

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
a Tributary of the Pacific Ocean

United States of America; Klamath Irrigation
District; Klamath Drainage District; Tulelake
Irrigation District; Klamath Basin
Improvement District; Ady District
Improvement Company; Enterprise Irrigation
District; Malin Irrigation District; Midland
District Improvement Co.; Pine Grove
Irrigation District; Pioneer District
Improvement Company; Poe Valley
Improvement District; Shasta View Irrigation
District; Sunnyside Irrigation District; Don
Johnston & Son; Bradley S. Luscombe; Randy
Walthall; Inter-County Title Company;
Winema Hunting Lodge, Inc.; Van Brimmer
Ditch Company; Plevna District Improvement
Company; and Collins Products, LLC,
Contestants

PROPOSED ORDER

Case No. 225

Claim: 114

Contests: 3106, 3490¹, 3758, and 4145²

vs.

Duane Martin;
Claimant/Contestant

This proceeding pursuant to ORS Chapter 539 is part of a general stream adjudication to determine the relative rights of the parties to the waters of the various streams and reaches within the Klamath River Basin.

HISTORY OF THE CASE

On November 29, 1990, Duane Martin (Claimant) filed a Statement and Proof of Claim (114) as a non-Indian successor to a Klamath Indian Allottee³ for water from the

¹ Don Vincent voluntarily withdrew from Contest 3490 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3490 on June 24, 2002. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3490 on January 15, 2004.

² The Klamath Tribes voluntarily withdrew contest 4145. See KLAMATH TRIBES VOLUNTARY WITHDRAWAL OF CONTEST dated January 28, 2005.

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Sprague River, a tributary of the Williamson River, which is a tributary of the Klamath River. The Map to Accompany Statement and Proof of Claim (OWRD Ex. 1 at 6-7) was offered by Claimant in 1991 to support his claim for irrigation of 781.4 acres from three points of diversion from the Sprague River. His initial claim stated the purposes of the claim were for pasture and hay, with a claimed period of use from April 1 to October 31 for irrigation. Claimant supplied the measured discharge rate for each point of diversion of 1375 gpm (3.06 cfs), 1880 gpm (4.29 cfs), and 840 gpm (1.87 cfs), for a total of 9.12 cfs. This diversion rate equates to a rate of less than 1.80 cfs/acre. (Book Direct Testimony at 4.)

In 1998, Claimant provided additional information that suggested a claim for irrigation of 803.9 acres, which seemed to include an additional 22.5 acres in allotments 452 and 453. Amendment of a claim is not allowed after open inspection is commenced. OAR 690-030-0085.⁴ Claimant specifically denied a claim for these acres because the issue had not yet been resolved. (OWRD Ex. 1 at 41; Book Direct Testimony at 4-5.) A summary table of the 13 allotments in this claim that are owned by Claimant is in Exhibit U3.

On October 4, 1999, the adjudicator of the Klamath Basin Adjudication issued a Preliminary Evaluation (PE), recommending denial of Claimant's claim. (OWRD Ex. 1 at 229-230; Book Direct Testimony at 4-5.)

On May 8, 2000, Claimant Duane Martin filed Contest 3106. (OWRD Ex. 1 at 172-175.) On May 2, 2000, the individuals and entities identified as the Klamath Project Water Users⁵ (KPWU), filed the Claims of Others (Contest 3490). (OWRD Ex. 1 at 176-211.) On December 4, 2000, Contestants Ralph Sterns, Gary Orem, and Don Vincent withdrew from Contest 3490 because they sold their interests. (OWRD Ex. 1 at 190-192.) On June 24, 2002, Contestant Berlva Pritchard withdrew from Contest 3490 because she sold her interest. (OWRD Ex. 1 at 194-198.) On January 15, 2004, Klamath

³ Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "Walton" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986) (*Walton III*).

⁴ "The Water Resources Director shall not permit any alteration or amendment of the original claim after the period for inspection has commenced; * * *"

⁵ Klamath Irrigation District, Klamath Drainage District, Tulalake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Ralph Sterns, Gary Orem, Don Vincent, Berlva Prichard, Randy Walthall, Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Company, and Collins Products, LLC.

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Hills District Improvement Co. voluntarily withdrew from Contest 3490. On May 8, 2000, the United States filed Contest 3758. (OWRD Ex. 1 at 212-215.) On February 4, 2005, the United States filed a Contest Amendment. On May 8, 2000, the Klamath Tribes filed Contest 4145. (OWRD Ex. 1 at 216-228.) On January 28, 2005, the Klamath Tribes voluntarily withdrew Contest 4145.

OWRD referred this matter to the Office of Administrative Hearings (OAH) for a contested case hearing. A Scheduling Order issued on July 25, 2003, set a schedule for discovery and filing written direct and rebuttal testimony.

Pursuant to a Hearing Notice mailed by certified mail on March 26, 2005, a hearing was held in Salem, Oregon on May 4, 2005. Administrative Law Judge (ALJ) Lawrence S. Smith presided. Claimant did not appear, but was represented by Attorney Ronald Yockim. Trial Attorney Vanessa Boyd-Willard represented the United States. Oregon Assistant Attorney General Jesse Ratcliffe represented the Oregon Water Resources Department (OWRD). By telephone, Attorney Andrew Hitchings represented KWPU. Dale Book, witness for the United States, was cross-examined, per request of Claimant.

The recording of the hearing failed. The parties stipulated to a written reconstruction on June 9, 2005. A Second Order Amending Scheduling Order was issued July 28, 2005, granting the request for more time for closing arguments. On August 9, 2005, Claimant submitted written closing arguments. On September 13, 2005, the United States filed written closing argument and KPWU filed written opposition to Claimant's closing argument. On October 7, 2005, Claimant filed a reply brief. On October 20, 2005, the United States filed objection that Claimant was relying on exhibits not in the record. No further documents were filed, and the record closed on November 16, 2005.

ISSUES

1. Whether natural overflow constitutes a valid *Walton* water right.
2. Whether Claimant provided sufficient title information to establish a *Walton* water right
3. Whether Claimant provided sufficient evidence of the development and continuous use of water in Claimant's allotments to establish a *Walton* water right.

EVIDENTIARY RULINGS

The following were admitted without objection:

- OWRD Exhibit 1
- The direct testimony of Duane Martin (Claimant)
- The direct testimony of Dale Book (US expert witness)
- The Affidavit and Rebuttal Affidavit of Ronald Yockim (Claimant's attorney)
- The Affidavit of Vanessa Boyd Willard, trial attorney for the U

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- The rebuttal testimony of William Ripple (Claimant's witness)
- The rebuttal testimony of Dale Book
- US Exhibits U1 through U46
- Claimant's Exhibits 1 through 61, C62 through C82, C89 through C115, C122 through C125, and C128 through C153

The United States objected to Claimant's offer of Exhibits C83 through C88 because the exhibits relate to allotment 453, which is not included in Claimant's claim. Allotment 453 was initially part of Claimant's claim and, based on Claimant's argument that it will rely on these Exhibits in its argument, the objection is overruled.

The United States objected to Claimant's offer of Exhibits C116 through C121 because the exhibits are pictures of property not part of Claimant's claim. Claimant argues that the pictures show the continuation of the ditches, which he claims will support his claim. Based on this alleged relevance, the objection is overruled.

On October 7, 2005, the United States objected to Claimant's reliance in his closing arguments on documents not part of the record and moved to strike all references to documents not in the record and cited in Claimant's Closing Argument submitted August 9, 2005, and Claimant/Contestant's Reply Brief submitted October 7, 2005. Specifically, the United States seeks to strike Claimant's citation to and reliance on a 1926 State Engineer's report at page 17 in Claimant's Closing Argument and at page 7, n. 9 in Claimant's Reply Brief, as well as the four documents attached to Claimant's Closing Argument, Exhibits A through D. (United States' Motion to Strike at 2.)

Proposed Orders by ALJs are based only on the record in each case. Water right adjudications under ORS 539.110 are contested cases under the Oregon Administrative Procedures Act. ORS 183.310(2)(a)(A) and (D). An ALJ may consider legal rulings in other cases, but cannot consider evidence in these other cases that was not admitted in the ALJ's case. ORS 183.415(11); OAR 137-003-0645. See ORS 183.450(2) and (4), which provides in relevant part:

(2) All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to and except as provided in subsection (4) of this section no other factual information or evidence shall be considered in the determination of the case. * * *

* * * * *

(4) The hearing officer and agency may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency. Parties shall be notified at any time during the proceeding but in any event prior to the final decision of material officially noticed and they shall be afforded an opportunity to contest the facts so noticed. The hearing officer and agency may utilize the hearing officer's or agency's experience, technical competence and specialized knowledge in the evaluation of the evidence presented.

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An ALJ may not consider evidence not admitted to the record. To do so would deprive the other parties of the opportunity rebut the evidence. Claimant requested that the ALJ take judicial notice of the extra-record evidence. (Claimant/Contestant's Reply Brief at 28, fn. 40.) As cited above, ORS 183.450(4) provides that the "hearing officer and agency may take notice of judicially cognizable facts, * * *." OAR 137-003-0615 provides in relevant part that the ALJ may take "notice of judicially cognizable facts" and "official notice of general, technical or scientific facts within the specialized knowledge of the administrative law judge." Judicially cognizable facts are those "not subject to reasonable dispute because it is generally known or can be accurately and readily determined by resort to sources whose accuracy cannot reasonably be questioned." Oregon Attorney General's *Administrative Law Manual* 131 (January 15, 2004). Claimant offers the evidence and documents to establish certain facts in the documents. The facts can reasonably be questioned, so judicial notice is not appropriate. The United States' motion to strike is granted.

Hearsay evidence

Much of the evidence is expert evidence by United States witness Dale Book. At hearing, he was qualified as an engineering and aerial photography expert. Claimant did not provide expert evidence to rebut his expert testimony, so Book's testimony is persuasive and controlling. He necessarily relied on old documents and statements during his review of possible irrigation or other development in the allotments. Much of this information has been admitted to the record as exhibits. "Irrelevant, immaterial or unduly repetitious evidence shall be excluded . . . All other evidence of a type relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible." ORS 183.450(1). Because these legal conclusions rely on old information, first-hand or direct testimony is not generally available, so much of the evidence relied upon by Book is hearsay. In *Reguero v. Teacher Standards and Practices Commission*, 312 Or 402 (1991), the Oregon Supreme Court laid out five factors for determining whether hearsay is "substantial evidence" to support agency action:

- [1] the alternative to relying on the hearsay evidence;
- [2] the importance of the facts sought be proved by the hearsay statements to the outcome of the proceedings and considerations of economy;
- [3] the state of the supporting or opposing evidence, if any;
- [4] the degree of lack of efficacy of cross examination with respect to the particular hearsay statements; and
- [5] the consequences of the decision either way.

Reguero, 312 at 418.

In regards to the general records of deeds and other official documents, they were reliable because there was no alternative to relying on them, the facts they contain are important, there is not much, if any, opposing evidence, cross-examination of the record keepers is not likely due to the age of the documents, and the documents are important for resolution of the issues.

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Claimant alleged that irrigation in allotments 865 and 867 occurred in 1916, based on a 1921 letter from C.T. Darley (Ex. RS-26). That letter states that Drew is filing for a permit to appropriate waters from Whiskey Creek, but it is “really a right by application for a portion of lands as they were irrigated about 1916 by Indians then owning a portion of the lands.” This statement is not reliable because Indians did not own a portion of the lands in 1916 and the map attached to the letter included areas outside of allotments 865 and 867. Regarding the *Reguero* factors, there is an alternative to relying on this letter because there is other evidence of ownership around that time. The facts in the letter are important in regards to Claimant’s attempt to meet his burden of proving diligent development by the first non-Indian owner, but the contrary evidence and ambiguity regarding whether the letter was referring to land in allotments 865 and 867 or the other areas on the attached map leads to the conclusion that reasonably prudent persons would not rely upon the facts in the letter in the conduct of their serious affairs. Therefore, the letter does not establish reasonable development. See the discussion of allotments 865 and 867 in the Opinion portion of the Order.

FINDINGS OF FACT

(1) On 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 acreage. His claim consists of 13 allotments he owns, which have been consolidated under Claimant’s ownership after his purchase in 1987 or 1988. All the land included in this claim is within the former boundaries of the Klamath Indian Reservation. All the land included in Claim 14 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.

(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.) Claimant has state water rights on the majority of the claimed lands, with priority dates of 1921, 1927, or 1951 for surface water rights and 1947 or 1948 for groundwater rights. Claimant seeks the reservation’s priority date for his allotments. (OWRD Ex. 1 at 13 to 19; Book Direct at 15 to 17.)

(3) Claimant’s claim is based in good part natural overflow of the Sprague River on his allotments. He also has asserted that irrigation in his allotments was developed by the first non-Indian owners and the developed irrigation has been continuous since. The historic irrigation, prior to development of the existing system, was supplied by a ditch diverting from Whiskey Creek, on a portion of the claim area, and a pump and ditch diverting from the Sprague River in allotment 426. Two wells were also developed and used for irrigation to part of the claim area. (Book Direct at 5.)

(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 Ex. U15),

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land in Sections 7 and 18 ("west section", see Ex. U16), and land in Sections 8 and 9 ("middle section", see 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. The "east section" is covered by a state water right from Whiskey Creek with a priority date of 1921. The Whiskey River 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.)

(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. Portions of this section were irrigated by a 1927 surface water right from the Sprague River and supplemented with a 1948 ground water rights. (Book Direct at 18.)

(7) The claim in the "middle section" is for 344.2 acres in five allotments from Diversion Point No. 2 on the Sprague River. Portions of this section were developed for irrigation in the 1940s with one of the Drew wells and a diversion from the Sprague River. The Drew wells have a 1947 priority date and the Sprague diversion has a 1951 water right for supplemental irrigation on lands irrigated by the Drew well. (Book Direct at 18.)

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

Allotment 279 (Sect. 17, T. 36 S, R. 11 E., N $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, "middle section")

Acres 12.2

Allottee: Roxie Barkley (Rosie)

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

Conveyed from Barkley's heir, Clifford Barkley, to Pierre Dick on December 19, 1955. (OWRD Ex. 1 at 1-4-105.) 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.

The irrigation of the 12 acres 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.)

Allotment 280 (Sect. 8, T. 36 S, R. 11 E., SE $\frac{1}{4}$, "middle section")

Acres 116.1

Allottee: William Barkley

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Conveyed to Barkley in 1917. (Ex. U4 at 12.) On May 27, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company. (Book Rebuttal Testimony at 2.)

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), irrigation development started.

(Book Direct at 23, 28, and 31; Ex. U3.)

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.)

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

Charles Drew is listed as a non-Indian in Allotment 413 and so designated by Claimant. Next owner is unknown.

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), irrigation development started.

(Book Direct at 30; Ex. U3.)

Allotment 413 (Sect. 18, T. 36 S, R. 11 E., N½NE¼, "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.)

The first irrigation development occurred after the Haworth water rights application was filed in 1927, seven years after it passed from Indian ownership.

(Book Direct at 29.)

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. (Ex. 4 at 13 and OWRD Ex. 1 at 96; Ex. U11 at 7.)

Irrigation development occurred in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and in 1951 (Permit 21236 to Drew to divert surface water).

(Book Direct at 30; Ex. U3.)

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Allotment 424 (Sect. 8, T. 36 S, R. 11 E., S $\frac{1}{2}$ N $\frac{1}{2}$, "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.)

Irrigation development occurred in 1947 (Permit U-216 to Charles Drew for five groundwater wells) and in 1951 (Permit 21236 to Drew to divert surface water). (Book Direct at 31; Ex. U3.)

Allotment 426 (Sect. 18, T. 36 S, R. 11 E., N $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, "west section")

Acres 67.2

Allottee: Duffie Tupper

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

Conveyed from US to Watson "Duffy" Tupper in 1918. (Ex. U6 at 8.)

Insufficient evidence of the date of conveyance from Indian ownership. Irrigation development started with the 1927 Haworth water right. (Book Direct at 29; Ex. U3.)

Allotment 428 (Sect. 18, T. 36 S, R. 11 E., E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, "west section")

Acres .6

Allottee: Duffie Tupper

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

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 January 1957 (OWRD Ex. 1 at 100), to Ester Duffy Wilson (a Klamath Indian) in August 1957 (OWRD Ex. 1 at 111), and to Martin Dale Wilson in 1959 (OWRD Ex. 1 at 112). Marlin Dale Wilson is listed on the Klamath Tribe 1957 Final Roll, but no Martin Dale Wilson. (Ex. U9.)

This allotment received water on the claim area of 0.6 acres from the Hess Wells, put in place in the 1950s.

(Book Direct at 30; Ex. U3.)

Allotment 439 (Sect. 7, T. 36 S, R. 11 E., S $\frac{1}{2}$ SE $\frac{1}{4}$, "west section")

Acres 31.5

Allottee: Bill Wild (Wild Bill Squire)

Conveyed to him as a trust patent in 1910. (Ex. U6 at 10.)

Conveyed to Fred Haworth as a fee patent in 1927. (Ex. U6 at 11.) 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.

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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. Except for 27.1 acres, 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 and 30; OWRD Ex. 1 at 152; Ex. U3.)

Allotment 440 (Sect. 7, T. 36 S, R. 11 E., N½SE¼, “west section”)

Acres 28.4

Allottee: Minnie Smithson

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

A fee patent conveyed from the US to non-Indian Fred Haworth in 1927. (Ex. U4 at 4.) Haworth 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. Except for 27.1 acres, 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 30; Ex. U3.)

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.)

A fee patent conveyed from the USA to Charles Snelling in 1914. (OWRD Ex. 1 at 97.) 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 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.

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. Irrigation on this allotment started after 1921, as developed by Charles E. Drew. 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.)

Allotment 867 (Sect. 11, T. 36 S, R. 11 E., W½SW¼, “east section”)

Acres 80

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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.) 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.)

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. (Book Direct at 28-29; Ex. U3.)

Allotment 1562 (Sect. 18, T. 36 S, R. 11 E., S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, "west section")

Acres 77.8

Allottee: Samuel Clinton

A fee patent conveyed from the US to Samuel Clinton in 1918. (Ex. U4 at 1.) The property was then conveyed to B.E. Wolford in 1918. (Ex. U5 at 1.) 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 1918. (Ex. U5 at 2.) A John Jackson is listed on the 1914 census of the Klamath tribe.

Development of six acres of this allotment occurred in conjunction with the 1927 Haworth water right. Additional land was brought into irrigation after 1947, some 30 years after conveyance from Indian ownership. (Book Direct at 30; Ex. U3.)

(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 conclusions 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.

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.

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27.1 acres in allotments 439 and 440 meet the *Walton* standards. Season of use is April 1 through October 31, as requested by Claimant.
(Book Direct at 32; Affidavit and Rebuttal of Book at 3.)

(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, 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.)

(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. The rate should be prorated to the amount of acreage approved for the *Walton* right.

(Book Direct at 33.)

CONCLUSIONS OF LAW

1. Natural overflow does not constitute a valid *Walton* water right.
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 development and/or continuous use of water to establish a *Walton* water right in allotments 279, 280, 281, 423, 424, 865, 867, 1562, and 32.8 acres in allotments 439 and 440. Claimant has established a *Walton* water right for 27.1 acres in allotments 439 and 440.

OPINION

Because Claimant is claiming water rights as a non-Indian successor to a Klamath Indian allottee, the water right is governed by the *Colville Confederated Tribes v. Walton* line of cases⁶ and is commonly referred to as a *Walton* water right. A prior Klamath Basin Adjudication, the Proposed Order in *Nicholson et al. v. United States*, Case No. 272, listed the following elements that must be proved to establish a *Walton* water right, with a priority date of October 14, 1864, the date the Klamath Indian reservation was established:

⁶ See footnote 3.

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1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe;
2. The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor;
3. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except that:
4. The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first purchaser of land from an Indian owner.
5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

Ruling on United States' Motion for Ruling on Legal Issues, Case No. 272, at 9 (August 4, 2003). US witness Book relied on this Ruling when evaluating Claimant's claim for a *Walton* water right. (Book Direct Testimony at 6.) This Ruling is not a final order issued by OWRD in a contested case and is therefore not legally binding, but its reasoning is persuasive and its legal conclusions are adopted.

Claimant has the burden of establishing his claim for a *Walton* water right by a preponderance of the evidence. ORS 539.110;⁷ ORS 183.450(2);⁸ OAR 690-028-0040(1).⁹ 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 a portion of allotments 439 and 440.

⁷ “* * * 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.”

⁸ “* * * The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”

⁹ “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.”

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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-foot 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.

Claimant relies on state authority for his claim based on natural overflow and has provided no persuasive federal authority to support his allegation that natural overflow can establish a *Walton* water right. In *Walton III*, the Circuit Court of Appeals reversed and remanded to the District Court with specific instructions regarding how to allocate the water at issue. In fulfilling the Circuit Court's mandate, the District Court held:

The Tribe continues to maintain that Walton is being awarded water for application on his "soggy boggy" lands. That was true at the time the findings were entered, but not at the present time. Findings were made in a two-step process. First the Court determined that the initial non-Indian purchaser had beneficially applied water to thirty acres and that all subsequent owners continued such irrigation. Second, it was determined that if Walton's diligence (as opposed to the diligence of intervening owners) was controlling, then he had beneficially applied water to a minimum of 104 acres. The circuit expressly adopted the first findings, and just as expressly rejected the second on the dual bases that (1) Walton's diligence would be of weight only to the extent that his predecessors had exercised like diligence; and (2) to "award additional water [to the water-saturated lands] would result in a double allocation."

Order, *Colville Confederated Tribes v. Walton*, No. C-3421 RJM (DE Wash, filed June 25, 1987) at 2-3.

Based on the circuit court's holding in *Walton III*, as implemented by the District Court by Order filed June 25, 1987, ALJ Betterton concluded in Klamath Adjudication Case No. 157 that, "[a]n irrigation claim based on natural overflow and sub-irrigation is not entitled as a matter of law to a *Walton* water right." *Amended Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues and Dismissal of Claimant's Claim*, December 10, 2004 at 5. Although not legally binding, this Proposed Order is persuasive, based on a plain reading of the various *Walton* holdings.

Claimant argues that nothing in the *Walton* holdings says that intent to divert water can only be established by artificial, manmade irrigation and that Oregon law, specifically *In re: Water Rights of the Silvies River*, 115 Or 27 (1925), recognizes that a diversion from the natural channel is not necessary to establish a water right by appropriation where land is naturally irrigated. 115 Or at 66. ALJ Betterton specifically concluded that *Silvies River* "does not apply to federal reserved rights based on a treaty." *Amended Proposed Order* at 5. Natural overflow has been the basis for pre-1909 claims.

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but not after 1909, when permits were required. ORS 537.140(1). In any event, the circuit court of appeals in *Walton III* concluded that *Walton* water rights were “[r]eserved rights [that] are ‘federal water rights’ and ‘are not dependent upon state law or procedures.’” *Walton III* at 400, citing from *Cappaert v. United States*, 426 US 128, 145 (1976). It further concluded, “It is appropriate to look to state law for guidance. [Citation omitted.] * * * The dispute involves relative shares of [the Indian tribe’s] reserved waters, and is governed by federal law. We look to state law only for guidance.” *Id.* Claimant must establish an initial diversion of water in order to show “prior appropriation”, the intent and due diligence to establish a water claim. *Walton III* at 402, again citing *Colorado River* at 805. Therefore, to the extent that Claimant’s *Walton* water right claim is based on natural overflow, it is denied.

Claimant decries OWRD’s “blind adherence” to *Walton* and claims that the first purchaser rule is “clearly wrong” and “unjust” because the *Walton* rulings will yield harsh results in the cases where the first non-Indian owner quickly turns over the property to another non-Indian owner. Claimant is in effect making a policy argument, which is contrary to the *Walton* line of cases. The ALJ has no authority to ignore the *Walton* rulings for policy reasons. Even if the ALJ has such authority, a rational basis for exists for limiting development only to the first non-Indian purchaser because the subsequent sale by the first non-Indian purchaser has little impact on the value of the initial sale by an Indian seller. In other words, the purpose of the federal law to protect the Indian’s inchoate right to water is not affected by limiting development rights to the first purchaser because the Indian seller will likely receive little benefit if the second buyer receives any of the Indian’s inchoate right to water.

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, Claimant has not established that the additional water use was developed 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

The evidence for some of the allotments raises a question of diligent development. Claimant argues that there should be no time limit 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 *Seaward v. Pacific Livestock Co.*, 49 Or 157, 160-162 (1907) for pre-1909 claims and it is the time limit used by Oregon in

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ORS 537.230(1)¹⁰ 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. ORS 540.610(1).¹¹ Therefore, five years is the appropriate time length for reasonable due diligence, absent evidence of good cause reasons to rebut this presumption. Claimant offered no evidence of good cause reasons to 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, Claimant has failed to provide sufficient evidence of the development by the Indian seller or by the first non-Indian purchaser within five years of purchase. Claimant has also failed in some cases to establish the continuous use of water since development to establish a *Walton* water right in allotments 279, 280, 281, 423, 424, 865, 867, 1562, and 32.8 acres in allotments 439 and 440. Claimant has established a *Walton* water right for 27.1 acres in allotments 439 and 440. Each allotment is considered separately below.

Allotment 279 (middle section)

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 irrigation of the 12 acres on this allotment began in 1958 after the purchase by Goularte, the second non-Indian purchaser.

Allotment 280 (middle section)

On May 27, 1927, non-Indians Charles E. Drew and Ida Drew issued a right of way deed to Oregon-California & Eastern Railway Company. 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. 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 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 20 years after purchase. This irrigation was not diligent development, even if groundwater wells are considered development.

¹⁰ “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.”

¹¹ “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.”

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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, irrigation was not diligently developed by Drew, the first non-Indian purchaser.

Allotment 423 (middle section)

The first non-Indian purchaser was Luke Walker, in 1919. 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 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 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 began about 20 years after purchase. This irrigation was not diligent development, 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 purchaser developed this irrigation or whether the development was diligent or continuously maintained.

Allotment 428 (west section)

The first non-Indian purchaser was Bly Lumber Co. in January 1957, who sold it to Ester Duffy Wilson (a Klamath Indian) in August 1957. Claimant has the burden of establishing his claim and has not provided sufficient evidence of any irrigation development by Bly Lumber Co.

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Allotment 439 (west section)

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. 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.

Allotment 440 (west section)

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. 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.

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 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.

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

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evidence that Snelling or Grigsby, the first two non-Indian owners, developed an irrigation system 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.

Allotment 1562 (west section)

The first non-Indian purchaser was B.E. Wolford in 1918. Wolford conveyed the property to 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. 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.

ORDER

It is proposed that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below.

The elements of a *Walton* water right are only established for Claim 114 as follows:

SOURCE: Sprague River
POINT OF DIVERSION: Point two
USE: Irrigation of 27.1 acres
RATE: 1/cfs per 40 acres.
DUTY: 3.5 af/acre
PERIOD OF USE: April 1 to October 31 each year.
PRIORITY DATE: 1864
PLACE OF USE: Allotment 439--Section 7, T. 36 S, R. 11 E., S½SE¼
Allotment 440--Section 7, T. 36 S, R. 11 E., N½SE¼

Lawrence S. Smith
Administrative Law Judge
Office of Administrative Hearings

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ISSUED AND MAILED ON: March 23, 2006

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Hearing Officer. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Adjudicator
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2006, I mailed a true copy of the following:
PROPOSED ORDER, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

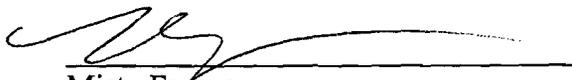
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Misty Fragua
Administrative Assistant

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