

**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
JOHN M. MOSBY AND)	DETERMINATION
MARILYN MOSBY)	
_____)	Water Right Claim 18

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 18 (Claimants: JOHN M. MOSBY AND MARILYN MOSBY) and its associated contests (2818, 3099, 3436, 3720, and 4076) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 165.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued an AMENDED PROPOSED ORDER (Proposed Order) for Claim 18 on June 2, 2006.
3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) the United States of America and (2) John M. and Marilyn Mosby.
4. On May 8, 2012, the Adjudicator issued a SECOND AMENDED PROPOSED ORDER (Amended Proposed Order) to modify the season to April 1 through October 31 because the season of use in the June 2, 2006 Proposed Order exceeded the claimed season of use. No exceptions were filed to Amended Proposed Order.
5. The Amended Proposed Order issued on May 8, 2012, is adopted and incorporated in its entirety as if set forth fully herein.
6. The exceptions filed to the Proposed Order issued on June 2, 2006, along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 18. The exceptions are found to be persuasive in part, and therefore,

modifications are made to the Proposed Order as described in Sections A.8, A.9, A.10 and A.11, below.

7. 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.8, below.
 - 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.9, below.
 - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.10, below.
 - f. The “Opinion” is adopted with modifications, as set forth in Section A.11, below.
 - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in this Partial Order of Determination for Claim 18. Consistent with Sections A.8, A.9, A.10 and A.11, below, the outcome of the Order has been modified to recognize a right for irrigation on an additional 787.2 acres, to approve livestock watering incidental to irrigation for 1356 head, to limit the season of use to April 1 to October 31 as claimed, and to describe the effects of naturally occurring subirrigation from the Williamson River on a portion of the claimed place of use.
8. **History of the Case.** The first paragraph is modified as follows: (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

Claimants John M. and Marilyn Mosby filed their claim (claim 18) on December 7, 1990, making a claim for water as non-Indian successors to a Klamath Indian Allottees, and as non-Indian successors to unallotted Klamath Indian Reservation lands. This *Walton* claim¹ is for 77.73 cubic feet per second (cfs) of water, being 4.78 cfs from Scott Creek, 41.25 cfs from Sand Creek, and 26.7 cfs from the Williamson River for irrigation of approximately 5,376.7² acres of land; and 5 cfs (unspecified source) for livestock use, ~~with a~~ The claimed period of use ~~of~~ is April through October for irrigation, and year round for livestock. (Ex. 20002 at 1-10). On October 4, 1999, Richard D.

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

² On the Statement and Proof of Claim, Item 7, the total acres are listed as 5376.7 acres. However, the sum of the acres listed by source and quarter-quarter is 5336.3. (Compare Ex. 20002 at 3 – 5 with Ex. 20002 at 8).

Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation for this claim preliminarily denying the claim. Various contests were filed, including Contest 2818 filed by WaterWatch,³ Contest 3099 filed by Claimants, Contest 3436 filed by Klamath Project Water Users (KPWU),⁴ Contest 3720 filed by the United States, and Contest 4076 filed by the Klamath Tribes.⁵

Reason for Modifications: To make corrections raised in exceptions; using evidence on the record, to provide more specific information with reference to what was claimed; to provide an additional citation to the record; and to clarify the number of acres claimed in a footnote.

9. **Findings of Facts.** 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 the modified findings of fact are provided beneath certain sections of modified findings. A summary of the reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: The general reasons for modifications are as follows: (1) To correct scrivener's errors and provide clarity of evidence in the record. (2) To provide evidence from the record to substantiate beneficial use of water by the method of natural overflow, and by the method of subirrigation, issues raised in exceptions. (3) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions. (4) To provide evidence from the record to substantiate beneficial use of water being made with reasonable diligence by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions. (5) 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.

³ Withdrawn on February 20, 2003.

⁴ KPWU is a group of separate water users and districts within the Klamath Basin who have filed joint contests in Adjudication proceedings. The group is composed of the following parties: Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC.

⁵ Withdrawn on August 12, 2004.

Modified Proposed Order Findings of Fact

GENERAL DEVELOPMENT OF LANDS APPURTENANT TO THE CLAIM:

1. Claim 18 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. It was originally 43 parcels, all but three of which were originally allotted to Klamath Indians as part of the termination of the Reservation. The remaining three parcels were transferred by the United States to the Klamath Indian Tribes after the Reservation was terminated, and then transferred by the Tribes. The total claim is for 5,376.7 acres.⁶ (Ex. 20002 at 8.)

2. The Allotments are located on both sides of the Williamson River, west of the Klamath Marsh. (Exs. 40008, 50172, ~~50183~~ 20002 at 154-155.) Prior to development, part of the land was subject to periodic flooding, while other portions were subject to subirrigation from the Williamson River or its tributaries. (Exs. 40061, 40065, 40067⁷; Affidavit of John Mosby at 2; 40001 at 65-134.) Early in the 1900s, several studies were conducted as to the feasibility of developing drainage ditches to drain portions of the reservation that were inundated much of the year. (Ex. 50105.) In addition, by 1920, several irrigation systems were under construction or completed on the reservation, including the Sand Creek Unit,

¶ Construction of the irrigation system for the Sand Creek Unit began sometime after 1918 and was completed in 1920 (Exs. 50094 at 4-5; 50105 at 20; 50106 at 2-3; 20002 at 139) which The Unit was reported to irrigate 3,614 acres in the area. (Ex. 50105 at 10, 20; Ex. 20002 at 129, 143.) It was found, however, that the Sand Creek Unit was difficult and expensive to maintain, and the area irrigated from the Unit was reduced to 1,150 acres in 1939. (Exs. 20002 at 143; 50094 at 4-5; 50107 at 8.) Owners of the 1,150 acres land in the Sand Creek Unit were later assessed government charges under a Secretary of Interior Contract # 14-20-0500-2150 dated April 21, 1965. This contract specified which lands remained in the project as of 1965. (Ex. 20002 at 72-73, 143; Ex.

⁶ As stated in the claim document. Claimant asserted in briefing that the actual irrigable acreage was 5,587. Since the claim controls, that will be the figure used in this case.

⁷ The three exhibits listed are appraisals of the area shortly after 1900 that refer to the lands as “wet” or “marsh land.” Since no irrigation works were in place at the time, it is inferred from these descriptions that the property was receiving water by natural subirrigation.

40001 at 17.) The source of water for irrigation within the Sand Creek Unit is commingled water from Scott Creek and Sand Creek. (Ex. 20002 at 129-130, 143).

¶ A 1952 aerial photograph clearly shows a ditch passing through Allotments 84, 91, 92, and 94. (Ex. 40022.) The shape and location of this ditch is consistent with an “Old Ditch” marked on a 1962 Final Proof Survey map for Permit S-23046. (Ex. 20002 at 27.) In approximately By 1955, the Sand Creek Ditch was already developed by D.O. Williams as evidenced on a 1955 aerial photo. (Exs. 40001 at 36-37; 40023.) Laterals in Allotments 1347½ and 1387 were extended from the Sand Creek Ditch in 1969. (Ex. 40001 at 88-90, 96.)

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

ALLOTMENTS 133, 38, 39, 123, and 122:

3. These properties were part of the property served by the Sand Creek Unit, an irrigation system developed prior to 1964 by 1920. (Exs. 50094 at 4-5; 50105 at 20; 50106 at 2-3; 20002 at 139.) Pursuant to the Act of August 20, 1964 (Public Law 88-456, 78 Stat 554) Allotments 133, 38, 39, 122, and 123 were identified in a 1965 contract between the United States and the property owners for assessments based upon the number of total acres under contract within each allotment,⁸ 160 acres each. The contract does not refer to either acreage recited as “irrigable” or “under cultivation.” The acres under contract, by allotment, are as follows: Allot. 133 – 160 ac; Allot. 38 – 154 ac; Allot. 39 – 160 ac; Allot. 123 – 160 ac; Allot. 122 – 110 ac. (Exs. 50112; 20002 at 72-73.)

4. The claimed source of water for Allotments 133, 38, 39, 123, and 122 is commingled water from Scott and Sand Creeks. The claimed Scott Creek point of diversion is located within the NESE, Section 1, Township 31 S, Range 7 E, W.M. The claimed (upper) Sand Creek point of diversion is located within the NWNW, Section 28 Township 31 S, Range 7 E, W.M. (Ex. 20002 at 1-6, 34; Ex. 40008.)

⁸ For example, in Allotment 122 only 110 acres of the 160 acre allotment were assessed. (Compare Ex. 20002 at 131 to Ex. 50129 at 1.)

4 5. The parties agree that Allotment 122, located in the NE¼ of Section 17, Township 31 S, Range 8 E, W.M. should be allowed as a *Walton* claim, with at least 110 acres irrigated. (Claimants' Reply Brief at 24; United States' Posthearing Brief at 42.) The parties agree that at least United States asserts that 134 acres have a developed water right for Allotment 39, located in the NE¼ of Section 7, Township 31 S, Range 8 E, W.M. and that at least 119 acres have a developed water right for Allotment 123, located in the NW¼ of Section 17, Township 31 S, Range 8 E, W.M.; The claimants disagree with this evaluation of Allotments 39 and 123, asserting that additional acreage should be allowed. The United States' relied on interpretation of nine aerial photographs spanning the years 1952 to 2000 for measuring the maximum acres historically irrigated within these two allotments. The acreage for Allotment 39 is based on a 1961 aerial photograph and a 2000 aerial photograph for Allotment 123. based upon the evidence of water actually beneficially applied to the allotments. The source for these properties is Sand Creek, a tributary of Williamson River. The diversion point is located in the NW 1/4 SE 1/4, section 16, Township 31 S, Range 7 E, W.M. (Exs. 20002 at 45, 40008, 40010; 40001 at 26-35; Claimants' Reply Brief at 25; United States' Posthearing Brief at 41 42.)

Allotment 122

6. Allotment 122 was transferred from Indian ownership to a non-Indian successor as early as 1917. (Ex. 20002 @ 97-98; Ex 40010.) As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 110 acres assessed in the 1965 contract.

Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)

The Claimants did not provide the location of these 110 acres by quarter-quarter. OWRD estimated the 110 acres by quarter-quarter using the 1923 map of the Sand Creek Unit (Ex. 20002 at 131) which illustrates the location of 110 acres within the NE¼ of Section 17, the OWRD Field Investigation Map for Township 31 S, Range 8 E, W.M.,

and a mapping tool as follows: 33.5 ac within the NENE ; 40.0 ac within the NWNE; 33.0 ac within the SWNE; and 3.5 ac within the SENE.

Allotment 39

7. Allotment 39 was transferred from Indian ownership to a non-Indian successor in 1917. (Ex. 20002 at 93; Ex 40010.) As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 156.0 acres claimed, being 40.0 acres within the NENE, 40.0 acres within the NWNE, 38.0 acres within the SWNE, and 38.0 acres within the SENE.

Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)

Allotment 123

8. Allotment 123 was transferred from Indian ownership to a non-Indian successor as early as 1917. (Ex. 20002 @ 97-98; Ex 40010.) As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 160.0 acres claimed, being 40.0 acres within the NENW, 40.0 acres within the NWNW, 40.0 acres within the SWNW, and 40.0 acres within the SENW.

Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)

Allotments 133 and 38

59. In 1915, Grover Neil acquired title to both Allotments 133 and 38. He was the first non-Indian owner. (Ex. 50085.) In 1914, prior to his obtaining title to this property, Grover Neil apparently filed an application for a water right for irrigation of this land

with the State of Oregon. (Ex. 40054.) Neil transferred the property to another non-Indian owner on August 23, 1915. (Ex. 20002 at 83.) There is no evidence that water was diverted to the property before this second transfer. In 1914, the Superintendent of the Klamath Indian Reservation sent a letter concerning the water right application of Grover Neil in connection with these Allotments. (Ex. 40054.)

10. Allotment 133 is located in the SW¼ of Section 5, Township 31 S, Range 8 E, W.M. As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 160.0 acres claimed, being 40.0 acres within the NESW, 40.0 acres within the NWSW, 40.0 acres within the SWSW, and 40.0 acres within the SESW.

Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)

11. Allotment 38 is located in the NW¼ of Section 7, Township 31 S, Range 8 E, W.M. As evidenced by the 1920 completion date of the Sand Creek Unit and this allotment's inclusion in the Sand Creek Unit Irrigation Project 1965 contract, beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence by non-Indian successors on the 140.0 acres claimed, being 40.0 acres within the NENW, 31.6 acres within Lot 1 (NWNW), 30.4 acres within Lot 2 (SWNW), and 38.0 acres within the SENW.

Irrigation from the claimed source has continued on this parcel as evidenced by the 1965 contract and water right Permit S-25987/Certificate 34993, priority date October 31, 1957. (Exs. 20072; 50134.)

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

Finding of Fact 6, OWRD addresses the location of 110 acres within the NE¼ of Section 17.

ALLOTMENTS 168, 91, 94, 184 and 84:

¶ 12. In the letter discussed above in relation to Allotments 133 and 38, the Superintendent stated: “The Indians tell me that the waters of Sand Creek have been used by them for irrigation purposes and for livestock for more than 20 years.” (Ex. 40054.) The distance between Allotments 133 and 38 and Allotments 84, 91, 94, 168, and 184 is more than one mile. (Ex. 40008.)

13. Testimony was given by the United States that water from Sand Creek, prior to the installation of the Sand Creek Ditch in 1955, under high flows would spread out to the east and work its way east to the Klamath Marsh which is located immediately to the east of Claim 18 lands. (Attachments 3 and 4 to Claimants’ Reply Brief – Hearing Transcript at 40-41.) The United States also testified that natural overflow from Sand Creek spread over portions of Allotments 168 and 184. (Exs. 40001 at 45, 62; 40008.)

7 14. In 1920, a farming and grazing lease entered into respecting Allotment 94 made provision for the lessee to clean out a ditch. The lease does not recite whether this ditch is for irrigation or drainage. (Ex. 40068.) ~~In 1951, A 1962~~ Final Proof Survey map was filed for a state water right covering ~~a portion of this entire~~ block of allotments. This Survey map shows an “old ditch” passing continuously through Allotments 170, 92, 94, 91 and 84, ~~west of this block of allotments. It does not show any connection between that “old ditch” and Allotments 84, 91, 94, 168 and 184. A ditch with the same contours is visible on a 1952 aerial photograph. (Compare Ex. 20002 at 27 to Ex. 40022 .)~~ Furthermore, the United States testified that in 1952, a pre-existing ditch intercepted excess runoff from Sand Creek to the north prior to the construction of the Sand Creek Ditch spreading water onto Allotments 91, 94 and 84. (Ex. 40001 at 56, 58-60, 67.)

8 15. Allotment 91 was transferred to B.S. Grigsby, a non-Indian, on April 20, 1921. (Ex. 50012.) Allotment 94 was transferred to B.S. Grigsby, a non-Indian, on June 29, 1927. (Ex. 50020.) Allotment 184 was transferred to Emma R. Grigsby, a non-Indian on

February 18, 1918. (Exs. 50010, 50011.) Allotment 84 was transferred to B.S. Grigsby, a non-Indian, on March 9, 1914. (Ex. 50002.) Allotment 168 was transferred to D.O. Williams, a non-Indian, on December 20, 1937. (Ex. 40016 at 2.)

Allotment 168

16. Allotment 168 is located in the NE¼ of Section 20, Township 31 S, Range 8 E, W.M. Two sources of water were claimed for this parcel. Commingled water from Scott and Sand Creeks were claimed on the northernmost 76.8 acres. Sand Creek from the “lower” point of diversion was claimed on the southernmost 71.8 acres. The claimed lower Sand Creek point of diversion is located within the NWNW, Section 20 Township 31 S, Range 8 E, W.M. (Ex. 20002 at 1-6, 27; Ex. 40008.) Department of Interior Grazing Lease # 115 was issued in 1925 on lands appurtenant to this parcel. (Ex. 50117.) Beneficial use of water from Sand Creek by the method of natural overflow on a portion of Allotment 168, being the 71.8 acres claimed from Sand Creek, was made prior to transfer from Indian ownership.

Irrigation from the claimed source has continued on this parcel as evidenced by water right Permit S-23046/Certificate 31364, priority date February 7, 1951. (Exs. 20002 at 27; 50133; 40101.)

Allotment 94

17. Allotment 94 is located in the NW¼ of Section 29, Township 31 S, Range 8 E, W.M. The claimed source of water for this parcel is Sand Creek with a claimed “lower” point of diversion located within the NWNW, Section 20 Township 31 S, Range 8 E, W.M. (Ex. 20002 at 1-6, 27; Ex. 40008.) A FARMING AND GRAZING LEASE dated 1920 was issued for this allotment wherein the lessee agreed to repair fences and clean out the ditch. (Ex. 40068.) In addition, DEPARTMENT OF INTERIOR GRAZING LEASE # 115 was issued in 1925 on lands appurtenant to this parcel. (Ex. 50117.) On a 1927 CERTIFICATE OF APPRAISEMENT, 160 acres were characterized as grazing land. Beneficial use of water was made on this parcel prior to transfer from Indian ownership on 156.9 acres claimed⁹,

⁹ The claimants recorded 39.3 acres within the NWNW of Section 29 (Ex. 20002 at 3), but to be consistent with the map was corrected by OWRD to 39.0 acres (Ex. 20002 at 149, 151.). Therefore there are 156.9 total acres claimed in Allotment 94.

being 39.3 acres within the NENW, 39.0 acres within the NWNW, 39.3 acres within the SWNW, and 39.3 acres within the SENW; Section 29, Township 31 S, Range 8 E, W.M.

Irrigation from the claimed source has continued on this parcel as evidenced by water right Permit S-23046/Certificate 31364, priority date February 7, 1951. (Exs. 20002 at 27; 50133; 40101; 40008).

Allotments 91, 184, 84

18. Although there was natural overflow and/or evidence of an early ditch on Allotments 91, 184 and 84, the first evidence of beneficial use of water from Sand Creek on these parcels is water right Permit S-23046/Certificate 31364 with a priority date of February 7, 1951. (Exs. 50133; 40008; 40101.) These allotments transferred out of Indian ownership between the years 1914 and 1921. Thus beneficial use of water was not demonstrated for thirty to thirty-five years following transfer from Indian ownership.

Beneficial use of water with reasonable diligence has not been demonstrated on these three allotments.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to make findings of fact pertaining to natural overflow; to add clarification using evidence on the record.

ALLOTMENTS 170, 92, 93, 16, 80, 81, 83, 82, 95, 97, 100, 101, 103, 104, 266, 559, 591, 1311, 1374, 1493:

Allotment 170 – Claimed from Commingled Waters of Scott and Sand Creeks

19. The claimed source for Allotment 170 is commingled water from Scott and Sand Creeks. (Ex. 20002 at 1-6; Ex. 40008.) This allotment transferred out of Indian ownership in 1921. (Ex. 40010.) United States interpreted a 1952 aerial photograph as showing 96 acres of natural flooding on this allotment (Ex. 40001 at 42); however, there is no evidence on the record that beneficial use of this natural overflow was made with reasonable diligence. And although these lands are included in Certificate 31364 (1951 priority date) for irrigation from a point of diversion on Sand Creek (Ex. 50133), this

source of water is different from that which was claimed for this allotment. Even if it had been the same as the claimed source, beneficial use under this certificate would not have been made with reasonable diligence.

Beneficial use of water with reasonable diligence has not been demonstrated on Allotment 170.

Allotments 92, 93, 16, 80, 81, and Portions of 82, 83, 591, 1493 -- Claimed from Sand Creek.

20. The claimed source of water for these allotments is Sand Creek from the claimed lower point of diversion. (Ex. 20002 at 1-6, 27; Ex. 40008.)

21. Testimony was given by the United States that water from Sand Creek, prior to the installation of the Sand Creek Ditch, would under high flows spread out to the east toward the Klamath Marsh, which is located immediately to the east of Claim 18 lands. (Attachments 3 and 4 to Claimants' Reply Brief – Hearing Transcript at 40-41.) The United States' testimony also demonstrated that natural overflow spread over portions of Allotments 92, 93 and 16 (Ex. 40001 at 47, 50, 53; Ex. 40008.) However, there is no evidence on the record that beneficial use of water by the method of natural overflow was made within these allotments.

22. The first evidence of beneficial use of water on Allotments 92, 93, 16, 80, and 81, and on portions of Allotments 82, 83, 591, and 1493, is from the lower point of diversion on Sand Creek under the authority of water right Permit S-23046/Certificate 31364. This water right has a priority date of February 7, 1951. (Exs. 50133; 40008; 40101.) These allotments transferred out of Indian ownership between the years 1914 and 1927. (Ex. 40010.) Beneficial use of water was not demonstrated for twenty-four to thirty-seven years following transfer from Indian ownership.

Beneficial use of water with reasonable diligence from Sand Creek has not been demonstrated on these allotments or portions of allotments.

Allotments 95, 97, 100, 101, 103, 104, 266, 559, 1311, 1374, and Portions of 82, 83, 591, 1493 -- Claimed from the Williamson River.

23. The claimed source of water for these allotments is the Williamson River, with a claimed point of diversion located within the SENW, Section 33 Township 31 S, Range 8 E, W.M. (Ex. 20002 at 1-6, 31; Ex. 40008.)

24. The United States' testimony demonstrates that Allotments 95, 97, 100, 101, 103, 104, 266, 559, 1311, and 1374, which are located south and east of the Williamson River, appear to receive subirrigation from the river due to the proximity of the river and the low lying nature of the land. (Ex. 40001 at 98-99.) The United States' testimony also demonstrates that Allotments 1311, 82, 591, 1493, portions of Allotments 95, 97, and 103, the western portion of 266, and the eastern three-quarters of 83 are substantially influenced by subirrigation. (Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.) An APPRAISAL REPORT for Allotment 95 states that “underground water” is at a sufficient height to provide adequate moisture to grow a good crop of grass. (Ex. 40098.) Soils maps and soils interpretations conducted by the U.S.D.A. Soil Conservation Service describe the majority of these lands as being within the Chincallo Series and subject to annual inundation (Ex. 500142 at 3), with only a small percentage of lands described as being subject to annual flooding (Exs. 500142 at 4; 40008) or frequent flooding except where diked (Ex. 500142 at 5).¹⁰ (See also Exs. 500143-144; 40008; Claimants' Closing Argument at 24.)

25. The following allotments have grazing leases dated prior to the allotment transferring out of Indian ownership: Allotments 82, 83, 101, 104, 266, 591, and 1493 (Exs. 40010; 40076; 40078; 50116; 50117; 50118). Of these, Allotments 83, 101, 104 and 1493 also have a CERTIFICATE OF APPRAISEMENT issued under Indian ownership that characterizes all the acres within the allotment as “grazing.” (Exs. 40077; 40080, 40087, 40090; 40093; 40094.) Allotments 100 and 103 have similar certificates. *Id.* Finally, a 1956 APPRAISAL REPORT characterized Allotment 95 as follows: “[t]he subject tract

¹⁰ The Chincallo Series represents the overwhelming majority of the claimed lands, the Kirk Series is of limited presence being mostly in the far northwest and southeast corners of the farm, and the Skellock series occupy a very limited amount of land within Allotment 1347½. This analysis is based on the soils maps in Ex. 50143.

consists of meadow land utilized at present for the grazing of cows . . . the tract is enclosed with a standard 4 barded wire fence.” Allotment left Indian ownership in 1956. (Exs. 40010; 40098.)

Beneficial use of water from the Williamson River by the method of natural subirrigation¹¹ has been demonstrated on Allotments 95, 100, 101, 103, 104, and 266, and portions of Allotments 82, 83, 591 and 1493.

26. Aside from subirrigation, the first evidence of beneficial use of water on Allotments 95, 97, 100, 101, 103, 104, 266, 559, 1311, 1374, and portions of Allotments 82, 83, 591, and 1493 is from a diversion on the Williamson River as authorized under water right Permit S-25337/Certificate 33523. The water right has a priority date of February 10, 1958. (Exs. 40008; 40104.) With the exception of Allotments 95 and 1131, these allotments transferred out of Indian ownership between the years 1913 and 1927. (Ex. 40010.) Thus beneficial use of water from a diversion was not demonstrated on these twelve allotments for thirty-one to forty-five years following transfer from Indian ownership. Allotment 1131 transferred out of Indian ownership in 1950, eight years after beneficial use of water from a diversion began; beneficial use of water with reasonable diligence was not demonstrated on this allotment.

27. Allotment 95 transferred out of Indian ownership in 1956 (Exs. 50076; 40010). Thus, beneficial use of water from a diversion on the Williamson River was made with reasonable diligence by non-Indian successors on the 155.9 acres claimed, being 39.8 acres within the NENW, 39.8 acres within the NWNW, 39.8 acres within the SWNW, and 36.5 acres within the SENW; Section 8, Township 32 S, Range 8 E, W.M.

Irrigation from the claimed source has continued on this parcel as evidenced by water right Permit S-25337/Certificate 33523, priority date February 10, 1958. (Exs. 40008; 40104.)

¹¹ Natural subirrigation as used here refers to water use which results from a naturally occurring high water table condition.

Section Summary

9. 28. Except for 155.9 acres within Allotment 95, there is no evidence of beneficial use of water by the method of natural overflow or by an artificial diversion of water to the other nineteen allotments addressed in this section, prior to or within a reasonably diligent period after the transfer of the property to the second non-Indian owner successors.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to make findings of fact pertaining to natural overflow and subirrigation; to add clarification using evidence on the record.

ALLOTMENT 532:

~~10~~ 29. The claimed source of water for Allotment 532 is commingled water from Scott and Sand Creeks. (Ex. 20002 at 1-6.) United States interpreted a 1952 aerial photograph as showing 96 acres of natural flooding on this allotment (Ex. 40001 at 39); however, there is no evidence on the record that beneficial use of natural overflow was made within this allotment. Ditches have been identified that could have supplied water to Allotment 532 in 1955, prior to its acquisition by Ernest Bubb, the first non-Indian owner, in 1957. However, there is no evidence that water was beneficially applied to this allotment at that time. (Ex. 40016 at 1; Ex. 40001 at 36-37, 96; Ex. 40023.) The United States determined, based on interpretation of aerial photographs, that the first evidence of application of water to Allotment 532 is in 1969. (Ex. 40001 at 96.) There is no evidence in the record of a state water right appurtenant to this allotment.

Beneficial use of water with reasonable diligence has not been demonstrated on this allotment.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to make findings of fact pertaining to natural overflow; to add clarification using evidence on the record.

ALLOTMENTS 105 and 267:

~~¶ 30.~~ These allotments were acquired by the first non-Indian owner, McAuliffe, in 1926, and sold to D.O. Williams, also a non-Indian, in 1939. (Exs. 50035, 50041.) The claimed source of water for these two allotments is the Williamson River. (Ex. 20002 at 1-6, 31; Ex. 40008.)

¶ 31. In 1926 McAuliffe entered into an agreement, as part of the purchase of Allotment 267, to pay irrigation assessments for the portion of the property that is irrigated, and described the property as “irrigable lands now under a constructed ditch.” (Ex. 40088.) At the same time, a Certificate of Appraisement was prepared, which shows that Allotment 267 was appraised as land for grazing, and did not show any part of the property under irrigation. (Ex. 40089.) ~~There is no evidence of irrigation of Allotments 105 or 267 prior to 1961. (Testimony of Clements.)~~

Allotment 267

32. The United States’ testimony demonstrates that Allotment 267, which is located south and east of the Williamson River, receives subirrigation from the river due to the proximity of the river and the low lying nature of the land. (Ex. 40001 at 98-99; Attachments 9 to 11 to Claimants’ Reply Brief – Hearing Transcript at 58-60.) A U.S.D.A. Soil Conservation Service map shows the majority of soils in this allotment are of the Chincallo Series (2H3ZV3, 4H3ZV3), which are subject to annual inundation. (Ex. 500142 a 3.) There is a narrow strip of Kirk Series soils (4M6ZA4) along the southern edge of the allotment parallel to an irrigation ditch. The Kirk Series soils are described as being subject to frequent flooding except where diked. (Ex. 500142 at 5). (See also Exs. 500143 at 3; 40008; Claimants’ Closing Argument at 24.)

33. The Department of Interior issued grazing leases appurtenant to this allotment in 1925 and 1926. (Exs. 50116, 50118.) Beneficial use of water from the Williamson River by the method of natural subirrigation¹² has been demonstrated on this allotment.

¹² Natural subirrigation as used here refers to water use which results from a naturally occurring high water table condition.

34. The first evidence of a diversion from the Williamson River appears on a 1952 aerial photograph. (Ex. 50165.) The canal on this allotment is consistent with the canal associated with water right Permit S-25337/Certificate 33523, which has a priority date of February 10, 1958. (Exs. 20002 at 31; 40104.) Beneficial use of water from a diversion was not demonstrated on this allotment for at least twenty-six years following transfer from Indian ownership.

Allotment 105

35. The United States testified that Allotment 105, which is located south and east of the Williamson River, receives subirrigation from the river due to the proximity of the river and the low lying nature of the land. (Ex. 40001 at 98-99; Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.) A U.S.D.A. Soil Conservation Service map all the soils in this allotment are of the Chincallo Series (2H3ZV3, 4H3ZV3), which are subject to annual inundation (Ex. 500142 a 3;). (See also Exs. 500143 at 3; 40008; Claimants' Closing Argument at 24.)

36. Department of Interior Grazing Lease # 128 was issued in 1926 on lands appurtenant to this allotment. (Ex. 50118.) Beneficial use of water from the Williamson River by the method of natural subirrigation¹³ has been demonstrated this allotment.

37. Aside from subirrigation, the first evidence of beneficial use of water on this parcel was from a diversion on the Williamson River as authorized by water right Permit S-25337/Certificate 33523 with a priority date of February 10, 1958. Beneficial use of water from a diversion was not demonstrated on this allotment for thirty-two years following transfer from Indian ownership.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on

¹³ Natural subirrigation as used here refers to water use which results from a naturally occurring high water table condition.

the record; to make findings of fact pertaining to subirrigation; to add clarification using evidence on the record.

ALLOTMENTS 86, 142, 143, 593, 1383, 1347½, and 1387:

38. The claimed source of water for Allotments 86, 142, 143, 593, 1383, 1347½ and 1387 is Sand Creek from the claimed lower point of diversion. (Ex. 20002 at 1-6, 27; Ex. 40008.)

39. The United States' testimony demonstrates that Allotments 86, 143, 142, 1383, and the eastern part of 593 are substantially influenced by subirrigation from the Williamson River, a source other than that which was claimed. (Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.)

~~40.~~ 40. Allotment 86 was transferred to H.R. Dunlap, a non-Indian on June 30, 1920. (Ex. ~~250063.~~) This parcel was transferred to B.S. Grigsby, also a non-Indian, on July 3, 1920. (Ex. ~~250064.~~)

~~41.~~ 41. Allotment 142 was transferred to B.S. Grigsby, a non-Indian, on August 27, 1918. (Ex. 50018.) This parcel was transferred to W.B. Stevens, also a non-Indian, on July 25, 1921. (Ex. 50021.)

~~42.~~ 42. Allotment 143 was transferred to B.S. Grigsby, a non-Indian, on March 24, 1927. (Ex. 50014.) This parcel was transferred to a second non-Indian ~~no later than 1948 on~~ August 29, 1936. (Ex. ~~50043~~ 50023.)

~~43.~~ 43. Allotment 593 was transferred to B.S. Grigsby, a non-Indian, on July 14, 1915. (Ex. 50010.) This parcel was transferred to a second non-Indian ~~no later than 1948 on~~ August 29, 1936. (Ex. ~~50043~~ 50023.)

~~44.~~ 44. ~~There is no~~ The first evidence for irrigation of beneficial use of water from Sand Creek on Allotments 86, 142, 143, or 593 prior to 2000. (Ex. 40001 at 97.) is water right

Permit S-23046/Certificate 31364, which has a priority date of February 7, 1951. (Exs. 50133; 40008; 40101.) The beneficial use of water was not demonstrated for twenty-four to thirty-six years following transfer from Indian ownership.

Beneficial use of water with reasonable diligence has not been demonstrated on these four allotments.

~~17~~ 45. Allotment 1383 was transferred to B.S. Grigsby, a non-Indian, on March 24, 1927. (Ex. 50016.) The first evidence of beneficial use of water from Sand Creek on this allotment is water right Permit S-23046/Certificate 31364 with a priority date of February 7, 1951. (Exs. 50133; 40008; 40101.) The beneficial use of water was not demonstrated for twenty-four years following transfer from Indian ownership.

Beneficial use of water with reasonable diligence has not been demonstrated on this allotment.

~~18~~ 46. Allotment 1347½ was transferred out of Indian ownership no later than 1962. (Ex. 40005 at 36.)

~~19~~ 47. Allotment 1387 was transferred out of Indian ownership in 1955. (Ex. 50031.) It was subsequently transferred to D.O. Williams, also a non-Indian, in 1957. (Ex. 50032.) Allotments 1347½ and 1387 were not irrigated until at least 1969, when the ditches were constructed connecting these parcels to the Sand Creek Ditch. (Ex. 40001 at 88-90, 96.) There is no evidence in the record of a state water right appurtenant to these two parcels.

Beneficial use of water with reasonable diligence has not been demonstrated on these two allotments.

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

UNALLOTTED PARCELS A, B, C-1 and C-2:

48. Parcels A, B, C-1 and C-2 were transferred directly by the Klamath Tribes to others pursuant to the Klamath Termination Act after the dissolution of the Klamath Indian Reservation.

49. The claimed source of water for these four parcels is the Williamson River, with a claimed point of diversion located within the SENW, Section 33 Township 31 S, Range 8 E, W.M. (Ex. 20002 at 1-6, 31; Ex. 40008.)

50. The United States' testimony demonstrates that Parcels B, C-1 and C-2 are substantially subirrigated from the Williamson River. (Ex. 40001 at 131, 133, 134.)

¶ 51. In 1959, Clarence and Beulah Clinton, members of the Klamath Tribe, acquired Parcel C-1, amounting to 39.6 acres, located in Lot 3 (NE¼ NW¼) of Section 5, and Parcel C-2, amounting to 55.5 acres, located in the E½ NW¼ SE¼ of Section 6, all within Township 32 S, Range 8 E, W.M.. (Exs. 50140; 40008; 40010; 50081.) It was subsequently acquired by D.O. Williams, a non-Indian, who included it within land planned to be under irrigation in a Final Proof Survey in 1964. (Ex. 20002 at 31.) Parcels C-1 and C-2 were conveyed by Charles and Hazel A. Heaton, non-Indians, to Dayton O. Williams on May 16, 1960. (Ex. 50071.)

52. The first evidence of beneficial use of water on Parcels C-1 and C-2 is from a diversion on the Williamson River as authorized under water right Permit S-27254/Certificate 33422. The water right has a priority date of March 9, 1961. (Exs. 40008; 40105.)

Beneficial use of water from the Williamson River was made with reasonable diligence by non-Indian successors on the 92.4 acres claimed within these two parcels, being 39.6 acres within Lot 3 (NENW), Section 5; and 15.5 acres within the NESE, and 40.0 acres within the SESE, Section 6, all within Township 32 S, Range 8 E, W.M.

~~21~~ 53. The record does not establish when parcels A, and B and C-1 were transferred by the Tribes pursuant to the Klamath Termination Act after the dissolution of the Klamath Indian Reservation, ~~but by 1964, parcel C-1 was held by D.O. Williams and was part of the property planned for irrigation. (Ex. 20002 at 31.)~~ There is no evidence in the record of a state water right appurtenant to Parcels A and B.

Reasons for Modifications: Using evidence on the record, to correct and provide more specific information with reference to what was claimed; to provide additional citations to the record; the ALJ's proposed findings of fact failed to fully set forth the evidence on the record; to include a finding of fact pertaining to subirrigation; to add clarification using evidence on the record; to correct a scrivener's error in the location description of Parcel C-1; to correct errors in the chain of title for Parcel C-1, issue raised in exceptions.

RATE AND DUTY:

~~22~~ 54. The Standard Rate for irrigation in the Klamath Basin is 1/40th cubic foot per second per irrigated acre. The Standard Duty in the Klamath Basin is 3.5 acre-feet for each acre irrigated. ~~The Standard Season in the Klamath Basin is March 1 through October 1.~~ (Ex. 20002 at 285.) None of the parties has contested these standards. The season of use is April 1 through October 31, as claimed.

Reasons for Modifications: The season of use was modified in the Amended Proposed Order issued by OWRD on May 8, 2012.

10. **Conclusions of Law.** The Proposed Order's "Conclusions of Law" section is modified as follows: (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

1. The land appurtenant to the claim was transferred from Klamath Indian ownership to non-Indian ownership.

2. ~~Water for part of the claimed use was developed and used by the last~~ On certain portions of the claimed place of use, beneficial use of water from each of the claimed sources was made by an Indian owner of the property prior to transfer to a non-Indian owner, and/or was diligently developed and beneficially used by the non-Indian owners successors of the property after transfer from the last Indian owner.

3. The *Walton* elements are satisfied for a portion of this claim, being 1110.6 acres of irrigation with incidental livestock watering as follows: 726.0 acres from the

commingled sources of Scott and Sand Creeks within Allotments 133, 38, 39, 123 and 122; 228.7 acres from Sand Creek within Allotments 94 and 168; and 155.9 acres from the Williamson River within Allotment 95, and Parcels C-1 and C-2.

4. The Klamath Tribes Termination Act is a valid basis for the portion of the claim covering unallotted, former Klamath Indian Reservation land. The elements for a Klamath Termination Act right are satisfied for irrigation with incidental livestock watering from the Williamson River on 95.1 acres within Parcels C-1 and C-2.

4 5. There is insufficient title information to establish a ~~Walton~~ Klamath Termination Act right for a ~~portion of~~ the place of use within Parcels A and B.

5 6. There is sufficient information on the development or ~~continuous~~ continued use of water on part of this place of use, being 1205.7 acres within Allotments 133, 38, 39, 123, 122, 94, 168, 95, and Parcels C-1 and C-2, to establish a *Walton* right or Klamath Termination Act right.

7. Beneficial use of water by the method of natural overflow, as a matter of law, is a valid basis for a *Walton* water right. However, except for a portion of Allotment 168, the evidence on the record does not establish beneficial use of water from a claimed source by the method of natural overflow.

8. The Claimants have not provided sufficient evidence to demonstrate that beneficial use of commingled water from Scott and Sand Creeks was made with reasonable diligence on Allotments 168, 170, and 532.

9. The Claimants have not provided sufficient evidence to demonstrate that beneficial use of water from Sand Creek was made with reasonable diligence on Allotments 91, 184, 84, 92, 93, 16, 80, 81, 82, 83, 591, 1493, 86, 142, 143, 593, 1383, 1347½ and 1387.

10. The Claimants have not provided sufficient evidence to demonstrate that beneficial use of water from the Williamson River was made with reasonable diligence on Allotments 97, 100, 101, 103, 104, 266, 559, 1311, 1374, 82, 83, 591, 1493, 267 and 105.

11. The record supports an irrigation season of April 1 through October 31, a duty of 3.5 acre-feet per acre irrigated and a rate of 1/40 cubic foot per second per acre irrigated.

12. Livestock watering incidental to irrigation is limited to 1356 head for 1205.7 acres.

Reason 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 2006 Proposed Order.

11. **Opinion.** The Proposed Order’s “Opinion” section is modified as described herein.

OWRD has removed the ALJ’s discussions regarding the elements of a *Walton* claim, including the first non-Indian purchaser rule, and regarding natural overflow and subirrigation 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. In addition, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS.

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

Application of Walton Elements or Klamath Termination Act Elements (Parcels A, B, C-1 and C-2 only) 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.

The water rights sought by claimant will stand or fall based upon the ability of claimant to satisfy the elements of a *Walton* claim (or a Klamath Termination Act claim, depending on the history of the parcel). As discussed below, the various allotments have very different histories. Those different histories control the outcome as to each parcel.

ALLOTMENTS 133, 38, 39, 123, and 122:

Allotment 122

The parties agree that Allotment 122 should be allowed as a *Walton* claim, with 110 acres irrigated. Allotment 122 was conveyed from Indian ownership to non-Indian ownership in a number of Quitclaim Deeds from 1917 to 1922. (20002 at 98-103.) The United States' testimony demonstrates that Allotment 122 was irrigated by Indian predecessors or within a reasonable time after transfer to the first non-Indian owner based on construction of the Sand Creek Unit being completed in 1920, and by virtue of this allotment's inclusion in the Sand Creek Unit from 1920 through 1965, when the repayment contract (# 14-20-0500-2150) was entered into between the United States Department of Interior and prior landowner D.O. Williams. (40001 at 31-33.) Although 160 acres were claimed in Allotment 122, a *Walton* right must be limited to the 110 acres that were included in the Sand Creek Unit.

Allotments 39 and 123

The United States concedes that Allotments 39 and 123 are subject to a *Walton* right, but asserts that the water right should be limited to 134 and 119 acres respectively, based upon the ~~evidence of water actually beneficially applied to the allotments~~ analysis of aerial photographs. The United States' conclusion regarding the maximum number of acres they determined to have been continuously irrigated is based on the analysis of photographs from eleven days taken over a 48-year span (1952 – 2000). (Exs. 40019 – 40053.) The aerial photographs submitted by the United States are insufficient to establish abandonment of the developed *Walton* right. As described in the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS, a *Walton* claimant need not establish continuous beneficial use of water following initial development of the right.

Instead, a contestant has the burden to prove that a claimant has abandoned the right after development. Especially in light of water right Certificate 34993 which has authorized irrigation of these acres from the claimed source of water since 1957, the sporadic nature of this evidence is insufficient to establish abandonment of any portion of the developed rights. Claimant asserts, to the contrary, that the water right should be for 160 acres in each case, because that was the amount identified in the Act of August 20, 1964 (P.L. 88-456, 78 Stat 554) as the acreage included within the Sand Creek Unit. Claimant argues that this identification constitutes a federal reservation of rights that overshadows any other law to the contrary. Claimant is mistaken. First, federal reservations of water right apply to property in control of the United States. No authority has been cited for the proposition that such rights appertain to property that was already in private hands when a federal law was enacted. Moreover, the contract asserted as an expression of intent to appropriate water for 160 acres is devoid of any such expression. While it measures the assessment of charges for construction and maintenance of the water system by a specified number of acres, it does not describe those acres as “irrigable” or “under cultivation.” Without some such expression, the evidence for claimant’s position does not reach a preponderance. Since it is claimant’s burden to prove all the elements of a water right, and claimant has not done so as to 160 acres in each allotment, the water right should be limited to 134 acres for Allotment 39, and 119 acres for Allotment 123.

Allotment 39 was conveyed from Indian to non-Indian ownership in 1917. (20002 at 93.) Allotment 123 was conveyed from Indian ownership to non-Indian ownership in a number of Quitclaim Deeds from 1917 to 1922. (20002 at 98-103.) The United States’ testimony demonstrates that Allotments 39 and 123 were irrigated within a reasonable time after transfer to the first non-Indian owner based on construction of the Sand Creek Unit being completed in 1920, and by virtue of these two allotment’s inclusion in the Sand Creek Unit from 1920 through 1965, when the repayment contract (# 14-20-0500-2150) was entered into between the United States Department of Interior and prior landowner D.O. Williams. (40001 at 31-33.) A *Walton* right must be limited to the acres that were included in the Sand Creek Unit, but may not exceed the number of acres that were claimed.

Allotments 133 and 38

Claimant argues that Allotments 133 and 38 are the subject of federal reserved rights, because they were in Indian ownership until after the Sand Creek Unit was under study. However, claimant does not explain how the reservation of a federal water right for development of an irrigation project can be translated into an appropriation of water for application to a particular parcel of land. Claimant does not provide any authority for such a novel assertion. Claimant's water rights in Allotments 133 and 38 stand or fall based upon whether claimant has, as to them, satisfied the elements of a *Walton* right.

Claimant states that an application for a water right was filed in 1914 by Grover Neil, who acquired title to both Allotments 133 and 38 in 1915 and was the first non-Indian owner. Claimant argues that this shows that the elements of a *Walton* right were satisfied in 1914.¹⁴ This is not correct. Unlike a pre-1909 water right, where intent is sufficient to commence the appropriation, so long as other factors are present, in a *Walton* right water must be actually applied. There is no evidence that water was actually applied to the property during Grover Neil's tenure of ownership. ~~This is especially so when the property was conveyed to a second non-Indian owner on August 23, 1915. Under the circumstances, the elements of a *Walton* right are not satisfied as to Allotments 133 or 38. However, these two allotments were irrigated within a reasonable time by non-Indian successors based on construction of the Sand Creek Unit being completed in 1920, and by virtue of these two allotment's inclusion in the Sand Creek Unit from 1920 through 1965, when the repayment contract (# 14-20-0500-2150) was entered into between the United States Department of Interior and prior landowner D.O. Williams. (40001 at 31-33.) A *Walton* right must be limited to the acres that were included in the Sand Creek Unit, but may not exceed the number of acres that were claimed.~~

¹⁴ Claimant (Claimant's Reply Brief, at 30) describes a letter from the Superintendent as expressing concerns as to whether Mr. Neil's filing for a water right would adversely affect the Indians' use of Sand Creek water, and contends that the United States may not argue that the water was not timely developed when the United States objected to the water right application. The letter is not an objection to the application, does not "express concerns" or even mention adverse effects of the application on the Indians. It merely reports the application, and that some Indians had reportedly used water from Sand Creek for 20 years. (Ex. 40054.)

Summary of Allotments 133, 38, 39, 123, and 122

The claimed lands within Allotments 133, 38, 39, 123, and 122 have been continuously authorized for irrigation from the commingled water of Scott and Sand Creeks under Permit S-25987 / Certificate 34993 since 1957 (Ex. 50134) and have continued to be irrigated as claimed.

Claimants have established *Walton* water rights for 110 acres within Allotment 122, 156 acres within Allotment 39, 160 acres within Allotment 123, 160 acres within Allotment 133, and 140 acres within Allotment 38.

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

ALLOTMENTS 168, 91, 94, 184 and 84:

Claimant argues that Allotments 168, 91, 94, 184 and 84 were irrigated out of Sand Creek before the allotments passed out of Indian ownership. This argument is based on the conclusion that a ditch listed in a farming and grazing lease for Allotment 94 in 1920 is the same as an "old ditch" shown on a Final Proof Survey map in 1951-1962. This ditch was established by the time a 1952 aerial photograph was taken, and a ditch visible on the photograph matches the contours of the "old ditch" labeled on the survey map. This ditch is continuous from north to south throughout Allotments 170, 92, 94 and 91, and extends into 84. The Claimant asserts that this ditch was used for irrigation for some time before 1920, as evidenced by the description of the Superintendent in the letter of 1914 about the water right application of Neil, discussed in connection with Allotments 133 and 38, above, in which the Superintendent notes, "The Indians tell me that the waters of Sand Creek have been used by them for irrigation purposes and for livestock for more than 20 years." Thus, Claimant asserts, the "old ditch" must have been used prior to 1900 by "the Indians" who discussed irrigation with the

Superintendent in 1914. This assertion is supported with respect to Allotment 94. However, with respect to Allotments 168, 91, 184 and 84 there is no evidence of beneficial use of water that may have occurred from use of this ditch.

Among this group of allotments, the “old ditch” would have conveyed water from Sand Creek to Allotments 84, 91 and 94. The proximity and direction of the ditch relative to Sand Creek in conjunction with the testimony given by the United States that prior to the installation of the Sand Creek Ditch by 1955, under high flows Sand Creek would spread out to the east, creates a plausible scenario for Sand Creek water (exclusive of any other source) being conveyed in this ditch.

The grazing lease on Allotment 94 demonstrates that water was put to beneficial use on this allotment prior to its transfer to non-Indian successors in 1927.

With respect to Allotments 84 and 91, however, Claimant has established only that they could have been irrigated by the “old ditch.” Allotments 81 and 94 passed out of Indian ownership at the latest in 1927. The first evidence of beneficial use of water on these allotments is in 1951, the priority date of water right Certificate 31364.

~~So much cannot be drawn from the evidence, particularly when the allotments to which the Superintendent referred in his letter were more than a mile away from any of the allotments in this group. Moreover, there is no evidence that the ditch described in the farming and grazing lease is actually the ditch shown in the Final Proof Survey. It cannot be established when the “old ditch” in the Final Proof Survey was constructed, except to say it was constructed at some time prior to 1951. The evidence also does not show what land was irrigated out of this ditch. The most that Claimant can provide is the speculation that, given the slope and contours of the ground, water from that ditch could have irrigated the parcels in question. Since Allotments 91, 94, 184 and 84 passed out of Indian ownership at the latest in 1927, it has not been shown that the property was irrigated prior to transfer from Indian ownership. In addition, the only evidence in the record shows a ditch serving the property in 1951. The actual date of development of~~

~~that ditch is unknown. The most that can be said, then, is that the ditch was developed at some time within the 24 years after the property passed out of Indian ownership. This is not sufficient to establish diligent development by the first non-Indian owner.~~

¶ Allotment 168 was transferred to the first non-Indian owner in 1937, but the “old ditch” did not pass through Allotment 168. According to the Final Proof Survey map, it passed through Allotment 170, to the west. It is therefore, ~~again~~, speculative whether water from this ditch ever was applied to Allotment 168. However, this particular parcel was subject to natural overflow from Sand Creek. A 1925 grazing lease on lands that included Allotment 168 demonstrates that water was put to beneficial use prior to its transfer to non-Indian successors in 1937.

The claimed lands within Allotment 94 and 71.8 acres claimed within Allotment 168 have been continuously authorized for irrigation from Sand Creek under Permit S-23064 / Certificate 31364 since 1951, and have continued to be irrigated as claimed.

The “old ditch” did not pass through Allotment 184. This allotment was transferred to the first non-Indian owner in 1918. Although this parcel was subject to natural overflow from Sand Creek, the first evidence of beneficial use of water on this allotment is in 1951, the priority date of water right Certificate 31364.

In summary, claimants have established *Walton* water rights for 156.9 acres within Allotment 94, along with the portion of Allotment 168 that was claimed from Sand Creek, being 71.8 acres. Claimants have not established *Walton* water rights for Allotments 84, 91, and 184.

Reasons for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, natural overflow, and continued use of a developed right; to apply the appropriate legal bases to the Proposed Order’s modified findings of fact.

ALLOTMENTS 170, 92, 93, 16, 80, 81, 83, 82, 95, 97, 100, 101, 103, 104, 266, 559, 591, 1311, 1374, 1493:

~~Claimant's entire argument for a water right as to these allotments depends on natural overflow as the basis for a *Walton* right. Since, as discussed above, a *Walton* right requires a diversion of water, and may not be based upon natural irrigation, a water right cannot be allowed for these allotments. The claims on these 20 allotments depend in the first instance on assertions of beneficial use of natural overflow. However, the evidence supports only three (Allotments 16, 92 and 93) as being subject to natural overflow from any of the claimed sources. And while natural overflow from Sand Creek may have spread over portions of Allotments 92, 93 and 16, there is no evidence on the record that beneficial use of water was made by the method of natural overflow on these allotments.~~

State-issued water rights cover certain of these allotments, and serves as evidence of beneficial use of water as of the priority date of the rights. With the exception of Allotment 95, however, the priority dates are too far removed from the dates of transfer of the allotments to non-Indian successors to constitute application of water to beneficial use with reasonable diligence.

Allotment 95 left Indian ownership in 1956, and these lands were covered under a 1958 state based water right Certificate 33523 from the same water source as claimed (the Williamson River). These lands have continued to be irrigated as claimed. Claimants have established *Walton* water rights from the Williamson River for 155.9 acres within Allotment 95.

The claims for the remaining 19 allotments are denied.

Reasons for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, beneficial use of water being made with reasonable diligence after transfer to non-Indian successors, natural overflow, and continued use of a developed

right; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

ALLOTMENT 532:

This allotment is subject to natural overflow. Furthermore, the Claimant argues that the ditches providing water to Allotment 532 were in place in 1955, prior to its acquisition by the first non-Indian owner, Earnest Bubb, in 1957. However, the existence of natural overflow or artificial diversion works that could have served a parcel is not sufficient evidence that beneficial use of water had actually been made. of application of water to the ground. In order to make out a *Walton* right, Claimant must ~~show not only demonstrate~~ that beneficial use of water was applied to made on the property before it transferred, or was made with reasonable diligence after the property transferred to non-Indian successors. ~~but how much water and to what portion of the property it was applied.~~ There are no grazing leases or other evidence on the record demonstrating beneficial use of water by the method of natural overflow. In addition, the Claimant does not controvert the evidence presented by Clements that "no irrigation is evident until 1969 – 12 years after acquisition by the first non-Indian owner." Because a *Walton* claimant must show beneficial use with reasonable diligence ~~diligent development of irrigation by the first non-Indian successors owner,~~ and such a delay does not establish the necessary diligence, a *Walton* right cannot be allowed for this allotment.

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

ALLOTMENTS 105 AND 267:

These allotments were acquired by the first non-Indian owner, McAuliffe, in 1926, and sold to D.O. Williams in 1939. Claimant asserts that Clements testified that a

ditch was visible in aerial photos taken in 1952, that Clements testified that he could see irrigation water coming from this ditch, and that since there was a reference to a “irrigable lands now under constructed ditch” in a Certificate of Appraisal standardized language on a FORM OF AGREEMENT – CIRCULAR NO. 1677A¹⁵ from 1926 for Allotment 267 (Ex. 40088), that Clements’ testimony shows that Allotments 105 and 267 were being irrigated in 1926, soon after transfer to the first non-Indian owner. This mischaracterizes Clements’ testimony. He testified at hearing that he could see a feature on several maps, including the map dated 1952, and that at the southern end of the feature, on a map from 1961 he could see signs of irrigation which, in his opinion, came from “the ditch at the South end of that parcel.” He also, however, testified that he did not know if the feature noted “was a water structure or not.” ~~Clearly, then, Clements was not referring to that feature when he mentioned a “ditch at the south end of the parcel.”~~ Indeed, although the printed language of the Certificate of Appraisal refers to property as being “now under constructed ditch,” the actual space for acreage under irrigation was left blank, and the property appraised as grazing land. Certificates of Appraisal for Allotment 267 (Exs. 40086, 40089), dated 1921 and 1926, characterized the allotment as “best adapted for grazing” and as grazing “all” acres. In 1926, the blanks for “Irrigated” or “Irrigable” acres were left empty. That the only reference to a ditch was stock language on a form in conjunction with the Certificates of Appraisal showing lack of irrigation strongly suggests that this allotment was not being irrigated by a diversion or natural overflow in 1926.¹⁶

~~Additionally, the reference from the Certificate of Appraisal to Allotment 267 as being “now under constructed ditch” clearly does not refer to the feature noted on the aerial photograph, since that feature does not cross Allotment 267 at any point. It would therefore be unlikely to be the “ditch” referred to in the Certificate of Appraisal. If~~

¹⁵ The full title of this circular is as follows: THIS FORM OF AGREEMENT TO BE EXECUTED BY PURCHASE TO PAY THE CONSTRUCTION AND OPERATION AND MAINTENANCE CHARGES ASSESSED AGAINST THE IRRIGABLE LANDS PURCHASED UNDER INDIAN IRRIGATION PROJECTS. This standardized form was an agreement that the purchaser, D.P. McAuliffe, “will pay on a per acres basis all irrigation charges assessed or to be assessed against this land. . .”

¹⁶ As discussed in a section below, these two allotments were subject to natural subirrigation from the Williamson River, which would explain, without contradiction, the 1926 characterization of the property as “grazing” and the presence of a 1926 grazing lease on Allotments 105 and 267.

~~the feature discussed above is not the ditch, as is probably the case, there is no evidence showing where the ditch, if any, referred to in the Certificate of Appraisalment was located. Thus, the evidence does not establish the existence of a ditch serving even 267. There is even less evidence for a ditch that could have served Allotment 105.~~

The earliest evidence of irrigation on these allotments by anything other than natural subirrigation is the “feature” on the 1952 aerial photograph. This “feature” is exactly consistent with the irrigation canal on a 1964 final proof survey map for Permit S-25337/Certificate 33523, which has a priority date of 1958. The canal extends from the Williamson River through the NE corner of Allotment 105, southeast through Allotment 267 until it reaches the southern edge of irrigated acreage. Assuming Claimant’s predecessors began using this canal to irrigate these allotments in 1952, this represents a 26-year period after transfer of the allotments to non-Indian ownership in 1926. This is not sufficient to demonstrate beneficial use of water with reasonable diligence. The claims for Allotments 105 and 267 are denied. The evidence is not sufficient to show artificial diversion of water in a specified amount to benefit specified property prior to the transfer of the property to the second non-Indian owner in 1939. Consequently, a *Walton* right has not been established.

Reason for Modifications: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, and beneficial use of water being made with reasonable diligence after transfer to non-Indian successors; to apply the appropriate legal bases to the Proposed Order’s modified findings of fact. Additionally, the ALJ confused the contents Exhibits 40088 and 40089 (the FORM OF AGREEMENT – CIRCULAR NO. 1677A and a CERTIFICATE OF APPRAISEMENT, both issued in 1926). The second paragraph was stricken because it is confusing and not needed. Exhibits 50164, 50166 and 50167 are aerial photographs noted in Ron Yockim’s October 28, 2004 DOCUMENT LIST as “ditches drawn by Mr. Clements at hearing.” None of these maps have any handwritten notations in the vicinity of the Williamson River. The handwritten labeled ditches are consistent with the “old ditch” in Allotments 170, 92, 94, 91 and 84, and with the Sand Creek Ditch. Because the weight of the evidence already shows that beneficial use of water was not likely in the year 1926, it is not necessary to rely on documents that don’t pertain to the area in question, and may have been referenced by mistake.

ALLOTMENTS 86, 142, 143, 593, 1347½, 1383, 1387:

Claimant's brief did not discuss these allotments. Allotments 1347½ and 1387 could not have been irrigated until 1969, when ditches were extended to these properties from the Sand Creek Ditch. Allotment 1387 was transferred out of Indian ownership in 1955, and transferred to D.O. Williams in 1957. The evidence does not show, therefore, that it was irrigated before the subsequent non-Indian owner. Although the evidence is unclear as to when Allotment 1347½ was first transferred, it transferred no later than 1962. Therefore, because it is claimant's burden to establish all the elements of a *Walton* right, this lack of evidence defeats the claim as to this parcel. The record does not establish that beneficial use of water was made with reasonable diligence. No *Walton* right can be found as to these two parcels.

There is no evidence showing that Allotments 86, 142, 143, 593, or 1383 were irrigated prior to ~~2000~~ 1951, the priority date of water right Certificate 31364 which authorizes irrigation from the Williamson River on these five parcels. All of these parcels had been transferred out of Indian ownership between 1915 and 1927, and to the second non-Indian owner by 1948. Beneficial use of water was made not made with reasonable diligence after transfer to non-Indian successors. No *Walton* right can be found as to these five parcels.

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

UNALLOTTED PARCELS, A, B, C-1 and C-2:

These properties were transferred directly by the Klamath Tribes pursuant to the Klamath Termination Act without a prior allotment. All parties agree that although, strictly speaking, they are not *Walton* claims as they did not come through the Allotment process, they are subject to a similar analysis. Although The United States asserted that

there was no evidence as to when ~~they~~ Parcels A and B had transferred from Indian ownership. Exhibit 50140 shows that a portion of the property, being Parcels C-1 and C-2, was were transferred to Clarence and Beulah Clinton, who were members of the Klamath Tribe, in 1959. The legal description ~~does not, however,~~ matches the description ~~for any of the parcels noted except~~ of Parcel C-1 (Lot 3 within Section 5) and Parcel C-2 (E½ SE¼ NW¼, Section 6). That property apparently transferred to D.O. Williams prior to 1964, since it was included in a Final Proof Survey map filed by Williams in that year. The actual date of transfer out of Indian ownership is unknown. However, there is no evidence of an intervening owner between the Clintons and Williams. The property was developed for irrigation by Williams, a non-Indian owner, so soon after it was originally sold by the Klamath Tribe, that it should be considered to have been diligently developed by either the Indian owners, or the first non-Indian owner. Consequently, the acreage in Parcels C-1 and C-2 was under irrigation shortly after it was transferred out of Tribal ownership, and should be allowed as a water right. Parcels C-1 and C-2 was were also included in that Final Proof Survey map, ~~but the description of the property transferred to the Clintons does not include that parcel, so it cannot be determined when it left Tribal ownership, or whether an intervening non-Indian owner may be in the chain of title.~~ Water use has continued as claimed under the authority of Certificate 33422.

¶ Parcels A and B were outside the Final Proof Survey map, so there is no evidence that they have been irrigated.

A Tribal Right, analogous to a *Walton* right, should be allowed as to 95.1 acres, being 39.6 acres in Parcel C-1 and 55.5 acres in Parcel C-2. A water right subject to this adjudication has not been shown as to Parcels A, or B, and C-1.

Reasons for Modifications: To correct and clarify the elements of a Klamath Termination Act right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water prior to transfer from Indian ownership, beneficial use of water being made with reasonable diligence after transfer to non-Indian successors, and continued use of a

developed right; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

NATURAL OVERFLOW FROM CLAIMED SOURCES OF WATER

John Mosby testified that "I have personally observed the claimed lands being hayed, grazed and irrigated from the 1930s. The overflow in the spring from the Williamson River as well as water entering the marsh from other sources, resulted in lands being covered with water and/or subirrigated." (Affidavit of John Mosby at 2, Item 3.) This statement alone is not sufficient to establish that natural overflow from the claimed sources of water actually correspond to claimed lands having those same claimed sources.

The only corroborating evidence which specified overflow from a named source matching the source of water claimed on specific allotments was presented in the United States' testimony. Based on interpretation of aerial photographs the United States testimony demonstrates that water from Sand Creek, prior to the installation of the Sand Creek Ditch, under high flows would spread out to the east toward Klamath Marsh. (Attachments 3 and 4 to Claimants' Reply Brief – Hearing Transcript at 40-41.) The United States further specified that natural overflow from Sand Creek would spread onto Allotments 168, 92, 93, 16 and 184. (Ex. 40001 at 45, 47, 50, 53 62.)

Those allotments or portions of allotments that are subject to natural overflow from Sand Creek, but for which the claimed source is commingled water from Scott and Sand Creeks or from the Williamson River, do not qualify for a *Walton* right with Sand Creek as a source.

Except for a portion of Allotment 168, there is no evidence in the record that demonstrates beneficial use water by the method of natural overflow. A *Walton* right was established for a portion of Allotment 168 on the basis of natural overflow (*see above*).

Reasons for Modifications: To provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to natural overflow; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

NATURAL SUBIRRIGATION FROM THE WILLIAMSON RIVER:

The United States' testimony establishes that Allotments 95, 97, 100, 101, 103, 104, 266, 559, 1311, 1374, 267, 105 and portions of Allotments 82, 83, 591, and 1493, all of which are located south and east of the Williamson River, receive subirrigation due to the proximity of the river and the low lying nature of the land. (Exs. 40001 at 98-99; Attachments 9 to 11 to Claimants' Reply Brief – Hearing Transcript at 58-60.)

The evidence establishes that these portions of the claimed place of use are subject to natural subirrigation from the Williamson River. Subirrigation does not form the basis for a Walton right or a Klamath Termination Act right. Natural subirrigation is a privilege only, as such it cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others. No priority date, season of use, rate or duty shall attach to such a privilege. This privilege may not be transferred to any other property, and may not be altered by the use of any physical means to modify the manner in which natural subirrigation occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural subirrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150.

No Double Allocation

Allotment 95 both receives subirrigation and qualifies for a Walton right from a point of diversion on the Williamson River. So that no double allocation will be awarded, the Walton right is limited by the principle of beneficial use when the authorized place of use on this allotment is subject to subirrigation from the same source.

Reasons for Modifications: To provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to subirrigation; to apply the appropriate legal bases to the Proposed Order's modified findings of fact.

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.8, 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.9, above.
 - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.10, above.
 - f. The “Opinion” is adopted with modifications, as set forth in Section A.11, above.
 - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in this Partial Order of Determination for Claim 18. Consistent with Sections A.6, A.7, A.8 and A.9, above, the outcome of the Order has been modified to recognize a right for irrigation on an additional 787.2 acres, to approve livestock watering incidental to irrigation for 1356 head, to limit the season of use to April 1 to October 31 as claimed, and to describe the effects of naturally occurring subirrigation from the Williamson River on a portion of the claimed place of use.
2. The Amended Proposed Order issued on May 8, 2012, is adopted and incorporated in its entirety as if set forth fully herein.
3. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.
4. The Klamath Tribes Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 et seq. for an Indian reserved water right is a valid basis for this claim. The elements of a Klamath Termination Act claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS is incorporated as if set forth fully herein.
5. Portions of the claimed place of use are subject to natural subirrigation from the Williamson River. The use of water by natural subirrigation is a privilege only, and does not constitute a water right. This privilege cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others, and no priority date, season of use, rate or duty shall attach to such privilege. This privilege may not be transferred to any other property. This may not be altered by the use of any physical means to modify the manner in which natural subirrigation occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural subirrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150.

5. Based on the file and record herein, IT IS ORDERED that Claim 18 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 18

CLAIM MAP REFERENCE:

OWRD INVESTIGATION MAPS – T 31 S, R 7 E; T 31 S, R 8 E; and T 32 S, R 8 E

CLAIMANTS: JOHN M. MOSBY AND MARILYN MOSBY

1133 NORTH 'H' ST, SUITE L
LOMPOC, CA 93436

SOURCES OF WATER:

SCOTT CREEK, tributary to SAND CREEK,
SAND CREEK, tributary to the WILLIAMSON RIVER, and
The WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE:

IRRIGATION OF 1205.7 ACRES WITH INCIDENTAL LIVESTOCK WATERING OF UP TO 1356 HEAD FOR ENTIRE CLAIM, AS FOLLOWS:

726.0 ACRES FROM COMMINGLED WATER FROM SCOTT CREEK (POD 1) AND UPPER SAND CREEK (POD 2),

228.7 ACRES FROM LOWER SAND CREEK (POD 3), AND

251.0 ACRES FROM THE WILLIAMSON RIVER (POD 4)

RATE OF USE:

30.14 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

18.15 CFS OF COMMINGLED WATER, BEING 4.78 CFS FROM SCOTT CREEK (POD 1) AND 13.37 CFS FROM UPPER SAND CREEK (POD 2), MEASURED AT THE POINTS OF DIVERSION,

5.72 CFS FROM LOWER SAND CREEK (POD 3) MEASURED AT THE POINT OF DIVERSION, AND

6.27 CFS FROM THE WILLIAMSON RIVER (POD 4) MEASURED AT THE POINT OF DIVERSION.

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

DUTY:

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

PERIOD OF ALLOWED USE: APRIL 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Source	Twp	Rng	Mer	Sec	Q-Q	Remarks
POD 1	Scott Creek	31 S	7 E	WM	1	NE SE	COMMINGLED WATER FROM UPPER SAND CREEK AND SCOTT CREEK
POD 2	Upper Sand Creek	31 S	7 E	WM	28	NW NW	
POD 3	Lower Sand Creek	31 S	8 E	WM	20	NW NW	
POD 4	Williamson River	31 S	8 E	WM	33	SE NW	

THE PLACE OF USE IS LOCATED AS FOLLOWS:

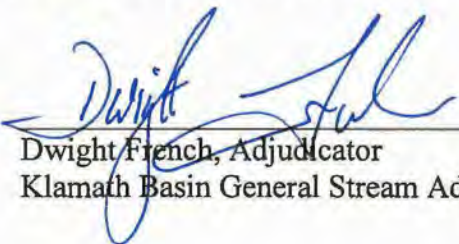
IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD
31 S	8 E	WM	5	NE SW		40.0	POD 1 and POD 2
31 S	8 E	WM	5	NW SW		40.0	
31 S	8 E	WM	5	SW SW		40.0	
31 S	8 E	WM	5	SE SW		40.0	
31 S	8 E	WM	7	NE NE		40.0	
31 S	8 E	WM	7	NW NE		40.0	
31 S	8 E	WM	7	SW NE		38.0	
31 S	8 E	WM	7	SE NE		38.0	
31 S	8 E	WM	7	NE NW		40.0	
31 S	8 E	WM	7	NW NW	1	31.6	
31 S	8 E	WM	7	SW NW	2	30.4	
31 S	8 E	WM	7	SE NW		38.0	
31 S	8 E	WM	17	NE NE		33.5	
31 S	8 E	WM	17	NW NE		40.0	
31 S	8 E	WM	17	SW NE		33.0	
31 S	8 E	WM	17	SE NE		3.5	
31 S	8 E	WM	17	NE NW		40.0	
31 S	8 E	WM	17	NW NW		40.0	
31 S	8 E	WM	17	SW NW		40.0	
31 S	8 E	WM	17	SE NW		40.0	
31 S	8 E	WM	20	SW NE		35.5	POD 3
31 S	8 E	WM	20	SE NE		36.3	
31 S	8 E	WM	29	NE NW		39.3	
31 S	8 E	WM	29	NW NW		39.0	
31 S	8 E	WM	29	SW NW		39.3	
31 S	8 E	WM	29	SE NW		39.3	
32 S	8 E	WM	5	NE NW	3	39.6	POD 4
32 S	8 E	WM	6	NE SE		15.5	
32 S	8 E	WM	6	SE SE		40.0	
32 S	8 E	WM	8	NE NW		39.8	
32 S	8 E	WM	8	NW NW		39.8	
32 S	8 E	WM	8	SW NW		39.8	
32 S	8 E	WM	8	SE NW		36.5	

FURTHER LIMITATIONS:

THE RIGHT TO USE WATER IS LIMITED BY THE PRINCIPLE OF BENEFICIAL USE WHEN THE AUTHORIZED PLACE OF USE IS SUBJECT TO SUBIRRIGATION FROM THE SAME SOURCE.

[End of Water Right Claim Description]

Dated at Salem, Oregon on February 28, 2014



Dwight French, Adjudicator
Klamath Basin General Stream Adjudication