acres; the season of use for livestock watering is corrected in Findings of Fact A.10.a, and a rate is specified for livestock watering in Section A.10.b, below.
6. **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):

Claimants seek a water right as non-Indian successors to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the allotments’ share of the Tribe’s “practically irrigable acreage” (“PIA”).² This *Walton* claim is for ~~589.3~~ 58.3 cubic feet per second (cfs) of water from the Williamson River, Jack Creek, Long Prairie Creek, and commingled water from Long Prairie Creek, Jack Creek and tailwater from the Williamson River, for irrigation of approximately 2333.8 acres of land, and 1 cfs from the Williamson River for livestock use. The claimed period of use is February through October. (OWRD Ex. 1 at 1-3, 7-9, 23-24.)

Reasons for Modification: To correct the amount of cfs claimed – issue raised in exceptions; to add clarification using evidence on the record; to provide additional citations to the record.

7. **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.

Summary of Reasons for Modification of Findings of Fact: (1) To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow

² Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397, 402 (9th Circuit, 1985).

– issue raised in exceptions. (2) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership – issue raised in exceptions. (3) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by non-Indian successors after transfer from Indian ownership – issue raised in exceptions. (4) 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.

Modified Proposed Order Findings of Fact

1) For all allowed water rights in Claim 9 where the Williamson River is the source of water, the Rate is 1/80th cfs/acre.³ For all allowed water rights in Claim 9 where the source of water is Long Prairie Creek, the Rate is 1/40 of one cfs per acre. The Duty for all allowed water rights in Claim 9 is 3.5 acre-feet per acre per year. The Period of Use for irrigation is March 1 through October 31. The rate for livestock watering is 12 gallons per head per day from the Williamson River. The Period of Use for livestock watering is February 1 through October 31, as claimed. The Priority date is October 14, 1864.³ (OWRD Ex. 1 at 23, 59, 131.)

Reasons for Modification: The ALJ’s proposed finding of fact failed to fully set forth the evidence on the record, and did not include an irrigation rate from Long Prairie Creek or a rate for livestock watering, each of which need to be included due to other modifications made in this Proposed Order; to provide an additional citation to the record.

³ The rate allowed from the Williamson River is based on a certificate of water right obtained by William Kittredge with a priority of April 16, 1930, which specified a rate of 1/80th cfs per acre. (OWRD Ex. 1 at 59.) The rate of 1/40 of one cfs per acre for irrigation from Long Prairie Creek and the duty for all irrigation approved under Claim 9 is based on the rate and duty specified in Appendix A of the Preliminary Evaluation for those cases where a different rate or duty does not apply. (Id. at 131.) The rate of 12 gallons per day per head for livestock watering from the Williamson River is based on the rate specified in Appendix A of the Preliminary Evaluation for those cases where a different rate does not apply. (Id. at 132. Season of Use is also as specified in Appendix A, ~~except as to livestock~~. Claimant did not specify a season of use for livestock only, in the claim document, but only stated that the period of use was “Feb through Oct.” (Id. at 23.) OWRD asked for clarification of the season of use for livestock, but did not receive a response. Consequently, the season of use for livestock is limited to the season claimed, February through October. Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation. **Reasons for modification of footnote:** To correctly apply the irrigation terms rate (a fraction of one cubic foot per second) and duty (a volume expressed in acre-feet per acre); to include the livestock watering rate; season of use *is* specified in Appendix A.

2) Beginning in 1912, William Kittredge began leasing properties that had formerly been part of the Klamath Reservation, and had been allotted to individual Klamath Indians. He later bought a number of the allotments as they became available. The property subject to this claim is part of the property acquired by Kittredge between 1917 and 1931. Beginning in 1917, Kittredge began developing irrigation systems throughout his property, which was, and is still, used for pasture and hay. (Ex. 60138.)⁴ In 1918, Kittredge built a diversion dam across the Williamson River called the Big Wire Dam, located in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. Several ditches were then built upstream from this dam to provide irrigation for much of the property subject to this claim. (Ex. OWRD Ex. 1 at 63; Ex. 60138 at 4.) William Kittredge’s map for Williamson River water right Permit 9592 (later certificated as 11956), labeled “Map Showing Kittredge Ditches” within T 30, S, R 10 E, W.M., shows the locations of his ditches, and includes the following footnote:

“Everything in Twp 30 S. Rge 10 E, under water since year 1922 and the land South of the Williamson River in the SW¼ and in that part of the SW¼ of SW¼ lying between the main River and the fork, all in Section 18, and all of the land in S½ NW¼ and SW¼ Sec 19, and NW¼ and N½ SW¼ Sec. 30 lying Westerly and Northerly of black line was irrigated prior to 1893.”

(OWRD Ex. 1 at 59-61, 63.) As a result of the diversions and ditches, by 1921, hay was being cut from three fields named Big Wire, Little Wire, and Timothy. Ex. 60138 at 4, 7.) By 1930, an additional dam had been built downstream on the Williamson River, at the SW¼ SW¼ SE¼ Section 18, T 30 S, R 10 E, W.M. (OWRD Ex. 1 at 59, Supplemental Direct Testimony of James P. Lynch, Ex. 1.)

Reasons for Modification: The ALJ’s proposed finding of fact failed to fully set forth the evidence on the record; to correct a scrivener’s error.

⁴ Although the exhibits were marked with a 12-digit number, the first seven digits did not change from exhibit to exhibit. For ease of reference only the last five digits of the exhibit numbers will be cited in this order.

(3) Upstream from Kittredge's holdings, George Mayfield acquired a number of non-contiguous properties, also formerly Indian allotments. (Shaw Direct, Ex. 30004 at 16). In 1924, Mayfield built a diversion at Rocky Ford, about 4 miles upstream from the mouth of the Mayfield Ditch and ditch to draw in order to use water from the Williamson River to irrigate some of his properties. (Ex. 60138 at 5; Shaw Rebuttal, Ex. 30003 at 4-5, para 10,11; Shaw Direct, Ex. 30004 at 41, OWRD Ex. 1 @ 25.) This diversion reduced the availability of water for irrigation of Kittredge's holdings downstream. (~~Id.~~ Ex. 60138 at 5; Shaw Direct, Ex. 30004 at 41.) ~~A few years later~~ In 1932, William Kittredge bought out Mayfield's holdings, which consisted of Rocky Ford, the Royce place and the Mayfield place,⁵ and discontinued the use of this diversion at Rocky Ford. (~~Id.~~ Ex. 60138 at 5; Shaw Direct Ex. 30004 at 16-17, 41, 49-50.) Only lands described as the Mayfield place are appurtenant to Claim 9. (OWRD Ex. 1 at 7-12, 36, 39-40; Shaw Direct Ex. 30004 at 49-50.)

At an unknown date, the Mayfield Ditch was constructed across the Mayfield place which originates south of the Mayfield place near the center of Section 14, enters the Mayfield place at the SW Corner of the SE¼ NW¼ Section 11 and ends near the center of Section 9. (OWRD Ex. 1 at 5, 7-8, 25, 36, 58.) The Mayfield Ditch conveys water commingled from Jack Creek, Long Prairie Creek, and tailwater from an upstream user of Williamson River water for irrigation across the Mayfield place. (Id. at 5.)

Those portions of land lying above the Mayfield Ditch are subject to natural overflow from two intermittent streams, Jack Creek and Long Prairie Creek. (Id. at 5, 25.)

Although in his affidavit Oscar Kittredge states that water from Jack Creek, Long Prairie Creek and tailwater pumped from the Williamson River, in addition to overflow from Jackson Creek was all used for irrigation on the

⁵ Rocky Ford: Lots 3, 4, 5, and the SW¼ NW¼ ["NW¼"], Section 1; SW¼ Section 1; and the SE¼ Section 2, all within T 31S, R 10 E. Royce Place: SE¼, Section 24; NE¼ Section 25; and portion of NW¼ east of the Williamson River, Section 25; all within T 30 S, R 10 E. Mayfield Place: E½ and SW¼, Section 9; all Section 10; and the NW¼, Section 11; all within T 30 S, R 10 E. (Shaw Direct Ex. 30004 at 16-17, 41, 49-50; OWRD Ex. 1 at 36, 39-40.) Reason for addition

Mayfield place, his statement is ambiguous as to whether this was occurring at or prior to the time when the Kittredge's first took ownership of this parcel in 1932, or use of water from these sources began after the Mayfield place was purchased by the Kittredges. (Ex. 60138 at 5; Shaw Direct Ex. 30004 at 16-17.)

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to provide additional citations to the record; OWRD has determined that the ALJ's finding that a ditch to draw water from the Williamson River built in conjunction with the 1924 diversion is not supported by a preponderance of evidence on the record.

4) It is possible that before 1918, part of this property was subject to flooding from temporary dams. However, the evidence is not sufficient to establish when this practice was carried out, how often it was done, or what land benefited from the dams.

5) **Allotment 54 (87.6 acres claimed)**

This allotment, composed of 160 acres located in S $\frac{1}{2}$ S $\frac{1}{2}$ Section 8, T 30 S, R 10 E, W.M., was confirmed to Evangeline Blow, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40013.) In 1910 the property was described as having no improvements except fencing. (*Id.* at 18.) The property was conveyed to William Kittredge, a non-Indian, on July 7, 1926. (Ex. 60045.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, on May 20, 1944. (Ex. 60047.)

The claim is for 28.8 acres irrigated from Jack Creek, and ~~57.5~~ 58.8 acres, being 20.8 within the SW $\frac{1}{4}$ SW $\frac{1}{4}$, 34.8 within the SE $\frac{1}{4}$ SW $\frac{1}{4}$, and 3.2 within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ ⁶ irrigated from the Williamson River with a diversion point at the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T 30 S, R 10 E, W.M. (Point of Diversion (POD) north of Big Wire Dam). (OWRD Ex. 1 at 8, 11, 13, 25.)

¶ The 20.8 acres within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ and the 34.8 acres within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ are part of the Timothy Field that was being cut for hay by 1921.

of footnote: To show support using evidence on the record that the three Mayfield properties were non-contiguous.

(Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) for 67.1 acres in Section 8, T 30 S, R 10 E, W.M. with a points of diversion from the Williamson River located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (~~Id.~~ OWRD Ex. 1 at 25, 57, 59, 60, 63.) A footnote on a map for Permit 9592⁷ (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system since beginning in 1922. (Id. at 25, 59, 63.) At hearing, the United States conceded that the Water Right Certificate established the elements of a *Walton* right for irrigation from the Williamson River. (Transcript at 39.) The remaining irrigated acreage claimed was not described in this water right certificate, and was developed at a later date by Kittredge, or a subsequent non-Indian owner.

Beneficial use of water from the Williamson River on 58.8 acres in Allotment 54 was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 58.8 acres, or 0.74 total cfs. The point of diversion is north of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

The record contains no evidence of beneficial use of water from Jack Creek with reasonable diligence on this allotment following transfer from Indian ownership.

Reasons for Modification: To correct the number of acres claimed within this allotment; to add clarification using evidence on the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

6) **Allotment 153 (132.0 acres claimed)**

This allotment, composed of 160 acres located in NE¼ Section 9, T 30 S, R 10 E, W.M., was confirmed to Luty Howard, a Klamath Indian, by instrument

⁶ 57.5 was a typographical error in the Preliminary Evaluation. (See Ex. 40004, and *Compare* OWRD Ex. 1 at 11, 25, and 92.) Reason for addition of footnote: To show that this scrivener's error was recognized on the record.

⁷ The map referred to here is on the record at OWRD Ex. 1 at 63. Reason for addition of footnote: To avoid potential confusion with a second map included in the same group of citations, being OWRD Ex. 1 at 25.

dated March 3, 1910. (Ex. 40018.) In 1920, the property was described as having no ditch for irrigation. (*Id.* at 6.) The property was conveyed to George Mayfield, a non-Indian, on August 2, 1923. (Ex. 60057.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on April 19, 1924. (Ex. 60056.)

The claim is for 132 acres irrigated by water diverted from the combined flow of Jack Creek, Long Prairie Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977: (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Jack Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (OWRD Ex. 1 at 52, 58, 62.) There is no evidence of a diversion of water to this property prior to transfer of ownership, in 1924, to William Mayfield, the second non-Indian owner. Oscar Kittredge's 1978 affidavit establishes that as of 1978, the property was watered for the most part by natural overflow from Jackson Creek, a source not included in this claim, and by return flow from a diversion by an upstream user. (*Id.*)

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: 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.

7) Allotment 158 (107.2 acres claimed)

This allotment, composed of 160 acres located in SW¼ Section 9, T 30 S, R 10 E, W.M., was confirmed to Horace Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40022.) In 1920 the property was described as having no ditch. (*Id.* at 4.) The property was conveyed to J.W. McCoy, a non-Indian, on August 6, 1920. (Ex. 60052.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60055.).

This claim is for 107.2 acres irrigated by water diverted from Jack Creek. (OWRD Ex. 1 at 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977. (*Id.* at 5.) ~~A Water Right Permit for this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (*Id.* at 62.)~~ There is no evidence of a diversion of water to this property prior to transfer of the property to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: Lands within the SW¼ Section 9 were not included in Permit 42725. (OWRD Ex. 1 at 52, 62.)

8) Allotment 154 (108.2 acres claimed)

This allotment, composed of 160 acres located in SE¼ Section 9, T 30 S, R 10 E, W.M., was confirmed to Eva Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40019.) The property was conveyed to Charles Pitcher, a non-Indian, on November 29, 1918. (Ex. 60053.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on April 20, 1920. (Ex. 60054.)

The claim is for 80.2 acres irrigated from the combined waters of Jack Creek, Long Prairie Creek, and return flow from an upstream user, and 28 acres irrigated from a diversion on Jack Creek. (OWRD Ex. 1 at 7, 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977- (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Jack Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 52, 58, 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: 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.

9) **Allotment 264 (114.8 acres claimed)**

This allotment, composed of 160 acres located in NE¼ Section 10, T 30 S, R 10 E, W.M., was confirmed to Jack Palmer (Kane), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40025.) The property was conveyed to A.C. Beal and J.W. McCoy, non-Indians, on April 22, 1920. (Ex. 60010.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60014, 60015.).

This claim is for 114.8 acres, being 78 acres irrigated from a diversion in Long Prairie Creek, and 36.8 acres irrigated from the combined waters of Long Prairie Creek, Jack Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7, 8.)

Klamath Indian Jack Palmer, on an application for a Patent in Fee signed by him on May 3, 1919, stated that Allotment 264 was used for grazing or mowing, and that he himself owned cattle and horses. (Ex. 40025.)

¶ Long Prairie Creek naturally floods the lands above the Mayfield Ditch in this allotment (Id. at 5, 25.) Diversion facilities were later built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977: (Id. at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (Id. at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (Id. at 52, 58, 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

As evidenced by the Patent in Fee application, beneficial use of water from Long Prairie Creek by the method of natural overflow was established under

Indian ownership of the parcel. The 78.0 acres within Allotment 264 which were claimed for irrigation from Long Prairie Creek and are located above the Mayfield Ditch should be approved. The rate is 1/40 of one cfs per acre for 78.0 acres, or 1.95 total cfs. The point of diversion is on Long Prairie Creek within the NW¼ NW¼ Section 11, T 30 S, R 10 E, W.M.

The record does not contain evidence that the water from the combined sources for irrigation on 36.8 acres was put to beneficial use with reasonable diligence.

Reasons for Modification: 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.

10) Allotment 156 (128.9 acres claimed)

This allotment, composed of 160 acres located in NW¼ Section 10, T 30 S, R 10 E, W.M., was confirmed to Frank Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40020.) In 1920 the property was described as having no irrigation. (*Id.* at 3.) The property was conveyed to George Mayfield, a non-Indian, on June 13, 1923. (Ex. 60057.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on April 19, 1924. (Ex. 60056.)

This claim is for 128.9 acres, with diversion for 15.6 acres from Long Prairie Creek, and the remainder from combined waters of Long Prairie Creek, Jack Creek and return flow from an upstream user. (OWRD Ex. 1 at 7, 8.) Long Prairie Creek naturally floods the lands above the Mayfield Ditch in this allotment (*Id.* at 5, 25.) At some unknown date prior to 1977 diversions were built on Long Prairie Creek or Jack Creek, which were intermittent creeks, to divert an unknown amount of water. (*Id.* at 5.) Likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Jack Creek and Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (*Id.* at 52, 58, 62.) There is no evidence of irrigation on this property prior to its acquisition by the second non-Indian owner. Oscar Kittredge's 1978 affidavit establishes that as of 1978, the

property was watered for the most part by natural overflow from Jackson Creek, not a source under this claim, and by return flow from a diversion by an upstream user. (Ex. 600138 at 5.)

Although there is evidence of natural overflow from Long Prairie Creek on 15.6 acres claimed for irrigation from Long Prairie Creek, as it is situated above the Mayfield ditch, there is no evidence on the record confirming beneficial use of this water being made with reasonable diligence. The record does not contain evidence that the water from the combined sources for irrigation on 113.3 acres was put to beneficial use with reasonable diligence.

Reasons for Modification: 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.

11) **Allotment 157 (136.8 acres claimed)**

This allotment, composed of 160 acres located in SW¹/₄ Section 10, T 30 S, R 10 E, W.M., was confirmed to Hampton Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40021.) This property was described in 1920 as having no ditches. (*Id.* at 4.) The property was conveyed to A.C. Beal, a non-Indian, on August 13, 1920. (Ex. 60009.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 8, 1920. (Ex. 60014.).

The claim is for 136.8 acres irrigated from the combined waters of Long Prairie Creek, Jack Creek and return flow from an upstream user. (OWRD Ex. 1 at 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977; (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Jack Creek and Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian owner. (*Id.* at 52, 58, 62.) There is no evidence of a diversion of water to this property prior to the date the property was conveyed to George Mayfield, the second non-Indian owner. (Ex. 60138 at 5.)

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: 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 265 (159.3 acres claimed)

This allotment, composed of 160 acres located in SE $\frac{1}{4}$ Section 10, T 30 S, R 10 E, W.M., was confirmed to Lillie Palmer (Kane), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40026.) The property was conveyed to Klamath Cattle Co. a non-Indian, on August 25, 1926. (Ex. 60018.) The property was subsequently conveyed to George Mayfield, also a non-Indian, on November 3, 1927. (Ex. 60006.)

The claim is for 159.3 acres irrigated from the combined waters of Jack Creek, Long Prairie Creek, and return flow from an upstream user. (OWRD Ex. 1 at 7, 8.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977: (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (*Id.* 1 at 52, 58, 62.) There is no evidence as to when water was first diverted to this property.

The record does not contain evidence that the water claimed for irrigation within this allotment was put to beneficial use with reasonable diligence.

Reasons for Modification: 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 152 (79.5 acres claimed)

This allotment, composed of 160 acres located in NW $\frac{1}{4}$ Section 11, T 30 S, R 10 E, W.M., was confirmed to Jason Howard, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40017.) In 1916 this property was described as having no irrigation and no water supply. The property was mostly

in wild grass, uncultivated and without a water right. (*Id.* at 8 through 11.) The property was conveyed to George Mayfield, a non-Indian, on April 4, 1924. (Ex. 60002.) The property was subsequently conveyed to William Mayfield, also a non-Indian, on November 19, 1924. (Ex. 60056.)

While still in Indian ownership, Allotment 152 was leased to William Mayfield for the purpose of grazing cattle in 1909. William Mayfield was characterized as a “stockman of good reputation.” (See FARMING AND GRAZING LEASE, dated May 15, 1909, Ex. 40017.)

The claim is for ~~82.5~~ 79.5 acres irrigated from ~~the combined waters of Jack Creek, Long Prairie Creek, and return flow from an upstream user,~~ (OWRD Ex. 1 at 7-11.) Diversion facilities were built on Long Prairie Creek and Jack Creek, both intermittent streams, to divert an unknown amount of water, at an unknown date prior to 1977; (*Id.* at 5); likewise, the Mayfield Ditch was constructed at an unknown date. (*Id.* at 25, 52, 62.) A Water Right Permit (#42725) for irrigation from Long Prairie Creek on this parcel was obtained in 1977, well after conveyance to the second non-Indian Owner. (*Id.* at 52, 58, 62.) Oscar Kittredge’s 1978 affidavit establishes that as of 1978, the property was watered for the most part by natural overflow from Jackson Creek, and by return flow from a diversion by an upstream user. (Ex. 60138 at 5.)

As evidenced by a grazing lease, beneficial use of water from Long Prairie Creek by the method of natural overflow on this parcel was established under Indian ownership. Beneficial use of water with reasonable diligence has been shown on the 79.5 acres within Allotment 152 which were claimed for irrigation from Long Prairie Creek and are located above the Mayfield Ditch. The rate is 1/40 cfs per acre for 79.5 acres, or 1.99 total cfs. The point of diversion is on Long Prairie Creek within the NW¼ NW¼ Section 11, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ’s proposed finding of fact failed to fully set forth the evidence on the record; to correct the source of water that was claimed; to show the correct number of acres claimed within this allotment; to add clarification using evidence on the record; to provide additional citations to the record.

14) Allotment 18 (115.2 acres claimed)

This allotment, composed of 160 acres located in NW¼ Section 16, T 30 S, R 10 E, W.M., was confirmed to Logan Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40006.) The property was conveyed to William Kittredge, a non-Indian, on January 29, 1923. (Ex. 60017.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, also a non-Indian, on May 20, 1944. (Ex. 60047.).

The claim is for 101.2 acres irrigated from two points of diversion on the Williamson River (94.4 acres, being 12.4 acres within the NE¼ NW¼, 17.6 within the NW¼ NW¼, 40.0 within the SW¼ NW¼, and 24.4 within the SE¼ NW¼, from a diversion on the South side of the river [POD south of Big Wire Dam], and 6.8 acres within the NW¼ NW¼, from a diversion on the North side of the river [POD north of Big Wire Dam], both located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.); and 14 acres irrigated from Jack Creek. (OWRD Ex. 1 at 8, 9, 11, 13, 25.)

¶ The 12.4 acres within the NE¼ NW¼, 17.6 within the NW¼ NW¼, 40.0 within the SW¼ NW¼, and 24.4 within the SE¼ NW¼, are part of the Big Wire Field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 118 acres in NW¼ Section 16, T 30 S, R 10 E, W.M. from ~~two diversions from~~ on the Williamson River in NE¼ NW¼, and NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. at 25, 59, 63.) The acreage claimed to be watered from Jack Creek was not described in this water right certificate, and may have been developed at a later date by Kittredge, or a subsequent non-Indian owner.

Beneficial use of water from the Williamson River on 101.2 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 101.2 acres, or 1.27 total cfs. The point of diversion for 6.8 acres within the NW¼ NW¼ Section 16 is north of

Big Wire Dam, and the point of diversion for the remaining 94.4 acres is south of Big Wire Dam, both diversions being located within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

The record contains no evidence of beneficial use of water from Jack Creek with reasonable diligence on this allotment following transfer from Indian ownership.

Reasons for Modification: 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.

15) Allotment 20 (129.6 acres claimed)

This allotment, composed of 160 acres located in the SW¼ Section 16, T 30 S, R 10 E, W.M., was confirmed to Grover Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40007.) In 1921 the property was described as having no irrigation. (*Id.* at 5.) The property was conveyed to William Kittredge, a non-Indian, on May 31, 1921. (Ex. 60001.) The property was subsequently conveyed to William Kittredge and Sons, a partnership, also a non-Indian, on May 20, 1944. (Ex. 60047.)

The claim is for irrigation of 129.6 acres from the Williamson River with a diversion point within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam). (OWRD Ex. 1 at 9, 13, 25.)

¶ The 129.6 acres are part of the Big Wire field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 128.1 acres in SW¼ Section 16, T 30 S, R 10 E, W.M. from ~~one~~ diversion points on the Williamson River in the NE¼ NW¼ and NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (~~the~~ OWRD Ex. 1 at 55, 57, 60, 63.) The additional 1.5 acres, not included on the certificate may have been developed subsequently. A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. at 25, 59, 63.)

Beneficial use of water from the Williamson River on 128.1 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 128.1 acres, or 1.60 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: 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.

16) Allotment 52 (152.1 acres claimed)

This allotment, composed of 160 acres located in NE¼ Section 17, T 30 S, R 10 E, W.M., was confirmed to Jennie Blow (Blew), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40011.) In 1914 the property was described as having no improvements. (*Id.* at 11.) The property was sold on contract to Alex Davis, a non-Indian, in 1916. On March 9, 1920 a patent was issued in Davis' name. (Ex. 60022.) Prior to this patent, William Kittredge, also a non-Indian, had apparently agreed to purchase the property, and was making Davis' payments on the contract as early as May 1917. (Ex. 40011 at 4, 5.) William Kittredge received title to the property on October 2, 1922. (Ex. 60027.)

The claim is for 152.1 acres, being 148.5 acres irrigated from the Williamson River (117.4 acres from the POD north of Big Wire Dam, and 31.1 acres irrigated from the POD south of Big Wire Dam, both located from the Williamson River within the NW¼ NW¼ Section 16, T 30 S, R 10 E); and 3.6 acres irrigated from Jack Creek. (OWRD Ex. 1 at 9, 11, 13, 25.)

¶ The 0.3 acres within the NE¼ NE¼, the 10.8 acres within the SW¼ NE¼, and the 20.0 acres within the SE¼ NE¼, are part of the Big Wire Field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 151 acres in NE¼ Section 17, T 30 S, R 10 E, W.M. from two diversion points on the Williamson River in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates

acres [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. 25, 59, 63.) The diversion from Jack Creek may have been developed by a subsequent owner.

Beneficial use of water from the Williamson River on 148.5 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The is 1/80th cfs per acre for 148.5 acres, or 1.85 cfs. The point of diversion for 31.1 acres [0.3 acres within the NE¼ NE¼, 10.8 acres within the SW¼ NE¼, and 20 acres within the SE¼ NE¼ Section 17] is south of Big Wire Dam, and the point of diversion for the remaining 117.4 acres is north of Big Wire Dam, both diversions being located within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

The record contains no evidence of beneficial use of water from Jack Creek with reasonable diligence within this allotment following transfer from Indian ownership.

Reasons for Modification: 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 53 (154.4 acres claimed)

This allotment, composed of 160 acres located in NW¼ Section 17, T 30 S, R 10 E, W.M., was confirmed to Elvira Blow (Blew), a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40012.) The property was conveyed to William Kittredge, a non-Indian, on June 26, 1920. (Ex. 60024, 60026.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 21, 1955. (Ex. 60049.)

The claim is for ~~148.4~~ 154.4 acres irrigated from the Williamson River, being 148.4 acres from the POD north of Big Wire Dam, and 6.0 acres irrigated from the POD south of Big Wire Dam. (OWRD Ex. 1 at 9, 11, 13, 25.)

¶ The acres claimed within this allotment are either a part of the Timothy (154.4 acres) or the Little Wire (6.0 acres) fields that were being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate

160 acres in NW¼ Section 17, T 30 S, R 10 E, W.M. from ~~one~~ diversion points on the Williamson River in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. at 25, 59, 63.)

Beneficial use of water from the Williamson River on 154.4 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 154.4 acres, or 1.93 total cfs. The point of diversion for 6.0 acres [2.4 acres within the SW¼ NW¼ and 3.6 acres within the SE¼ NW¼ Section 17] is south of Big Wire Dam, and the point of diversion for the remaining 148.4 acres is north of Big Wire Dam, both diversions being located within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to show the correct the number of acres claimed within this allotment – the ALJ's proposed order did not include the 2.4 acres claimed within the SW¼ NW¼ or the 3.6 acres within the SE¼ NW¼; to add clarification using evidence on the record; to provide additional citations to the record.

18) Allotment 78 (150.2 acres claimed)

This allotment, composed of 160 acres located in SW¼ Section 17, T 30 S, R 10 E, W.M., was confirmed to Golliep Elksnat, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40016.) The property was conveyed to George Mayfield, a non-Indian, on August 9, 1920. (Ex. 60023.) The property was subsequently conveyed to William Kittredge, also a non-Indian, on October 30, 1920. (Ex. 60025.)

The claim is for 150.2 acres irrigated from the POD south of Big Wire Dam, located within the NW¼ NW¼ Section 16, T 30 S, R 10 E on the Williamson River. (OWRD Ex. 1 at 9, 13, 25.)

¶ The acres claimed within this allotment are part of the Little Wire field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) Kittredge obtained a Certificate of Water Right (#11956) to irrigate 152.4 acres in SW ¼ Section 17, T 30 S, R 10 E, W.M.

from ~~one~~ diversion points in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. at 25, 59, 63.)

Beneficial use of water from the Williamson River on 150.2 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 150.2 acres, or 1.88 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: 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 174 (159.8 acres claimed)

This allotment, composed of 160 acres located in SE¼ Section 17, T 30 S, R 10 E, W.M., was confirmed to Silas Jackson, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40024.) In 1916 the property was described as having no irrigation installed. (*Id.* at 3.) The property was conveyed to William Kittredge, a non-Indian, on November 11, 1917. (Ex. 60013.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.)

The claim is for 159.8 acres irrigated from the POD south of Big Wire Dam, located within the NW¼ NW¼ Section 16, T 30 S, R 10 E on the Williamson River. (OWRD Ex. 1 at 10, 13, 25.)

¶ The acres claimed within this allotment are part of the Big Wire field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 160 acres in SE¼ Section 17, T 30 S, R 10 E, W.M. from ~~one~~ diversion points in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages

[appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id., 59, 63.)

Beneficial use of water from the Williamson River on 159.8 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 159.8 acres, or 2.0 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: 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 24 (54.4 acres claimed)

The total allotment is located in several parcels, only 80 acres of which is subject to this claim. That portion is located in E½ NE¼ Section 18, T 30 S, R 10 E, W.M., and was confirmed to Fannie Ball, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40009.) In 1918 the property was described as subject to "some private wild flooding" but having no constructed irrigation ditches. (*Id.* at 8, 9.) The property was conveyed by Fannie Ball (under the name "Mrs. Lion Hart") to William Kittredge, a non-Indian, on April 29, 1921. (Ex. 60032.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.)

The claim is for 54.4 acres irrigated from the POD north of Big Wire Dam located on the Williamson River within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.. (OWRD Ex. 1 at 11, 13, 25.)

¶ The 54.4 acres are part of the Timothy field that was being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) to irrigate 52.7 acres in E½ NE¼ Section 18, T 30 S, R 10 E, W.M. from one diversion points in the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) The additional 1.7 acres not included on the certificate may have been developed subsequently. A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages

[appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. at 25, 59, 63.)

Beneficial use of water from the Williamson River on 52.7 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 52.7 acres, or 0.66 total cfs. The point of diversion is north of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: 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 25 (24.2 acres claimed)**

The total allotment is composed of 160 acres, only 80 of which are subject to this claim. That portion, located in W½ SE¼ Section 18, T 30 S, R 10 E, W.M., was confirmed to Eddie Ball, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40010.) The property was conveyed to A.A. Bellman, a non-Indian, on October 13, 1917. (Ex. 60020.) The property was subsequently conveyed to Charles Worden, also a non-Indian, on October 16, 1917. (Ex. 60021.) William Kittredge received title to the property in 1920. (Ex. 60028.)

The claim is for 24.2 acres, being 0.2 acres irrigated in the NW¼ SW¼ SE¼ Section 18, T 30 S, R 10 E, W.M., and 24 acres irrigated in the SW¼ SW¼ SE¼ Section 18, T 30 S, R 10 E, W.M. The claimed point of diversion is the POD south of Big Wire Dam located on the Williamson River within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (OWRD Ex. 1 at 10, 13, 25.)

¶ The claimed acres are part of the Little Wire field that was being cut for hay by 1921, and the Horse field. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) for 29 acres in SW¼ SE¼ Section 18, T 30 S, R 10 E, W.M. from one diversion points within the NW¼ NW¼, Section 16, and the SW¼ SE¼ Section 18, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60, 63.) A footnote on a map for Permit 9592 (later certificated as 11956)

indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. at 25, 59, 63.)

Beneficial use of water from the Williamson River on 24.2 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 24.2 acres, or 0.30 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: To correct a scrivener's error in the location of the claimed acreage; 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 77 (65.6 acres claimed)

The total allotment includes a number of different parcels, only 80 acres of which are subject to this claim. That portion, located in E½ SE¼ Section 18, T 30 S, R 10 E, W.M., was confirmed to Irene Skellock, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40015.) The property was conveyed to William Kittredge, a non-Indian, on April 20, 1921. (Ex. 60030.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.)

The claim is for 65.6 acres, being 62 acres irrigated from one diversion point on the Williamson River, located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam), and 3.6 acres irrigated from a second diversion point on the Williamson River also located in ~~SW¼ SE¼ Section 18,~~ NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD north of Big Wire Dam). (OWRD Ex. 1 at 10, 11, 13, 25.)

¶ The claimed acres are part of the Little Wire and Timothy fields that were being cut for hay by 1921. (Corrections to Direct Testimony of Robert M. Cook, Ex. 1; Ex. 60138 at 4, 7.) William Kittredge obtained a Certificate of Water Right (#11956) for 71.3 acres in E½ SE¼ Section 18, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to

this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. at 25, 59, 63.)

Beneficial use of water from the Williamson River on 65.6 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 65.6 acres, or 0.82 total cfs. The point of diversion for 3.6 acres within the NE¼ SE¼ is north of Big Wire Dam, and the point of diversion for the remaining 62.0 acres is south of Big Wire Dam, both diversions being located within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: To correct and clarify the locations of the claimed points of diversion; 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.

23) Allotment 75 (105.8 acres claimed)

This allotment, composed of 160 acres located in NE¼ Section 19, T 30 S, R 10 E, W.M., was confirmed to Mamie Skellock, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40014.) The property was conveyed to William Kittredge, a non-Indian, on March 10, 1926. (Ex. 60034.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 2, 1955. (Ex. 60049.)

The claim is for 105.8 acres irrigated from a single diversion point on the Williamson River located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam). (OWRD Ex. 1 at 10, 13, 25, 63.)

William Kittredge obtained a Certificate of Water Right (#11956) for 110.4 acres in NE¼ Section 19, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (*Id.* at 55, 57, 60.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. 25, 59, 63.) At hearing, the United States conceded that the Water Right Certificate established the elements of a *Walton* right for irrigation from the Williamson River. (Transcript at 39.)

Beneficial use of water from the Williamson River on 105.8 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 105.8 acres, or 1.32 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: 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.

24) Allotment 173 (97.0 acres claimed)

This allotment, composed of 160 acres located in NE¼ Section 20, T 30 S, R 10 E, W.M., was confirmed to Emma Jackson, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40023.) A Fee Patent was issued to Emma Jackson December 28, 1918. (Ex. 60029.) The property was conveyed to Robert Wilson and Nora Bernice Wilson, non-Indians, by an unrecorded transfer. (Ex. 60066.) The property was subsequently conveyed to William Kittredge, also a non-Indian, on April 4, 1931. Ex. 60066.)

The claim is for 97 acres irrigated from a single diversion point on the Williamson River located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam). (OWRD Ex. 1 at 10, 13, 25, 63.)

¶ William Kittredge obtained a Certificate of Water Right (#11956) for ~~93.0~~ 98.0 acres in NE¼ Section 20, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (Id. at 25, 59, 63.)

Beneficial use of water from the Williamson River on 97.0 acres within this allotment was made with reasonable diligence following the last known date the property was still under Indian ownership. The rate is 1/80 of one cfs per acre for 97.0 acres, or 1.21 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; 98.0 acres are shown on the 1930 water right certificate 11956 within the NE¼ Section 20; to add clarification using evidence on the record; to provide additional citations to the record.

25) Allotment 21 (71.2 acres claimed)

This allotment, composed of 160 acres located in NW¼ Section 21, T 30 S, R 10 E, W.M., was confirmed to Nannie Pompey, a Klamath Indian, by instrument dated March 3, 1910. (Ex. 40008.) In 1923, this property was described as mostly in timber, with about 40 acres of flat meadow ground. (*Id.* at 3.) The property was conveyed to William Kittredge, a non-Indian, on January 23, 1924. (Ex. 60065.) The property was subsequently conveyed to Donovan Nicol, also a non-Indian, on September 21, 1955. (Ex. 60049.)

The claim is for 71.2 acres irrigated from a single diversion point located in NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M. (POD south of Big Wire Dam). (OWRD Ex. 1 at 10, 13, 25.)

¶ William Kittredge obtained a Certificate of Water Right (#11956) for 66.5 acres in NW¼ Section 21, T 30 S, R 10 E, W.M. with a priority date of April 16, 1930. (OWRD Ex. 1 at 55, 57, 60.) The additional 4.7 acres not included on the certificate may have been developed subsequently. A footnote on a map for Permit 9592 (later certificated as 11956) indicates acreages [appurtenant to this allotment] noted on the map were under irrigation from the Kittredge Ditch system beginning in 1922. (*Id.* at 25, 59, 63.)

Beneficial use of water from the Williamson River on 66.5 acres within this allotment was made with reasonable diligence following transfer from Indian ownership. The rate is 1/80 of one cfs per acre for 66.5 acres, or 0.83 total cfs. The point of diversion is south of Big Wire Dam within the NW¼ NW¼ Section 16, T 30 S, R 10 E, W.M.

Reasons for Modification: 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.

8. **Conclusions of Law.** Within the section titled “Conclusions of Law” of the Proposed Order, Conclusions #3 and #6 are modified, and Conclusion #7 is added as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

a. Conclusion #3

There is sufficient information on the development or ~~continuous~~ continued use of water on this Place of Use to establish a *Walton* right for a portion of the property subject to this claim.

b. Conclusion #6

There is not sufficient information to support a period of use for irrigation outside of March 1 to October 31.

c. Conclusion #7

Beneficial use of water by the method of natural overflow is a valid basis for a *Walton* water 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.

9. **Opinion.** The entire section titled “Opinion” of the Proposed Order is modified as described herein.

OWRD has removed the ALJ’s discussions regarding the elements of a *Walton* claim, and natural overflow of water as a basis for a *Walton* claim. The deleted paragraphs are noted below as “*****”. In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

The remaining portions of the Opinion section of ALJ’s Proposed Order have been labeled “Application of Walton Elements to the Modified Proposed Order Findings of Fact.” Additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text.

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

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook*

v. Employment Division, 47 Or App 437 (1980); *Metcalf v. AFSD*, 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

Unlike many of the cases in the Adjudication, in this case we have the advantage of sworn statements made by a percipient witness to many of the events of significance, Oscar Kittredge. While Contestants have been able to raise questions as to the reliability of some of the other affidavits placed in this record, there is no clear evidence suggesting that Kittredge's affidavit marked as Ex. 60138 is not reliable.

To the contrary, ~~I consider~~ this affidavit is considered, with limited corroboration from another Kittredge affidavit dated in 1977 and attached to the Supplemental Direct Testimony of James P. Lynch, to be of particular value for several reasons:

Kittredge was born in 1900, and was 12 years old when he came to the Klamath Marsh area. He was an adult, or nearly so, when many of the events described in his affidavits occurred. He made his affidavits in 1978 and 1979, in the course of different litigation. The *Walton* cases were not published until the mid-1980s. Thus, particularly with regard to the "successor non-Indian" rule, and the artificial diversion rule, the principles stated in the *Walton* case could not have been in the contemplation of either Kittredge or his counsel when the affidavits were produced. No parties have suggested that Kittredge's affidavits are unreliable. To the contrary, all parties have relied upon different parts of his affidavits as support for their positions.

Although both affidavits are on the record, the shorter affidavit Kittredge signed in 1979 is primarily useful in clarifying statements contained in the longer

and more detailed affidavit he prepared in 1978⁸. For example, reading the two affidavits together, it is clear that the “diversion in the Big Wire Field” mentioned in the earlier affidavit is the “Big Wire Dam” that was in existence in the 1970s.

For these reasons ~~I have relied on~~ Kittredge’s affidavits were relied on in much of the fact-finding in this case. While there is other evidence from which inferences could be made that contradict Kittredge’s affidavits,⁹ ~~I am not prepared to ignore~~ the otherwise apparently reliable statements by a percipient witness should not be ignored in favor of possible, but not necessary, contrary inferences that could be drawn.

As discussed below, the various allotments have different histories. Those different histories control the outcome as to each parcel. Several general statements can be made, however, that control the way the various portions of the claim are analyzed.

Long Prairie Creek and Jack Creek

Long Prairie Creek and Jack Creek are both subject to natural overflow, but mainly above the Mayfield Ditch. Where Jack Creek is claimed as the source of water, there is no evidence on the record to support beneficial use of water by natural overflow. Where Long Prairie Creek is claimed as the source of water such evidence on the record only exists for two allotments, 152 and 264.

The only eyewitness evidence as to the construction of any diversion of water to the non-contiguous Mayfield properties from the Williamson River was contained in the affidavit of Oscar Kittredge, who was present in 1924 when

⁸ The Department has noted that there appear to have been some alterations in this exhibit after it was signed, and questions its reliability. (*cf.* Oregon Water Resources Department’s Response to Robert Cook and TPC, LLC’s Motion to admit Exhibit 160E00060129 through 160E00060138**** dated August 27, 2004) In view of the points the Department has made, ~~I have treated~~ this document has been treated with some care. However, the only portion for which it was considered is a list of dams contained on the same page as Kittredge’s notarized signature, which seems sufficiently reliable to merit consideration.

⁹ For example, the Big Wire Dam is located in a parcel that was owned by Logan Pompey in 1918, the year Kittredge says his father built the dam. It could be inferred from this that Kittredge was mistaken, and the dam was built after 1923, when William Kittredge bought the property. This is not a necessary inference, though, as there are other explanations possible. William Kittredge, after all, leased a number of Indian allotments in the area, and, as his son put it “the water development had been instigated on many of the allotments prior to the date of actual acquisition of title and while the same were under lease.” (Ex. 60138 at 6.)

Mayfield constructed a diversion from the Williamson River at Rocky Ford. However, that testimony does not establish that water from that diversion was ever applied or conveyed by the Mayfield Ditch on the property appurtenant to Claim 9 which Mayfield sold (in addition to other parcels) to Kittredge. Although David Shaw speculated that the diversions on Long Prairie Creek and Jack Creek would logically have been built before the 1924 diversion, the evidence is insufficient to prove this occurred. Shaw noted that “The Long Prairie and Jack Creek water supplies probably spread over much of the Mayfield place without construction of ditches and diversion facilities***.” (Rebuttal Testimony of David B. Shaw at 4.) Shaw draws from this that it would be logical for diversions to be developed on these creeks before a diversion on the Williamson River, because of the comparative ease with which the creek diversions could be accomplished.

However, it is also possible that the early property owners would see no need to change the natural pattern of water dispersion if water was reaching the points at which it was needed with no additional effort by the owners. In any event, Oscar Kittredge stated in his affidavit in 1978 that at that time the former Mayfield properties were largely irrigated by overflow from Jackson Creek, a source that is not part of this claim. ~~I find it also telling that the Kittredges, who had acquired the Mayfield property by 1930, did not include that property in the application for a water right with a 1930 priority. One would suppose that if water was being applied by the Kittredge family through an artificial diversion by that time, the property would have been included in the certificate.~~¹⁰

On this record it is not possible to determine when the diversions on Long Prairie and Jack Creek, or the Mayfield Ditch which is used to spread water out from these sources, were constructed. It is therefore not possible to determine whether those diversions were constructed with reasonable diligence after transfer from Indian to non-Indian ownership. ~~before the property transferred to the second non-Indian owner. Even if it were found that the diversions were~~

¹⁰ The Kittredge’s acquired the Mayfield properties in 1932, two years after the water right with a 1930 priority date was filed. (Shaw Direct Ex. 30004 at 16-17.) Reason for addition of footnote: To show the reason why OWRD has determined that the stricken statement is not supported by a preponderance of the evidence on the record.

~~developed before transfer to the second non-Indian owner, it would not be possible to quantify the various diversions, given that, as noted above, the property was largely watered by overflow from a source that is not subject to this claim, and the amount of water attributable to each stream has never been established. Consequently, I have concluded~~ In conclusion, except for the limited instances where the record supports beneficial use of water from Long Prairie Creek made by the method of natural overflow, ~~that~~ those parts of the claim where the point of diversion is on Jack Creek ~~and~~ or Long Prairie Creek cannot be allowed as a *Walton* right.

Combined Flows: Jack Creek, Long Prairie Creek, Return Flow

Part of the claim is based on a combination of water from Jack Creek, Long Prairie Creek, and return flow diverted from the Williamson River by an upstream user. This commingled water is treated as a single source; as claimed, it is not possible to quantify the rate of water from each supply source separately. ~~I am not convinced that~~ Although a claim based on return flow/tailwater is allowable as a privilege only¹¹ in this adjudication, in any event, ~~Even if such a claim could be allowed, however,~~ the evidence in this case is not sufficient to establish ~~one~~ when beneficial use of the commingled water first began and thus reasonable diligence cannot be determined. ~~As discussed above, the claimed diversion from Jack Creek and Long Prairie Creek cannot be allowed. Claimants have not provided evidence from which it could be determined how much of the combined flow can be derived from each source. Without that information, the amount of return flow claimed cannot be quantified.~~ This part of the claim cannot be allowed.

Big Wire Dam and Reasonable Diligence

Contestants argue that, absent evidence of special circumstances, the correct measurement of due diligence would require irrigation to have been

¹¹ Use of tailwater cannot be insisted upon if the use or non-use of water by upstream users no longer results in waste water or overflow being available to a downstream user, and as such is a privilege-only use of water. Use of tailwater within irrigation districts or federal reclamation projects is addressed separately in the Findings of Fact and Order of Determination in the Klamath Basin Adjudication, and is not at issue in this particular claim.

developed within five years of the acquisition of the property by the first non-Indian owner. Contestants also argue that this five-year period should be found to end on the priority date of Kittredge's water right certificate, April 16, 1930. In this case, Contestants' position would require ~~me to~~ disallowing a *Walton* right as to all properties that Kittredge acquired before April 16, 1925, since Kittredge could not be found to have developed the irrigation with reasonable diligence as to those parcels.

While a five-year rule might be a useful rule of thumb, no rule or statute requires it. To the contrary, the only governing rule on the subject, OAR 690-028-0045(1) defines reasonable diligence as: "that which is usual and ordinary with persons performing similar projects." Such a determination must be made on a case-by-case basis. OAR 690-028-0045(2). Contestants' argument assumes that the "reasonable diligence" standard should be applied to each allotment separately without regard to its context. As each allotment was acquired, it became but part of a much larger property, for which an irrigation system was being constructed. Oscar Kittredge stated in his affidavit that William Kittredge built the Big Wire Dam in 1918, and began moving water into ditches behind the dam soon thereafter. Since the Big Wire Dam was one of the Points of Diversion noted in the 1930 Water Right Permit, it is apparent that Kittredge was developing his irrigation system well before 1930. Thus, 1930 is not the appropriate benchmark from which to measure reasonable diligence in developing the irrigation system on these properties. To the contrary, 1930 would better be treated as the end-point, ~~by which at least the basic outlines of the irrigation system had been completed.~~ Because it is noted on his map labeled "Kittredge Ditches," which is a part of his 1930 water right application, that water had been used beginning in 1922, eight years prior to when he applied for the water right, a preponderance of evidence on the record supports the conclusion that the irrigation system was completed or nearly completed before he applied for his water right. Considering the extensive system of ditches that was constructed between 1918 and 1930¹², it

¹² ~~I take~~ Judicial notice is taken that a section is composed of one square mile. (*Webster's Third New International Dictionary* (1986) at page 2052) The allotments are spread over several

is not surprising that it would take up to 12 years to complete. The gauge of reasonable diligence for a system as extensive as that involved here could logically be considerably longer than five years. In conclusion, when considering the property as a whole (excluding the Mayfield place which he acquired in 1932), I conclude that 12 years was a reasonable time in which to construct the irrigation system, and that William Kittredge exercised reasonable diligence in doing so.

The Mayfield Place and Reasonable Diligence

For the purposes of this discussion, the Mayfield place means the parcel appurtenant to Claim 9 which was purchased by Kittredge from Mayfield in 1932 and described as the E½ and SW¼, Section 9; all Section 10; and the NW¼, Section 11; all within T 30 S, R 10 E. Beneficial use of water on the Mayfield place is from sources of water and on places of use not included in Kittredge's 1930 water right. Water is conveyed through the Mayfield Ditch, which is not shown on the map labeled "Kittredge Ditches." On this record it is not possible to determine when the Mayfield Ditch was first constructed. Thus is not possible to establish beneficial use of water with reasonable diligence on the Mayfield place except where beneficial use of water by the method of natural overflow can be established.

Individual Allotments

~~I turn now to the several allotments.~~

Allotment 54

This allotment first passed from Indian to non-Indian ownership in 1926. Of this portion of the claim, 28.8 acres are based on a diversion from Jack Creek. For the reasons discussed above, the evidence is insufficient to establish a *Walton* claim for water diverted from Jack Creek. However, the Contestants conceded that the portion of the claim (~~57.5~~ 58.8¹³ acres) diverted from the Williamson River was allowable as a *Walton* claim, since William Kittredge, the first non-

sections. Consequently, the ditches required to irrigate the several allotments would span several miles in length.

¹³ See Fn 5

Indian owner, acquired the property less than five years before the approved priority date on a water permit Kittredge was later granted. Although Kittredge's permitted right was for 67.1 acres, only ~~57.5~~ 58.8 acres was claimed from the Williamson River in this proceeding, so only ~~57.5~~ 58.8 acres can be allowed.

Allotment 153

This portion of the claim is based on diversion of the combined flow of Jack Creek, Long Prairie Creek, and return flow from an upstream user. ~~As discussed above, a diversion from this combined source cannot be allowed as a *Walton* right. In any event,~~ There is no evidence of a diversion beneficial use of water prior to conveyance out of Indian ownership, and it is unlikely that a diversion was constructed in the seven months between George Mayfield's acquisition of the property was in 1923 and his transfer to William Mayfield occurred 10 months later in April 1924. As discussed above, the evidence does not support a finding of development ~~before~~ after transfer from Indian ownership to the second non-Indian user successors, or continuous use of the water thereafter. No *Walton* right exists respecting this allotment.

Allotment 158

This portion of the claim is based on use of water from Jack Creek. In 1920 this property was described as having no ditch. ~~It is unlikely that irrigation was developed in the three months between acquisition by J.W. McCoy, the first non-Indian owner, and transfer to George Mayfield, the second non-Indian owner. There is no evidence that J.W. McCoy constructed any diversions. Although Mayfield is recorded as having constructed diversions in this area, he was the second non-Indian owner, so any irrigation he developed would not qualify for treatment under a *Walton* claim. As discussed above, the record does not support beneficial use of water made from Jack Creek with reasonable diligence after transfer from Indian to non-Indian successors.~~ No *Walton* right can be found on this record.

Allotment 154

This portion of the claim is based on use of water from Jack Creek, and from commingled water from Jack Creek, Long Prairie Creek and return flow from an upstream user. There is no clear evidence that Charles Pitcher constructed any diversion facilities in the area. The earliest record of a diversion by George Mayfield was in 1924, and this was from the Williamson River, not the source claimed here. In any event, Mayfield was the second non-Indian owner of the property. As discussed above, the record does not support beneficial use of water made from these two sources with reasonable diligence after transfer from Indian to non-Indian successors. The record will not support a *Walton* right.

Allotment 264

This portion of the claim is based on use of water from Long Prairie Creek, and from commingled water from Jack Creek, Long Prairie Creek and return flow from an upstream user. As in the case of Allotment 158, there is no evidence that the first non-Indian owner constructed any diversions on this property in the three months before George Mayfield, the second non-Indian owner, acquired it. Moreover, the claimed sources, Jack Creek, Long Prairie Creek, and combined water with return flow from an upstream user, cannot form the basis of a *Walton* right, as discussed above. As discussed above, the record does not support beneficial use of water made from the commingled water source with reasonable diligence after transfer from Indian to non-Indian successors. No *Walton* right can be found for this portion of Allotment 264.

Because the portion of this allotment claimed from Long Prairie Creek is situated above the Mayfield Ditch, it would be subject to natural overflow. As supported by the Indian owner's Patent in Fee application, beneficial use of water from Long Prairie Creek was made on this allotment while still in his ownership. The record supports a *Walton* right for 78.0 acres based on use of water by the method of natural overflow for this portion of Allotment 264.

Allotment 156

The ~~circumstances~~ ownership history of this allotment ~~are~~ is similar to ~~those~~ that for Allotment 153. There is no evidence that the claimed sources of the

water from Long Prairie Creek, or from commingled water from Jack Creek, and Long Prairie Creek and return flow from an upstream user were developed before ~~the property was transferred to William Mayfield, the second non-Indian owner~~ with reasonable diligence following transfer from Indian ownership to non-Indian successors. No *Walton* right can be found.

Allotment 157

As in the case of Allotment 154, there is nothing on the record suggesting that ~~the first non-Indian owner, in this case A.C. Beal, ever constructed any diversion facilities. While George Mayfield is known to have done so, he was the second non-Indian owner, so any development he might have done would not qualify for a *Walton* right~~ beneficial use of water was made with reasonable diligence following transfer from Indian ownership to non-Indian successors. Moreover, The sources of this water, the combined flow of Jack Creek, Long Prairie Creek, and return flow, will not support a *Walton* right.

Allotment 265

Again, the claimed source of water, Long Prairie Creek, ~~and Jack Creek and return flow~~ has not been shown to have been developed before ~~George Mayfield, the second non-Indian owner, acquired this property~~ with reasonable diligence following transfer from Indian ownership to non-Indian successors. No *Walton* right can be found.

Allotment 152

Like Allotment 153, George Mayfield acquired this property in April 1924, and transferred it to William Mayfield in November of the same year. ~~As the claimed source is Jack Creek, Long Prairie Creek, and return flow, and there is no evidence for development of these sources as early as 1924, no *Walton* right can be found. No *Walton* right can be found.~~ This allotment is situated above the Mayfield Ditch, and as such would be subject to natural overflow from the claimed source, Long Prairie Creek. This allotment was leased for grazing prior to transfer from Indian ownership, thus beneficial use of water was made while still

in Indian ownership. The record supports a Walton right for 79.5 acres based on use of water by the method of natural overflow.

Allotment 18

This allotment first passed from Indian to non-Indian ownership in 1923. Of this portion of the claim, 14 acres are based on a diversion from Jack Creek. However, the evidence is not sufficient to establish when water was diverted from Jack Creek, or whether that portion of the claim was developed with reasonable diligence.

As to the remainder of the claim, William Kittredge built the Big Wire Dam in 1918. That dam is currently located in this allotment. While Kittredge acquired the property seven years before he obtained a Water Right Certificate including it, he apparently began construction of the dam while the allotment was still in Indian ownership. ~~this does not establish that the irrigation system of which the Big Wire Dam was a part was not developed with reasonable diligence. It is likely that Kittredge would have applied water to the land closest to the dam as soon as he acquired title, if not before.~~ This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922. A Walton right in 101.2 acres irrigated from the Williamson River should be allowed. However, that portion of the claim from Jack Creek should not be allowed, as the evidence does not show when the diversion was constructed.

Allotment 20

This allotment first passed from Indian to non-Indian ownership in 1921. This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922. ~~As discussed above, 12 years was a reasonable amount of time in which to have built such an extensive system.~~ A Walton right in 128.1 acres, the amount developed with reasonable diligence ~~by 1930,~~ should be allowed. The remaining 1.5 acres should not be allowed, as the evidence does not show that it was developed with reasonable diligence.

Allotment 52

This allotment first passed from Indian to non-Indian ownership in 1916. On this allotment, 3.6 acres are based on a diversion from Jack Creek. However, the evidence is not sufficient to establish when water was diverted from Jack Creek, or whether that portion of the claim was developed with reasonable diligence.

~~While~~ As to the remainder on this allotment, William Kittredge is known to have constructed a diversion on the Williamson River as early as 1918, and may have had some interest in this property in 1917 when he made a payment on behalf of Alex Davis, the first non-Indian owner. Kittredge acquired title to this allotment in 1922. the evidence does not show that water was applied to this property prior to Kittredge's obtaining title in 1922 as the second non-Indian owner. Unlike the case of Allotment 18, where it is known that Kittredge constructed works on the parcel before he acquired title to it, the record is silent as to the development of irrigation on this parcel while in another non-Indian's title. A Walton right should not be allowed. This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922. A Walton right for 148.5 acres irrigated from the Williamson River should be allowed. However, that portion of the claim from Jack Creek should not be allowed, as the evidence does not show when the diversion was constructed.

Allotment 53

This allotment first passed from Indian to non-Indian ownership in 1920. Irrigation of this allotment was developed between 1918 and 1930 as part of the system William Kittredge constructed during that period. Beneficial use of water was made beginning in 1922. A Walton right should be allowed for ~~148.4~~ 154.4 acres, the amount claimed.

Allotment 78

~~William Kittredge was the second non-Indian owner of this parcel. There is no evidence that George Mayfield, the first non-Indian owner, developed irrigation to the property in the two months before he transferred it to Kittredge.~~

A *Walton* right should not be allowed. This allotment first passed from Indian to non-Indian ownership in 1920. It was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922. A *Walton* right should be allowed for 150.2 acres, the amount claimed.

Allotment 174

The circumstances of this allotment are similar to those of Allotments 18, 20 and 53. Likewise, a *Walton* right should be allowed for 159.8 acres, the amount claimed.

Allotment 24

The circumstances of this allotment are similar to those of Allotments 18, 20, 53 and 174. Likewise, a *Walton* right should be allowed for 52.7 acres, the amount allowed in Kittredge's 1930 water permit. The remainder should not be allowed, as it has not been shown to have been developed with reasonable diligence.

Allotment 25

This allotment first passed from Indian to non-Indian ownership in 1917. There is no evidence that irrigation was developed on this property by its Indian owners. Nor is there evidence that A.A. Bellman, the first non-Indian owner, developed irrigation on this property in the three days before he transferred the property to Charles Worden. A *Walton* right should not be allowed. This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922. A *Walton* right should be allowed for 24.2 acres, the amount claimed.

Allotment 77

Like Allotment 174, a *Walton* right should be allowed in 65.6 acres, the amount claimed.

Allotment 75

At hearing, Contestants conceded that a *Walton* right existed for water to this parcel from the Williamson River. A *Walton* right should be allowed in 105.8 acres, as claimed.

Allotment 173

This allotment was still under Indian ownership on December 28, 1918, being titled by fee patent to the same Indian owner confirmed as the allottee in 1910. Thus this allotment had not been transferred to non-Indian ownership prior to that date. Because of a break in the chain of title, the identity of the first non-Indian owner cannot be determined. While it is possible that the Wilsons were the first non-Indian owners, there is no evidence that the Wilsons developed irrigation to the property before it was transferred to William Kittredge in 1931. A *Walton* right should not be allowed. This allotment was encompassed within the irrigation system that William Kittredge constructed between 1918 and 1930, with beneficial use of water beginning in 1922. A *Walton* right should be allowed for 97.0 acres, the amount claimed.

Allotment 21

Like Allotment 24, a *Walton* right should be allowed in 66.5 acres, the amount allowed to William Kittredge in 1930. The remaining 4.5 acres should not be allowed, as not shown to have been diligently developed.

Livestock Watering

Neither party addressed the question of livestock watering. These allotments were used for grazing well before transfer out of Indian ownership, and have been either grazed or cut for hay ever since. There is ample support for the livestock watering portion of this claim for up to 2400 head of cattle, the number claimed.

Reasons for Modifications: To correct and clarify the elements of a *Walton* water right; to provide consistency with the above Modified Proposed Order Findings of Fact; to provide clarity of evidence on the record; to further substantiate approval of the claim; to apply the appropriate legal basis/bases to the proposed order's modified findings of fact.

10. **Order.**

- a. Within the section titled “Order” of the Proposed Order, the season of use for livestock watering is corrected as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

Stock Water for 2400 head of cattle, between ~~March~~ February 1 and October 31.

Reason for Modification: To provide consistency with Conclusion of Law #1.

- b. Within the section titled “Order” of the Proposed Order, a rate for livestock watering is added (shown in “underline” text) as follows:

Rate for Livestock Watering: 28,800 gallons per day, or 0.45 cfs from the Williamson River (based on 12 gallons per head per day for 2400 head).

Reason for Modification: To allow a separate rate for livestock watering – issue raised in exceptions.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
 - a. The “History of the Case” is adopted with modifications, as set forth in Section A.6, above.
 - b. The “Evidentiary Rulings” is adopted in its entirety.
 - c. The “Issues” is adopted in its entirety.
 - d. The “Findings of Fact” is adopted with modifications, as set forth in Section A.7, above.
 - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.8, above.
 - f. The “Opinion” is adopted with modifications, as set forth under Section A.9, above.
 - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 9. Consistent with Sections A.7, A.8, A.9, above, the outcome of the Order has been modified to recognize a right for irrigation on an additional 584.7 acres; the season of use for livestock watering is corrected in Findings of Fact A.10.a, and a rate is specified for livestock watering in Section A.10.b, above.
2. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.
3. Beneficial use of water by the method of natural overflow was established on Allotments 152 and 264 prior to the development of specific points of diversion.

4. Based on the file and record herein, IT IS ORDERED that Claim 9 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 9

CLAIM MAP REFERENCE:

CLAIM # 9, PAGE 25; OWRD INVESTIGATION MAP – T 30 S, R 10 E;

CLAIMANT: JERRY L. NEFF AND LINDA R. NEFF
4118 HARBOR WALK DRIVE
FORT COLLINS, CO 80525

ROBERT M. COOK - T P C, LLC, AN OREGON LIMITED LIABILITY CO
32041 CARTNEY DR.
HARRISBURG, OR 97446

SOURCE OF WATER:

LONG PRAIRIE CREEK, tributary to UPPER KLAMATH LAKE, and
The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE:

IRRIGATION OF 1470.3 ACRES AS FOLLOWS:

157.5 ACRES FROM LONG PRAIRIE CREEK POD, AND

1312.8 ACRES FROM THE WILLIAMSON RIVER, BEING 387.7 ACRES FROM BIG WIRE DAM POD NORTH, AND 925.1 ACRES FROM BIG WIRE DAM POD SOUTH;

LIVESTOCK WATERING FROM THE WILLIAMSON RIVER FOR 2400 HEAD

RATE OF USE:

20.395 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

3.94 CFS FROM LONG PRAIRIE CREEK FOR IRRIGATION, MEASURED AT THE POINT OF DIVERSION,

16.41 CFS FROM THE WILLIAMSON RIVER FOR IRRIGATION, MEASURED AT THE POINTS OF DIVERSION, BEING 4.85 CFS FROM BIG WIRE DAM POD NORTH, AND 11.56 CFS FROM BIG WIRE DAM POD SOUTH, AND

0.045 CFS FOR LIVESTOCK WATERING FROM THE WILLIAMSON RIVER MEASURED AT THE PLACE OF USE, NOT TO EXCEED 28,800 GALLONS PER DAY.

DIVERSION OF STOCK WATER TO THE PLACE OF USE IS LIMITED TO THAT WHICH HAS BEEN HISTORICALLY DIVERTED FOR BENEFICIAL USE AND IS REASONABLY NECESSARY TO TRANSPORT THE WATER.

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

THE RATE OF USE FOR IRRIGATION FROM THE WILLIAMSON RIVER MAY NOT EXCEED 1/80 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

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

PERIOD OF ALLOWED USE:

Use	Period
Irrigation	March 1 - October 31
Livestock Watering from the Williamson River	February 1 - October 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name	Source	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
Long Prairie Creek POD	Long Prairie Creek	30 S	10 E	WM	11	NW NW	330 FEET EAST FROM NW CORNER, SECTION 11
Big Wire Dam POD North	Williamson River	30 S	10 E	WM	16	NW NW	NONE GIVEN
Big Wire Dam POD South	Williamson River	30 S	10 E	WM	16	NW NW	NONE GIVEN

THE PLACE OF USE IS LOCATED AS FOLLOWS:


IRRIGATION FROM LONG PRAIRIE CREEK POD					
Twp	Rng	Mer	Sec	Q-Q	Acres
30 S	10 E	WM	10	NE NE	17.2
30 S	10 E	WM	10	NW NE	17.6
30 S	10 E	WM	10	SW NE	11.2
30 S	10 E	WM	10	SE NE	32.0
30 S	10 E	WM	11	NW NW	10.4
30 S	10 E	WM	11	SW NW	35.1
30 S	10 E	WM	11	SE NW	34.0

IRRIGATION and LIVESTOCK WATERING FROM THE WILLIAMSON RIVER						
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD
30 S	10 E	WM	8	SW SW	20.8	BIG WIRE DAM POD NORTH
30 S	10 E	WM	8	SE SW	34.8	
30 S	10 E	WM	8	SE SE	3.2	
30 S	10 E	WM	16	NW NW	6.8	
30 S	10 E	WM	17	NE NE	34.4	
30 S	10 E	WM	17	NW NE	39.4	
30 S	10 E	WM	17	SW NE	28.0	
30 S	10 E	WM	17	SE NE	15.6	
30 S	10 E	WM	17	NE NW	40.0	
30 S	10 E	WM	17	NW NW	40.0	
30 S	10 E	WM	17	SW NW	35.6	
30 S	10 E	WM	17	SE NW	32.8	
30 S	10 E	WM	18	NE NE	31.9	
30 S	10 E	WM	18	SE NE	20.8	
30 S	10 E	WM	18	NE SE	3.6	

IRRIGATION and LIVESTOCK WATERING FROM THE WILLIAMSON RIVER						
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD
30 S	10 E	WM	16	NE NW	12.4	BIG WIRE DAM POD SOUTH
30 S	10 E	WM	16	NW NW	17.6	
30 S	10 E	WM	16	SW NW	40.0	
30 S	10 E	WM	16	SE NW	24.4	
30 S	10 E	WM	16	NE SW	25.7	
30 S	10 E	WM	16	NW SW	40.0	
30 S	10 E	WM	16	SW SW	40.0	
30 S	10 E	WM	16	SE SW	22.4	
30 S	10 E	WM	17	NE NE	0.3	
30 S	10 E	WM	17	SW NE	10.8	
30 S	10 E	WM	17	SE NE	20.0	
30 S	10 E	WM	17	SW NW	2.4	
30 S	10 E	WM	17	SE NW	3.6	
30 S	10 E	WM	17	NE SW	40.0	
30 S	10 E	WM	17	NW SW	38.6	
30 S	10 E	WM	17	SW SW	31.6	
30 S	10 E	WM	17	SE SW	40.0	
30 S	10 E	WM	17	NE SE	40.0	
30 S	10 E	WM	17	NW SE	39.8	
30 S	10 E	WM	17	SW SE	40.0	
30 S	10 E	WM	17	SE SE	40.0	
30 S	10 E	WM	18	NE SE	22.0	
30 S	10 E	WM	18	NW SE	0.2	
30 S	10 E	WM	18	SW SE	24.0	
30 S	10 E	WM	18	SE SE	40.0	
30 S	10 E	WM	19	NE NE	29.6	
30 S	10 E	WM	19	NW NE	40.0	
30 S	10 E	WM	19	SW NE	32.6	
30 S	10 E	WM	19	SE NE	3.6	
30 S	10 E	WM	20	NE NE	40.0	
30 S	10 E	WM	20	NW NE	28.0	
30 S	10 E	WM	20	SW NE	0.2	
30 S	10 E	WM	20	SE NE	28.8	
30 S	10 E	WM	21	NE NW	7.0	
30 S	10 E	WM	21	NW NW	39.5	
30 S	10 E	WM	21	SW NW	20.0	

[End of Water Right Claim Description]

Dated at Salem, Oregon on February 28, 2014


 Dwight French, Adjudicator
 Klamath Basin General Stream Adjudication