

**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
BONANZA CONSERVATION, LLC	)	DETERMINATION
	)	
_____	)	Water Right Claim 703

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 AMENDED PROPOSED ORDER**

1. Claim 703 (submitted by THE NATURE CONSERVATION TRUST) and its associated contests (1693, 3073, 3511, 3817, and 4242) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 253.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claims 703 and 704 on March 28, 2007.
3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) The Nature Conservation Trust and (2) the United States of America.
4. The exceptions filed to the Proposed Order along with opposition and responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 703.
5. On January 6, 2012, the Adjudicator issued an AMENDED PROPOSED ORDER (Amended Proposed Order) to modify original Proposed Order to (1) correct and clarify the amounts of acreage irrigated by various sources of water and diversion points, (2) recognize beneficial use of water prior to transfer from Indian ownership, (3) recognize beneficial use of water by the method of natural overflow, (4) recognize development with reasonable diligence by non-Indian successors, (5) recognize the appropriate standard for determining loss of a right through nonuse, and (6) correct the season of use approved for irrigation. With respect to the portions of the 2007 Proposed Order that pertained to

Claim 703, and except as modified, the Amended Proposed Order fully incorporated the 2007 Proposed Order.

6. On March 15, 2012, the claim was transferred to the BONANZA CONSERVATION, LLC (Claimant). *See* STATUTORY WARRANTY DEED (September 27, 2011), and CHANGE OF OWNERSHIP FORM (March 15, 2012).
7. Exceptions were filed to the Amended Proposed Order within the exception filing deadline by the Claimant Bonanza Conservation, LLC, the United States of America and the Klamath Project Water Users (KPWU).
8. The exceptions filed to the Amended Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 703. The exceptions are found to be persuasive, in part, and therefore, modifications are made to the Amended Proposed Order as described in Sections A.10, and A.11, below.
9. The 2012 Amended Proposed Order is adopted and incorporated in its entirety as if set forth fully herein, with two exceptions: (1) the section titled “B. Modifications to the ‘Findings of Fact’” is adopted with modifications, as set forth in Section A.10, below, and (2) the section titled “D. Modifications to the ‘Opinion’” is adopted with modifications, as set forth in Section A.11, below. The outcome of the Amended Proposed Order is without modification.
10. **“B. Modifications to the ‘Findings of Fact.’”**
  - a. Within the Amended Proposed Order’s section titled “B. Modifications to the ‘Findings of Fact,’” the first paragraph of Finding of Fact #13 pertaining to Allotment 794 (Amended Proposed Order at 18) is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

This allotment, located in NE¼ NW¼, NW¼ NE¼ of Section 21, T36S R10E, W.M., was allotted to Eda Jackson (Cole), a Klamath Indian, by instrument dated November 19, 1920. (OWRD Ex. 1 at 77.) The property was conveyed to Klamath Indian Hiram Richard Robbins on February 27, 1940 (Ex. U6 at 14; U9 at 17). The property was transferred from Klamath Indians Rayson Colde Tupper, Clint Strom Tupper, Tana Lee Tupper Walker, Richard Keane Tupper, Rachael Robbins Tupper, and the Estate of Berva D. Tupper to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13; U9.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (~~U8~~ U8 at 14-15.)

- b. Within the Amended Proposed Order's section titled "B. Modifications to the 'Findings of Fact,'" the first paragraph of Finding of Fact #14 pertaining to Allotment 795 (Amended Proposed Order at 18) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

This allotment, located in SE¼ SW¼, SW¼ SE¼ of Section 16 (Allotment 795-North) (Claim 703), and E½ E½ NE¼ of Section 28, T36S R10E, W.M. (Allotment 795-South) (Claim 704), was allotted to Birdie Jackson, a Klamath Indian, by instrument dated February 11, 1921. (OWRD Ex. 1 at 78; OWRD Ex. 2 at 60.) The property appurtenant to Allotment 795 North (Claim 703) was conveyed to Klamath Indian Hiram Richard Robbins on February 27, 1940 (Ex. U6 at 14; U9 at 17). The property was transferred from Klamath Indians Rayson Colde Tupper, Clint Strom Tupper, Tana Lee Tupper Walker, Richard Keane Tupper, Rachael Robbins Tupper, and the Estate of Berva D. Tupper to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13; U9.) ~~The property was apparently conveyed to Hiram Robbins, also a Klamath Indian, at some time before 1978, when it was conveyed by Robbins' heirs to the Hi Robbins Corporation, an Oregon Corporation. (Ex. U8 at 5-13.)~~ The property was subsequently conveyed to Alan B. Tyler, also a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

**Reason for Modifications:** The 2012 Amended Proposed Order failed to fully set forth the evidence on the record with regards to modifications made to the ALJ's Proposed Order Findings of Facts 13 and 14.

11. **"D. Modifications to the 'Opinion.'"**

- a. Within the Amended Proposed Order's section titled "D. Modifications to the 'Opinion,'" and within subsection "4. Application of *Walton* Elements to Each Allotment," the last sentence in paragraph for "Allotment 216" (Amended Proposed Order at 57) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

Irrigation of the ~~72.1~~ 71.3 acres claimed within this allotment should be allowed, of which ~~63.3~~ 60.2 acres are irrigated by the method of natural overflow from the Sprague River.

- b. Within the Amended Proposed Order's section titled "D. Modifications to the 'Opinion,'" and within subsection "4. Application of *Walton* Elements to Each Allotment," the last sentence in paragraph for "Allotment 669" (Amended Proposed Order at 59-60) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

Irrigation of the ~~156.4~~ 157.2 acres claimed within this allotment is allowable, of which ~~26.0~~ 29.1 acres are irrigated by the method of natural overflow from the Sprague River.

**Reason for Modifications:** The 3.1 acres irrigated by natural overflow were mistakenly added to the natural overflow acreage for Allotment 216 instead of Allotment 699. Both allotments are located within the same quarter-quarter.

- c. Within the Amended Proposed Order's section titled "D. Modifications to the 'Opinion,'" and within subsection "4. Application of *Walton* Elements to Each Allotment," the paragraph for "Allotment 795" (Amended Proposed Order at 61) is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

**Allotment 795:**

The first evidence of non-Indian ownership on Allotment 795 is when it passed from Indian ownership (~~Hiram Robbins~~) in 1978, to the Hi Robbins Corporation. It was divided between Claim 703 and 704. In their exceptions to the Amended Proposed Order, the United States pointed to a title schematic in the record (OWRD Ex. 1 at 23, bottom, right hand corner) to "reasonably infer that the first non-Indian owner of this allotment was Dan Wann in 1925." (CONTESTANT UNITED STATES' EXCEPTIONS TO THE AMENDED PROPOSED ORDER at 83.) OWRD gives little weight to this hand written schematic, especially since it does not agree with the title documents that are included in the record. The title schematic illustrates that a "Deed Non Compt Indian Lands" transferred lands in Section 16 to Nathaniel Jackson prior to its transfer to Hiram Robbins. The 1940 unrestricted deed (Ex. U6 at 14) shows the property transferred from the Klamath Agency directly to Hiram Robbins without an intermediary transfer to Nathaniel Jackson, raising doubt that the title schematic referred to by the United States pertains to Allotment 795. The United States is correct that there is a gap in the chain of title between the

property's initial allotment and its reversion back to the United States, which must have occurred at some time prior to 1940. However, the fact that the property did revert back to the United States means that it is more likely than not that the property did not pass out of Indian ownership prior to 1940. Allotment 795 then continued in Indian ownership (Hiram Robbins), and was ultimately conveyed by Indian owners to the Hi Robbins Corporation in 1978.

¶ The portion that is subject to Claim 703 was irrigated while still in Indian ownership beginning in the 1960s when Phil Tupper installed check dams to control water for irrigation. Water is backed up to flood-irrigate behind the dams, while controlled subirrigation (as a result of the check dams) and seepage occurs below the dams; water perks down through the meadows. The record establishes that beneficial use of water on the claimed acreage occurred prior to transfer from Indian ownership. Furthermore, because a pre-water code water right claim is at issue, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, OWRD did find that irrigation on a portion of the permitted lands (being the same as the claimed lands) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, further demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. This portion of the claim, 22.8 acres, should be allowed. The additional 5.2 acres claimed in 1999 are not allowable.

**Reason for Modifications:** The evidence supports ownership conveyed to Hi Robbins Corporation, not from Hiram Robbins in 1978, but from multiple Indians listed in Findings of Facts #13 and #14 as amended in this partial Order of Determination in Section A.10.a and b., above.

## **B. DETERMINATION**

1. The Amended Proposed Order is adopted and incorporated in its entirety as if set forth fully herein, with two exceptions: (1) the section titled "B. Modifications to the 'Findings of Fact'" is adopted with modifications, as set forth in Section A.10, above, and (2) the section titled "D. Modifications to the 'Opinion'" is adopted with modifications, as set forth in Section A.11, above. The outcome of the Amended Proposed Order is without modification.

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. The Klamath Tribes Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 et seq. for an Indian reserved water right is a valid basis for a portion of this claim. The elements of a Klamath Termination Act claim are established for 2.1 acres within the SW¼ SW¼, SECTION 9, TOWNSHIP 36 SOUTH, RANGE 10 EAST, W.M. The GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS is incorporated as if set forth fully herein.
4. Beneficial use of water by the method of natural overflow is shown to be established for portions of this claim.
5. Based on the file and record herein, IT IS ORDERED that Claim 703 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO. 703**

**CLAIM MAP REFERENCE:**

CLAIM # 703, PAGES 9-10; OWRD INVESTIGATION MAP – T 36 S, R 10 E

**CLAIMANT: BONANZA CONSERVATION, LLC**

31895 VILLAGE CREST LANE  
WILSONVILLE, OR 97070

**SOURCES OF WATER:**

UNNAMED STREAM, tributary to CHERRY CREEK,  
CHERRY CREEK, tributary to the SPRAGUE RIVER,  
UNNAMED STREAM, tributary to the SPRAGUE RIVER, and  
The SPRAGUE RIVER, tributary to the WILLIAMSON RIVER

**PURPOSE OR USE:**

IRRIGATION OF 810.1 ACRES, BEING 167.4 ACRES BY THE METHOD OF NATURAL OVERFLOW OF THE SPRAGUE RIVER, 467.2 ACRES FROM POD 1, 76.3 ACRES FROM POD 2, 8.4 ACRES FROM POD 3, 24.8 ACRES FROM POD 4, AND 66.0 ACRES FROM COMMINGLED WATER FROM PODS 3 AND 4.

**RATE OF USE FROM PODS**

16.07 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION, BEING 11.68 FROM POD 1, 1.91 CFS FROM POD 2, 0.21 CFS FROM POD 3, 0.62 CFS FROM POD 4, AND 1.65 CFS FROM COMMINGLED WATER FROM PODS 3 AND 4.

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 OF WATER APPLIED FROM PODS:**

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

**PERIOD OF ALLOWED OF WATER APPLIED FROM PODS:** MARCH 1 - OCTOBER 16

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

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

Pod Name	Source	Twp	Rng	Mer	Sec	Q-Q	Remarks
POD 1	The Sprague River	36 S	10 E	WM	9	NW NW	
POD 2	Unnamed Stream	36 S	10 E	WM	17	SW SE	Tributary to the Sprague River
POD 3	Cherry Creek	36 S	10 E	WM	16	SW SE	
POD 4	Unnamed Stream	36 S	10 E	WM	21	NE NW	Tributary to Cherry Creek
Commingled Water from PODS 3 & 4	Cherry Creek, and Unnamed Stream tributary to Cherry Creek	36 S	10 E	WM	16	SW SE	
					21	NE NW	
	The Sprague River	No Specific Point of Diversion – Natural Overflow					

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

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD
36 S	10 E	WM	4	SW SE	19.0	NATURAL OVERFLOW FROM SPRAGUE RIVER
36 S	10 E	WM	5	NE SW	2.4	
36 S	10 E	WM	5	NW SW	33.1	
36 S	10 E	WM	5	SW SW	8.6	
36 S	10 E	WM	8	NE NE	6.2	
36 S	10 E	WM	9	NE NE	26.0	
36 S	10 E	WM	9	NW NE	16.1	
36 S	10 E	WM	9	NE NW	28.2	
36 S	10 E	WM	9	NW NW	27.8	
36 S	10 E	WM	5	NE SW	32.8	POD 1
36 S	10 E	WM	5	NW SW	1.1	
36 S	10 E	WM	5	SW SW	19.4	
36 S	10 E	WM	5	SE SW	19.6	
36 S	10 E	WM	8	NE NE	0.8	
36 S	10 E	WM	8	SE NE	6.2	
36 S	10 E	WM	8	NE NW	14.3	
36 S	10 E	WM	8	SE NW	15.6	
36 S	10 E	WM	8	NE SW	12.4	
36 S	10 E	WM	8	SE SW	6.5	
36 S	10 E	WM	9	NE NE	14.0	

IRRIGATION						Authorized POD
Twp	Rng	Mer	Sec	Q-Q	Acres	
36 S	10 E	WM	9	NW NE	16.4	POD 1
36 S	10 E	WM	9	SW NE	40.0	
36 S	10 E	WM	9	SE NE	40.0	
36 S	10 E	WM	9	NE NW	8.8	
36 S	10 E	WM	9	NW NW	10.0	
36 S	10 E	WM	9	SW NW	34.0	
36 S	10 E	WM	9	SE NW	38.5	
36 S	10 E	WM	9	NE SW	13.5	
36 S	10 E	WM	9	NW SW	16.8	
36 S	10 E	WM	9	SW SW	2.1	
36 S	10 E	WM	9	NE SE	40.0	
36 S	10 E	WM	9	NW SE	38.6	
36 S	10 E	WM	9	SW SE	0.3	
36 S	10 E	WM	9	SE SE	13.3	
36 S	10 E	WM	17	NW NE	6.0	
36 S	10 E	WM	17	NE NW	4.6	
36 S	10 E	WM	17	NE SW	1.6	
36 S	10 E	WM	8	NE SW	2.7	POD 2
36 S	10 E	WM	8	SW SW	9.7	
36 S	10 E	WM	8	SE SW	14.3	
36 S	10 E	WM	17	NE NW	6.1	
36 S	10 E	WM	17	NW NW	12.4	
36 S	10 E	WM	17	NE SW	10.0	
36 S	10 E	WM	17	NW SW	2.2	
36 S	10 E	WM	17	SE SW	18.9	
36 S	10 E	WM	16	SW NE	1.2	POD 3
36 S	10 E	WM	16	SE NE	1.0	
36 S	10 E	WM	16	SE SW	3.5	
36 S	10 E	WM	16	SW SE	1.4	
36 S	10 E	WM	16	SE SE	1.3	
36 S	10 E	WM	16	SE SW	8.5	POD 4
36 S	10 E	WM	21	NE NW	16.3	
36 S	10 E	WM	9	SW SE	13.6	COMMINGLED WATER FROM PODS 3 AND 4
36 S	10 E	WM	9	SE SE	2.8	
36 S	10 E	WM	16	NE NE	1.2	
36 S	10 E	WM	16	NW NE	25.5	
36 S	10 E	WM	16	SW NE	5.3	
36 S	10 E	WM	16	NE NW	1.1	
36 S	10 E	WM	16	SE NW	7.1	
36 S	10 E	WM	16	SE SW	9.4	

**FURTHER LIMITATIONS TO THE RIGHT TO USE OF WATER BY NATURAL OVERFLOW:**


BENEFICIAL USE OF WATER MADE FROM THE METHOD OF NATURAL OVERFLOW IS A PRIVILEGE ONLY. AS LONG AS BENEFICIAL USE OF WATER BY NATURAL OVERFLOW CONTINUES, THE HOLDER OF THIS VESTED WATER RIGHT CANNOT MAKE A CALL ON WATER APPROPRIATED UNDER ANY OTHER WATER RIGHTS.



ANY CONVERSION FROM BENEFICIAL USE OF WATER BY NATURAL OVERFLOW TO BENEFICIAL USE OF THE SAME WATER FROM A SYSTEM RELYING ON A POINT(S) OF DIVERSION WILL BE CONSIDERED A CHANGE IN POINT OF DIVERSION SUBJECT TO APPROVAL OF A TRANSFER OF WATER RIGHT IN COMPLIANCE WITH THE PROVISIONS OF ORS 540.505 TO 540-587. NOTWITHSTANDING APPROVAL OF A CHANGE IN POINT OF DIVERSION, THE FOLLOWING CONDITIONS WILL APPLY TO ANY APPROVED POINT OF DIVERSION TRANSFER: 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. THE DUTY FOR IRRIGATION MAY NOT EXCEED 3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
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Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication