

**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
ORIN KIRK)	DETERMINATION
)	
_____)	Water Right Claim 694

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 CORRECTED PROPOSED ORDER**

1. Claim 694 (Claimant: ORIN KIRK, PO BOX 1079, CHILOQUIN, OR 97624) and its associated contests (1764 and 3574) were referred to the Office of Administrative Hearings for a contested case hearing which were designated as Case 93.
2. The Office of Administrative Hearings (OAH) conducted contested case proceedings and ultimately issued a CORRECTED PROPOSED ORDER (Corrected Proposed Order) for Claim 694 on January 23, 2006.
3. Exceptions were filed to the Corrected Proposed Order within the exception filing deadline by the Klamath Project Water Users.
4. The exceptions filed to the Corrected Proposed Order have been reviewed and considered in conjunction with the entire record for Claim 694, and are found to be persuasive in part. Accordingly, changes were made to the Corrected Proposed Order to accommodate the exceptions.
5. On May 3, 2012, the Oregon Water Resources Department (OWRD) re-referred Claim 694 for further hearing before the OAH. OWRD withdrew the re-referral and Claim 694 on December 20, 2012. No proposed order was issued on the re-referral.
6. The Corrected Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:

- a. The “History of the Case” is adopted with modifications, as set forth in Section A.7, below.
- b. The “Issue” 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.8, below.
- e. The “Conclusions of Law” is adopted with modification, as set forth in Section A.9, below.
- f. The “Opinion” is adopted with modification, as set forth in Section A.10, below.
- g. The section titled “Proposed Order” (page 5) is replaced in its entirety, as set forth in Section A. 11, below. The outcome of the Order has been modified to reflect the denial of Claim 694.

7. **History of the Case.** Within the section titled “History of the Case” of the Corrected Proposed Order, the third sentence within the third Paragraph is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

The present claim is for 306 acre-feet from ~~one~~ two points of diversion located on the Williamson River, for the irrigation of 98.7 acres. (OWRD Ex. 1 at 39, 42.)

Reason for Modification: To provide an additional citation to the record. In addition, OWRD has determined that the Administrative Law Judge’s (ALJ’s) finding that the claim was for one point of diversion is not supported by a preponderance of evidence on the record; two points of diversion were claimed.

8. **Findings of Fact.** The Corrected Proposed Order’s Findings of Fact 3 and 4 are modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

(3) On November 1, 1992, Natural Resources Consulting Engineers, Inc. issued a report to establish a reserved surface water right claim for Claim 694. (OWRD Ex. 1 at 3.) The November 1, 1992 report was superseded with a revised report October 1, 1999 to further clarify the claim. (OWRD Ex. 1 at 34- 47.) This report indicates that the following constitute 98.7 practicably irrigable acres:

7.2	acres	NW1/4	SE1/4
32.4	acres	SW1/4	SE1/4
15.9	acres	NE1/4	SW1/4
11.1	acres	SE1/4	SW1/4

Section 6, Township 32 South, Range 8 East, Willamette Meridian

28.7 acres NE1/4 NE1/4
3.4 acres NW1/4 NE1/4
Section 7, Township 32 South, Range 8 East, Willamette Meridian.

(OWRD Ex. 1 at 10, 39, 40.)

This report established that the indicated acreage could be irrigated using sprinklers, at a total cost for production of ~~\$299~~ \$221 per acre per year, and that the resulting crop of alfalfa would generate annually \$450 per acre, resulting in a net benefit of ~~\$151~~ \$229 per acre per year. (OWRD Ex 1 at 37.)

The claim is for future use of water from the Williamson River from two points of diversion at a rate of 1.78 cfs with a total duty of 306.0 acre-feet per year for irrigation of 98.7 acres. (OWRD Ex. 1 at 39, 42.)

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; to provide corrected and additional citations to the record.

(4) Claimant Orin Kirk is enrolled as a Klamath Indian. (OWRD Ex. 1 at 11.) On October 8, 19567, the United States of America, Department of the Interior, acting by and through the Area Director of the Portland Area Office of the Bureau of Indian Affairs issued a deed to Friedman Kirk, which was recorded on June 7, 1985, for lands described as W1/2SE1/4, E1/2SW1/4 of Section 6, N1/2NE1/4 of Section 7, Township 32 South Range 8 East of the Willamette Meridian, Klamath County, Oregon. The property was in continuous Indian ownership until October 9, 1999. (OWRD Ex. 1 at 13, 34, 131). There is no evidence on the record concerning ownership of the property after that date. has been in continuous Indian ownership since this deed was recorded. (OWRD Ex. 1 at 13, 131.)

Reason for Modification: The deleted portion of the ALJ's finding of fact was not supported by a preponderance of evidence in the record. The modified finding reflects the period of Indian ownership that is supported by the evidence.

9. **Conclusions of Law.** The Corrected Proposed Order’s “Conclusions of Law” section is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

Claimant has not established this claim for an allottee water right or a *Walton*
water right. ~~with a priority date of October 14, 1864~~

Reason for Modification: As described in the modified “Opinion” section, below, there is insufficient evidence that the claimed place of use remained in ownership by a member of the Klamath Tribes after October 9, 1999. As a result, Claim 694 fails to meet the requirements of either an Allottee or a *Walton* claim.

10. **Opinion.** The first two paragraphs of the Corrected Proposed Order’s “Opinion” section are adopted without modification. The remainder of the “Opinion” section is replaced with the following:

In this case, no claimant appeared at hearing, and the record establishes ownership by a member of the Klamath Tribes only up until October 9, 1999. There is no evidence that, at the time of the hearing, the proper claimant was a Klamath Indian. As a result, the second element of an Allottee claim is not established, and the claim cannot be recognized on an Allottee theory.

Even though an Allottee right may not be recognized, it is possible in principle that this claim might succeed as a claim for a *Walton* right. However, as described in detail below, the present claimant(s) have not established that the claimed use of water has been developed with reasonable diligence since the passage of the land out of Indian ownership.

OWRD incorporates the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

There is no evidence that the claimed place of use remained in Indian ownership after October 9, 1999. There is no evidence that any attempt to develop the claimed use of water has ever been made. This means that more than five years passed without any evidence of development between the last known date of Indian ownership and the contested case hearing. .

The *Walton* requirement of reasonable diligence is based on the equivalent state-law principle applied by states that have adopted the prior appropriation doctrine.

The Oregon Supreme Court has defined reasonable diligence as follows:

The test, both in the construction of the necessary works and in the application of the water to a beneficial purpose, is *reasonable diligence*. There must be such assiduity of work of construction as will manifest to the world a *bona fide intention to complete it within a reasonable time*. The question is one of fact and must be determined from the surrounding circumstances.

Silvies River, 115 Or 27 at 61 (citations omitted) (emphasis added). *See also, In re Water Rights of Hood River*, 114 Or 112, 131 (1924) (“That which is usual and ordinary with men engaged in like enterprises who desire to speedily effect their designs is required.”).

In *Seaward v. Pacific Livestock Co.*, 49 Or 157 at 160-61 (1907), the Court stated the general rule succinctly:

What is a reasonable time in which to apply water originally intended to be used for some beneficial purpose depends upon the magnitude of the undertaking and the natural obstacles to be encountered in executing the design: *Hindman v. Rizer*, 21 Ore. 112 (27 P. 13); *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 85 (45 P. 472; 60 Am. St. Rep. 777).

The *Seaward* Court applied this rule to facts involving settlement of land by the Pacific Livestock’s predecessors, Morgan and Hinkey, in 1886, with first irrigation in 1887. Between 1887 and 1899 Morgan and Hinkey “were constantly enlarging the area of their arable land.” *Seaward* at 161. The Pacific Livestock Company bought Morgan and Hinkey’s land in 1899, and for a period of five years “made no attempt whatever to prepare any new land for cultivation, whereby a purpose to expand the appropriation might have been disclosed to persons who desired to make a subsequent use of the water.” *Id.* Since no cause for the delay was given, and therefore “believing it to have been unreasonable,” the Court did not allow the Pacific Livestock Company to expand its

appropriation based on the early initiation of the right by Morgan and Hinkey. *Id.* at 161, citing *Cole v. Logan*, 24 Or 304.

Seaward does not stand for the principle that a failure to develop water use within a period of five years must inevitably mean that the appropriator has failed to meet the reasonable diligence standard. Under other factual circumstances, a longer period development period may very well be considered reasonable. In this case, however, there is no evidence that development of the claimed use would have involved any unusual difficulty, or that there are any other mitigating circumstances that might warrant a greater than five year period of total inactivity. The technical report pertaining to development of an irrigation system on the claimed place of use does not indicate any particular technical challenges in establishing an irrigation system. OWRD Ex. 1 at 3-8. The size of the irrigable area (98.7 acres) is not unusually large compared to other adjudication claims. *Id.* Finally, there is simply no evidence at all of any kind of development of water use. There is no evidence, for example, that a claimant had diligently pursued development but needed some additional time to complete development, or that a claimant began development but ran into economic difficulties. Given the totality of the circumstances in this case, OWRD concludes that a greater than five year period of complete inactivity following the last known date of Indian ownership means that the Claimant has failed to prove the required reasonable diligence element of a *Walton* claim. For this reason, Claim 694 is denied.

Reasons for Modifications: To make the application of the Allottee right elements consistent with the modified Findings of Fact; to apply the Findings of Fact to the *Walton* right elements.

11. **Proposed Order.** The section titled “Proposed Order” (page 5) is replaced as follows:

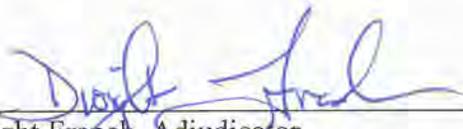
Neither the elements of an Allottee claim nor the elements of a Walton Claim are established for Claim 694; it is denied in its entirety.

Reasons for Modifications: To reflect the Findings of Fact, Conclusions of Law and Opinion sections.

B. DETERMINATION

1. The Corrected Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
 - a. The “History of the Case” is adopted with modifications, as set forth in Section A.7, above.
 - b. The “Issue” 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.8, above.
 - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.9, above.
 - f. The “Opinion” is adopted with modifications, as set forth in Section A.10, above.
 - g. The section titled “Proposed Order” (page 5) is replaced in its entirety, as set forth in Section A. 11, above. The outcome of the Order has been modified to reflect the denial of Claim 694.
2. Neither the elements of an Allottee claim nor the elements of a *Walton* claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING ALLOTTEE CLAIMS and the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS are incorporated as if set forth fully herein.
3. Based on the file and record herein, IT IS ORDERED that Claim 694 is denied as is of no force or effect.

Dated at Salem, Oregon on March 7, 2013



Dwight French, Adjudicator
Klamath Basin General Stream Adjudication