

**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
DONALD LAWLESS,	)	DETERMINATION
MARLENE LAWLESS, AND	)	
LEWIS LAWLESS	)	
_____	)	Water Right Claim 97

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 97 (Claimants: DONALD LAWLESS, MARLENE LAWLESS, AND LEWIS LAWLESS) and its associated contests (38, 2840, 3478, 3747, 4132) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 212.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 97 on December 13, 2006.
3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) Donald Lawless, Marlene Lawless and Lewis Lawless, and (2) the United States of America.
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 97. 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 follows:
  - 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 97. 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 7.3 acres

6. **Evidentiary Rulings.**

- a. Within the section titled “Evidentiary Rulings” of the Proposed Order, the first paragraph is modified as follows:

The AFFIDAVIT OF RICK N. BARNES dated July 16, 2004, and the REBUTTAL AFFIDAVIT OF RONALD S. YOCKIM dated July 16, 2004, are added to the list of items that were admitted into the record.

**Reason for Modification:** To correct omissions from the list of Evidentiary Rulings.

- b. Within the section titled “Evidentiary Rulings” of the Proposed Order, the second sentence within the last paragraph is corrected as follows (the correction is shown in “underline” text):

This motion was granted by order dated August 18, 2005.

**Reason for Modification:** To correct a scrivener’s error.

- 7. **Findings of Fact.** The Proposed Order’s “Findings of Fact” section is modified as shown below. Additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding. A summary of the 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 of beneficial use of water being made with reasonable diligence by non-Indian successors after transfer from Indian ownership, an issue raised in exceptions. (4) In each instance where this Partial Order of Determination modifies historical findings of fact made by the ALJ, the Adjudicator has determined that the ALJ’s original finding was not supported by a preponderance of evidence in the record.

**Modified Proposed Order Findings of Fact**

- 1) Claim 97 seeks a water right for lands owned by non-Indian successors to Indian allottees on the Klamath Indian Reservation. The claim is for a diversion rate of

14 cubic feet per second (cfs) from the Sprague River to irrigate 675.1 acres<sup>1</sup> and instream stockwater for 150 head of cattle. The claimed priority date is October 14, 1864. The claimed season of use for irrigation is May 1 through October 1, and year-round for instream livestock watering. (OWRD Ex. 1 at 1-8, 140, 143.) The claim is comprised of eight allotments in the Klamath Indian Reservation (Book Direct, Ex. 2-3.), which have been consolidated into the ownership of Donald, Marlene and Lewis Lawless (Claimants). The Claimants acquired the property in 1993 from Jeffrey and Tami Carter who filed this claim on behalf of Carter Air Balance, Inc. in 1991. (OWRD Ex. 1. at 1-104, 141-142.)

The claim for watering of livestock was not addressed in any contest other than claimants'. Livestock has been grazed on the property since before its conveyance out of Indian ownership. (Yockim Rebuttal Affidavit at 2, Ex. RS-29; OWRD Ex. 1 at 81.) The claim as a whole is based on the assertion that beneficial use of water for irrigation was developed made by the Indian owners, or made with reasonable diligence by first non-Indian owners, and has been continuous since that time. (OWRD Ex. 1 at 1-8, 15-17, 228-232.)

¶ The lands within Allotments 637, 638, a small portion of 634, 135, and most of 832 and 566 are subject to natural overflow in the spring from the Sprague River. (L. Lawless Rebuttal at 2, Ex. 3; D. Lawless Rebuttal at 2, Ex 7; Ex. RS-26 at 51-56, 75-86, 101, 106 - 107.)

**Reasons for Modification:** Using evidence on the record, to provide more specific information with reference to what was claimed; 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 use consistent terminology regarding beneficial use of water; to add clarification using evidence on the record.

## 2) Allotment 135 (39.6 acres claimed)

This property located in the NW¼, Section 6, Township 36 S, Range 10 E, W.M. was allotted to Millie George, a Klamath Indian, by trust patent dated 1910. (OWRD Ex. 1 at 202.) The property was split into two tracts under the ownership of the heirs of Millie George. The allotment includes land on both sides of the Sprague River. (*Id.* at 77; Book Direct, Ex. 3.) Only land on the east side is included in Claim 97. (OWRD Ex.

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<sup>1</sup> The original claim was for 720 acres in 1991. (OWRD Ex. 1 at 3). The claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)

1 at 102 143.) Tract A includes the south part of allotment 135 within the claim (SE $\frac{1}{4}$  NW $\frac{1}{4}$ ) and Tract B includes the north part of allotment 135 within the claim (NE $\frac{1}{4}$  NW $\frac{1}{4}$ ). (Book Direct at 10.)

**Tract A** (6.2 acres) was conveyed from Norma Weeks Jackson, a Klamath Indian, to Gienger Enterprises, a non-Indian business, on March 7, 1968. (OWRD Ex.1 at 89.) On September ~~25~~ 27, 1968, Gienger Enterprises conveyed the SE $\frac{1}{4}$  NW $\frac{1}{4}$  in Section 6, Township 36 S, Range 10 E, W.M., among other parcels, to Charles Dixon, a non-Indian. (*Id.* at 90.) On June 24, 1969, Charles Dixon conveyed SE $\frac{1}{4}$  NW $\frac{1}{4}$  East of the Sprague River, Section 6, Township 36 S, Range 10 E, W.M. among other parcels to Dale and Madeline Newman. (*Id.* at 91.)

Although, prior to transfer out of Indian ownership, a small part of this property was sometimes flooded by a temporary dam across the Sprague River, this practice was discontinued at some time prior to conveyance out of Indian ownership in 1968, and the extent of this irrigation is unknown.<sup>2</sup> (Ex. RS-26 at 83.) Tract A is subject to natural overflow from the Sprague River. (Ex. RS-26 at 51-56, 106.) After conveyance out of Indian ownership, irrigation of Tract A was not initiated prior to conveyance to Dixon, the second non-Indian owner. However, a subsequent owner, Richard Perry, applied for an Oregon water right (Permit S-37151) for lands appurtenant to Allotment 135 in 1973. (OWRD Ex. 1 at 12-13; Book Direct, Ex. 11 at 12-14.) Notice of Complete Application of Water to a Beneficial Use ("Form C") was filed by the permit holder for Permit S-37151 on December 2, 1977. (Book Direct, Ex. 11 at 15.) Although Tract A was not included in the original 1973 application and its map for this water right, a 1994 final proof survey for this permit included 7.4 acres within Tract A (SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 6). (Book Direct, Ex. 11 at 12-17; OWRD Ex. 1 at 12-13.)

¶ The point of diversion for this parcel, Pump 1, is located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 32, Township 35 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is 0.16 cfs. The duty is 18.6 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.

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<sup>2</sup> Given the direction of the current in the Sprague river, (as shown by OWRD Ex. 1 at 13) a dam located at the Southern end of Tract A, (as described by James Goold in Ex. RS-26 at 83) would have flooded only a very small portion of this tract, or of any land subject to this claim.

**Tract B** (33.4 acres) was under the ownership of David Skeen, a Klamath Indian, in 1948. (OWRD Ex 1 at 75-76.) In ~~1960~~ 1969, the tract was conveyed by Charles Dixon, a non-Indian to Dale Newman, also a non-Indian. The chain of title between Skeen and Dixon is unknown. (Book Direct at 10.) Tract B is subject to natural overflow from the Sprague River (Ex. RS-26 at 51-56, 106); however, there is no evidence on the record confirming any beneficial use of water for irrigation made on this allotment prior to the 1973. Irrigation of Tract B was initiated under Oregon water permit number S-37151 in 1973 (Book Direct at 13-14; OWRD Ex. 1 at 12-14.)

**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.

### 3) **Allotment 566 (104.0 acres claimed)**

This allotment, composed of 104 acres located in NW¼, Section 5, Township 36 S, Range 10 E, W.M., was confirmed to Mildred Miller by instrument dated March 7, 1910. (OWRD Ex. 1 at 194-195.) The property was conveyed by the heirs of Mildred Miller to Leroy Gienger, a non-Indian, on September 8, 1958. (*Id.* at 73 -74.) The property was subsequently conveyed to Albeit Lang in 1965 (*Id.* at 30-31).

Portions of Allotment 566 are subject to natural overflow from the Sprague River. (Ex. RS-26 at 51-56, 106.) As evidenced on an 1958 Indian Land Status report, Allotment 566 was leased for farming and grazing beginning in 1954, which was prior to the initial transfer from Indian ownership. (OWRD Ex. 1 at 171-172.) Gienger, the first non-Indian owner, developed or continued to develop an artificial irrigation system on the property by 1960. Allotment 566 has continuously been irrigated since that time. (Book Direct at 17-18.)

The point of diversion for this parcel, Pump 3, is located within the NW¼ NW¼, Section 5, Township 36 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is 2.6 cfs.<sup>3</sup> The duty is 312 acre-feet per year. The period of use is May 1 through October 1. 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.

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<sup>3</sup> All rates and duties allowed are calculated at 1/40<sup>th</sup> 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 10-13.) Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

4) **Allotment 634 (160.0 acres claimed)**

This allotment, composed of 160 acres located in the SE¼, Section 31, Township 35 S, Range 10 E, W.M., was confirmed to Charleys Cowan, a Klamath Indian by ~~trust~~ fee simple patent dated February 7, 1920. (OWRD Ex. 1 at 183.) The property remained in Klamath Indian ownership until May 10, 1923, when it was conveyed by David Skeen, a Klamath Indian, to B.E. Wolford and Dan Wann, both non-Indians. (*Id.* at 63; Book Direct, Ex. 8 at 5.) B. E. Wolford acquired the Wann interest in 1929. (OWRD Ex. 1 at 68-69, 178.) The property was then conveyed by the Wolford heirs to Leroy Gienger in 1944. (~~Id.~~ Book Direct, Ex. 3b.)

¶ A small portion of Allotment 634 is subject to natural overflow from the Sprague River (Ex. RS-26 at 51-56, 106), however the record contains no evidence of beneficial use of water for irrigation made prior to 1950. Irrigation on Allotment 634 was first initiated by Leroy Gienger, a subsequent non-Indian owner, in 1950, 27 years after transfer from Indian ownership. (Book Direct at 13.) Gienger applied for Oregon water right Permit S-20509 on lands appurtenant to this allotment in 1950. (OWRD Ex. 1 at 10-11.) This does not demonstrate beneficial use water for irrigation made with reasonable diligence.

**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.

5) **Allotment 636 (100.1 acres claimed)**

This allotment, composed of 100.1 acres located in the NE¼, Section 31, Township 35 S, Range 10 E, W.M., was confirmed to Ward Weeks, a Klamath Indian, by trust patent dated March 7, 1910. (OWRD Ex. 1 at 186-187.) The heirs of Ward Weeks conveyed the property to Vincent Bodner, Jr., a Klamath Indian, on September 3, 1947. (*Id.* at 85, 188-189).

The property was conveyed by Vince Bodner, Jr. to Gienger Enterprises, a non-Indian business, in April 1964. (*Id.* at 87.) The property was subsequently conveyed to James Templeton on May 20, 1965 (*Id.* at 93), and then to Albeit Lang on May 4, 1966. (*Id.* at 95.)

Beneficial use of water for irrigation was developed made on the property while under the ownership of Gienger Enterprises, in 1964, prior to the transfer of the property to James Templeton. (Bodner, Jr. Affidavit at 1.)

The points of diversion for this parcel, Pump 1 and Pump 2, is are located in the SE¼ SW¼, Section 32, Township 35 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is 2.50 cfs, being 0.59 cfs from Pump 1 for 23.7 acres, and 1.91 cfs from Pump 2 for 76.4 acres. The duty is 300 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.

**Reasons for Modification:** To correct and provide additional citations to the record; to use consistent terminology regarding beneficial use of water; to add clarification using evidence on the record. In addition the ALJ's finding with respect to the number of acres claimed within the NE¼, Section 31 (Allotment 636) is not supported by a preponderance of evidence on the record. In a footnote to the Proposed Order's Finding of Fact #1, the ALJ noted that "the claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)" The map at OWRD Ex. 1 at 143 clearly shows 100.1 acres within this allotment. Since this map is intended to provide definitive information about the place of use, OWRD views this change as the correction of a clerical error.

6) **Allotment 637 (24.4 acres claimed)**

This allotment, composed of 24.4 acres located in the NW¼, Section 31, Township 35 S, Range 10 E, W.M., was confirmed to Neffie Weeks, a Klamath Indian, by trust patent dated March 7, 1910 (Id. at 184, 185). The property was passed to the Indian heirs of Neffie Weeks, Caroline Cowen and Cinda Checaskane, on November 1, 1920. (*Id.* at 83-84.) The property was subsequently conveyed to Vince Bodner, Jr., a Klamath Indian, on December 21, 1942. (*Id.*) The property was conveyed from Vince Bodner, Jr. to Gienger Enterprises, a non-Indian business, in 1964. (*Id.* at 87; Book Direct at 7.)

Allotment 637 is subject to natural overflow from the Sprague River. (Ex. RS-26 at 51-56, 106.) Like Allotment 636, this property was first irrigated by Gienger Enterprises, the first non-Indian owner, in 1964. (Bodner, Jr. Affidavit at 1) The points of diversion for this parcel, Pump 1 and Pump 2, is are located in the SE¼ SW¼, Section 32, Township 35 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is 0.61 cfs, being 0.15 cfs from Pump 1 for 6.0 acres, and 0.46 cfs from Pump 2 for 18.4 acres. The duty is 73.2 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.

**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.

7) **Allotment 638 (52.0 acres claimed)**

This allotment, composed of ~~65.8~~ 52.0 acres located in the SW¼, Section 31, Township 35 S, Range 10 E, W.M., was confirmed to Ella Cowen, a Klamath Indian, prior to 1923. (OWRD Ex. 1 at 64-65; 204-205.) David Skeen, an Klamath Indian, received the patent in on June 30, 1923. (*Id.*; Ex. RS -14) The property was conveyed from David Skeen to Albeit Thalhofer, a non-Indian, on February 5, 1927. (*Id.* at 66-67.) The property was subsequently conveyed from Mr. Thalhofer to Klamath County by Sheriff's deed in 1941 and to Leroy Gienger in 1942. (*Id.* at 179.)

¶ Allotment 638 is subject to natural overflow from the Sprague River (Ex. RS-26 at 51-56, 106); however, the record contains no evidence of beneficial use of water for irrigation prior to 1950. Irrigation on Allotment 638 was first initiated by Leroy Gienger, a subsequent non-Indian owner, in 1950, 23 years after transfer from Indian ownership. (Book Direct at 16.) Gienger applied for Oregon water right Permit S-20509 on lands appurtenant to this allotment in 1950. (OWRD Ex. 1 at 10-11.) This does not demonstrate beneficial use of water for irrigation made with reasonable diligence.

**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 the ALJ's finding with respect to the number of acres claimed within the SW¼, Section 31 (Allotment 638) is not supported by a preponderance of evidence on the record. In a footnote to the Proposed Order's Finding of Fact #1, the ALJ noted that "the claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143)." The map at OWRD Ex. 1 at 143 clearly shows 52.0 acres within this allotment. Since this map is intended to provide definitive information about the place of use, OWRD views this change as the correction of a clerical error.

8) **Allotment 832 (160.0 acres claimed)**

This allotment composed of ~~158.34~~ 160.0 acres located in the NE¼, Section 6, Township 36 S, Range 10 E, W.M., was confirmed to Robinson (aka Psissum - Ky - wath) prior to 1921. (OWRD Ex. 1 at 198.) The property was conveyed to Anna Willis, a Klamath Indian, on April 30, 1921. (*Id.*) The property was conveyed from Anna Willis to David Skeen, a Klamath Indian, in 1921. (*Id.* at 179.) The property was conveyed



from David Skeen to Albeit Thalhoffer, a non-Indian, on February 5, 1927. (*Id.* at 66-67.) Klamath County subsequently obtained the property. (*Id.* at 179.) The property was conveyed from Klamath County to ~~Gienger Enterprises~~ Leroy Gienger April 15, 1941. (*Id.* at 70).

Although it is possible that some part of this property was sometimes flooded by a temporary dam across the river, the inception date of this practice and the extent of the irrigation thereby accomplished is unknown. (Ex. RS-26 at 83.) Most of Allotment 832 is subject to natural overflow from the Sprague River (Ex. RS-26 at 51-56, 106). The record contains no evidence of beneficial use of water for irrigation prior to 1940. Beneficial use of water from the Sprague River by the method of natural overflow may have been made on a portion of this allotment in the 1940s, 13 years after transfer to non-Indian successors. (Book Rebuttal at 2.) A subsequent owner, Richard Perry, applied for an Oregon water permit number S-37151 for lands appurtenant to Allotment 832 in 1973. (OWRD Ex. 1 at 12-13; Book Direct, Ex. 11 at 12-14). ~~The first clear record of irrigation on Allotment 832 was in 1974, by James Goold. (Test of Book.) This does not demonstrate beneficial use of water for irrigation made with reasonable diligence.~~

**Reasons for Modification:** The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record. In addition the ALJ's finding with respect to the number of acres claimed within the NE¼, Section 6, (Allotment 832) is not supported by a preponderance of evidence on the record. In a footnote to the Proposed Order's Finding of Fact #1, the ALJ noted that "the claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143)." The map at OWRD Ex. 1 at 143 clearly shows 160.0 acres within this allotment. Since this map is intended to provide definitive information about the place of use, OWRD views this change as the correction of a clerical error. The statement that the first clear record on irrigation on this allotment was in 1974 by Goold was stricken because it is not supported by a preponderance of the evidence on the record.

9) **Allotment 1264/1542 (35.0 acres claimed)**

This allotment, composed of 34 35 acres located in the S½ SW¼, Section 32, Township 35 S, Range 10 E, W.M., was confirmed to Sylvester Smith ~~prior to 1956 on~~ October 25, 1950. (Ex. 9.) (OWRD Ex. 1 at 168.) The property was then conveyed to Theodore Crume, a Klamath Indian, in 1956. (~~Id.~~ Book Direct, Ex. 9 at 4.) The property was conveyed from Theodore Crume to Leroy Gienger, a non-Indian, in 1957 (Book Direct, Ex. 10 at 9), and from Leroy Gienger to Albeit Lang ~~in~~ on August 12, 1965. (OWRD Ex. 1 at 30-31; ~~Ex. 10.~~)

Irrigation of the property was initiated by Theodore Crume, the last Indian owner, and was continued by Mr. Gienger, and has been maintained through the present. (Book Direct at 17-18; Gienger Direct at 2.) Two points of diversion serve this parcel. One point, Pump 3, is located in the NW¼, NW¼ Section 5, Township 36 S, Range 10 E, W.M. The other point, Pump 1, is located in the SE¼ SW¼, Section 32, Township 35 S, Range 10 E, W.M. (OWRD Ex. 1 at 143.) The rate is ~~0.85~~ 0.88 cfs, being 0.42 cfs from Pump 1 for 16.7 acres, and 0.46 cfs from Pump 3 for 18.3 acres. The duty is ~~102~~ 105 acre-feet per year. The period of use is May 1 through October 1. The priority date is October 14, 1864.

**Reasons for Modification:** To correct and provide additional citations to the record; to add clarification using evidence on the record. In addition the ALJ's finding with respect to the number of acres claimed within the S½ SW¼, Section 32 (Allotment 1264/1542) is not supported by a preponderance of evidence on the record. In a footnote to the Proposed Order's Finding of Fact #1, the ALJ noted that "the claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)" The map at OWRD Ex. 1 at 143 clearly shows 100.1 acres within this allotment. Since this map is intended to provide definitive information about the place of use, OWRD views this change as the correction of a clerical error.

#### **10) Instream Livestock Watering:**

The property within all claimed allotments was used for the grazing of livestock since before its conveyance out of Indian ownership. (Yockim Rebuttal Affidavit at 2, Ex. RS-29; OWRD Ex. 1 at 81.) The stock water claim for instream livestock watering of 150 head of cattle should be allowed where the Sprague River is coextensive with these allotments, being within Allotments 135 (Tracts A and B), 566, 637, 638, and 1264/1542. Because there is no evidence on the record to the contrary, the standard rate for livestock watering is 12 gallons of water per head of livestock per day as outlined in the GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION. OWRD incorporates into this Finding of Fact #10 the portions of The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION pertaining to the standard rate for livestock watering. The rate of 12 gallons of water per head of livestock per day is consistent with OWRD's standard as set forth in Appendix A of the Preliminary Evaluation.

**Reason for Additional Finding of Fact #10:** The facts in the ALJ's Proposed Order failed to fully set forth the evidence on the record. To include a finding regarding a rate for livestock grazing.

8. **Conclusions of Law.** Within the section titled “Conclusions of Law” of the Proposed Order, Conclusions 1, 3-6, 9-11, and 16-19 are adopted without modification. Conclusions 2, 7, 8, 12, 13, 14 and 15 are modified, and Conclusions 20, and 21 are added as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

a. Conclusion 2:

For the part of the claimed place of use that is approved, the period of use for irrigation should be May 1 through October 1 of each year, as claimed.

b. Conclusion 7:

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

c. Conclusion 8:

Part of the claimed place of use has ~~been continuously~~ continued to be irrigated.

d. Conclusion 12:

Beneficial use of water on a portion 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.

e. Conclusion 13

Beneficial use of water for irrigation ~~of on~~ a portion of the claimed place of use for was not ~~developed~~ made with reasonable diligence by ~~the first~~ non-Indian ~~owners~~ successors.

f. Conclusion 14:

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.

g. Conclusion 15:

Water claimed for a portion of the claimed place of use has ~~been continuously~~ continued to be used by the first non-Indian successor and by all subsequent successors.

h. Conclusion 20:

Beneficial use of water by the method of natural overflow was made on Allotment 566 prior to the initial transfer from Indian ownership.

i. Conclusion 21:

Property within all the claimed allotments was used for the grazing of livestock since before its conveyance of Indian ownership. Therefore, the stock water claim for instream livestock watering of 150 head of cattle is allowed where the Sprague River is coextensive with these allotments, being within Allotments 135 (Tracts A, and B), 566, 637, 638 and 1264/1542. The period of use for instream livestock watering is year-round. The rate is 12 gallons of water per head of livestock per day.

**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 additional conclusions and conclusions that differ from those in the 2006 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 "~~striketrough~~" text.

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

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division*, 47 Or App 437 (1980); *Metcalf v. AFSD*, 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

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

### **Allotment 135**

A small portion of this property, which was divided into two parcels while still in Indian ownership, may have been irrigated by the Indian owners through flooding as a result of temporary dams across the Sprague River, but the amount of this irrigation, and its date, are unknown. It would have been very little, however, as most of the property in question is downstream from the dam. The first substantial evidence of irrigation of Tract A, the small southernmost of the tracts, is the 1977 Notice of Complete Application of Water to a Beneficial Use ("Form C") for which a water right application was filed in 1973, and its 1994 final proof map. ~~appears after the property had been conveyed to Charles Dixon, the second non-Indian owner.~~ Beneficial use of water for irrigation on Tract A was made with reasonable diligence. Tract A, therefore, does ~~not~~ qualify for a *Walton* right.

Tract B, ~~likewise,~~ was not subject to irrigation until 1973, when Richard Perry applied for a water right permit. The property was first conveyed out of Indian ownership before 1960, and in 1960 was transferred to the second non-Indian owner, Dale Newman. Because the chain of title is incomplete it is not possible to determine when the land was transferred out of Indian ownership. Reasonable diligence cannot be determined. Tract B, ~~also,~~ does not qualify for a *Walton* right.

### **Allotment 566**

Beneficial use of water was established prior to the initial transfer from Indian ownership, and evidenced by reference to a 5 year grazing and farming lease on an Indian Land Status report. Irrigation on this allotment ~~was~~ continued to be developed by Leroy Gienger, the first non-Indian owner, by 1960. These 104 acres, therefore, qualify for a *Walton* right.

### **Allotment 634**

Beneficial use of water for irrigation was ~~developed~~ made on this allotment by Leroy Gienger, who acquired the property from the Wolford family in 1944, 21 years after transfer from Indian ownership. The earliest evidence of beneficial use of water for irrigation is in 1950, 27 years after transfer from Indian ownership. Since the Wolfords

were not Indians, Gienger was at least the second non-Indian owner. Beneficial use of water was not made with reasonable diligence. The allotment does not, therefore, qualify for a *Walton* right.

### **Allotment 636**

The 100.1 acres of this allotment were first irrigated by Gienger Enterprises, the first non-Indian owner, in 1964, shortly after the land was transferred from Indian ownership. Beneficial use of water was made with reasonable diligence. This allotment qualifies for a *Walton* right.

### **Allotment 637**

Like Allotment 636, beneficial use of water for irrigation was developed made on this parcel, at the latest, by Gienger Enterprises the first non-Indian owner. This occurred in 1964, shortly after the land was transferred from Indian ownership. Beneficial use of water was made with reasonable diligence. The 24.4 acres of this parcel, therefore, qualify for a *Walton* right.

### **Allotments 638 and 832**

Beneficial use of water for irrigation of these allotments was not initiated prior to at a sheriff's sale, to Klamath County, the second non-Indian owner. Beneficial use of water occurred 23 years (Allotment 638) and 47 years (Allotment 832) after their initial transfer from Indian ownership.<sup>4</sup> Beneficial use of water was not made with reasonable diligence. These allotments do not qualify for a *Walton* right.

### **Allotment 1264/1542**

Irrigation of this property was initiated by Theodore Crume, the last Indian owner, and has continued to the present. The 34 acres in this property qualify for a *Walton* right.

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<sup>4</sup> As noted in the findings of fact, there is some evidence that irrigation may have occurred within 13 years of transfer from Indian ownership. Because a 13-year period is insufficient to establish reasonable diligence, it is not necessary to determine whether the evidence of irrigation after 13 years is substantial enough to support a *Walton* right.

### **Instream Livestock Watering**

As noted, no party other than Claimants addresses stock water in their contest. The evidence establishes that the property claimed in question was used for the grazing of livestock since before conveyance out of Indian ownership. Consequently, the stock water claim for instream livestock watering of 150 head of cattle should be allowed where the Sprague River is coextensive with these allotments, being within Allotments 135 (Tracts A and B), 566, 637, 638, , and 1264/1542.

**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 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 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" is 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 97. 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 an additional 7.3 acres.
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 97 is approved as set forth in the following Water Right Claim Description.

**CLAIM NO. 97**

**CLAIM MAP REFERENCE:** CLAIM # 97 MYLAR MAP (Jan. 20, 1999)

**CLAIMANT:** DONALD T. LAWLESS  
 MARLENE LAWLESS  
 LEWIS LAWLESS  
 PO BOX 1778  
 GRANTS PASS OR 97528

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

**PURPOSE OR USE:**

IRRIGATION OF 269.7 ACRES, BEING 52.6 ACRES FROM PUMP 1, 94.8 ACRES FROM PUMP 2, AND 122.3 ACRES FROM PUMP 3; AND INSTREAM LIVESTOCK WATERING OF 150 HEAD.

**RATE OF USE:**

6.7428 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

6.74 CFS FOR IRRIGATION MEASURED AT THE POINT OF DIVERSION, BEING 1.31 CFS FROM PUMP 1, 2.37 CFS FROM PUMP 2, AND 3.06 CFS FROM PUMP 3; AND

0.0028 CFS FOR INSTREAM LIVESTOCK WATERING MEASURED AT THE PLACE OF USE, NOT TO EXCEED 1800 GALLONS PER DAY.

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	May 1 - October 1
Instream Livestock Watering	January 1 - December 31

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

**THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:**

Pod Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
Pumps 1 & 2	35 S	10 E	WM	32	SE SW		4034 FEET SOUTH AND 1491 FEET EAST FROM NW CORNER, SECTION 32, T 35 S, R 10 E
Pump 3	36 S	10 E	WM	5	NW NW	4	5437 FEET SOUTH AND 1121 FEET EAST FROM NW CORNER, SECTION 32, T 35 S, R 10 E
Sprague River	35 S	10 E	WM	31	SE NW		No specific point of diversion - livestock drink directly from the Sprague River
	35 S	10 E	WM	32	SW SW		
	36 S	10 E	WM	5	NE NW	3	
	36 S	10 E	WM	5	NW NW	4	
	36 S	10 E	WM	5	SE NW		
	36 S	10 E	WM	6	SE NW		



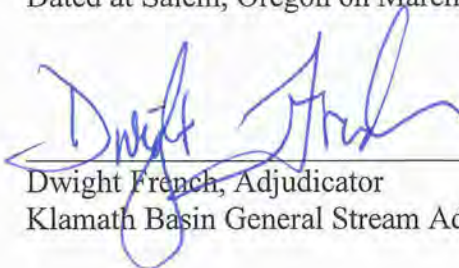
THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD
35 S	10 E	WM	31	NE NE		8.9	Pump 1
35 S	10 E	WM	31	NW NE		0.5	
35 S	10 E	WM	31	SE NE		14.3	
35 S	10 E	WM	31	SE NW		6.0	
35 S	10 E	WM	32	SW SW		15.7	
35 S	10 E	WM	32	SE SW		1.0	
36 S	10 E	WM	6	SE NW		6.2	
35 S	10 E	WM	31	NE NE		1.1	Pump 2
35 S	10 E	WM	31	NW NE		9.6	
35 S	10 E	WM	31	SW NE		40.0	
35 S	10 E	WM	31	SE NE		25.7	
35 S	10 E	WM	31	SE NW		18.4	
35 S	10 E	WM	32	SW SW		18.3	Pump 3
36 S	10 E	WM	5	NE NW	3	5.0	
36 S	10 E	WM	5	NW NW	4	39.0	
36 S	10 E	WM	5	SW NW		40.0	
36 S	10 E	WM	5	SE NW		20.0	

INSTREAM LIVESTOCK WATERING FROM THE SPRAGUE RIVER				
Twp	Rng	Mer	Sec	Q-Q
35 S	10 E	WM	31	SE NW
35 S	10 E	WM	31	NE SW
35 S	10 E	WM	31	SE SW
35 S	10 E	WM	32	SW SW
35 S	10 E	WM	32	SE SW
36 S	10 E	WM	5	NE NW
36 S	10 E	WM	5	NW NW
36 S	10 E	WM	5	SE NW
36 S	10 E	WM	6	NE NW
36 S	10 E	WM	6	SE NW

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
 Dwight French, Adjudicator  
 Klamath Basin General Stream Adjudication