

**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
DUANE MARTIN)	DETERMINATION
_____)	
)	Water Right Claim 114

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 114 (Claimant: DUANE MARTIN) and its associated contests (3106, 3490, 3758, and 4145) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 225.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 114 on March 23, 2006.
3. Exceptions were filed to the Proposed Order within the exception filing deadline by Duane Martin.
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 114. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.6, A.7, and A.8, 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 "Issues" is adopted in its entirety.
 - c. The "Evidentiary Rulings" is adopted in its entirety.
 - d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.6, below.
 - e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.7, below.

- f. The “Opinion” is adopted with modifications, as set forth in Section A.8, 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 114. Consistent with Sections A.6, A.7 and A.8, below, the outcome of the Order has been modified to recognize a right for irrigation on an additional 45.6 acres.

6. **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 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) 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) On or before January 31, 1991, Duane Martin (Claimant) filed a Statement and Proof of Claim as a non-Indian successor to a Klamath Indian Allottee for water from the Sprague River, a tributary of the Williamson River, which is a tributary of the Klamath River. His claim is No.114 for an Indian reserved right for ~~practicably irrigable~~ aereage irrigation of 781.4 acres from three points of diversion with a season of use April 1 through October 31. (OWRD Ex. 1 at 1-7.) His claim consists of 13 allotments he owns, which have been consolidated under Claimant’s ownership after his purchase in 1987 or 1988. (Book Direct at 5, 8; Ex. U2; Ex. C56 at 9.) All the land included in this claim is within the former boundaries of the Klamath Indian Reservation. All the land included in Claim 114 was allotted by the United States to members of the Klamath Tribes. (Book Direct at 5.) The location of the claim is detailed in OWRD Ex. 1 at ~~6-7~~ 70-71.

Reason for Modification: To correct and provide additional citations to the record; using evidence on the record, to provide more specific information with reference to what was claimed.

(2) The claimed purposes is irrigation for pasture and grass hay. ~~The claim is for less than 1.80 acre-feet per acre for irrigation. (Book Direct Testimony at 4 OWRD Ex. 1 at 1.)~~ Claimant has state water rights on the majority of the claimed lands, with priority dates of 1921 (Permit No. 5184 from Whiskey Creek), 1927 (Permit No. 7908 from the Sprague River), ~~or~~ and 1951 (Permit No. 21236 from the Sprague River) for surface water rights, and 1947 (Permit U-216) or 1948 (Permit U-254) for ground water rights. (OWRD Ex. 1 at 13-18, Ex. U22-U24.) Only two of the water right permits are for irrigation from the Sprague River, and were submitted in abstract form to accompany the Statement and Proof of Claim. (OWRD Ex. 1 at 8, 9, 13, 15.) Of these, only Permit No. 21236 specified any rate and duty, being 1/40 of one cfs for each acre irrigated, and 3.0 acre-feet per acre for each acre irrigated during the irrigation season. (OWRD Ex. 1 at 13, 15.) This provides the only evidence of the claimed rate and duty of water. Claimant seeks the reservation's priority date for his allotments. (OWRD Ex. 1 at 13 to 19 1, 4.) ; ~~Book Direct, at 15 to 17 Ex. U22 U23.~~)

Reason for Modification: To correct and provide additional citations to the record; using evidence on the record, to provide more specific information with reference to what was claimed; 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 the claim is for less than 1.80 acre-feet per acre was stricken because it is not supported by a preponderance of the evidence on the record; furthermore, no such statement is found in Book's Direct Testimony at 4.

(3) Claimant's claim is based in good part on natural overflow of the Sprague River on his allotments. (Martin Direct at 3-5; Ex. C56 at 21-28, 62-64, 68-72.) He also has asserted that artificial irrigation in his allotments was developed by the first non-Indian owners and the developed irrigation has been continuous since. In addition to natural overflow, the historic artificial irrigation, prior to development of the existing system, was supplied by a ditch diverting water from Whiskey Creek, on a portion of the claimed area, and a pump and ditch diverting from the Sprague River in Allotment 426. Two Six wells were also developed in the mid-1940s, and used for irrigation to on part of the claimed area. (Book Direct at 5, Ex. U22-U24.)

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 the last sentence, two wells was corrected to

six wells, because the finding that only two wells were developed for irrigation on part of the claimed area is not supported by a preponderance of the evidence on the record.

(4) Claimant's claim covers 13 allotments along the south side of the Sprague River in Range 11 East, Township 36 South. Irrigation in this area occurred in three areas—land east of Council Butte in Sections 10 and 11 (“east section,” see Book Direct, Ex. U15), land in Sections 7 and 18 (“west section,” see Book Direct, Ex. U16), and land in Sections 8 and 9 (“middle section”, see Book Direct, Ex. U17). (Book direct at 5.)

(5) The claim in the “east section” is for 152.9 acres in two allotments from Diversion Point No. 3 on the Sprague River. It is about 1.5 miles upstream of the “middle section” of the claim and is not contiguous with the other sections. (Ex. U2; OWRD Ex. 1 at 70-71.) The “east section” is subject to natural overflow from the Sprague River (Martin Direct at 3-5, Ex. C56 at 21-28) and is covered by a state water right from Whiskey Creek with a priority date of 1921. (OWRD Ex. 1 at 17-18.) ~~The Whiskey River~~ Creek joins the Sprague River about one mile upstream from the “east section.” Early development of the “east section” was supplied with water diverted from Whiskey Creek. Irrigation occurred along the Creek prior to 1923. (Book Direct at 17-18.)

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 correct a scrivener's error in the name of Whiskey Creek.

(6) The claim in the “west section” is for 284.3 acres in six allotments from Diversion Point Nos. 1 and 2 on the Sprague River. (Ex. U2; OWRD Ex. 1 at 70-71.) Portions of this section are subject to natural overflow from the Sprague River (Martin Direct at 3-5; Ex. C56 at 68-72) and were irrigated ~~by a~~ under the authority of a 1927 surface water right from the Sprague River and supplemented with a 1948 ground water rights. (Book Direct at 18, Ex. U22; OWRD Ex. 1 at 89.)

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.

(7) The claim in the “middle section” is for 344.2 acres in five allotments from Diversion Point No. 2 on the Sprague River. (Ex. U2; OWRD Ex. 1 at 70-71.) Portions of this section are subject to natural overflow from the Sprague River (Martin Direct at 3-

5; Ex. C56 at 62-64, 68-72) and were developed for irrigation in the 1940s using water supplied from ~~with one of~~ the Drew wells and a diversion ~~from~~ on the Sprague River. The Drew wells have a 1947 priority date, and The Sprague diversion has a 1951 water right, which was issued on April 30, 1954, for primary irrigation and for supplemental irrigation on lands otherwise irrigated by the Drew wells. (Book Direct at 18, Ex. U24; OWRD Ex. 1 at 90-91.)

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.

(8) The prior ownership, ~~developed~~ beneficial use of water for irrigation, and water priority dates of the allotments are summarized as follows:

Allotment 279 (Sect. 17, T. 36 S, R. 11 E., N½ NE¼, N½ NW¼, "middle section")

Acres 12.2

Allottee: Roxie Barkley (Rosie)

Conveyed to her in 1910. (Ex. U4 at 3; Ex. C3.)

Conveyed to her heir, Clifford Barkley, December 15, 1955. (OWRD Ex. 1 at 102.)

Conveyed from Barkley's heir, Clifford Barkley, to Pierre Dick on December 19, 1955. (OWRD Ex. 1 at 104-105.) Pierre Dick is not listed on the Klamath Tribe Final Roll published in the 1957 Federal Register (Ex. U9).

Conveyed from Dick to Frank Goularte in 1958. (OWRD Ex. 1 at 106-107.)

A Certificate of Appraisalment (from an onsite inspection made April 19, 1955) indicates irrigated and/or irrigable acreage within Allotment 279 while under Indian ownership; 140 acres were characterized as agricultural, and 20 acres as grazing. (Ex. C82.)

The ~~irrigation of the~~ 12.2 acres claimed on this allotment appear irrigated from the ditch crossing the northwest corner of the allotment in aerial photos in 1960, after the purchase by Goularte. (Book Direct at 31, Ex. U3.)

Beneficial use of water from the Sprague River was made on this parcel within five years of transfer from Indian ownership.

The point of diversion (POD 1) for this parcel is located in the SW¼ SE¼ Section 7, Township 35 S, Range 11 E, W.M. The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of 3.0 acre-feet per acre, from April 1 through October 31, with a priority date of October 14, 1864.

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.

Allotment 280 (Sect. 8, T. 36 S, R. 11 E., SE¼, "middle section")

Acres 116.1

Allottee: William Barkley

Conveyed to Barkley in 1917. (Ex. U4 at 12; Ex. C112.) Conveyed from William Barkley to non-Indian Charles E. Drew on April 28, 1919. (Id.) On May 27 20, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company (OCERC). (Ex. C59-C60; Book Rebuttal at 2.)

The right of way agreement between Drew and OCERC stipulated that the railway company, upon construction of the railway, was to provide suitable passage for cattle under the railroad and install pit cattle guards unless the right of way became fenced. (Ex. C59-C60.) This occurred eight years after the land passed out of Indian ownership.

Based on permits ~~granted~~ with priority dates in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and 1951 (Permit 21236 to Drew to divert surface water), wells were developed for irrigation, and an irrigation system that utilized water from the Sprague River development started was developed. (Book Direct at ~~30~~, 23, 28, and 31; Ex. U3; OWRD Ex. 1 at 90-91.) Application of water under the permit could not have occurred until at least twenty-four years following transfer from Indian ownership.

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

Reason for Modification: To provide additional citations to the record; to correct the date of the right of way deed with the railroad company; 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 281 (Sect. 9, T. 36 S, R. 11 E., SW¼, “middle section”)

Acres 22.4

Allottee: Hattie Barkley

Conveyed to her in 1910. (Ex. U6 at 1; Ex. C79.)

Conveyed from US to Charles Drew in 1927. (Ex. U4 at 14; Ex. C79.)

Charles C. E. Drew is listed as a non-Indian purchaser of in Allotment 413 and so designated by Claimant. (Ex. U11 at 3.) The next owner is unknown.

Based on permits granted with priority dates in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and 1951 (Permit 21236 to Drew to divert surface water), irrigation development and application of water to beneficial use did not occur until at least twenty-four years following transfer from Indian ownership. ~~started.~~ (Book Direct, at ~~30~~ 23; Ex. U3; U24; OWRD Ex. 1 at 90-91)

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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

Allotment 413 (Sect. 18, T. 36 S, R. 11 E., N½ NE¼, “west section”)

Acres 78.8

Allottee: Julia Jefferson

Conveyed to her in 1910. (Ex. U6 at 2.) She died on July 2, 1923. (Ex. U6 at 4.)

Conveyed from US to non-Indian Charles Drew on October 19, 1920. (Ex. U6 at 3; U-11 at 3; Ex. C75.)

Conveyed from Charles Drew to Fred Haworth on September 14, 1927. (Ex. C113.)

The first irrigation development occurred after the Haworth water rights application was filed in 1927. A certificate based on this application was issued on November 28, 1930. This means that beneficial use was made sometime between the filing of the application and the issuance of the certificate. Beneficial use was therefore made between seven and ten years after it passed from Indian ownership. (Book Direct at 29; OWRD Ex. 1 at 89.)

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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 423 (Sect. 8, T. 36 S, R. 11 E., SW¼, "middle section")

Acres 144.6

Allottee: Sarah John

Conveyed to her in 1910. (Ex. U6 at 5.)

Conveyed from US to non-Indian Luke Walker in 1919. (Book Direct, Ex. U4 at 13; Ex. C77-C78; OWRD Ex. 1 at 96; Ex. U11 at 7.)

On May 20, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company (OCERC). (Ex. C59-C60; Book Rebuttal at 2.) The right of way agreement between Drew and OCERC stipulated that the railway company, upon construction of the railway, was to provide suitable passage for cattle under the railroad and install pit cattle guards unless the right of way became fenced. (Yockim Affidavit, Ex. 59-60.) This occurred eight years after the land passed out of Indian ownership.

Irrigation development using ground water occurred in 1947 (Permit U-216 to Charles Drew for five groundwater wells), ~~and~~ In 1951 an irrigation system that utilized water from the Sprague River was developed (Permit 21236 to Drew to divert surface water). (Book Direct at ~~30~~ 31; Ex. U3; OWRD Ex. 1 at 90-91.) Application of water under the permit could not have occurred until at least thirty-two years following transfer from Indian ownership.

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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 424 (Sect. 8, T. 36 S, R. 11 E., S½ N½, “middle section”)

Acres 48.9

Allottee: Alonzo Weeks

Conveyed to him in 1910. (Ex. U6 at 6.)

Conveyed from US to non-Indian Charles Drew in 1927. (Ex. U4 at 10; Ex. C89.)

Irrigation development using ground water occurred in 1947 (Permit U-216 to Charles Drew for five groundwater wells), ~~and~~ In 1951 an irrigation system that utilized water from the Sprague River was developed (Permit 21236 to Drew to divert surface water). (Book Direct at ~~30~~ 31; Ex. U3; OWRD Ex. 1 at 90-91.) Application of water to beneficial use did not occur until at least twenty-four years following transfer from Indian ownership.

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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

Allotment 426 (Sect. 18, T. 36 S, R. 11 E., N½ NW¼, SW¼ NW¼, “west section”)

Acres 67.2

Allottee: Duffie Tupper

Conveyed to him in 1910 (Ex. U6 at 7; Ex. C2.)

Conveyed from US to Watson “Duffy” Tupper in 1918. (Ex. U6 at 8, Ex.U4 at 2; Ex. C2, Ex. C62.)

Conveyed from non-Indian Charles Drew to Fred Haworth on September 14, 1927. (Ex. C113.)

There is insufficient evidence on the record of the date of conveyance from Indian ownership. Irrigation development using water from the Sprague River started with the 1927 Haworth water right. (Book Direct at 29; Ex. U3; OWRD Ex. 1 at 89.) Based on the last known date of ownership by a Klamath Indian (1918), as many as nine years could have passed following transfer of the parcel from Indian ownership until development began, and as many as twelve years could have passed until water was applied to

beneficial use (based on the issuance of a certificate for this application on November 28, 1930).

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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 428 (Sect. 18, T. 36 S, R. 11 E., E½ SW¼, SE¼ SW¼, "west section")

Acres 0.6

Allottee: Duffie Tupper

Conveyed to him as a trust patent in 1910 (Ex. U6 at 9; Ex. C61.)

Conveyed from USA to Watson Duffy Tupper, an heir of Duffie Tupper, as a fee patent in 1927. (Ex. U6 at 10.)

Conveyed from US to Bly Lumber Co. ~~in~~ on January 25, 1957 (OWRD Ex. 1 at 100 110), to Esther ~~Duffy~~ Tupper Wilson (a Klamath Indian) ~~in~~ on August 29, 1957 (OWRD Ex. 1 at 111), and to ~~Martin~~ Marlin Dale Wilson ~~in~~ on March 26, 1959 (OWRD Ex. 1 at 112). Marlin Dale Wilson is listed on the Klamath Tribe 1957 Final Roll. ~~but no~~ Marlin Dale Wilson. (Ex. U9.)

This allotment received water on the claimed area of 0.6 acres from the Hess Wells, put in place in the 1950s. (Book Direct at 30; Ex. U3.)

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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 names "Ester Duffy Wilson" and "Martin Dale Wilson" were changed/corrected to reflect the names as they appear on the deeds; a BARGAIN AND SALE DEED dated August 29, 1957 lists a Esther Tupper Wilson as the grantee (OWRD Ex. 1 at 111), and a DEED, COUNTY OF KLAMATH, VOL 311, PAGE 21, dated March 26, 1959 (OWRD Ex. 1 at 112) lists a Esther Tupper Wilson as the grantor conveying the property to a Marlin Dale Wilson.

Allotment 439 (Sect. 7, T. 36 S, R. 11 E., S½ SE¼, “west section”)

Acres 31.5

Allottee: Bill Wild (Wild Bill Squire)

Conveyed to him as a trust patent in 1910. (Ex. U6 at 40 11.)

Conveyed to Fred Haworth as a fee patent in 1927. (Ex. U6 at 44 12; Ex. C11.)

Haworth is not listed on the Klamath Tribe 1957 Final Roll (Ex. U9) and Claimant considers him to be the first non-Indian owner. (Ex. U10.) Haworth owned it until at least 1956.

A Certificate of Appraisement (from an onsite inspection made on January 25, 1926) shows that, while under Indian ownership, Allotment 439 was being used for grazing; 80 acres were characterized as grazing land with wire fence improvements in place. (Ex. C68.)

At the time of conveyance from Indian ownership, Haworth filed for Sprague River water rights and claimed land on this and Allotment 440 as part of the area served. He received state water Permit 7908 and after perfecting the permit, Certificate 8896 was issued. (Book Direct at 21; Ex. U3; OWRD Ex. 1 at 89.) Book testified that except for 27.1 acres, aerial photographs taken in 1940 or 1941, 1953, and 1960 show no irrigation, or limited irrigation, on this allotment. (Book Direct at 26, 27, 30; Exs. U29-U32.) ~~these two allotments were not continuously irrigated after the Haworth irrigation system was developed, based on aerial photographs from 1940 to 1969.~~ After 1969, this area received water from the system in Section 8, with water diverted from Diversion Point No. 2, consistent with the current operation on the claim. (Book Direct at 21, 30, ~~Ex. U3; OWRD Ex. 1 at 89.~~)

Beneficial use of water from the Sprague River by the method of natural overflow was made on this parcel prior to transfer from Indian ownership.

The points of diversion for this parcel are located in the SW¼ SE¼ Section 7, Township 35 S, Range 11 E, W.M. (POD 1) for 3.6 acres, and the NW¼ SE¼ Section 8, Township 35 S, Range 11 E, W.M. (POD 2) for 27.9 acres. The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of 3.0 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.

Allotment 440 (Sect. 7, T. 36 S, R. 11 E., N½ SE¼, "west section")

Acres 28.4

Allottee: Minnie Smithson

Conveyed to her as a trust patent in 1910. (Ex. U6 at 13; Ex. C70.)

A fee patent conveyed from the US to non-Indian Fred Haworth in 1927. (Ex. U4 at 4; Ex. C74.) Haworth owned it until at least 1956.

A Certificate of Appraisalment (from an onsite inspection made on February 9, 1921) shows that, while under Indian ownership, Allotment 440 was being used for grazing, and that there were established fences. (Ex. C71.) A subsequent inspection made on January 25, 1926 characterized 80 acres as grazing land. (Ex. C73.)

At the time of conveyance from Indian ownership, Haworth filed for Sprague River water rights and claimed land on this and Allotment 439 as part of the area served. He received state water Permit 7908 and after perfecting the permit, Certificate 8896 was issued. (Book Direct at 21; Ex. U3; OWRD Ex. 1 at 89.) Book testified that, except for 27.1 acres, aerial photographs taken in 1940 or 1941, 1953, and 1960 show no irrigation, or limited irrigation, on this allotment. (Book Direct at 26, 27, 30; Exs. U29-U32.) ~~these two allotments were not continuously irrigated after the Haworth irrigation system was developed, based on aerial photographs from 1940 to 1969.~~ After 1969, this area received water from the system in Section 8, with water diverted from Diversion Point No. 2, consistent with the current operation on the claim. (Book Direct at 21, 30, ~~Ex. U3; OWRD Ex. 1 at 89.~~)

Beneficial use of water from the Sprague River by the method of natural overflow was made on this parcel prior to transfer from Indian ownership

The point of diversion (POD 2) for this parcel is located in the NW¼ SE¼ Section 8, Township 35 S, Range 11 E, W.M. The claimed water use on this property is at a rate of 1/40 of one cfs per acre, with a duty of 3.0 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.

Allotment 865 (Sect. 10, T. 36 S, R. 11 E., SE¼, "east section")

Acres 72.9

Allottee: Horace Taylor

Conveyed to him as a trust patent in 1910. (Ex. U6 at 15; Ex. C92.)

A fee patent conveyed from the USA to Charles Snelling in 1914. (OWRD Ex. 1 at 97; Ex. C92.) The transaction is listed as "Indian Lands Sold to White Men." (Ex. U11 at 6.) and Claimant considers Snelling to be the first non-Indian owner of the allotment. The property was later conveyed to Marvin Cross (OWRD Ex. 1 at 98) and then to Charles E. Drew (OWRD Ex. 1 at 99). No evidence that Snelling or Cross, the first two non-Indian owners, developed an irrigation system on this allotment.

Although this allotment is also located at the end of the Turner-George Ditch, which diverted water from Whiskey Creek, with a priority date of 1921- (Book Direct at 28-29; Ex. U3), the claimed source of water for Claim 114 is the Sprague River. There is no evidence on the record of beneficial use of water from the Sprague River being made with reasonable diligence after transfer from Indian ownership. Irrigation from Whiskey Creek on this allotment started after 1921, as developed by Charles E. Drew. (Book Direct at 28-29.) The earliest evidence of development of irrigation from Whiskey Creek comes from a Notice of Prosecution of Work with Diligence, dated September 22, 1922. In the document, Mr. Drew states that he "enlarged old ditch and constructed new ditch" between August 15, 1921, and August 15, 1922, in order to serve the property. (Book Direct at Ex. U14.) Only a portion of the claimed area has been irrigated since development, about 100 acres from the old ditch and 60 acres from the Sprague River. (Book Direct at 28-29; ~~Ex. U3.~~)

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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 867 (Sect. 11, T. 36 S, R. 11 E., W½ SW¼, “east section”)

Acres 80.0

Allottee: Emma Taylor

Conveyed to her as a trust patent in 1910. (Ex. U6 at 16.)

A fee patent conveyed from the US to B.S. Grigsby in 1914. (OWRD Ex. 1 at 100; Ex. U4 at 6; Ex. C6, Ex. C93.) The transaction is listed as “Indian Lands Sold to White Men.” (Ex. U11 at 6.) and Claimant considers Grigsby to be the first non-Indian owner of the allotment. In 1914, the property was conveyed from Grigsby and Emma Grigsby to Charles Snelling. No evidence that Snelling or Grigsby, the first two non-Indian owners, developed an irrigation system on this allotment. (OWRD Ex. 1 at 101.)

Although this allotment is located at the end of the Turner-George Ditch, which diverted water from Whiskey Creek, with a priority date of 1921- (Book Direct at 28-29; Ex. U3), the claimed source of water for Claim 114 is the Sprague River. There is no evidence on the record of beneficial use of water from the Sprague River being made with reasonable diligence after transfer from Indian ownership. Irrigation from Whiskey Creek on this allotment started after 1921, as developed by Charles E. Drew. (Book Direct at 28-29; ~~Ex. U3.~~) The earliest evidence of development of irrigation from Whiskey Creek comes from a Notice of Prosecution of Work with Diligence, dated September 22, 1922. In the document, Mr. Drew states that he “enlarged old ditch and constructed new ditch” between August 15, 1921, and August 15, 1922, in order to serve the property. (Book Direct at Ex. U14.)

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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 1562 (Sect. 18, T. 36 S, R. 11 E., S½ NE¼, SE¼ NW¼, NE¼ SW¼, “west section”)

Acres 77.8

Allottee: Samuel Clinton

A fee patent conveyed from the US to Samuel Clinton ~~in~~ on March 25, 1918. (Ex. U4 at 1.) The property was then conveyed to B.E. Wolford ~~in~~ on June 18, 1918. (Ex. U5 at ¶ 2.) B.E. Wolford is not listed on the Klamath Tribe Final Roll and Claimant considers Wolford the first non-Indian owner of the allotment. Wolford conveyed the property to John and Emma Jackson ~~in~~ on August 7, 1918. (Ex. U5 at ¶ 1.) A John Jackson is listed on the 1914 census of the Klamath Tribe. Charles and Iva Drew conveyed the property to Fred Haworth on September 14, 1927. (Ex. C113.) There is a broken chain of title between the Jacksons and the Drews.

Development of six acres of this allotment occurred in conjunction with the 1927 Haworth water right. Given the broken chain of title between the Jacksons and the Drews, August 7, 1918 is the last known date of Indian ownership. As many as nine years could have passed following transfer of the parcel from Indian ownership until development began, and as many as twelve years could have passed until water was applied to beneficial use (based on the issuance of a certificate for this application on November 28, 1930). Additional land was brought into irrigation after 1947, some 30 years after conveyance from Indian ownership. (Book Direct at 30; Ex. U3; OWRD Ex. 1 at 89.)

Beneficial use of water from the Sprague River with reasonable diligence has not been demonstrated on this parcel.

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.

(9) USA Witness Dale Book has a master’s degree in civil engineering, with specialty in water resources planning and management. He has been self-employed as a water rights analyst since 1984. (Ex. U1.) He is qualified as an expert pursuant to Rule 702 in civil engineering and aerial photography interpretation. (Stipulated record of the hearing on May 4, 2005, cross-exam of Book.)

(10) Based on his professional opinion and expertise, Book makes the following factual conclusions, which are supported by a preponderance of the evidence, in reference to Claimant's claim, ~~pursuant to various *Walton* holdings:~~

~~653.7 acres in Allotments 279, 280, 281, 413, 423, 424, 865, 867, and 1562 did not meet the *Walton* standards because they were not developed by original Indian allottees or *first* non-Indian owners.~~

~~32.8 acres in allotments 439 and 440 may have met the initial *Walton* criteria, but were not in continuous use.~~

~~The first conveyance to a non-Indian owner was not established with respect to 67.2 acres in Allotment 426, did not meet the *Walton* standards because the date of the first conveyance to a non-Indian owner was not established.~~

27.1 acres in Allotments 439 and 440 meet the *Walton* standards. Allotments 439 and 440 passed out of Indian ownership in 1927 and have been authorized for irrigation from the Sprague River with a state water right since 1930. Except for 27.1 acres, aerial photographs taken in 1940 or 1941, 1953, and 1960 show no irrigation, or limited irrigation, on Allotments 439 and 440. (Book Direct at 26, 27, 30; Exs. U29-U32.) The season of use is April 1 through October 31, as requested by Claimant. (Book Direct at 32; Affidavit and Rebuttal of Book at 3.)

Reason for Modification: The ALJ qualified Book as an expert in civil engineering and aerial photography, and his testimony pertaining to these subjects is entitled to significant weight. Book also gave his opinions as to whether the claimed lands were eligible for *Walton* rights. This involves an application of fact to law, and is the province of the decision maker, not the witness. The Department has removed the ALJ's incorporation of Book's "findings" with respect to eligibility for *Walton* rights, since these constitute conclusions of law rather than statements of fact. In addition, the ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

(11) Book further opined the following regarding duty of water:
For the claim area covered by Allotments 279, 413, 426, 428, 439, 440, 865, 867, and 1562, Book's testimony supports the application of water not to exceed 3.5 acre-feet/acre. the water diverted from the *Walton* right should be limited such that the total water delivered to the approved acreage, in combination with water delivered from the well, does not exceed 3.5 acre-feet/acre, the standard duty for the Klamath Basin. (Book Direct at 33.) The Claimant claimed only 3.0 acre-feet per acre.

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record. In addition, a duty of 3.5 acre-feet per acre as opined by Book is not supported by a preponderance of the evidence on the record. Furthermore, the method of determining the duty of surface water use in combination with groundwater use involves an issue of law, not fact, and is not the appropriate subject of a finding of fact.

(12) Book finally opined the following regarding rate of diversion:

The rate of discharge should be based on the measured pumping rate for the facilities in place documented in the record at OWRD Ex. 1 at 69. According to Book, the rate should be prorated to the amount of acreage approved for the *Walton* right. (Book Direct at 33.) However, for any of the parcels where the elements of a *Walton* claim are established, the rate should be based on 1/40 of one cfs per acre as claimed, not to exceed the claimed pumping rate.

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record. In addition, the non-standard method of determining rate by prorating acreage according to a measured pumping rate involves an issue of law, not fact, and is not the appropriate subject of a finding of fact.

7. **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 "~~striketrough~~" text):

1. Beneficial use of water by the method of natural overflow ~~does not constitute~~ is a valid basis for a *Walton* water right. However, except for Allotments 439 and 440, the evidence on the record does not establish beneficial use of water by the method of natural overflow.

2. Claimant has not provided sufficient title information to establish a *Walton* water right in Allotment 426.

3. Claimant has not provided sufficient evidence of the reasonably diligent development and/or continuous use of beneficial use of water for irrigation needed to establish a *Walton* water right in Allotments ~~279~~, 280, 281, 413, 423, 424, 428, 865, 867, and 1562. and 32.8 acres in allotments 439 and 440. Claimant has established a *Walton* water right for ~~27.1~~ 59.9 acres in Allotments 439 and 440, and 12.2 acres in Allotment 279.

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 Proposed Order.

8. **Opinion.** The Proposed Order's "Opinion" section is modified as described herein.

OWRD has removed the ALJ's discussions regarding the elements of a *Walton* claim, including the first non-Indian purchaser rule, and regarding natural overflow and subirrigation of water as a basis for a *Walton* claim. The deleted paragraphs are noted below as "*****". In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

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

Claimant has the burden of establishing his claim for a *Walton* water right by a preponderance of the evidence. ORS 539.110;¹ ORS 183.450(2);² OAR 690-028-0040(1).³ See also *Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). As explained below, Claimant did not meet this burden, except for Allotment 279 and a portion of Allotments 439 and 440.

¹ " * * * The evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest. The burden of establishing the claim shall be upon the claimant whose claim is contested."

² " * * * The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position."

³ "Each claim or registration statement for existing beneficial uses shall be compared to all information submitted for consistency regarding settlement of the area and general development of projects. The burden of proof to establish a claim by a preponderance of relevant evidence rests on the claimant."

1. Natural flooding/ natural overflow

There is no dispute that the land in Claim 114 was formerly part of the Klamath Indian Reservation, that the land was allotted to Klamath tribal members, and that the land was transferred to non-Indians. Claimants assert a water right of ~~less than 1.8 acre-fee per acre~~ for irrigation of 781.4 acres used for grass hay and pasture for livestock, based in good part on natural overflow of the Sprague River. As evidenced by permit abstract No. 21236 submitted by the Claimant to accompany the Statement and Proof of Claim, the claimed rate is 1/40 of one cfs per acre and duty is 3.0 acre-feet per acre during a season of use April 1 through October 31.

2. Sufficient title information

Claimant has not provided sufficient title information to establish a *Walton* water right in Claimant's Allotment 426. Specifically, Claimant has provided no evidence of the date of the first non-Indian purchase of the allotment, ~~and the purchaser's name.~~ Therefore, the Claimant has not established that ~~the additional~~ beneficial use of water use was developed made with reasonable diligence, ~~by the first purchaser of land from an Indian owner or that, after initial development, the water claimed must have been continuously used by the first non-Indian successor and all subsequent successors.~~

3. Sufficient information of the ~~development or continuous use~~ beneficial use of water with reasonable diligence

The evidence for some of the allotments raises a question of ~~diligent development~~ beneficial use of water being made with reasonable diligence. Claimant argues that there should be ~~no time limit~~ a reasonable time period without unreasonable delay within which to exercise due diligence. The United States argues ~~more persuasively~~ that, because there is no applicable federal law, state law should be consulted and that, based on state law, five years is a reasonable time limit, unless Claimant shows good cause reasons for a longer period of time. ~~Oregon has adopted this time limit in~~ Caselaw has established that five years is sufficient for reasonably diligent development in at least some factual circumstances. See *Seaward v. Pacific Livestock Co.*, 49 Or 157, 160-162 (1907). In addition, five years is the default period for application of water to a beneficial

~~use under the Water Rights Act, unless an extension is granted. ORS 537.230(1), for pre 1909 claims and it is the time limit used by Oregon in ORS 537.230(1)⁴ for completion of works necessary to put water to beneficial use. Moreover, five years of non-use creates a “rebuttable presumption of forfeiture” of a water right. However, the period for reasonably diligent development is ultimately a fact-dependent determination. The time period to make beneficial use of water with reasonable diligence for a *Walton* claim is that which does not require unusual or extraordinary effort, absent extraordinary circumstances. ORS 540.610(1) (Oregon Administrative Rule 690-028-0045).⁵ Therefore, generally five years is considered ~~the~~ an appropriate time length for reasonable due diligence, absent evidence of extenuating circumstances, ~~good cause reasons to rebut this presumption~~. Claimant offered no evidence of ~~good cause reasons to demonstrate that more than five years was reasonably necessary to put water to beneficial use for any of the area claimed. As a result, the determinations made below as to diligent development on individual claimed allotments are based on a five-year development period.~~ rebut this presumption. Any evidence of diligence by subsequent owners is only relevant regarding continuous use. *Walton III* at 402.~~

Based on ~~Book’s expert opinion~~ evidence on the record, Claimant has failed to provide sufficient evidence of the development beneficial use of water by the Indian seller, or beneficial use of water having been made with reasonable diligence by ~~the first non-Indian purchaser within five years of purchase~~ successors for portions of the claim. Claimant ~~has also failed in some cases to establish the continuous use of water since development~~ to establish a *Walton* water right on the basis of water use made with reasonable diligence in Allotments 279, 280, 281, 413, 423, 424, 428, 865, 867 and 1562.

⁴ ~~“The construction of any proposed irrigation or other work shall be prosecuted with reasonable diligence and be completed within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval.”~~

⁵ ~~“Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right.”~~ 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 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.

~~and 32.8 acres in allotments 439 and 440.~~ Claimant has established a *Walton* water right for ~~59.9~~ 31.5 acres in Allotments 439, ~~and~~ 28.4 acres in Allotment 440, ~~and~~ 12.2 acres in Allotment 279. Each allotment is considered separately below.

Allotment 279 (middle section)

Beneficial use of water was made on this parcel within five years of transfer from Indian ownership. The first non-Indian purchaser was Pierre Dick, on December 19, 1955, and he conveyed it to Frank Goularte in 1958. ~~There is no evidence of reasonable development of irrigation by Dick, the first non-Indian purchaser.~~ The artificial irrigation of the 12.2 acres on this allotment began by 1960, in 1958 after the purchase by Goularte, the second non-Indian purchaser. This constitutes reasonably diligent development of the acres claimed within Allotment 279.

Allotment 280 (middle section)

On May ~~27~~ 20, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company. The terms of the contract suggest that grazing may have been occurring on this allotment at the time the deed was issued. Beneficial use of water under Permit 21236 (issued in 1951 for diversion from the Sprague River) could not have occurred until at least twenty-four years following transfer from Indian ownership. ~~Based on permits granted in 1947 (Permit U-216 to Drew for five groundwater wells) and 1951 (Permit 21236 to Drew to divert surface water), groundwater irrigation started at least 20 years after purchase by the Drews. It is unnecessary to determine whether the right of way deed is sufficient, on its own, to establish evidence of beneficial use of water. Even assuming that it did, the eight-year gap between transfer from Indian ownership and the issuance of the deed is too long under the facts in this case to establish beneficial use of water with reasonable diligence with respect to the *Walton* claim. This irrigation was not diligent development even if groundwater wells are considered development.~~

Allotment 281 (middle section)

In 1927, non-Indian Charles Drew purchased the property from the allottee. ~~Based on~~ A ~~permits granted in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and~~ was issued in 1951 (Permit 21236 to Drew to divert surface water from the

~~Sprague River), twenty-four years after transfer from Indian ownership. groundwater irrigation started about 20 years after purchase. This irrigation was not diligent development, does not demonstrate beneficial use of water with reasonable diligence with respect to the Walton claim, even if groundwater wells are considered development.~~

Allotment 413 (west section)

~~The first non-Indian purchaser was Charles Drew, on October 19, 1920. The first irrigation development occurred after the Haworth water rights application was filed in 1927, seven years after it passed from Indian ownership. As explained above, five years is a reasonable time limit for due diligence, unless Claimant establishes good cause reasons to rebut this presumption. Claimant has not claimed that the time limit should be extended due to good cause reasons beyond the purchaser's control. Therefore, beneficial use of water for irrigation was not diligently developed made with reasonable diligence by Drew, the first non-Indian purchaser after transfer from Indian ownership.~~

Allotment 423 (middle section)

~~The first non-Indian purchaser was Luke Walker, in 1919. On May 27, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company. The terms of the contract suggest that grazing may have been occurring on this allotment at the time the deed was issued. Beneficial use of water under Permit 21236 (issued in 1951 for diversion from the Sprague River) could not have occurred until at least thirty-two years following transfer from Indian ownership.~~

~~It is unnecessary to determine whether the right of way deed is sufficient, on its own, to establish evidence of beneficial use of water. Even assuming that it did, the eight-year gap between transfer from Indian ownership and the issuance of the deed is too long, under the facts in this case, to establish beneficial use of water with reasonable diligence.~~

~~Based on permits granted in 1947 (Permit U 216 to Charles Drew for five groundwater wells) and 1951 (Permit 21236 to Drew to divert surface water), groundwater irrigation started about 28 years after purchase. This irrigation, eight was not diligent development even if groundwater wells are considered development. Moreover, the development was not by Luke Walker, the first non-Indian purchaser.~~

Allotment 424 (middle section)

The first non-Indian purchaser was Charles Drew, in 1927. ~~Based on A permits granted in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and was issued in 1951 (Permit 21236 to Drew to divert surface water from the Sprague River), twenty-four years after transfer from Indian ownership, groundwater irrigation began about 20 years after purchase. This irrigation was not diligent development, does not demonstrate beneficial use of water with reasonable diligence, even if groundwater wells are considered development.~~

Allotment 426 (west section)

As explained above ~~in section two~~, Claimant has the burden of establishing his claim and he has not provided sufficient evidence of the date of conveyance from Indian ownership and the purchaser's name. Irrigation development started with the 1927 Haworth water right, but without the required evidence, Claimant cannot establish whether ~~the first non-Indian purchasers developed this~~ made beneficial use of water for irrigation with reasonable diligence. ~~or whether the development was diligent or continuously maintained.~~

Allotment 428 (west section)

This allotment was conveyed from USA to Watson Duffy Tupper, an heir of Duffie Tupper, as a fee patent in 1927. The first non-Indian purchaser was Bly Lumber Co. in January 1957, who sold it to Esther ~~Duffy~~ Tupper Wilson (a Klamath Indian) in August 1957. There is insufficient evidence of the beneficial use of water from the Sprague River on this allotment, either prior to or after transfer from Indian ownership. ~~Claimant has the burden of establishing his claim and has not provided sufficient evidence of any irrigation development by Bly Lumber Co.~~

Allotment 439 (west section)

Beneficial use of water by the method of natural overflow was made on this parcel while still under Indian ownership. The first non-Indian purchaser was Fred Haworth in 1927. He owned it until at least 1956. At the time of conveyance, Haworth filed for Sprague River water rights and claimed land on this and Allotment 440 as part of

the area served. He received state water permit 7908 which was later perfected. Use of water is still authorized under Certificate 8896. The aerial photographs submitted by the United States are insufficient to establish abandonment of the developed Walton right. The photographs show limited or no irrigation occurring on a portion of this allotment, but only on three days in three separate years since 1940 or 1941. Except for 27.1 acres for which the United States concedes that Claimant has established a Walton water right, these two allotments were not continuously irrigated after the Haworth irrigation system was developed, based on aerial photographs from 1940 to 1969. Beneficial use of water was established on 31.5 acres in this allotment under Indian ownership prior to transfer to a non-Indian owner.

Allotment 440 (west section)

Beneficial use of water by the method of natural overflow was made on this parcel while still under Indian ownership. The first non-Indian purchaser was Fred Haworth in 1927, who owned it until at least 1956. At the time of conveyance, Haworth filed for Sprague River water rights and claimed land on this and Allotment 439 as part of the area served. He received state water permit 7908 which was later perfected. Use of water is still authorized under this Certificate 8896. The aerial photographs submitted by the United States are insufficient to establish abandonment of the developed Walton right. The photographs show limited or no irrigation occurring on a portion of this allotment, but only on three days in three separate years since 1940 or 1941. Except for 27.1 acres for which the United States concedes that Claimant has established a Walton water right, these two allotments were not continuously irrigated after the Haworth irrigation system was developed, based on aerial photographs from 1940 to 1969. Beneficial use of water was established on 28.4 acres in this allotment under Indian ownership prior to transfer to a non-Indian owner.

Allotment 865 (east section)

This allotment is located at the end of the Turner-George Ditch, which diverted water from Whiskey Creek, with a priority date of 1921. Irrigation on this allotment started after 1921, as developed by Charles E. Drew.

The first non-Indian purchaser was Charles Snelling in 1914. The property was later conveyed to Marvin Cross and then Charles E. Drew. Claimant has provided no evidence that Snelling or Cross, the first two non-Indian owners, ~~developed an irrigation system~~ beneficially used water from the Sprague River on this allotment.

Claimant alleged that irrigation in this allotment and Allotment 867 occurred in 1916, based on a 1921 letter from C.T. Darley (Ex. RS-26.) As explained in the Evidentiary Rulings above, the evidence for this allegation is not reliable and not admitted. ~~Moreover, Claimant has failed to establish that, even if there were such Indian irrigation, the non-Indian purchasers of Allotments 865 and 867 continued such irrigation.~~

Irrigation from Whiskey Creek on this allotment started after 1921, as developed by Charles E. Drew. (Book Direct at 28-29.) The evidence indicates that development of irrigation works for the service of this allotment started in 1921, seven years after transfer from Indian ownership. This irrigation does not establish beneficial use of water with reasonable diligence with respect to the *Walton* claim.

Allotment 867 (east section)

This allotment is located at the end of the Turner-George Ditch, which diverted water from Whiskey Creek, with a priority date of 1921. Irrigation on this allotment started after 1921, as developed by Charles E. Drew.

The first non-Indian purchaser was B.S. Grigsby in 1914. The property was later conveyed to Marvin Cross and then to Charles E. Drew. In 1914, the property was conveyed from Grigsby and Emma Grigsby to Charles Snelling. Claimant provided no evidence that Snelling or Grigsby, the first two non-Indian owners, ~~developed an irrigation system~~ beneficially used water from the Sprague River on this allotment.

Claimant alleged that irrigation in this allotment and Allotment 865 occurred in 1916, based on a 1921 letter from C.T. Darley (Ex. RS-26.) As explained above for Allotment 865, this allegation is not accepted. ~~Moreover, Claimant has failed to establish that, even if there were such Indian irrigation, the non-Indian purchasers of Allotments 865 and 867 continued such irrigation.~~

Irrigation from Whiskey Creek on this allotment started after 1921, as developed by Charles E. Drew. (Book Direct at 28-29.) The evidence indicates that development of

irrigation works for the service of this allotment started in 1921, seven years after transfer from Indian ownership. This irrigation does not establish beneficial use of water with reasonable diligence with respect to the *Walton* claim.

Allotment 1562 (west section)

The first non-Indian purchaser was B.E. Wolford in 1918. Wolford conveyed the property to Indian owners, John and Emma Jackson in 1918. ~~Claimant has not established that irrigation was developed by Wolford, the first non-Indian owner. Furthermore, Development of six acres of this allotment was in conjunction with the 1927 Haworth water right, which is beyond the five-year deadline for reasonable development that is applicable to this case. As explained above, five years is a reasonable time limit for due diligence, unless Claimant establishes good cause reasons to rebut this presumption. Claimant has not claimed that the time limit should be extended due to good cause reasons beyond the purchaser's control. Additional land was brought into irrigation after 1947, some 30 years after conveyance from Indian ownership.~~

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 "Issues" is adopted in its entirety.
 - c. The "Evidentiary Rulings" is adopted in its entirety.
 - d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.6, above.
 - e. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.7, above.
 - f. The "Opinion" is adopted with modifications, as set forth in Section A.8, 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 114. Consistent with Sections A.6, A.7 and A.8, above, the outcome of the Order has been modified to recognize a right for irrigation on an additional 45.6 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. Beneficial use of water by the method of natural overflow was established prior to the development of specific points of diversion.
4. Based on the file and record herein, IT IS ORDERED that Claim 114 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 114

CLAIM MAP REFERENCE: CLAIM # 114, PAGES 69-70

CLAIMANT: DUANE MARTIN
2021 HWY 88
IONE, CA 95640-9113

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

PURPOSE OR USE:

IRRIGATION OF 72.1 ACRES, BEING 15.8 ACRES FROM POD 1 AND 56.3 ACRES FROM POD 2.

RATE OF USE:

1.80 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION, BEING 0.39 CFS FROM POD 1 AND 1.41 CFS FROM POD 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 POINT OF DIVERSION IS LOCATED AS FOLLOWS:

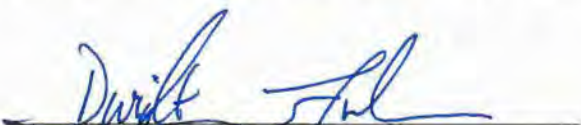
POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
POD 1	36 S	11 E	WM	7	SW SE	31	540 FEET NORTH FROM S¼ CORNER, SECTION 7
POD 2	36 S	11 E	WM	8	NW SE	18	375 FEET SOUTH AND 1675 FEET WEST FROM E¼ CORNER, SECTION 8

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD
36 S	11 E	WM	7	NE SE	24	13.2	POD 2
36 S	11 E	WM	7	NE SE	17	15.2	
36 S	11 E	WM	7	SE SE	32	9.7	
36 S	11 E	WM	7	SE SE	25	18.2	
36 S	11 E	WM	7	SE SE	32	3.6	POD 1
36 S	11 E	WM	17	NE NW		1.0	
36 S	11 E	WM	17	NW NW		11.2	

[End of Water Right Claim Description]

Dated at Salem, Oregon on February 28, 2014


 Dwight French, Adjudicator
 Klamath Basin General Stream Adjudication