

**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	)	PARTIAL ORDER OF
WAYNE RANCH, LLC	)	DETERMINATION
	)	
_____	)	Water Right Claim 74

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 CORRECTED PROPOSED ORDER**

1. Claim 74 (Claimant: WAYNE RANCH, LLC) and its associated contests (2838, 3466, 3742, and 4123) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 202.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a CORRECTED PROPOSED ORDER ORDER<sup>1</sup> (Corrected Proposed Order) for Claim 74 on December 8, 2006.
3. Exceptions were filed to the Corrected Proposed Order within the exception filing deadline by (1) Wayne Ranch, LLC, and (2) the United States of America.
4. The exceptions filed to the Corrected Proposed Order have been reviewed and considered in conjunction with the entire record for Claim 74. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Corrected Proposed Order as described in Sections A.6, A.7, A.8 and A.9, below.
5. The Corrected 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.
  - c. The “Issues” is adopted in its entirety.

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<sup>1</sup> The CORRECTED PROPOSED ORDER replaced a PROPOSED ORDER issued on December 5, 2006. The CORRECTED PROPOSED ORDER corrected an error in the Priority date as stated in Paragraphs 3 through 6 of the Findings of Fact. No other changes were made.

- 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 replaced in its entirety as set forth in Section A.9, below.
  - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B in this Partial Order of Determination for Claim 74. Consistent with Sections A.7, A.8, and A.9, below, the outcome of the Order has been modified to recognize a right for irrigation on an additional 371.4 acres, and to approve livestock watering incidental to irrigation.
6. **History of the Case.** Within the section titled “History of the Case” of the Corrected Proposed Order, the final paragraph is modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):

The evidentiary record closed on November 21, 2004. On December 14, 2004, a Scheduling Order was issued, providing due-dates for submission of written argument. On ~~February 11~~ June 23, 2005, Claimant filed its Closing Argument. ~~On March 30, 2005, the United States filed a motion seeking an extension of time to file its brief in response. This motion was denied, but, upon renewal of the motion, a short extension, until April 6, 2005, was allowed.~~ On ~~April 6~~ September 2, 2005, the United States filed its ~~Posthearing Brief~~ Closing Argument. Also on ~~April 6~~ September 2, 2005, KPWU filed its Response Opposition to Claimant’s Closing brief Argument. ~~On April 29, 2005, OWRD filed its Reply Brief.~~ Also on ~~April 29, 2005,~~ On October 20, 2005, Claimant filed its Reply Brief. ~~The record closed on April 29, 2005.~~

**Reason for Modification:** To make corrections raised in exceptions and to correct scrivener’s errors.

7. **Findings of Fact.** The Corrected Proposed Order’s “Findings of Fact” section is modified as shown below. Additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. 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 provide evidence from the record to substantiate beneficial use of water by the method of natural overflow, an issue raised in exceptions. (2) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an 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, an issue raised

in exceptions. (4) To provide evidence from the record to substantiate continued use of water by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions. (5) To provide evidence from the record to substantiate incidental livestock watering after transfer from Indian ownership, an issue raised in exceptions. (6) 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 Corrected Proposed Order Findings of Fact**

1. Claim 74 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. It was originally 13 parcels, all of which were allotted to Klamath Indians after 1910. ~~as part of the termination of the Reservation.~~ (OWRD Ex. 1 at 37 - 129.) The total claim is for irrigation of 710.3 acres from the Sprague River with a season of use April through October. (*Id.* at 5 7 -9.) Abstracts of Permits 21150, 24816, and 32240 covering portions of the claimed lands (submitted as a part of the Claimant's signed Statement and Proof of Claim), provide the only evidence of the claimed rate and duty of water. All three abstracts show water use at a rate of 1/40 of one cfs per acre and a duty of 3.0 acre-feet per acre during the irrigation season of each year. (OWRD Ex. 1 at 17, 19, 21.)

**Reason for Modification:** To provide more specific information with reference to what was claimed, using evidence on the record.

2. The allotments are located on or near the Sprague River. (*Id.* at 27, 147.) ~~Prior to development, most of the land was subject to periodic flooding, while other portions were subject to subirrigation from the Sprague River or its tributaries.~~ (*Direct Test of Walter Seput*, at 2.) Except for 13.4 acres located in the south half of Section 31 (within the north half of Allotment 1154), all of the claimed lands lie within the floodplain of the Sprague River and are naturally flood irrigated. While most of the claimed lands are in a depression, the lowest part of the claimed lands lies just north of the Sprague River Highway [southern border of most of the claimed lands]. The land closest to the river is higher than the land immediately to the south and west. When it naturally floods, the water all flows down slope to the south and away from the river. The land just north of

the Sprague River Highway is the last to dry out in the spring after flooding. (Seput Direct, at 2, 3, Ex. A-1, A-2.) Lands appurtenant to the claim within Allotments 713, 714, 127, 205, 206, and 1156 (north) receive natural overflow annually, while lands within Allotments 126, 547, 207, 548, 989, 1156 (south), and 1284, only receive natural overflow during periods of major floods. (Id. at 3, 4, Ex. A-3.) Ditches are utilized to even out the natural overflow and to facilitate draining of the land if the overflow lingers too long in the spring. (Id. at 5, 6, 7, Ex. A-4, E-1, E-2, F-1, F-2, H-1, H-2; Yockim Affidavit (Nov. 1, 2004), Ex. RS-6 at 2, 11.) Levees have been built by the government, landowners, or lessees to help control the natural overflow, but are only partially effective. (Seput Direct at 4, 5; Yockim Affidavit (Nov. 1, 2004), Ex. RS-6 at 6, 11, RS-9 at 2.) Once the lands have dried out in the spring and the season progresses, such use provides even further benefits. (Gurney Direct, Ex. 6 at 11-14; Seput Rebuttal at 2.)

**Reason for Modification:** To provide an additional citation to the record; 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. The ALJ's statement regarding periodic flooding and subirrigation is stricken because it has been replaced with a more detailed description of the natural flooding; furthermore, there is no mention of subirrigation in the Direct Testimony of Walter Seput at 2, and the finding related to subirrigation is not supported by a preponderance of evidence in the record.

**Allotments 713 and 714 (198.8 acres claimed)**

3. Klamath Indian Allotments 713 (131.9 acres) and 714 (66.9 acres), totaling 198.8 acres at within the SE¼ of Section 36, Township 34 S, Range 8 E, W.M. and NE¼ of Section 1, Township 35 S, Range 8 E, W.M., respectively, were allotted to Clarence Cowen and Ransom Cowen, both members of the Klamath Tribe. (Gurney Direct, Ex. 3 at 2; OWRD Ex. 1 at 14, 48, 101, 149-151.) The property Allotment 713 was sold to Henry G. Wolff, a non-Indian, in 1955. (Allotment 713) and 1957 (Allotment 714). (Id. at 78, 104.) Allotment 714 was ultimately sold to Henry G. Wolff, a non-Indian, in 1957. (Id. at 77 - 78.) Lands within these two allotments receive natural overflow from the Sprague River. (Seput Direct at 3, 4; Ex. A-3.) As evidenced by multiple grazing permits, beneficial use of water was established under Indian ownership of the land.

(Yockim Affidavit (Nov. 1, 2004), Ex. RS-5 - RS-9; Linn Rebuttal, Ex. ML-2, ML-6.) Wolff filed for a water right permit (S-24816) to develop irrigation on this property on April 9, 1957. (OWRD Ex. 1 at 19, 20, 187.) Development was complete by ~~January 24~~ March 23, 1962, when Certificate 29626 was issued. (*Id.* at 187.) Two points of diversion have been developed to irrigate separate portions of these lands. Pump 3 is located in the NE¼ SE¼, Section 36, Township 34 S, Range 8 E, W.M., and a second point of diversion, Pump 2, is located in the NW¼ SE¼, Section 31, Township 34 S, Range 9 E, W.M. (*Id.* at 146 - 151.) Proved application of water on this property, based on the rate and duty established in Certificate 29626, is 1/40 cfs per acre, three acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864. ~~The Diversion Point is located in the NE ¼ SE ¼ Section 36, Township 34 S, Range 8 E.W.M. (*Id.* at 18, 19.)~~

**Reason for Modification:** To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. The date on which Certificate 29626 was issued was corrected to March 23, 1962, the date clearly shown in the evidence cited for this fact (OWRD Ex. 1 at 187). OWRD has determined that the ALJ's finding that these lands are irrigated from a single point of diversion is not supported by a preponderance of evidence on the record.

**Allotments 127, 548 and 989 (5.1 acres claimed)**

4. Klamath Indian Allotments 127 (0.9 acres), 548 (0.6 acres) and 989 (~~8.6~~ approximately 3.6 acres), totaling ~~10.1~~ 5.1 acres located within the NW¼ NW¼ of Section 31, Township 34 S, Range 9 E, W.M. (127), the ~~NW¼ N½ SW¼~~ NW¼ of Section 32, Township 34 S, Range 9 E, W.M. (548), and the N½ NW¼ SW¼ of Section 32, Township 34 S, Range 9 E, W.M. (989)<sup>2</sup> (Gurney Direct Ex. 3 at 2; OWRD Ex. 1 at 14, ~~18~~, 149-151), were first purchased by non-Indians Earl Harris, F.F. McCready and Nellie McCready in the 1950s. (Gurney Direct Ex. 5 at 1, ~~8~~; OWRD Ex. 1 at 125 - 129; Yockim Affidavit (Mar. 29, 2004), Ex. AB-3.) Allotment 548 was leased for grazing while in Indian ownership. (Linn Rebuttal,

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<sup>2</sup> Allotment 989 is within the S½ SW¼ NW¼ and N½ NW¼ SW¼, Section 32, however, the claimed acreage is only within the N½ NW¼ SW¼. Reason for addition of footnote: to show location of the claimed acreage relative to the entire allotment.

Ex. ML-1 at 12.) The properties were already under an application for a water right permit (Application No. 26915 / Permit S-21150) on March 3, 1952, when the property passed out of Indian ownership. (OWRD Ex. 1 at 17.) A Final Proof Survey shows the system was completed in 1958, for which Certificate 24655 was issued. (*Id.* at 17, 18, 191.) A diversion point, Pump 2, located in the NW¼ SE¼, Section 31 Township 34 S, Range 9 E, W.M. has been developed to irrigate these lands. (*Id.* at 146 - 151.) Proved application of water on this property, based on the rate and duty established in Certificate 24655, is 1/40 cfs per acre, three acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864. ~~The Diversion Point was located in the NW¼ SE¼, Section 31 Township 34 S, Range 9 E, W.M. (127); SW ¼ SW ¼ Section 32, Township 34 S Range 9 E.W.M. (548, 989) (*Id.* at 17, 18).~~

**Reasons for Modification:** To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition, OWRD has determined that the ALJ's findings that the claimed acreage in Allotment 989 is 8.6 acres, and that the sum of the claimed acres in these three allotment totals 10.1 acres are not supported by a preponderance of evidence on the record. The maps referenced in the above citations show that the 8.6 acres are split between Allotments 989 and 1156 (south). In the Corrected Proposed Order's Finding of Fact #7 the ALJ found that Allotment 1156 (south) is approximately 5 acres, which would leave a balance of approximately 3.6 acres claimed in Allotment 989. OWRD has determined that the ALJ's finding that these lands are also irrigated from a point of diversion within the SW¼ SW¼ Section 32 is not supported by a preponderance of evidence on the record.

**Allotment 1284 (9.8 acres claimed)**

5. Klamath Indian Allotment 1284 (9.4 9.8 acres), located within the SW¼, SW¼ of Section 32, Township 34 S, Range 9 E, W.M., (Gurney Direct, Ex. 3 at 2; OWRD Ex. 1 at 14, ~~48~~ 149-151) was first sold to non-Indians J.W. Wolff, Gerald C. Wolff, and Henry C. Wolff on May 11, 1948. (Gurney Direct, Ex. 5 at 3 ¶m; OWRD Ex. 1 at 119.) The Wolff family filed for a water right permit (S-21150) to develop irrigation on this property on March 3, 1952. (*Id.* at 17, 18.) Development was complete by 1958 as evidenced by the Final Proof Map for Certificate 24655. (*Id.* at 17, 18, 191.) Pump 1, located in the SW¼ SW¼, Section 32, Township 34 S, Range 9 E, W.M., has been developed to irrigate a portion of

the claimed 9.8 acres (Allotment 1284), and a second point of diversion, Pump 2, located in the NW¼ SE¼, Section 31, Township 34 S, Range 9 E, W.M., has been developed to irrigate the remaining portion. (Id. at 146 -151.) Proved application of water on this property, based on the rate and duty established in Certificate 24655, is 1/40 cfs per acre, three acre-feet per acre, from April 1 through October 31 with a priority date October 14, 1864. ~~The Diversion Point: SW ¼ SW ¼ Section 32, Township 34 S Range 9 E, W.M. (Id. at 17, 18-).~~

**Reason for Modification:** To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition, OWRD has determined that the ALJ's finding that the claimed acreage in Allotment 1284 is 9.4 acres is not supported by a preponderance of evidence on the record. The OWRD investigation map (OWRD Ex. 1 at 14, 149) and the claimant's place of use listing (OWRD Ex. 1 at 150) both clearly show 9.8 acres were claimed within the SW¼, SW¼ of Section 32.

**Allotments 205, 206, and 1156 (north) (322.2 acres claimed)**

6. Klamath Indian Allotments 205 (154.3 acres) located within the SW¼, Section 31, Township 34 S, Range 9 E, W.M., Allotment 206 (116 acres) located within the NW¼, Section 6, Township 35 S, Range 9 E, W.M., and a portion of Allotment 1156 (Allotment 1156 (north) (51.9 acres) located within the NW¼, Section 31, Township 34 S Range 9 E, W.M., ~~was~~ were first sold to non-Indian Marvin Williams, Sr. in 1920. ~~It was~~ These allotments were transferred to Klamath Indian Marvin Williams, Jr. in 1923, from Marvin Williams, Jr. to C.R. Bowman, a non-Indian, and from C.R. Bowman to L.V. Corbell later the same year. (OWRD Ex. 1 at 49; Gurney Direct at 3.) Although Corbell applied for a water right permit in 1924, that permit (Permit S-6300) for lands appurtenant to Allotments 205, 206 and 1156 (north) was subsequently cancelled for ~~lack of diligent development~~ failure to submit proof (lack of proper showing) of construction and beneficial use of an irrigation system. ~~Water was not applied to this property prior to the transfer of the property by C.R. Bowman to L.V. Corbell.~~ (Id., at 3, 4, Ex. 7.) Because the lands within these three allotments receive natural overflow from the Sprague River (Seput Direct at 3, 4, Ex. A-3), and Corbell is documented as having cattle in 1922 (150 head owned by Lee

Corbell) and 1935 (184 head owned by L.V. Corbell) (Seput Direct, Ex. M), it is more likely than not that he was grazing cattle on these lands. Beneficial use of water was made by the method of the natural overflow of water from the Sprague River; therefore, water use was made with reasonable diligence following transfer from Indian ownership. A point of diversion, Pump 2, located in the NW¼ SE¼, Section 31, Township 34 S, Range 9 E, W.M., has been developed to irrigate the largest portion of these lands within Allotments 205, 206, 1156 (north), and a second point of diversion, Pump 1, located in the located in the SW¼ SW¼, Section 32, Township 34 S, Range 9 E, W.M., has been developed to irrigate the remaining portion within Allotments 205 and 206. (OWRD Ex. 1 at 146 -151.) The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of three acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864.

**Reason for Modification:** To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition, the ALJ's statement that the permit was cancelled for lack of diligent development is not supported by a preponderance of the evidence on the record. The OWRD order cancelling the permit (Gurney Direct, Ex. 7 at 6) did not make any determination about diligent development or lack thereof, but cancelled the permit for failure to submit proof. The ALJ's statement that water was not applied to beneficial use on this property prior to the transfer of the property by C.R. Bowman to L.V. Corbell was stricken because it is not supported by a preponderance of the evidence on the record.

**Allotment 1156 (south) (approximately 5 acres claimed)**

7. In 1926, a fee patent for the remaining portion of Allotment 1156 (south)<sup>3</sup> (approximately 5 acres) located within the S½ NW¼ SW¼, Section 32, Township 34 S, Range 9 E, W.M. was issued to Valentine Lee Corbell (Yockim Affidavit (Mar. 29, 2009), Ex. AB-5), a Klamath Indian, (Id. Ex. AC-1, AD-2 at 3, AD-3 at 3), before it was first sold to D.E. Colwell and R.D. Colwell, the first non-Indians owners, in 1943. (OWRD Ex. 1 at 52.) Water was ~~not applied to~~ beneficially used on this property prior to after the transfer of the property by the Colwells to the Wolff family in 1945, as evidenced by water right Certificate 24655 which

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<sup>3</sup> Allotment 1156 was divided into two separate, non-contiguous parcels in different Sections.

includes lands in Allotment 1156 (south) and has a priority date of March 3, 1952. (OWRD Ex. 1 at 17, 18, 54.) This is 9 years following transfer from Indian ownership which does not demonstrate use of water made with reasonable diligence.

**Reason for Modification:** To provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

**Allotment 207 (92.6 acres claimed)**

8. Klamath Indian Allotment 207 (92.6 acres) located within the S½ NE¼ and N½ SE¼, Section 31, Township 34 S, Range 9 E, W.M. was first sold to non-Indian owners A.C. and Dora Gienger in 1918. (OWRD Ex. 1 at 45.) The property was then sold to L.H. and Daisy Lauritsen on May 17, 1920. (Id. at 46.) Water was not applied to this property prior to the transfer to the Lauritsens. (Ex. 9, 10, 11, 12; Gurney Direct at 7.) The property eventually passed to Henry G. and Josephine M. Wolff, also non-Indians. (Id. at 113.) The record shows that water was applied to this property (Allotment 207) after the transfer to the Wolffs in 1952, 34 years following transfer from Indian ownership. This does not demonstrate use of water made with reasonable diligence.

**Reason 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.

**Allotment 547 (53.8 acres claimed)**

9. Klamath Indian Allotment 547 (53.8 acres) located within the N½ NE¼, Sections 31 and N½ NW¼, Section 32, Township 34 S, Range 9 E, W.M. was first transferred to non-Indian F. F. McCready in 1948 or 1949.<sup>4</sup> Prior to McCready's ownership, Allotment 547 was leased from 1930 through 1949 from Indian Allottee Fanny Alta Captain (Jackson) for farming and grazing. (Linn Rebuttal,

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<sup>4</sup> The property was owned by Klamath Indian Fanny Alta Jackson in 1948. (~~Ex. J. Gurney Direct~~, Ex. 13; Yockim Affidavit (Mar. 29, 204), Ex. AB-6) It was transferred by F.F. McCready to his wife in 1949. (OWRD Ex.1 at 107.) The record does not contain a transfer from Fanny Alta Jackson. She probably conveyed to F.F. McCready, but the record is silent. **Reason for modification of footnote:** To correct and provide additional citations to the record.

Ex. ML-1, ML-4 - ML-6.) The property then passed to Henry G. and Josephine M. Wolff, also non-Indians, in 1952. (OWRD Ex. 1 at 113.) Beneficial use of water was not applied to on this property prior to was made after the transfer to the Wolffs as evidenced by water right Certificate 24655 which includes lands in Allotment 547 and has a priority date of March 3, 1952.<sup>5</sup> A point of diversion, Pump 2, located in the NW¼ SE¼, Section 31, Township 34 S, Range 9 E, W.M., has been developed to irrigate these lands. (Id. at 146 -151.) The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of three acre-feet per acre, from April 1 through October 31, with a priority date October 14, 1864.

**Reason for Modification:** Using evidence on the record, to provide more specific information with reference to what was claimed. In addition, the ALJ's statement that water was not applied to the property prior to the transfer of the property to the Wolff family is not supported by a preponderance of the evidence on the record.

**Allotment 1154 (23.4 acres claimed)**

10. Klamath Indian Allotment 1154 (23.4 acres) located within the S½ SE¼ Section 31, Township 34 S, Range 9 E, W.M., and the N½ NE¼, Section 6, Township 35 S, Range 9 E, W.M. was first transferred to Della Barber, on July 2, 1947. (OWRD Ex. 1 at 62, 63.) While Although an Indian, Barber was not a member of the Klamath Tribe. (Gurney Direct, Ex. 14 at 4, 7.) Barber sold the property to the Wolff family on August 12, 1947. (OWRD Ex. 1 at 64.) Barber did not apply water to the property prior to her sale to the Wolffs. (Id. at 17-18, 191.) Although the Wolffs filed for a water right in 1952 which included 1.6 acres within the SW¼ SE¼, Section 31, Township 35 S, Range 9 E, W.M., a comparison of the final proof map for this water right (Permit S-21150 / Certificate 42655) with the claim map shows that these 1.6 acres are not co-extensive with the claimed 9.8 acres within this same quarter-quarter. (Id. at 16, 17, 18.) The Wolff's filed for a water right in 1966 (Permit S-32240), which included the 23.4 acres claimed within these allotments. (Id. at 21, 23.) This use

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<sup>5</sup> As Claimant notes, a water right application was filed while the McCreadys were still in title. (OWRD Ex. 1 at 17.) This application, however, was filed by the Wolffs. It is not likely that

of water, 19 years following transfer from Indian ownership, does not demonstrate use of water with reasonable diligence.

**Reason for Modification:** To correct and provide additional citations to the record; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

#### **Allotment 126 (0.7 acres claimed)**

11. Klamath Indian Allotment 126 (0.7 acres) located within the SW¼ SW¼, Section 30 Township 34 S, Range 9 E, W.M. was first transferred to non-Indian F.F. McCready in 1915. (Gurney Direct, Ex. 5 at 1; Yockim Affidavit (Mar. 29, 2004), Ex. AB-1.) There is no evidence that this property was irrigated.

**Reason for Modification:** To provide additional citations to the record; to add clarification using evidence on the record.

#### **Artificial Irrigation in 1918**

12. Although the Claimant asserted that historical accounts showed that in 1918, A.C. Gienger was irrigating property appurtenant to a portion of the claimed lands, this assertion is not supported by a preponderance of the evidence on the record. Similarly, there is insufficient evidence on the record to support the existence of the Lewis Dam in 1918. A 1925 Report on the Application for a Patent in Fee and a 1925 Certificate of Appraisalment for the allotment on which the dam was built do not identify irrigation works pertaining to the construction of a dam or ditch system on this allotment. (Gurney Direct at 3 ¶10).

**Reason for Additional Finding of Fact:** Reorganization of a finding found in the opinion section of the ALJ's Corrected Proposed Order; this finding has been moved from the opinion section and reworded.

#### **Livestock Use**

13. Historical grazing has been documented on Allotments 713, 714, 127, 1156 (north and south), 205, 206, 547, 548, and 989. (Linn Rebuttal, Ex. ML-1, ML-2, ML-4, ML-5, ML-6; Yockim Affidavit (Nov. 1, 2004), Ex. RS-5, RS-6,

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water was diverted to the property by the Wolffs in the 24 days before their deed, as second non-Indian owner, was recorded.

RS-7, RS-8, RS-9, RS-10.) Livestock watering which is incidental to irrigation should be approved on these lands for the number of livestock claimed (250 pair).

**Reason for Additional Finding of Fact:** With regards to livestock watering, the ALJ's failed to fully set forth the evidence on the record.

8. **Conclusions of Law.** Within the section titled "Conclusions of Law" of the Corrected Proposed Order, Conclusions #10 and #11 are modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

- a. Conclusion 10:

Beneficial use of water for irrigation with incidental livestock watering of 250 pair of cattle of part on a portion of the claimed place of use was developed made with reasonable diligence by the first non-Indian purchaser from an Indian owner following transfer from Indian ownership.

- b. Conclusion 11:

Water provided to Allotments 127, 1156 (north), 205, 206, 713, and 714 within the claimed place of use by the method of natural overflow, means (flooding in the spring or through subirrigation) and although not through a diversion system created by humans, ~~cannot be the~~ is a valid basis for a Walton right, ~~or constitute irrigation under a Walton right.~~

**Reasons for Modification:** 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 Corrected Proposed Order.

9. **Opinion.** The section titled "Opinion" of the Corrected Proposed Order is replaced in its entirety as follows:

OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

In addition, OWRD incorporates into the Opinion section all the paragraphs below:

**Application of Walton Elements to the Modified Corrected 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.

As discussed below, the various allotments have very different histories. Those different histories control the outcome as to each parcel.

**Allotments 713, 714, 127, 547, 548, 989, 1284**

Beneficial use of water by the method of natural overflow was made on Allotments 713, 714, and 548 while still under Indian ownership as evidenced by grazing leases. On Allotments 127, 547, 989, and 1248 beneficial use of water was made with reasonable diligence following transfer from Indian to non-Indian ownership.

The United States concedes that Claimant has met its burden as to Allotments 713, 714, 127, 548, 989 and 1284. The United States argues that the rate and duty as allowed in the Preliminary Evaluation exceed the amount claimed. This is correct. Claimant enclosed with his claim water right permits previously issued as evidence of use of water. Those permits expressly limited the rate and duty to 1/40 of one cfs per acre and 3 acre-feet per acre. The permits provide the best evidence in the record of the appropriate rate and duty to apply to the portion of the claim that qualifies for a *Walton* right. The qualifying acres are therefore limited to a rate of 1/40<sup>th</sup> cfs per acre and a duty of 3 acre-feet per acre.

**Allotments 1156 (north), 205, 206**

The existence of natural overflow on these allotments, combined with grazing records, show that Corbell made beneficial use of water within two years after the land was transferred out of Williams' Indian ownership. Beneficial use was made with reasonable diligence on the claimed portions of these allotments following transfer from Indian ownership.

The Claimants also asserted that water had been artificially applied to a beneficial use with reasonable diligence following transfer from Indian ownership. The evidence does not support this contention.<sup>6</sup> Since the evidence

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<sup>6</sup> Claimant asserted that the "historical accounts" showed that in 1918, A.C. Gienger was irrigating the property that he owned for two years. That "historical account" is actually the hearsay recital of Leroy Gienger as to what he had been told at third-hand about the activities of his grandfather. While recourse to such evidence has sometimes been necessary in the Klamath Adjudication, it must be viewed with some caution. In this case, there were maps and reports prepared contemporaneously with the Giengers' occupation of Allotment 207 which purported to record the property that was irrigated within the Klamath Reservation, including private developments. Those maps and reports make no mention of irrigation works developed in the area included within Gienger's property.

In *Cole v. DMV*, 336 Or 565 (2004) the Supreme Court discussed the factors to be considered in deciding whether hearsay may be treated as substantial evidence in any particular case. There, the Supreme Court concluded that where hearsay evidence is based upon multiple hearsay, and is contradicted by evidence presented by the opposing party, it is not sufficiently reliable to allow it to be treated as substantial evidence in an administrative case. Here, that is the case. The testimony of Leroy Gienger is multiple hearsay, and is contradicted by contemporaneously prepared documents in the record. It is not, therefore, sufficiently reliable to allow it to be treated as substantial evidence to support a finding of fact in this case.

establishes beneficial use of natural overflow with reasonable diligence following transfer from Indian ownership, proof of artificial irrigation is unnecessary with respect to the claimed lands in these allotments.

#### **Allotments 126, 207, and 1154, 1156 (south)**

Claimants have not proved that water was applied to a beneficial use on these Allotments with reasonable diligence. There is no evidence that water was ever applied to a beneficial use on Allotment 126. Water was not applied to a beneficial use on Allotment 1154 for 19 years following transfer from Indian ownership. Water was not applied to beneficial use on Allotment 1156 (south) for 9 years following transfer from Indian ownership<sup>7</sup>. Water was not applied to a beneficial use on Allotment 207 for 34 years following transfer from Indian ownership. These time periods do not demonstrate reasonable diligence based on the facts in this case.

#### **Summary**

In view of the foregoing, the portion of Claim 74 related to Allotments 713, 714, 127, 205, 206, 1156 (north), 547, 548, 989 and 1284 should be allowed for irrigation with incidental livestock watering. The remainder of the claim (Allotments 126, 207, 1154 and 1156 (south)) should be denied.

**Reasons for Modification:** 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; to apply the appropriate legal bases to the Corrected Proposed Order's modified findings of fact.

### **B. DETERMINATION**

1. The Corrected Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
  - h. The "History of the Case" "History of the Case" is adopted with modifications, as set forth in Section A.6, above.
  - a. The "Evidentiary Rulings" is adopted in its entirety.
  - b. The "Issues" is adopted in its entirety.
  - c. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, above.
  - d. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.8, above.
  - e. The "Opinion" is replaced in its entirety as set forth in Section A.9, above.
  - f. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B in this Partial Order of Determination for Claim 74. Consistent with Sections A.7, A.8, and A.9, above, the outcome of the Order has been modified

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Likewise, Claimant's argument for the existence of the Lewis Dam in 1918 is based entirely on inference unsupported by evidence sufficient to allow the inference to be made.

<sup>7</sup> The only evidence of beneficial use prior to transfer from Indian ownership is the fact that Corbell owned cattle in 1922 and 1935, and that Allotment 1156 (south) receives natural overflow during "major" floods. These facts are insufficient to establish a *Walton* right on this allotment.

to recognize a right for irrigation on an additional 371.4 acres, and to approve livestock watering incidental to irrigation.

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 portions of the claim prior to the development of specific points of diversion.
4. Based on the file and record herein, IT IS ORDERED that Claim 74 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO. 74**

**CLAIM MAP REFERENCE:**

OWRD INVESTIGATION MAPS – T 34 S, R 8 E; T 34 S, R 9 E; T 35 S, R 8 E; and T 35 S, R 9 E.

**CLAIMANT:** WAYNE RANCH, LLC  
6205 CRESCENT DR  
ENIDA, MN 55436

**SOURCE OF WATER:** The SPRAGUE RIVER, tributary to the WILLIAMSON RIVER

**PURPOSE OR USE:**

IRRIGATION OF 589.7 ACRES FROM PUMP 1, PUMP 2, AND PUMP 3, WITH INCIDENTAL LIVESTOCK WATERING OF 250 PAIR; NOT TO EXCEED IRRIGATION OF 135.2 ACRES FROM PUMP 1 AND 74.7 ACRES FROM PUMP 3.

**RATE OF USE:**

14.74 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION (PUMP 1, PUMP 2 AND PUMP 3), NOT TO EXCEED 3.38 CFS FROM PUMP 1 AND 1.86 CFS FROM PUMP 2.

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

**DUTY:**

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

**PERIOD OF ALLOWED USE:** APRIL 1 - OCTOBER 31

**DATE OF PRIORITY:** OCTOBER 14, 1864

**THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:**

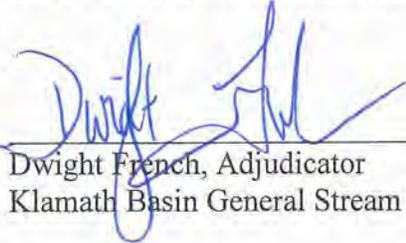
POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
Pump 1	34 S	9 E	WM	32	SW SW	150 FEET NORTH AND 420 FEET EAST FROM SW CORNER, SECTION 32
Pump 2	34 S	9 E	WM	31	NW SE	
Pump 3	34 S	8 E	WM	36	NE SE	

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

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD
34 S	9 E	WM	31	NE SW		36.9	Pumps 1 and 2
34 S	9 E	WM	31	SE SW		38.2	
34 S	9 E	WM	32	SW SW		9.8	
35 S	9 E	WM	6	NE NW	3	31.8	
35 S	9 E	WM	6	SE NW		18.5	
34 S	8 E	WM	36	NE SE		37.2	Pump 2
34 S	8 E	WM	36	SE SE		40.0	
34 S	9 E	WM	31	NE NE		29.2	
34 S	9 E	WM	31	NW NE		15.9	
34 S	9 E	WM	31	NW NW	1	0.9	
34 S	9 E	WM	31	SW NW	2	29.7	
34 S	9 E	WM	31	SE NW		22.2	
34 S	9 E	WM	31	NW SW	3	39.6	
34 S	9 E	WM	31	SW SW	4	39.6	
34 S	9 E	WM	32	NW NW		8.7	
34 S	9 E	WM	32	SW NW		0.6	
34 S	9 E	WM	32	NW SW		3.6	
35 S	8 E	WM	1	NE NE	1	39.8	
35 S	8 E	WM	1	SE NE		7.1	
35 S	9 E	WM	6	NW NW	4	39.6	
35 S	9 E	WM	6	SW NW	5	26.1	
34 S	8 E	WM	36	NW SE		16.6	Pumps 2 and 3
34 S	8 E	WM	36	SW SE		38.1	
35 S	8 E	WM	1	NW NE	2	20.0	

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
 Dwight French, Adjudicator  
 Klamath Basin General Stream Adjudication