

**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
CLIFFORD C. RABE AND)	DETERMINATION
MARY A. RABE)	
_____)	Water Right Claim 95

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 95 (Claimants: CLIFFORD C. RABE AND MARY A. RABE) and its associated contests (2764, 3477, 3746, and 4131) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 211.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 95 on February 1, 2007.
3. Exceptions were filed to the Proposed Order within the exception filing deadline by Clifford C. Rabe and Mary A. Rabe.
4. The exceptions to the Proposed Order along with responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 95. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.7, A.8, and A.9, below.
5. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as described below:
 - a. The "History of the Case" is adopted in its entirety.
 - b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, below.
 - c. The "Issues" is adopted in its entirety.
 - d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, below.

- e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.8, below.
 - f. The “Opinion” is adopted with modifications, as set forth 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 of this Partial Order of Determination for Claim 95. 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 220.3 acres and livestock watering.
6. **Evidentiary Rulings.** Within the section titled “Evidentiary Rulings” of the Proposed Order, the first paragraph is modified as follows:

The AFFIDAVIT OF VINCE BODNER, JR. dated April 9, 2004, is added to the list of items that were admitted into the record.

Reason for Modification: To correct an omission from the list of Evidentiary Rulings.

7. **Findings of Fact.** The Proposed Order’s “Findings of Fact” section is modified as shown below. Additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the general reasons for modification is provided here.

Summary of Reasons for Modification of Findings of Fact: (1) To 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, an issue raised in exceptions by the Claimants. (3) To provide evidence from the record to substantiate beneficial use of water prior to transfer from Indian ownership, an issue raised in exceptions by the Claimants (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 by the Claimants. (5) To provide evidence from the record to substantiate continued use of water by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions by the Claimants. (6) To provide evidence from the record to substantiate livestock watering after transfer from Indian ownership, an issue raised in exceptions by the Claimants. (7) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ’s original finding was not supported by a preponderance of evidence in the record.

Modified Proposed Order Findings of Fact

1. Claim 95 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. The claim is comprised of six allotments in the Klamath Reservation (Allotment numbers 400, 409, 637, 638, 1091, and 1252), that have been consolidated into the ownership of Clifford

and Mary Rabe (Claimants). The total acreage is 353.6 acres.¹ Claimants acquired the property in 1976. (Rabe Direct at 2.) The claim is for 7.0 cfs of water from the Sprague River, a tributary of the Williamson River, for irrigation and livestock watering of 225 head of cattle. The claimed season of use is April 15 to October 15 for irrigation, and year around for livestock watering. The claimed priority date is October 14, 1864. (OWRD Ex. 1 at 1-5.) The claimant submitted a 1995 pump test demonstrating the pumping capacity of his system to be 2613.0 gallons per minute, or 5.82 cfs. (Claimant's Ex. 55.)

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

2. The claimed acreage for Claim 95 extends into each of the six allotments. The Sprague River flows through the property and the acreage in the claim is located on the west and south sides of the Sprague River. Near the property, Trout Creek joins the Sprague River, approximately one-half mile west of the property, and downstream from the claimed point of diversion on the Sprague River. (Book Affidavit (Direct) at 13, Ex. 3.) Claimants identified claimed two a single point of diversions on serving the property from Trout Creek and the Sprague River, located within the NW¼ NE¼, Section 36, Township 35 South, Range 9 East, W.M. (OWRD Ex. 1 at 43 3, 68.) The claimed lands are within the flood plain of the Sprague River, are relatively flat, and therefore flood readily making them subject to natural overflow in the spring. This natural overflow has provided water for wild and cultivated grasses which have been utilized for hay and pasture (grazing). (Rabe Direct at 2, 3, Ex. C-1; Book Direct, Ex. 13; Rabe Rebuttal at 2, 3, Ex. H-1, H-2; Bodner Affidavit at 2, 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.)

Reasons for Modification: The ALJ's finding with respect to the number of points of diversion is not supported by a preponderance of evidence on the record; the Sprague River is the only source of water that was claimed in Claim 95. In addition, the ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

¹ Claimants claimed the total acreage was 374.8 acres, but OWRD determined the correct acreage was 353.6 acres. (OWRD Ex. 1 at 24, 29, 113, 118, 69.) There is no evidence to dispute OWRD's determination.

3. Vincent Bodner, Jr.,² a Klamath Indian, acquired allotment 637 in the late 1940s. He acquired allotments 638 and 1091 in the mid 1950s. He inherited allotments 400, 409, and 1252 in 1962. (Bodner Affidavit at 2-4.) Mr. Bodner did not use an irrigation system to artificially irrigate any of the allotments. (*Id.* at 5, 6.) However, he did make beneficial use of water by the method of natural overflow from the Sprague River on five of the six allotments (all except 1091) to grow and harvest hay crops, and/or by utilizing pasture for grazing cattle. (*Id.* at 2, 5, 6.) Although Mr. Bodner did not continue the artificial irrigation of the grass, as done by the prior landowner land on allotment 638, he continued to pasture and hay the grass that grew after the spring floods. He planted allotments 1252, 409, and 637 into rye grass which were “flooded by the [Sprague] River in the spring and the flood provided water for the hay and pasture. We hayed it and let the cows in onto the stubble in the fall.” With regards to allotment 400 Bodner stated that “we hayed and grazed [the wild hay] along the river while my family and I owned these lands.” (*Id.* at 2, 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.)

Reason for Modification: The ALJ’s proposed finding of fact failed to fully set forth the evidence on the record.

4. In 1967, the California Land Co. acquired all of the allotments from Vincent Bodner, Jr., Shirley Bodner, Alfaretta Skeen Bodner, and Vincent Bodner, Sr., all Klamath Indians. The California Land Co. was a group of non-Indians. (OWRD Ex. 1 at 11; Bodner Affidavit at 4.) The property was then conveyed to David Griffith in 1967 and subsequently acquired by a partnership in 1971 that included Cecil Elliott. The land was conveyed from Elliott to the Claimants in 1976. (OWRD Ex. 1 at 11.) There is no evidence that any of the persons in the chain of title after the California Land Co. are Klamath Indians. (Book Affidavit (Direct) at 12.)

² The Affidavit filed in this case shows the name spelled Bodnar. However, most of the other documents in the record spell the name Bodner. ~~I have adopted~~ The spelling used by the majority of documents, Bodner, is adopted. ~~I note that~~ There is no contention that the two spellings refer to two different people.

5. ~~There is no evidence~~ It is more likely than not that water was diverted beneficially used for livestock use because allotments 400, 1252, 409, 637, and 638 were grazed under the ownership of Vincent Bodner, Jr. (Bodner Affidavit at 2, 5, 6.)

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

Allotment 400 (13.6 acres claimed)

6. This property is located in the N½ NE¼, Section 36, Township 35 S, Range 9 E, W.M. The property was allotted to Rosa Dick, a Klamath Indian, by trust patent in 1900. (Book Direct, Ex. 14 at 4.) In 1918, the allotment was conveyed to John A. Smith, as heir to Rosa Dick, by fee patent from the United States. (Claimants' Ex. 25.) John Smith was not a member of the Klamath Tribe or any other tribe.³ (Book Direct, Ex. 14 at 2.) John Smith was the first non-Indian owner of Allotment 400. The property was conveyed to Nettie Smith, a Klamath Indian, in 1924. (Claimants' Ex. 33.) The property remained in Indian ownership until sold by Alfaretta and Vincent Bodner to the California Land Co. in 1967. (*Id.*, Ex. 50.)

7. Part of Allotment 400 was irrigated from a diversion on Trout Creek prior to 1923. (Book Direct, Ex. 10 at 27.) This irrigation was discontinued by at least the 1930's and was not resumed through 1967. (Bodner Affidavit at 3-4.) The Claimants did not claim Trout Creek as a source of water for Allotment 400. Trout Creek is a tributary of the Sprague River, but Trout Creek enters the Sprague River downstream from the point of diversion on the Sprague River claimed for Allotment 400. Although there was no state water right for Allotment 400 prior to 1976 (Book Affidavit (Direct) at 16), beneficial use of water from the Sprague River by the method of natural overflow began by 1962. (Bodner Affidavit at 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.) There was no irrigation on the property from 1967 to 1976 when Claimants purchased the property. (Bodner Affidavit at 3.) Claimants started to build the current artificial irrigation system on Allotment 400 in 1976. (Rabe Direct at 2.)

³ John Smith self-reported to being one quarter Pitt River Indian and three quarters white. He was not enrolled in any Indian Tribe. He was the widow of Rosa Dick and inherited the property from her on her death. ~~I am not persuaded by~~ Claimants' argument that Smith should be treated as an Indian for *Walton* right purposes because he married a Klamath Tribal member is not persuasive. See Claimants' Closing Argument at 9-10.

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

Allotment 1252 (69.4 acres claimed)

8. This property is located in the S½ NE¼, Section 36, Township 35 S, Range 9 East, W.M. The allotment was confirmed to David Skeen, a Klamath Indian, by trust patent granted in 1915 (Claimants' Ex. 24), and by fee patent in March 1918. (*Id.*, Ex. 26.) The property was conveyed from David Skeen to B. S. Grigsby and then back to David Skeen in 1918.⁴ (*Id.*, Ex. 27.) B. S. Grigsby was a non-Indian white man. (Stipulation.) The property was conveyed by Sheriff's deed to Klamath County in 1930, (*Id.*, Ex. 37 at 5), and then back to David Skeen in 1933. (*Id.*, Ex. 38.) The property was subsequently conveyed to the United States in trust for David Skeen in 1950 and conveyed to David Skeen again in 1959. (OWRD Ex. 1 at 8, 9.) The property was inherited by Vincent Bodner Jr. and Alfaretta Skeen Bodner in 1962. (Bodner Affidavit at 3.) The property was subsequently conveyed to the California Land Co. in 1967. (Claimants' Ex. 50.)

Reason for Modification: For consistency of terminology; to clarify a citation.

9. A portion of Allotment 1252 was irrigated by a ditch from Trout Creek prior to 1923. (Bodner Affidavit at 3 and Book Direct, Ex. 10.) However, irrigation was discontinued some time prior to 1950. (Bodner Affidavit at 3.) The ditch from Trout Creek was not used from at least 1950 through 1976. (*Id.* and Book Affidavit (Direct) at 18.) Mr. Bodner did not recall Trout Creek Ditch ever being used to irrigate Allotment 1252. (*Id.*) Beneficial use of water from the Sprague River on Allotment 1252 by the method of natural overflow began by 1962. (Bodner Affidavit at 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.) ~~There was no irrigation of the property from 1967 until Claimants purchased the property in 1976.~~ (Bodner Affidavit at 2-4.) Claimants started to build the current artificial irrigation system on Allotment 1252 in 1976. (Rabe Direct at 8, 9.) The point of diversion for this parcel is located in the NW¼ NE¼ Section 36, Township 35 S, R 9 E, W.M. (OWRD Ex. 1 at 68.) Rate is 1.74

⁴ Documentation for the conveyance from David Skeen to B.S. Grigsby, or some other sequence of ownership in 1918, has not been provided. (Book Affidavit at 8.)

cfs⁵. Duty is 208.2 acre-feet per year. The period of use for irrigation is April 15 through October 15, and year-round for livestock watering. The priority date is October 14, 1864.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.; to add clarification using evidence on the record; the statement that there was no irrigation on the on the property from 1967 to 1976 was stricken because it is not supported by a preponderance of the evidence on the record.

Allotment 409 (115.0 acres claimed)

10. The property is located in the SE¼, Section 36, Township 35 S, Range 9 E, W.M. The allotment to Bessie Faithful, a Klamath Indian, was confirmed by trust patent dated 1910. (Ex. 23.) David Skeen received a fee patent as heir to Bessie Faithful in 1919. (Ex. 28.) The property was conveyed by Sheriff's deed to Klamath County in 1930, (Ex. 37 at 5), and back to David Skeen by deed in 1933. (Ex. 38.) The property was conveyed from David Skeen to Hans Anderson in January 1945. (Ex. 43.) Hans Anderson was not an Indian. (Book Direct, Ex. 15 at 2.) The property was conveyed to David Skeen again in July 1945. The property was subsequently conveyed to the United States in trust for David Skeen in 1950. (OWRD Ex. 1 at 8.) The property was inherited by Vincent Bodner, Jr. and Alfaretta Skeen Bodner in the early 1960s. (Bodner Affidavit at 3.)

11. An early Bureau of Indian Affairs (BIA) report for Allotment 409 did not show the Trout Creek Ditch irrigating this allotment, although the Trout Creek Ditch appears to extend a short distance onto this allotment. (Book Affidavit (Direct) at 13-14.) Mr. Bodnar knew of a ditch from Trout Creek on the edge of this allotment, but he did not recall it ever being used to irrigate land in Allotment 409. (Bodner Affidavit at 3.) The Claimants did not claim Trout Creek as a source of water for Allotment 409. In the 1930s, David Skeen built a small dam on the Sprague River to obtain water for a ditch that ran onto allotment 409. (Bodner Affidavit at 3, 4.) The dam lasted two years and was not used again after that time. (*Id.* at 4.) A pump installed in the Sprague River in Allotment 638 provided water to Allotment 409 and 1252 but was used for only one year.

⁵ All rates and duties allowed are calculated at 1/40th cfs per acre and 3 acre-feet per acre, based on the amount approved in the water use permits issued on these properties. (OWRD Ex. 1 at 17, 24, 93.) Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

(*Id.* at 3.) The pump and ditch were not used after that. (*Id.*) Although a 1957 appraisal by the General Services Administration noted that there was no developed source of water to the allotment, it was stated that of the 160 acres of this property, sixty eight acres were under cultivation, and thirty five acres were in pasture at that time. (Book Direct, Ex. 20 at 3.) ~~Any development of irrigation of Allotment 409 was temporary and sporadic. (Book Affidavit at 21.)~~ Vincent Bodner did not artificially irrigate Allotment 409 during his period of ownership from the early 1960s to 1967; (Bodner Affidavit at 2-4); however, he did make beneficial use of water from the Sprague River by the method of natural overflow. (*Id.* at 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.) ~~There was no irrigation on the property from 1967 to 1976 when Claimants purchased the property. (Bodner Affidavit at 2-4.)~~ Claimants started to build the current irrigation system on this allotment in 1976. (Rabe Direct at 8, 9.) The point of diversion for this parcel is located in the NW¼ NE¼ Section 36, Township 35 S, R 9 E, W.M. (OWRD Ex. 1 at 68.) The rate is 2.87 cfs. The duty is 345.0 acre-feet per year. The period of use for irrigation is April 15 through October 15, and year-round for livestock watering. The priority date is October 14, 1864.

Reasons for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; the statement that there was no irrigation on the on the property from 1967 to 1976 was stricken because it is not supported by a preponderance of the evidence on the record.

Allotment 637 (35.9 acres claimed)

12. The property is located in the NW¼, Section 31, Township 35 S, Range 10 E, W.M. The allotment was confirmed to Neffie Weeks, a Klamath Indian, by trust patent dated 1910. (Claimants' Ex. 17.) The property was passed to the heirs of Weeks, Caroline Cowen and Cinda Checaskane, Klamath Indians. (*Id.*, Ex. 18, 19.) The property was conveyed to Vincent Bodner Jr. in 1942. (*Id.*, Ex. 21.) The property was conveyed to California Land Co. in 1967. (*Id.*, Ex. 50.)

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

13. ~~Allotment 637 was not irrigated until the Claimants acquired it and started their development in 1976. (Rabe Direct Testimony at 8-9.)~~ Beginning in the 1940s, Mr.

Bodner made beneficial use of water by the method of natural overflow from the Sprague River. Allotment 637 was planted into rye grass which was “flooded by the [Sprague] River in the spring and the flood provided water for the hay and pasture. We hayed it and let the cows in onto the stubble in the fall.” (Bodner Affidavit at 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.) Claimants started to build the current irrigation system on allotment 637 in 1976. (Rabe Direct at 8, 9.) The point of diversion for this parcel is located in the NW¼ NE¼ Section 36, Township 35 S, R 9 E, W.M. (OWRD Ex. 1 at 68.) Rate is 0.90 cfs. Duty is 107.7 acre-feet per year. Period of use for irrigation is April 15 through October 15, and year-round for livestock watering. Priority date is October 14, 1864.

Reasons for Modification: The ALJ’s proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

Allotment 638 (67.2 acres claimed)

14. The property is located in the SW¼, Section 31, Township 35 S, Range 10 E, W.M. The allotment was allotted to Ella Cowen, a Klamath Indian, ~~was confirmed by the allotment ledgers and township allotment maps. (OWRD Ex. 1 at 9.)~~ (Rabe Direct at 2; Claimants’ Ex. 15.) David Skeen received a fee patent in 1923 from Ella Cowen. (*Id.*) The property was conveyed to Albert Thalhoffer in 1927. (*Id.*, Ex. 16.) Mr. Thalhoffer was non-Indian white. (Stipulation.) The property was subsequently conveyed to Klamath County by Sheriff’s deed in 1941. (*Id.*, Ex. 40.) The property was then conveyed to Leroy Gienger in 1942. (*Id.*, Ex. 20.) Mr. Gienger was not an Indian. (Bodner Affidavit at 2.) Mr. Gienger conveyed the property to Vincent Bodner Jr. in 1964. (OWRD Ex. 1 at 9; Claimants’ Ex. 2.) The property was conveyed to the California Land Co. in 1967. (*Id.*, Ex. 50.)

Reasons for Modification: To provide corrected and additional citations to the record; to add clarification using evidence on the record; for consistency of terminology.

15. There was no artificial irrigation on the land prior to 1950, when Leroy Gienger started development of irrigation. An application for a water right was filed in 1950 to irrigate lands on both sides of the Sprague River within Allotment 638. Permit 20509 was ~~granted~~ issued in 1952 to Mr. Gienger. (OWRD Ex. 1 at 94.) ~~A water right~~

~~was granted to Mr. Gienger for lands in Allotment 638. (Id.) A permit application was filed in 1950 to irrigate lands on both sides of the Sprague River. Mr. Gienger submitted proof of appropriation in 1958 for irrigation of 286.5 acres and was granted a certificate in 1959, of which 126.5 acres were located in Allotment 638. (Id. at 93, 97.) Only 67.2 acres were located on Allotment 638. (Book Affidavit at 16.) Mr. Gienger's irrigation development started 23 years after the conveyance to Mr. Thalhofer, the first non-Indian owner. Irrigation was discontinued on this allotment. From the time that Mr. Bodner acquired it this allotment in 1964 until the Claimants acquired the property in 1976 (Bodner Affidavit 3.) he sold it in 1967, he continued to pasture and hay the grass that grew after the spring floods, thus making beneficial use of water from the Sprague River by the method of natural overflow. (Bodner Affidavit at 2, 5, 6, Ex. U.S.G.S. Quadrangle Map - Sprague River West.) Claimants started to build on the current irrigation system on this allotment in 1976. (Rabe Direct at 8, 9.)~~

Reasons for Modification: Changes were made to the description of Permit 20509 for added clarity. In addition, the ALJ's findings that only 67.2 acres of the area covered by the certificate resulting from Permit 20509, and that irrigation was discontinued on this allotment from the time Mr. Bodner acquired it, are not supported by a preponderance of evidence on the record. The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

Allotment 1091 (52.5 acres claimed)

16. This property is located in the E½, NE¼, Section 1, Township ~~35~~ 36 S, Range 9 E, W.M. The allotment to Julia Hart, a Klamath Indian, was confirmed by a 1913 trust patent. (Claimants' Ex. 1, 5.) Julia Hart died in 1911. The ownership by heirs was described in the 1958 Land Status Report issued for allotment 1091. (Id. at 5) The heirs conveyed the property to the Bly Lumber Co. in 1959. (Id. at 6 - 9.) Bly Lumber Co. was the first non-Indian owner. (Book Direct, Ex. 12 at 2, ¶5.d.) The property was subsequently conveyed to Leroy Gienger in 1959. (Claimants' Ex. 11.) Vincent Bodner Jr. acquired the property in 1964 and conveyed it to the California Land Co. in 1967. (Id. at 50.)

17. Allotment 1091 was not irrigated (either artificially or naturally) from 1940 - 1979. (Book Affidavit (Direct) at 22, and Book Direct, Ex. 6, 1968 photograph.) There

was no way to serve this land historically from ~~Fruit Creek or~~ the Sprague River pump. (*Id.* at 22.) There is no evidence in the record confirming any beneficial use of water made, either by the method of natural overflow or by use of an irrigation system on the property until after the Claimants purchased the property in 1976. Claimants developed the ditch serving this allotment several years after they acquired the property in 1976. (OWRD Ex. 1 at 99 - 100.)

Reasons for Modification: To correct a scrivener's error in the township; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

8. **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 period of use ~~is not relevant because a *Walton* right has not been established on any allotment~~ should be April 15 through October 15 for irrigation and year-round for livestock watering, as claimed.

2. The record ~~does not support~~ the claimed rate, duty, actual uses, the points of diversion, and re- diversion, place of use, seasons of use and/or acreage claimed because on allotments where a *Walton* right has not been established, on any allotment.

3. Title information ~~does not establish~~ a *Walton* right on any portions of the claimed places of use.

4. ~~There is insufficient continuous use of water on the Place of Use to establish a *Walton* right for any allotment.~~ On allotments where the Claimants have otherwise established the elements of a *Walton* right, the Contestants have failed to prove lack of continued use of the developed rights.

5. The diversion rate for the place of use ~~is not relevant because a~~ where a *Walton* right has not been established for any allotment should be 1/40 cfs per acre.

6. The diversion rate for livestock watering ~~is not relevant because a~~ where a *Walton* right has not been established for any allotment should be 12 gallons per day per

head for the number of cattle claimed (225 cattle). The season of use for livestock watering should be January 1 through December 31 as claimed.

7. ~~The period of use for irrigation in the preliminary evaluation is not relevant because a *Walton* right has not been established for any allotment exceeded the period of use claimed.~~

8. Beneficial use of water for irrigation was made on 35.9 acres of allotment 637 by Indian owners prior to transfer out of Indian ownership. Allotments 409 and 1252 went through periods of non-Indian ownership before Klamath Indian owners made beneficial use of water for irrigation on 184.4 acres within these two allotments. These periods of non-Indian ownership were not long enough for the inchoate *Walton* rights to expire for lack of diligent development. The claimed place of use was not under irrigation by the Indian owner before the land was transferred to the first non-Indian owner.

9. Beneficial use of water for irrigation on 133.3 acres within allotments 400, 638 and 1091 of the claimed place of use was not developed made with reasonable diligence by the first non-Indian purchaser from an Indian owner following transfer from Indian ownership.

10. Beneficial use of water for livestock watering was made on 35.9 acres of allotment 637 by Indian owners prior to transfer out of Indian ownership. Allotments 409, and 1252 went through periods of non-Indian ownership before Klamath Indian owners made beneficial use of water for livestock watering on 184.4 acres of these allotments. These periods of non-Indian ownership were not long enough for the inchoate *Walton* rights to expire for lack of diligent development. Irrigation of the claimed place of use was not developed with reasonable diligence by the non-Indian owner(s) after the first non-Indian purchaser from an Indian owner.

11. Water provided to the claimed place of use by the method of natural overflow means (flooding in the Spring or through sub-irrigation)--- although not through a diversion system created by humans-- does not constitute irrigation under is a valid basis for a *Walton* right.

~~12. Where the Claimants have otherwise established the elements of a Walton right, the Contestants have failed to demonstrate that the developed *Walton* rights have been abandoned as a result of non-use. If any part of the claimed place of use was ever irrigated by the Indian owner before the land was transferred to the first non-Indian owner or developed with reasonable diligence by the first non-Indian purchaser from an Indian owner, the water claimed for that part of the claimed place of use has not been continuously used by the first non-Indian successor and by all subsequent successors.~~

~~13. The irrigation season of use is not relevant because a *Walton* right has not been established for any allotment is limited to April 15 through October 15, the season of use claimed.~~

~~14. Because none of the claimed place of use is awarded a water right, the water duty for that part of the claimed place is not relevant. The water duty for that part of the claimed place of use that is approved should be 3.0 acre-feet per acre.~~

~~15. Because none of the claimed place of use is awarded a water right, the diversion rate for that part of the claimed place of use is not relevant.~~

~~16. 15.~~ The Preliminary Evaluation for Claim No. 95 (including Appendix A to the Preliminary Evaluation entitled “Standards for Rates, Duties, and Seasons of Use Within Previously Adjudicated Areas of the Klamath Basin”) should not be accorded any weight in this contested case.

Reason for Modifications: The evidence in the record and the application of the appropriate legal bases to the evidence in the record supports conclusions other than those in the Proposed Order.

9. **Opinion.** The Proposed Order's “Opinion” section is modified as described herein.

OWRD 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.

The remaining portions of the Opinion section of the ALJ’s Proposed Order have been labeled “Application of Walton Elements to the Modified Proposed Order Findings of

Fact.” Additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text.

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

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division*, 47 Or App 437 (1980); *Metcalfe 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 record shows that all of the allotments at issue in this case were of the Klamath Indian Reservation and the land was allotted to a member of the Klamath tribe. Each of the allotments was transferred from the original allottee or a direct Indian successor to the original allottee, to a non-Indian successor. Therefore, the first two elements of a *Walton* right, as articulated by Judge Young, have been satisfied by each allotment.

Claimants must also establish that the ~~claimed irrigation was developed~~ beneficial use of water from the Sprague River was made by their Indian predecessors or by ~~the first non-Indian purchaser successors~~ of each allotment with reasonable diligence, ~~prior to the conveyance of the allotment to the next owner.~~ To satisfy *Walton* elements, claimants must also show that each allotment was continuously irrigated after the initial development. Following case precedent⁶ and ~~Oregon statutes~~ Oregon Administrative Rule 690-028-0045,⁷ I ~~adopt a five-year rule of thumb~~ as the reasonable time period to

⁶ See, *Seaward v. Pacific Livestock Co.*, 49 Or 157 (1907) (when several appropriators quit expanding their irrigation in 1899 and did nothing for five years, the Oregon Supreme Court limited their claim to the acreage fed by a diversion that they each had developed by 1899).

⁷ ORS 537.230(1) provides for five years for the completion of the works necessary to put water to beneficial use, unless good cause to enlarge the period can be shown. See ORS 539.010(5). ORS 540.610(1) creates a rebuttable presumption of forfeiture after five years of non-use of irrigation. OAR 690-028-0045 provides that reasonable diligence in the construction of the system of works necessary to fully accomplish appropriation of the water does

make beneficial use of water for diligent development of the irrigation system and to determine the “continuous use” of the irrigation established by the last Indian owner or by the first by subsequent non-Indian owners is that which does not require unusual or extraordinary effort, absent extraordinary circumstances. In this case, even if a five-year standard did not apply, the extended periods of non-use far exceed any amount of time justified on this record. Below, I apply these The four elements of a *Walton* right are applied to the facts of each allotment at issue in this claim.⁸

Allotment 400

The first non-Klamath Indian purchaser of this allotment was John Smith in 1918. The record shows irrigation of the claimed portion of Allotment 400 from Trout Creek occurred prior to 1923, but was discontinued by at least 1940 and not resumed until 1976, when the first state water right was granted. Because the water was not continuously used after development by the first non-Indian successor and by all subsequent successors, this allotment fails to meet standards that establish a *Walton* right. The allotment returned to Indian ownership in 1924.

Irrigation from Trout Creek was discontinued no later than the 1930s. The irrigation from Trout Creek would have been sufficient to have established a *Walton* right for diversion from Trout Creek on the claimed portion of Allotment 400. Beneficial use was made within five years of transfer from Indian ownership. Under the facts in this case, that constitutes reasonably diligent development. However, the Claimants did not claim Trout Creek as a source of water for Allotment 400, instead claiming a point of diversion on the Sprague River. Trout Creek enters the Sprague River downstream from the current point of diversion on the Sprague River. The change from Trout Creek to

not require unusual or extraordinary effort. Reasonable diligence is that which is usual and ordinary with persons performing similar projects. The water user must demonstrate a genuine intent to complete the appropriation in a timely manner. The question is one of fact, to be determined from the circumstances on case-by-case basis.

⁸Claimants also argued that the standards should be different for allotments that leave Indian ownership and then at some point return to Indian ownership for a period of time before again returning to non-Indian ownership. Claimants argued lands that return to Indian ownership should provide a new chance for that Indian or his grantee to put in an irrigation system and receive a *Walton* right. (Claimants’ Closing Argument at 8-9) (Vince Bodner’s reacquisition of the property after a seller defaulted allegedly reinstated the reserved water right). This argument is not supported by case law. The *Walton III* court explained that the right flows from the allottee to the first grantee. (752 F2d at 402) (“the immediate grantee of the original allottee must exercise due diligence”). It is the reasonable diligence of the first non-Indian that is at issue to establish a *Walton* right.

Sprague River therefore constitutes a change in source, which is not permissible.⁹ The failure to claim the Trout Creek as a source of water for Allotment 400 by the January 31, 1991, claim filing deadline means that Claimants are now estopped from doing so. ORS 539.210. Finally, even if the Claimants had properly claimed Trout Creek as a source, any right to divert water from Trout Creek has been abandoned. There is no evidence of use of water from Trout Creek on this allotment after the 1930s. While the right to use of water from Trout Creek could not have been abandoned during the 1930-1967 period of Indian ownership, it was subject to abandonment beginning with the 1967 purchase by the California Land Co. Abandonment may be inferred from non-use if the period of non-use is sufficiently long. A forty-plus year period of nonuse is sufficient to infer abandonment.

With respect to the claim for use from the Sprague River, Allotment 400 was out of Indian ownership between 1918 and 1924, a period of six years. This is long enough, under the facts in this case, for the right to have expired if not diligently developed. When the property was re-conveyed to a Klamath Indian (Nettie Smith) in 1924, she could only have acquired those rights that had not been lost. There is no evidence that beneficial use of water from the Sprague River was made on Allotment 400 by the time Nettie Smith purchased it. The first evidence of use from the Sprague is not until 1962. The Claimants have not established a *Walton* right on the claimed lands in Allotment 400.

Allotment 1252

~~The first non-Indian purchaser of this allotment was B.S. Grigsby, who owned the property for a short time in 1918. David Skeen reacquired it and kept it until 1930 when it was conveyed to Klamath County. There is no evidence Mr. Grigsby developed irrigation. However, the record shows a portion of the allotment was irrigated by a ditch from Trout Creek prior to 1923. Even if Mr. Grigsby developed the irrigation described in 1923, use was discontinued some time prior to 1950. The ditch was not used from 1950 to 1976. This allotment fails to establish a *Walton* right because either there is no evidence that the first non-Indian owner developed irrigation or because the irrigation that was developed was not used continuously.~~

Allotment 1252 went through two periods of non-Indian ownership prior to the beginning of beneficial use of water: a period during 1918 (B.S. Grigsby) and 1930 –

⁹ Note that, per OAR 690-030-0085(2)(f), in the context of requesting a change of a claimed point of diversion for an adjudication claim, moving a point of diversion from an *upstream* tributary is not considered an impermissible change of source.

1933 (Klamath County). In *United States v. Anderson*, the Ninth Circuit addressed the effect on *Walton* rights of reacquisition by an Indian tribe after a period of non-Indian ownership. The court held that:

a non-Indian successor acquires a right to that quantity of water being utilized at the time title passes, plus that amount of water which the successor puts to beneficial use with reasonable diligence following the transfer of title. Where “the full measure of the Indian's reserved water right is not acquired by this means and maintained through continued use, it is lost to the non-Indian successor.” Consequently, on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse and those rights will have an original, date-of-the-reservation priority.

736 F2d 1358, 1362 (1984). As is discussed in greater detail in the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS, “reasonable diligence” is the measure of whether a *Walton* right has been timely developed after transfer from Indian ownership. Per *Anderson*, if the period for reasonably diligent development expired prior to reacquisition of the property by a member of the Klamath Tribes, reacquisition by the member cannot revitalize the right. However, if the period for reasonably diligent development has not expired by the time of reacquisition of the property by a member of the Klamath Tribes, then an inchoate right remains appurtenant to the property. If the inchoate right has returned intact to Indian ownership, the Indian owner retains the right to hold the inchoate right indefinitely, so long as the property remains within Indian ownership.

The first period of non-Indian ownership for this allotment lasted less than a year. The second lasted less than four years. The period for reasonably diligent development of a water right is dependent on a number of circumstances, and may vary in length. Generally, though, within a five year period an inchoate right will not be considered to have expired for failure to diligently develop. The five-year period is the default period for diligent development under Oregon’s Water Rights Act. ORS 537.230(1). Given this general rule, and the absence of evidence that a period of non-Indian ownership less than five years in length would have been an unreasonably long period for development, we

conclude that the inchoate *Walton* right had not expired by the time it re-entered Indian ownership in 1933, and therefore remained eligible for development.¹⁰

Beneficial use of water by the method of natural overflow was subsequently established under Indian ownership, at least by 1962. The water has continued to be put to beneficial use by non-Indian successors. This allotment meets all the standards that establish a *Walton* right.

Allotment 409

~~The first non-Indian purchaser of this allotment was Klamath County in 1930. The County did not develop irrigation on the land. The land was conveyed to David Skeen in 1933 and to Hans Anderson in 1945. The Trout Creek ditch extended onto this allotment, but was not used to irrigate the allotment. In the 1930s, David Skeen built a small dam on the Sprague River to obtain water for a ditch that ran into allotment 409. The ditch was used for two years and was not used after that time. There was no irrigation from the 1950s through 1976. Because the first non-Indian owner did not develop irrigation and because water was not used continuously after Mr. Skeen's development, this allotment fails to meet standards that establish a *Walton* right.~~

Allotment 409 also went through two periods of non-Indian ownership prior to the beginning of beneficial use of water: from 1930-1933 (Klamath County), and for a period during 1945 (Hans Anderson). As with Allotment 1252, neither period was long enough for the *Walton* right to expire for failure to diligently develop the claimed lands. Beneficial use of the majority of the claimed lands was occurring by 1957, under Klamath Indian ownership. Beneficial use of all of the claimed lands, resulting from natural overflow of the Sprague River, began by 1960, also under Klamath Indian ownership.¹¹ Beneficial use has continued, from an artificial irrigation system, under the ownership of the non-Indian successors. The claimed lands in this allotment meet the standards that establish a *Walton* right.

¹⁰ Oregon Administrative Rule 690-028-0026(3) provides that in a filing for Practicably Irrigable Acreage a claimant shall document through a chain of title statement that the lands have never had more than *five consecutive years* of non-Indian ownership since the date of the reservation (emphasis added). We interpret this rule to pertain only to the documentation accompanying a claim, and not to set a fixed period for reasonably diligent development of Practicably Irrigable Acreage (inchoate acreage).

¹¹ Because beneficial use was made under Indian ownership no later than 1960, and has continued under the non-Indian successors, it is not necessary to consider whether the initial efforts at development made in the 1930s by Mr. Skeen were sufficient to establish a right.

Allotment 637

Beneficial use of water by the method of natural overflow was established under Indian ownership prior to the non-Indian purchase of the allotment. The first non-Indian purchaser of this allotment was the California Land Company in 1967. There was no irrigation on this allotment until the Claimants acquired it and started their development in 1976. Because there was no development of irrigation by the first non-Indian purchaser for nine years, The record shows that water has continued to be put to beneficial use by non-Indian successors. Therefore, this allotment fails meets all the standards that to establish a Walton right.

Allotment 638

The first non-Indian purchaser of this allotment was Albert Thalhofer in 1927, who owned the land for 14 years. There is no evidence that Mr. Thalhofer either artificially irrigated the land or made beneficial use of natural overflow. The record shows that the first development of irrigation occurred in 1952 when a water permit was granted issued to Leroy Gienger, who acquired the land in 1942. Mr. Gienger's irrigation development started 23 years after transfer from Indian ownership, well outside a reasonable period for development of beneficial use given the facts in the record. Because Mr. Thalhofer was the first non-Indian purchaser and did not irrigate the land, the irrigation that was begun by Mr. Gienger in 1952 is of no moment. Furthermore, after Mr. Geinger irrigated the land in the 1950s, the land was not irrigated for approximately 20 years until Claimants started development of a system in 1976. The standards of a Walton right are not established for this allotment because beneficial use of water was not made with reasonable diligence following transfer from Indian ownership. there has not been diligent development or continuous use.

Allotment 1091

There is no evidence that the Indian owners irrigated this parcel—either artificially or by natural overflow. The first non-Indian purchaser was Bly Lumber Company in 1959. There is no evidence that any irrigation occurred from 1940 to 1979. The first evidence of beneficial use of water was in 1976. Thus, there is no evidence that the first non-Indian owner successors developed made beneficial use of water for

irrigation with reasonable diligence, and ~~there is no evidence of continuous use~~. Therefore, the standards of a *Walton* right are not established for this allotment.

Reasons for Modifications: (1) To correct and clarify the elements of a *Walton* right. (2) To provide clarity of evidence in the record and further substantiate approval of the claim. (3) To correct the legal basis for determining reasonable diligence in an adjudication of pre-1909 water rights. (4) To apply the appropriate legal bases to the Proposed Order's modified findings of fact.

Summary

For the reasons stated above, ~~none of the allotments at issue in this case establish~~ a *Walton* right is established for irrigation and livestock watering on 220.3 acres within allotments 1252, 409, and 637. The elements of a *Walton* right are not established for 133.3 acres within allotments 400, 638 and 1091.

Reason for Modifications: To provide consistency with Sections A.7, A.8 and A.9.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as described below:
 - a. The "History of the Case" adopted in its entirety.
 - b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.6, above.
 - c. The "Issues" is adopted in its entirety.
 - d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, above.
 - e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.8, above.
 - f. The "Opinion" adopted with modifications, as set forth in Section A.9, above.
 - g. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 95. Consistent with Sections A.7, A.8, and A.9, above, the outcome of the Order has been modified to recognize a right for irrigation on 220.3 acres and livestock watering.
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. Based on the file and record herein, IT IS ORDERED that Claim 95 is approved as set forth in the following Water Right Claim Description.

CLAIM NO. 95

CLAIMANT: CLIFFORD C. RABE
MARY A. RABE
22539 HWY 140 E
DAIRY, OR 97625

CLAIM MAP REFERENCE: CLAIM # 95, PAGE 74

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

PURPOSE OR USE:

IRRIGATION OF 220.3 ACRES; AND LIVESTOCK WATERING OF 225 HEAD.

RATE OF USE:

5.5142 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

5.51 CFS FOR IRRIGATION MEASURED AT THE POINT OF DIVERSION, AND

0.0042 CFS FOR LIVESTOCK WATERING MEASURED AT THE PLACE OF USE, NOT TO EXCEED 2700 GALLONS PER DAY.

DIVERSION OF STOCK WATER TO THE PLACE OF USE IS LIMITED TO THAT WHICH HAS BEEN HISTORICALLY DIVERTED FOR BENEFICIAL USE AND IS REASONABLY NECESSARY TO TRANSPORT THE WATER, AND TO PREVENT THE WATERCOURSE FROM BEING COMPLETELY FROZEN WHEN TRANSPORTING WATER OUTSIDE OF THE IRRIGATION SEASON.

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:

Use	Period
Irrigation	April 15 - October 15
Livestock	January 1 - December 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

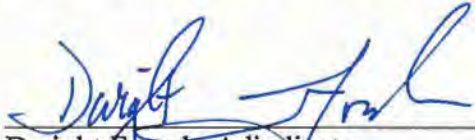
Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	9 E	WM	36	NW NE	1830 FEET NORTH AND 140 FEET EAST FROM C ¹ / ₄ CORNER, SECTION 36

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION and LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
35 S	9 E	WM	36	SW NE		35.4
35 S	9 E	WM	36	SE NE		34.0
35 S	9 E	WM	36	NE SE		40.0
35 S	9 E	WM	36	NW SE		28.8
35 S	9 E	WM	36	SW SE		6.2
35 S	9 E	WM	36	SE SE		40.0
35 S	10 E	WM	31	NW NW	2	1.3
35 S	10 E	WM	31	SW NW	2	33.8
35 S	10 E	WM	31	SE NW	2	0.8

[End of Water Right Claim Description]

Dated at Salem, Oregon on February 28, 2014



Dwight French, Adjudicator
Klamath Basin General Stream Adjudication