BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

KLAMATH RIVER BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Determination of the Relative Rights to the Use of the Waters of Klamath River and its Tributaries	)))))	**CORRECTED FINDINGS OF FACT AND ORDER OF DETERMINATION**

The Oregon Water Resources Department's Adjudicator, acting on authority delegated by the Water Resources Director, having considered the record in the above-entitled proceeding, and having determined that the Klamath River Basin Adjudication ("Adjudication") has proceeded in accordance with applicable law, as described below, hereby makes and orders to be entered of record in the Oregon Water Resources Department ("OWRD") the following Findings of Fact and Order of Determination:

A. INTRODUCTION AND FINDINGS OF FACT

A-1. INTRODUCTION TO THE ADJUDICATION PROCESS

The Adjudication is a proceeding for the determination of surface water rights in the Klamath River Drainage Basin pursuant to Oregon Revised Statutes ("ORS") Chapter 539.

The Adjudication involves the determination of water rights arising either from alleged use (or intent to use) initiated prior to the effective date of the Water Rights Code in 1909 (these claims are referred to herein as "pre-1909 claims"), or from the federal government's authority to reserve the use of water as an element of a reservation of federal or tribal land (these claims are referred to broadly as "federal reserved water right claims;" they may also be referred to based on the sub-type of federal reserved water right claims to which they belong).[1] *See generally* ORS Chapter 539.

The Adjudication includes over 730 claims to water rights based on either pre-1909 or federal reserved water right theories. Over 5,600 contests to these claims were filed.

Oregon follows the "prior appropriation" doctrine, which addresses which water rights are honored in times of shortage. Robert E. Beck, *Prevalence and Definition,* 2 *Waters and Water Rights*, 83 (Robert E. Beck, ed 1991); Janet C. Neuman, *Oregon*, 6 *Waters and Water*

[1] Post-1909 rights that are not based on the federal government's authority are determined through a permitting system under the Water Rights Code, ORS Chapter 537; they are not determined in the Adjudication.

Rights (2d ed 1994). In times of water shortage, one possessing a senior water right has a right to obtain regulation in his or her favor by having the watermaster shut off ("regulate") junior water users. ORS 540.045(1) (watermasters regulate distribution of water in accordance with "rights of record").

Until the issuance of the Findings of Fact and Order of Determination, the water right claims at issue in the Adjudication have remained outside the prior appropriation system. OWRD has not had the authority to regulate either in favor of or against these claims. ORS 539.045 (authorizing the watermaster to regulate according to "water rights of record," which as defined does not include adjudication claims). With the entry of the Findings of Fact and Order of Determination in OWRD's records, OWRD now has regulatory authority over the claims. ORS 539.130(4) ("the determination...shall be in full force and effect from the date of its entry in the records of the department unless its operation shall be stayed by a bond as provided in ORS 539.180"); 539.170 (while the Adjudication is pending in Circuit Court, "the division of water from the stream shall be made in accordance with the order of the director").

OWRD has administered the initial phases of the Adjudication, including receipt of claims and contests, conduct of contested cases and preparation of the Findings of Fact and Order of Determination. The Circuit Court is responsible for resolution of exceptions filed to the Findings of Fact and Order of Determination and issuance of the water right decree.

A-2. BASIN DESCRIPTION

The Klamath Basin is located in south central Oregon and northwestern California. The portion of the drainage basin located in Oregon measures approximately 85 miles from north to south and averages about 70 miles from east to west. It encompasses the major portion of Klamath County and smaller parts of Jackson and Lake Counties. The drainage area in Oregon includes a closed basin contiguous to the natural drainage basin of the Klamath River. This closed basin is the Lost River drainage located in the eastern extremity. The Adjudication does not address the rights to use water within the Lost River drainage. Therefore, references to the "Klamath River Drainage Basin," the "Klamath River Basin" or the "Klamath Basin" in the Findings of Fact and Order of Determination do not include the Lost River drainage, unless specifically stated otherwise.

Stream Systems within the Klamath River Drainage Basin (excluding the Lost River drainage)

Crater Lake, lying in the caldera of collapsed Mount Mazama, is a major water feature of the basin and is the principal attraction of the only National Park within the State of Oregon. Located along the crest of the Cascade Range, it has no visible inlet or outlet. On a long-term basis, precipitation and snowmelt on the crater walls are balanced by seepage and evaporation from the lake surface. The lake has a surface area of approximately 13,200 acres.

Upper Klamath Lake, the largest natural lake within the state, is another outstanding water feature of the basin. It is fed by both surface water entering from the north and west (the Williamson and Wood Rivers, its major tributaries,) and large springs and seeps located in the lake bed.

The Williamson River rises in large springs along the toe of Booth Ridge in the northeasterly portion of the basin. It flows northward for some distance before turning west and entering Klamath Marsh. From Klamath Marsh it flows southerly into Upper Klamath Lake. Between Klamath Marsh and Upper Klamath Lake, the Williamson has two significant tributaries. The first, Spring Creek, which enters the Williamson above the town of Chiloquin, exhibits almost constant flow; the second, Sprague River, joins the Williamson just south of Chiloquin.

The Sprague River has its headwaters on the westerly slopes of Coleman Rim and Gearhart Mountain in the eastern extremity of the basin. It is joined in the central portions of the Sprague River Valley by a major tributary, the Sycan River. The headwaters of the Sycan River are on Winter Ridge in the extreme easterly portion of the basin. The river flows in a northwesterly direction until it enters Sycan Marsh. From the marsh it flows southwesterly to its confluence with the Sprague. The Sprague River then flows generally westerly until it merges with the Williamson River near the town of Chiloquin.

Wood River rises from the Wood River Springs. The springs are located about 17 miles due north of Agency Lake. Wood River drains into Agency Lake, the shallow, marshy, northerly arm of Upper Klamath Lake.

Drainage from the easterly slopes of the Cascade Mountains provides surface inflows on the west side of Upper Klamath Lake. Within this western drainage, many small high altitude lakes exist in small natural pockets. One of these, Fourmile Lake, provides storage for releases into Cascade Canal, one of two systems that export water from the Klamath Basin for use in the Rogue Basin to the west. The other system utilizes water from Howard Prairie Lake and transfers it via the Howard Prairie Canal to the Rogue Basin.

Prior to modification by man, the outlet of Upper Klamath Lake was over a basalt dike located at the extreme southern end of the lake. This dike, which formed natural falls, is the headwaters of the first mile stretch of the Klamath River, which is know as the Link River. The Link River discharges into Lake Ewauna, which during peak floods overflowed into Lower Klamath Lake.

Historically, flood overflows from Lake Ewauna fed this large natural marsh known as Lower Klamath Lake. The area inundated extended from Klamath River into California and covered approximately 94,000 acres. It was in this old lakebed that some of the early private irrigation development occurred. Much of the area in Oregon has been reclaimed for agricultural purposes.

The Klamath River leaves Lake Ewauna, flowing in a generally southerly and westerly direction. Near Keno, the stream narrows and enters a precipitous gorge from which it enters John C. Boyle Reservoir. After release through a power generation facility, it leaves the state, flowing in a southwesterly direction for about 208 miles where it reaches its estuary at the town of Klamath, California.

Previously Adjudicated Sub-Basins

Along several tributaries of the Klamath River, successful adjudications of certain types of water right claims have already been completed. Specifically, prior adjudications have been completed on the North and South Forks of the Sprague River, Annie Creek, Cherry Creek, Four

and Seven Mile Creeks and the Wood River. The effect of these prior adjudications is addressed in the Partial Orders of Determination for claims in which a prior adjudication is relevant.

A-3 NOTICE OF INVESTIGATION OF STREAM

ORS 539.030 provides: "The Water Resources Director shall prepare a notice, setting forth the date when the director or the assistant of the director will begin such investigation as may be necessary for a proper determination of the relative rights of the various claimants to the use of the waters of the stream. The notice shall be published in two issues of one or more newspapers having general circulation in the counties in which the stream is situated, the last publication of the notice to be at least 10 days prior to the date set in the notice for the beginning of the investigation by the director or the assistant of the director."

The following notices were made in accordance with ORS 539.030:

12/23/1975 notice

On December 23, 1975, the OWRD Director, James E. Sexson, issued a document entitled "Notice to Water Users, Klamath River and Its Tributaries" ("December 23, 1975 Notice"). (Appendix A-1.) The December 23, 1975 Notice stated that pursuant to ORS 539.020 "on September 1, 1976 the Water Resources Director of the State of Oregon will begin an investigation of the flow and use of the waters of the Klamath River and its tributaries . . . (except Cherry Creek, Anna Creek, and those portions of the Wood River, Sprague River and Swan Lake Basin outside the former Klamath Indian Reservation boundaries)." The December 23, 1975 Notice was published in the Klamath Falls Herald and News on January 20, 1976 and January 27, 1976; the Lake County Examiner on January 15, 1976 and January 22, 1976; and the Medford Mail Tribune (Jackson County) on January 20, 1976 and January 27, 1976. In addition, the December 23, 1975 Notice was also given by certified mail to those federal agencies identified in Appendix A-2 on April 23, 1976, and to the federal entities listed on Appendix A-3 on April 29, 1976.

The December 23, 1975 Notice directed any person intending to make a water right claim in the Adjudication to file a "written notification of intent to file a claim on or before October 1, 1976" ("Notice of Intention"). The notice also included notification that a field inspection would ensue after a Notice of Intention was received by OWRD, and that there would be a fixed time and place in the future to receive claims and testimony.

3/1/1977 Supplemental Notice

On March 1, 1977, OWRD Director, James Sexson, issued a document entitled "Supplemental Notice to Water Users, Klamath River and Its Tributaries" ("March 1, 1977 Notice"). (Appendix A-4.) The March 1, 1977 Notice was published in the Klamath Herald and News, the Lake County Examiner, and the Medford Mail Tribune (Jackson County) on April 21, 1977 and April 28, 1977. In addition, although not required by statute, the March 1, 1977 Notice was also given by certified mail. The service list was compiled using with records of the county assessor. These persons are identified in Appendix A-5. Small groups of certified mailings relating to this notice continued between April 25, 1977 and April 9, 1980. The recipients of these additional mailings are identified in Appendix A-6.

The March 1, 1977 Notice provided any person who "intend[ed] to claim rights to the beneficial use of waters of said stream system, such use having been initiated prior to February 24, 1909 or prior to the effective dates for vested rights as provided by law, for those lands within the boundary of the former Klamath Indian Reservation, and continued to the present time, are required to file with the Water Resources Department . . . a written notice of intention to file a claim, as provided by ORS 539.030." A form entitled "Notice of Intention to File A Claim" was enclosed with the March 1, 1977 Notice. (Appendix A-7.)

A-4 EXAMINATION OF STREAMS AND DIVERSIONS AND IRRIGATED LANDS

Numerous Notice of Intention filings were received by OWRD. These filings are organized by Township, Range, Section in Appendix B. In addition, a summary list of Notices of Intention organized by the name of the filer, and secondarily identified by Township Range and Section is in Appendix N. Based on the Notice of Intention filings, OWRD began conducting and subsequently completed "an examination of the stream and the works diverting water therefrom," including " measurement of the discharge of the stream and of the capacity of the various diversions and distribution works, and an examination of the approximate measurement of the lands irrigated from the various diversion and distribution works." ORS 539.120.

I. Aerial Photography

To facilitate field investigation work, OWRD commissioned NASA to take aerial photographs of the lands within the basin. To prepare these photographs for field work, OWRD staff drafted Public Land Survey lines onto the photos, and over 225 miles of distance measurements were taken in the field to confirm their scale. These measurements were made through the use of geodimeter, theodolite, and an electronic distance measurement (EDM) instrument. The flight paths (Flights 1 & 2) and their associated aerial photographs paths are in Appendix C.

II. Field Inspections

Based on the Notice of Intention filings, OWRD conducted field inspections. On ground inspections were made of diversion works, canals and ditches, natural overflow, and water use for irrigation, livestock watering and domestic use, among other uses. The majority of field inspections were conducted in the presence of persons with knowledge of water use (such as landowners, tenants and employees) on the lands being inspected. These individuals provided valuable information about the elements of the water use, as well as data regarding the history of land ownership and historical water development on the property. OWRD's field inspectors observed and recorded characteristics of the diversion and distribution systems necessary to calculate their capacities (e.g. types and sizes of pumps; types and sizes of culverts; ditch sizes, types, and conditions; sprinkler sizes, etc.). Canal measurements are in Appendix D. In instances where water was in use during the inspection, direct water use measurements were often taken.

III. Field Inspection Reports

Following each field inspection, a detailed Field Inspection Report was written. The Field Inspection Reports typically reference the landowners name(s), address of the property, the Township, Range and Section location of the property, tax lot numbers, the source of water, use or purpose of water, relevant aerial photo numbers, and date of the inspection. In addition, each report includes a detailed narrative, specifying who was spoken with and their relationship to the land, and describing information gathered concerning water use as it pertained to dates of historical and current use. The narrative also includes a description of the lay of the land, drainage patterns, the types of vegetation encountered, evidence of old ditches, and the method of irrigation – natural overflow, subirrigation or irrigation system. If natural irrigation occurred there is generally a description of the directional movement of water and when the water flowed to various parcels of land. If an irrigation system was used there is generally a description of the method. For sprinker systems data was recorded for the motor, pump, intake, output, mainline, handline, wheelines, types of sprinklers, etc. For irrigation from ditches and canals information was recorded on the locations of headgates or slidegates, the amount of head, use of laterals, and a general description of flood irrigation if applicable. Domestic use and approximate numbers of livestock on the land were also noted. Field inspection reports are filed with the notices of intention by Township, Range, Section. (*See* Appendix B.)

IV. Field Investigation Maps

Following field inspections in which evidence of water use was found, maps were drafted showing the course of the stream, the location of each diversion point, and each ditch, canal, pipeline or other means of conveying the water to the place of use, and the location of the place of use within each legal subdivision. These Mylar maps were based upon photogrammetry, plane table and stadia surveys, and in some cases existing final proof survey maps. In addition, OWRD staff relied on U.S. Government Land Office records, county and private survey records, and other county records, such as those relating to Indian allotments and deeds. In addition, water uses noted by OWRD's field inspectors were often illustrated on relevant aerial photo to use as an aid while drafting the maps. Most uses were drafted on township maps at a scale of 1 inch = 1320 feet; some small lots were drafted at a scale that allowed even greater detail to be shown.

The original maps and plats prepared pursuant to ORS 539.120 are submitted herewith and incorporated herein as Appendix E, and referred to as "OWRD Investigation Maps."

V. Streamflow Investigations

The results of OWRD's technical work pertaining to streamflow are presented in Natural Flow Estimates for Streams in the Klamath Basin (Oregon Water Resources Department, Open File Report SW 34-001, June 2004. (*See* Appendix F (on CD).) Data and documentation pertaining to OWRD's streamflow estimates and stream measurements is also included in Appendix F. In addition, a further description of this work is contained in testimony submitted by Richard Cooper and Jonathan LaMarche in OAH Case Nos. 277, 279-281, and 284-286. Direct testimony by Cooper or Lamarche is generally located around Exhibit 65 for each case;

rebuttal testimony by Cooper or Lamarche is generally located around Exhibit 168 for each case. This testimony is also included in Appendix F. All of the documents in Appendix F are incorporated by reference as if set forth fully herein.

A-5. NOTICE TO FILE CLAIM

Pursuant to ORS 539.040, on September 7, 1990, Water Resources Director William H. Young issued a document entitled "Notice to File Claim" ("September 7, 1990 Notice"). (Appendix G-1.) The September 7, 1990 Notice enclosed a packet of documents including: Statement and Proof of Claim to Use of Water of the Klamath River and Its Tributaries, Instructions for Statement and Proof of Claim Form, and Klamath Basin Water Rights Adjudication – How to File a Claim – Should I File? (Appendix G-2.) The September 7, 1990 Notice required those desiring to claim a water right in the Adjudication to file Statements and Proofs of Claim between October 15, 1990 and December 7, 1990 (in Klamath Falls), or between December 17, 1990 and February 1, 1991 (in Salem).

Pursuant to ORS 539.040(1) the September 7, 1990 Notice was published in the Times Herald and News on September 11 and 12, 1990. Pursuant to ORS 539.040(2), the September 7, 1990 Notice was also given by certified mail to those parties listed in Appendix G-3.

Between November 14 and November 16, 1990, an additional letter titled "Important Information Regarding Water Use" (Appendix G-4), which served as a reminder of the upcoming deadline for filing claims, was mailed via first-class mail to certain parties listed in Appendix G-5.

Time to file a claim extended for certain classes of potential claimants[2]

As a result of a lawsuit filed on December 18, 1990, federal agencies, the Klamath Tribes, and certain water users within the Klamath Reclamation Project were not required to file claims during the original claiming period. *United States v. Oregon,* Complaint for Declaratory Judgment and Injunctive Relief, Dec. 18, 1990, USDC Case No. CV 90-1329-FR. After several years of litigation, most of the legal issues presented in *United States v. Oregon* were resolved by the Ninth Circuit in 1994. *See United States v. Oregon,* 44 F3d 758 (9th Cir. 1994). *United States v. Oregon* was finally resolved by the District Court on September 17, 1996. *See, United States v. Oregon,* Order of Dismissal, September 17, 1996, USDC Case No. CV 90-1329-FR.

Federal agencies, the Klamath Tribes, and certain other water users within the Klamath Reclamation Project were required to file their claims between October 1, 1996 and April 30, 1997. Pursuant to ORS 539.040, on August 21, 1996, OWRD Director Martha Pagel issued two

[2] In addition to the extension of time described in this section, OWRD provided certain other extensions of time for providing certain information related to the specific groups of claims. For example, OWRD allowed certain of the claimants referred to as "allottee" claimants to file their claims in stages, with certain claim information to be provided by the February 1, 1991 deadline, and other claim information to be filed by specifically identified, subsequent deadlines. See, e.g., Claim 689 (OAH Case No. 89) Record, OWRD Ex. 1 at 40 (describing stipulation with OWRD permitting certain claim information to be filed after the February 1, 1991 claim filing deadline). To the extent that any such extension was raised as an issue in a contested case proceeding for an affected claim, or is otherwise relevant to a determination of the claim, the extension will be addressed in the Partial Order of Determination for that claim.

notices to file claims pertaining to these classes of potential claimants ("August 21, 1996 Notices to File Claim"). One of the notices was directed to persons using water within the Klamath Reclamation Project. (Appendix H-1.) The other was directed to the United States Attorney General. (Appendix H-2.) A combined version of the August 21, 1996 Notices to File Claim was published on August 25 and 26, 1996, in the Klamath Falls' Herald and News. (Appendix H-3.) In addition, on August 21, 1996, the August 21, 1996 Notices to File Claim were sent via certified mail to the parties listed in Appendix H-4. The August 21, 1996 Notices to File Claim enclosed a packet of documents including: a cover letter, forms for Statement and Proof of Claim for Federal or Indian Reserved Water Rights, Statement and Proof of Claim to the Use of Waters of the Klamath River and Its Tributaries, Instructions for Statement and Proof of Claim Form, and Klamath Basin Water Rights Adjudication – How to File a Claim – Should I File? (Appendix H-5.)

Both August 21, 1996 Notices to File Claim directed that claims made pursuant to these notices could be filed in Klamath Falls between October 1, 1996 and January 31, 1997, and in Salem between February 3, 1997 and April 30, 1997.

Receipt of Claims

Each claim filed pursuant to the above notices was assigned a claim number by OWRD. Appendix O consists of logs from 1997 and 1998 of claims and claimants called the "Klamath Adjudication Directory." This directory shows groupings of claims by type. The directory references claims with a "series number" that is stamped on certain of the original claim documents. Some of these numbers may act as map references to maps in the record. Some lists also shows an OWRD File # which is no longer used.

A-6. DELEGATION OF AUTHORITY

On July 14, 1998, OWRD Director, Martha O. Pagel, delegated that portion of her authority comprising "all the powers, duties and functions necessary to accomplish the Klamath Basin Adjudication" to Water Rights Administrator, Richard D. Bailey. July 14, 1998 Order Delegating Authority to Adjudicate the Waters of the Klamath River and its Tributaries (Appendix I-1). This authority has subsequently been delegated to other OWRD employees, as described below. Each subsequent delegation covered a similar scope of authority. The person holding this delegated authority is referred to as the "Adjudicator." Throughout the Findings of Fact and Order of Determination, when references are made to actions taken by "OWRD" (e.g., specific findings of fact, conclusions of law, or partial orders of determination) following the initial delegation of authority on July 14, 1998, unless otherwise specified the referenced actions are exercises of the Adjudicator's delegated authority.

On January 27, 2003, OWRD Director, Paul R. Cleary, temporarily delegated Thomas Byler authority to act as Adjudicator. Order Temporarily Delegating Authority to Adjudicate the Waters of the Klamath River and its Tributaries (Appendix I-2). On March 10, 2003, OWRD Director, Paul R. Cleary, revoked the temporary delegation of authority to Thomas Byler and reinstated the July 14, 1998 delegation of authority to Richard D. Bailey. Order Revoking Temporary Delegation of Authority to Adjudicate the Waters of the Klamath River and its Tributaries and Reinstating Order Dated July 14, 1998 (Appendix I-3).

On February 18, 2005, OWRD director, Philip C. Ward, temporarily delegated Dwight French authority to act as Adjudicator. Order Temporarily Delegating Authority to Adjudicate the Waters of the Klamath River and its Tributaries (Appendix I-4). Dwight French was appointed Water Rights and Adjudications Division Manager on August 8, 2005. On August 16, 2005, OWRD Director, Phillip C. Ward, revoked the February 18, 2005 temporary delegation order and delegated Dwight French to act as Adjudicator. Order Revoking Order Temporarily Delegating Authority to Adjudicate the Waters of the Klamath River and its Tributaries and Delegating Authority to Adjudicate the Waters of the Klamath River and its Tributaries (Appendix I-5).

A-7. NOTICE OF OPEN INSPECTION

Pursuant to ORS 539.090, on September 16, 1999, OWRD Adjudicator, Richard D. Bailey issued a "NOTICE OF OPEN INSPECTION OF CLAIMS Klamath Basin General Stream Adjudication" ("Open Inspection Notice"), which gave notice that all claim information and other information of record would be available for inspection to all claimants and to any party who notified OWRD that they wished to contest the claim(s) of others. (Appendix J-1.) The Open Inspection Notice was mailed by certified mail to the parties listed in Appendix J-2. The Open Inspection Notice was published in the Klamath Falls Herald and News on Sunday, September 26, 1999. (Appendix J-3.)

The Open Inspection Notice provided for inspection in two phases: October 4, 1999 through November 5, 1999 in Klamath Falls, Oregon, and November 15, 1999 through January 14, 2000 in Salem, Oregon.

To describe the process, two sample sets of contest form and instructions for filing a contest were included in the mailing. (Appendix J-4.) One set is for claimants, titled "Statement of Contest of Preliminary Evaluation of Claim: YOUR CLAIM." The second set is to contest the claims of others titled "Statement of Contest of Claim and/or Preliminary Evaluation of Claim: CLAIMS OF OTHERS."

Open Inspection Period Extended

On December 8, 1999, OWRD Adjudicator Bailey sent a memorandum, via regular mail, to persons having an interest in the waters of the Klamath Basin. (Appendix J-5.) This memorandum, among other things, extended the Salem portion of the Open Inspection period until March 31, 2000. On December 16, 1999, December 21, 1999, and December 29, 1999, copies of the December 8, 1999 Memorandum, along with the Open Inspection Notice, were mailed to individuals who did not receive the September 16, 1999 Open Inspection Notice due to OWRD's mail being returned undeliverable (jointly referred to as Appendix J-6).

On January 10, 2000, OWRD Adjudicator Bailey issued a "NOTICE OF EXTENSION OF PERIOD FOR OPEN INSPECTION OF CLAIMS Klamath Basin General Stream Adjudication" ("Notice of Extension of Open Inspection"), extending the Salem portion of the Open Inspection period until March 31, 2000. (Appendix J-7.) The Notice of Extension of Open Inspection was given on January 7, 2000, to those parties listed in Appendix J-8.

A-8. PRELIMINARY EVALUATION OF CLAIMS

On October 4, 1999 (the day that Open Inspection commenced), OWRD Adjudicator Bailey issued a document entitled "Klamath Basin Adjudication Summary and Preliminary Evaluation of Claims" ("Preliminary Evaluation"). (Appendix K.) The Department's Preliminary Evaluation of claims is not required by law and created only for the benefit of contestants and claimants. OWRD does not attribute any weight to the Preliminary Evaluation for any of the individual claims in the Findings of Fact and Order of Determination. The weight assigned to documents that OWRD may have relied on in making the Preliminary Evaluation of each claim is dependent on the nature of the document.

A-9. NOTICE OF OPPORTUNITY FOR CONTESTED CASE HEARING

Pursuant to ORS 539.100, on February 11, 2000, OWRD Adjudicator Bailey issued a "Notice of Opportunity for Contested Case Hearing Regarding Claims" ("Contested Case Notice"). (Appendix L-1.) The Contested Case Notice enclosures included: Frequently Asked Questions; Statement of Contest of Preliminary Evaluation of Claim – Your Claim; Instructions for Statement and Contest Forms – Your Claim; Statement of Contest of Preliminary Evaluation of Claim – Claim of Others; and Instructions for Statement and Contest Forms – Claims of Others. (Appendix L-2) The Contested Case Notice was served by certified mail on February 15, 2000, to persons having or appearing to have an interest in the waters of the Klamath Basin, including holders of non-cancelled water rights. (Appendix L-3). The Contested Case Notice was also sent via certified mail to 29 Irrigation Districts and individual patrons of those Irrigation Districts on March 10, 13, 14, and 15, 2000. (Appendix L-4.) On March 22, 2000, ten Contested Case Notices were mailed to water right owners who did not receive the February 15, 2000 mailing due to having moved or due to errors by OWRD. In addition, four Contested Case Notices were sent via international registered mail to residents of Canada and Great Britain who own land that received Klamath Basin water via irrigation districts. (Appendix L-5.) On March 23, 2000, a Contested Case Notice was sent via certified mail to one individual who had not received the February 15, 2000 mailing due to an address change not having been entered in OWRD's database (Appendix L-6). On March 27, 2000, the Contested Case Notice was sent via certified mail to two claimants who had recently purchased property. (Appendix L-7.)

In accordance with the Contested Case Notice, any person desiring to contest the Adjudicator's Preliminary Evaluation and/or the water right claim of another person was required to file a contest (which served as a request for a contested case hearing) between April 3, 2000 and May 8, 2000. A total of 5,656 contests were filed on or before May 8, 2000.

Each contest filed pursuant to the above notices was assigned a contest number by OWRD. In some cases multiple parties jointly submitted a single contest. Appendix M is a "Contest Index" showing Claims and their associated contests and the name(s) of the original contestant.

A-10. CONTESTED CASE HEARINGS

As required by Oregon Laws 1999, Ch. 849, sec. 9, contested claims were referred (during a period between May 8, 2000 and November 2001) to the Hearing Officer Panel, now known as the Office of Administrative Hearings (OAH), for a contested case hearing. All contested case proceedings are addressed in the Partial Orders of Determination for each claim subject to a contested case hearing.

A small number of claims were not contested. These cases were not referred to the OAH for a contested case hearing. Additionally, some claims and some contests were withdrawn prior to time set for hearing of such claims or contests. Depending on the procedural posture of the case, the claim and/or contest was either dismissed by the Administrative Law Judge and referred back to the Adjudicator, or the claim and/or contest was withdrawn by the Adjudicator in accordance with OAR 137-003-515(4).

The OAH assigned a contested case number to each case. Generally, a single claim and all its associated contests were referred to the OAH as a single contested case. However, in some instances groups of claims may have been consolidated in a single case, or certain cases may have been consolidated for the purpose of a single hearing.

A-11. PARTIAL ORDERS OF DETERMINATION

Following the disposition of individual, contested claims at the OAH (whether by proposed order, withdrawal of contests, or a proposed settlement), the Adjudicator reviewed the proposed disposition and the record pertaining to each claim. The Adjudicator also reviewed the claims that were not contested. The Adjudicator's review and determination of each claim is reflected in a Partial Order of Determination for the claim. All of the Partial Orders of Determination for the Adjudication are compiled herein as part of the Findings of Fact and Order of Determination.

A-12. THE RECORD

The Adjudication record includes all documents entered into evidence or in OWRD's files pertaining to a given claim and the appendices to the Findings of Fact and Order of Determination. The documents pertaining to individual claims are not treated as appendices, but are part of the record filed with the clerk of the Klamath County Circuit Court, pursuant to ORS 539.130. The evidentiary record of a given contested claim is limited to the evidence admitted in the contested case proceeding(s) pertaining to that claim, with the exception that contested claims that were withdrawn from the OAH due to proposed settlement or the withdrawal of contests are not so limited, and may rely on evidence in the general Adjudication record relevant to such claims, unless otherwise stated in specific settlement or contest withdrawal documents.

Most of the Appendices to the Findings of Fact and Order of Determination have been referenced and described above, but there are a number that have not. The remainder are included within Appendix P. The contents of Appendix P include the following:

P-1: A 1991 "Klamath Claims Indexes" that is utilizes a file numbering system no longer used when referencing the claims.

P-2: Pro Hac Vice Records

P-3: "Dale White Correspondence" File

P-4: Klamath Tribes Census'

P-5: Misfilings

P-6: Returned Mail from specified notices (Filing Cabinet)

P-7: Certified Mailing Receipts from specified notices (Filing Cabinet)

P-8: Maps of Record (in Map file and on DVD set with index)

P-9: Assessment Rolls

P-10: Water Right Records

A-13. CHANGE OF OWNERSHIP RECORDS FOR TWO CLAIMANTS

In the following two claims, OWRD received change of ownership forms after completion of contested case proceedings in the claims before the Office of Administrative Hearings (OAH). Because these particular changes in ownership may bear on the legal status of a part or all of these claims, and because the claims had already been referred back to OWRD for final determination, OWRD did not change the name of the claimant in the Partial Orders of Determination of these claims. OWRD instead records the receipt of these changes of ownership forms here.

Claim 267

The property appurtenant to Claim 267 was subsequently transferred to Brenda C. Watkins Loving Trust, Brenda C. Watkins, Trustee. *See* CHANGE OF OWNERSHIP FORM (Aug. 18, 2006) and STATUTORY WARRANTY DEED, County of Klamath (Aug. 3, 2006) in the claim file for Claim 267.

Claim 275

The property appurtenant to Claim 275 was subsequently transferred to the Stewart Family Trust dated 6/4/2003, John D. Stewart, Trustee. *See* CHANGE OF OWNERSHIP FORM (Nov. 2, 2009) and STATUTORY WARRANTY DEED, County of Klamath (Nov. 24, 2008) in the claim file for Claim 275.

A-14. GENERAL FINDINGS OF FACT PERTAINING TO PARTIAL ORDERS OF DETERMINATION

In general, claims for irrigation, stockwater and domestic uses contained evidence pertaining to the appropriate rates, duties and seasons of water use for the claimed uses. However, where a claim contains no evidence to the contrary, OWRD applies the following

standard rates, duties and seasons, which are based on Appendix A to OWRD's Preliminary Evaluation. Certain claims' rates, duties or seasons may also be limited by the quantity of water or the length of the season claimed. The individual Partial Orders of Determination state the rates, duties and seasons for each claim recognized for an irrigation, stockwater or domestic use. Where the standard rate, duty or season applies, the individual Partial Order of Determination will incorporate these General Findings of Fact.

I. Irrigation

1. Duty

The standard duty for irrigation is not to exceed three and one-half acre-feet-per-acre during any one irrigation season, unless otherwise specified in the Partial Order of Determination for the claim.

2. Rate

The standard rate for irrigation is one-fortieth cubic foot per second for each irrigated acre, unless otherwise specified in the Partial Order of Determination for the claim.

3. Irrigation Season

The standard irrigation season is March 1 through October 31 each year, unless otherwise specified unless otherwise specified in the Partial Order of Determination for the claim.

II. Stockwater Use

1. Rate for Non-dairy Stockwater use

The standard rate for non-dairy stockwater use is twelve gallons per day per head, unless otherwise specified in the individual claim. If a claim is not specified as dairy stockwatering, the claim is treated as being for non-dairy stockwatering.

2. Rate for Dairy Stockwater Use

The standard rate for dairy stockwater claims is 35 gallons per day per head, unless otherwise specified in the individual claim.

3. Stockwater Season

The standard season for stockwater use is January 1 through December 31 each year, unless otherwise specified in the individual claim.

III. Domestic Use

1. Domestic Use Rate

The standard rate for domestic use is one-hundredth of one cubic foot per second per home, unless otherwise specified in the individual claim.

2. Domestic Use Season

The standard season for domestic use is January 1 through December 31 each year, unless otherwise specified in the individual claim.

A-15. LAYERED WATER RIGHTS

Certain claims recognized in whole or in part in the Findings of Fact and Order of Determination may have other rights or recognized claims on a portion or all of the same place of use, for the same purpose of use, and from the same or different sources of water, as the recognized claim. These overlapping rights are sometimes referred to as "stacked" rights. The "stacked" rights may result from the recognition of other adjudication claims based on independent events of appropriation, or from rights initiated through Oregon's permit system after the effective date of the Water Rights Code in 1909. Use of water on a place of use with "stacked" rights may not exceed the rate and duty necessary for beneficial use of water. In other words, the "stacked" rights may not be combined in such a way as to exceed the rate and duty necessary for beneficial use of water on a given place of use.

A-16. PLACE OF MEASUREMENT

The location of any required water use or streamflow measurements are addressed in the individual Partial Orders of Determination.

A-17. CONCLUSIVE AS TO EXISTING RIGHTS

ORS 539.200 provides that the Findings of Fact and Order of Determination, as confirmed or modified in the decree issued by the Circuit Court, "shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination."

Pursuant to ORS 539.210, any potential claimant who has failed to timely file a claim in the Adjudication "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant."

A-18. FILING EXCEPTIONS TO THE FINDINGS OF FACT AND ORDER OF DETERMINATION

Once the Final Order of Determination is filed with the Circuit Court, a date for hearing the determination will be established. ORS 539.130(2). The Water Resources Department notifies owners and claimants of the time set for the hearing. ORS 539.130(3). Parties may file exceptions to the Findings of Fact and Order of Determination prior the time set for hearing in accordance with ORS 539.150.

B. GENERAL CONCLUSIONS OF LAW

The general conclusions of law are addressed in separate subsections B-1 through B-9 as follows:

B-1 GENERAL CONCLUSIONS OF LAW CONCERNING PRE-1909 CLAIMS

B-2 GENERAL CONCLUSIONS OF LAW CONCERNING ALLOTTEE CLAIMS

B-3 GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS

B-4 GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS

B-5 GENERAL CONCLUSIONS OF LAW CONCERNING FEDERAL RESERVED WATER RIGHTS

B-6 GENERAL CONCLUSIONS OF LAW CONCERNING THE 1897 ORGANIC ACT

B-7 GENERAL CONCLUSIONS OF LAW CONCERNING PWR-107 CLAIMS

B-8 GENERAL CONCLUSIONS OF LAW CONCERNING ACQUIRED LANDS

B-9 GENERAL CONCLUSIONS OF LAW CONCERNING AMENDMENT OF CLAIMS

B-1. GENERAL CONCLUSIONS OF LAW CONCERNING PRE-1909 CLAIMS

I. Elements of a Pre-1909 Water Right

Under state law, to establish a right to the use of water initiated prior to February 24, 1909 (a "pre-1909 water right"):

> [a]s a general rule ... three elements must exist: (1) an intent to apply it to a beneficial use, existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, canal or other structure; and (3) an application of it within a reasonable time to some useful industry....

In re Water Rights of Silvies River, 115 Or 27, 64-65 (1925); *see also Low v. Rizor*, 25 Or 551, 557 (1894). This articulation of the elements of a pre-1909 water right parallels ORS 539.010(4), which provides:

> The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act ... where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and in compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter.

Id. Thus, this statute articulates a three-part test applicable to a pre-1909 water right: (1) good faith commencement prior to February 24, 1909; (2) of construction of works to apply water to a beneficial use; and (3) prosecuted with due diligence. OWRD addresses each of these elements in turn.

A. Intent

The *Silvies River* court defined the element of intent as follows:

> it is the present *bona fide* design or intention of applying [water] to some immediate beneficial use, or the appropriation must be made in the present *bona fide* contemplation of a future application of it to such a purpose; it should be shown in all its fullness by the facts and circumstances to have been present in the mind of the appropriator at the time the appropriation was made or claimed.

115 Or 27, 64-65. *See also Hindman v. Rizor*, 21 Or 112, 120 (1891) ("While (the appropriators) could rightfully appropriate water not only for the present but also for the future needs of the land, the water so appropriated must have been utilized within a reasonable time...."). Thus, while the "use" or application may be present or future, the "intent" or "contemplation" must in either case be contemporaneous with the initial appropriation. The original intention must include that the water will be used on certain lands "then definitely had in mind." *In re Water Rights of Deschutes River and Tributaries*, 134 Or 623, 655 (1930); *see also Nevada Ditch Co. v. Bennett*, 30 Or 59, 89 (1896); *In re Water Rights of Hood River*, 114 Or 112, 137-38 (1924). Although it is necessary that the original appropriator had such intent "in mind" at the time of the original appropriation, it is also essential that the intent continue in the original or subsequent appropriators until actual application to beneficial use. *Nevada Ditch Co.* at 89 (intent may be declared through another); *Hood River* at 137-38 (it must be "*reasonably anticipated* that when the diversion is ultimately completed . . . [the] land will then, or with reasonable diligence thereafter [be] ready to receive it") (Emphasis added).

B. Diversion

As stated above, a "diversion from the natural channel by means of a ditch, canal or other structure," *Silvies River*, 115 Or at 64-65 (1925), or the "construction of works," ORS 539.010(4), for the diversion and delivery of water to a beneficial use is generally a required element of a pre-1909 water right.

There is an exception to this requirement. No initial diversion is required where the appropriator's land is "naturally irrigated" and the appropriator "in some substantial way indicates that it is his intention to reap the benefit of the fruit of the irrigation." *Id.* at 66. In such case, the priority date is "deemed to be when the proprietor of the land accepts the gift made by nature..." *Id.*

The *Silvies River* court described the reasoning behind this exception to the diversion requirement:

> [D]iversion of the water has a special application or exception to much of the land in the Harney Valley. It involves the matter of the natural irrigation of the land. Nature has been very generous to the Harney Valley in this respect. With practically no artificial works for irrigation, thousands of acres are naturally watered.... It would seem to be fair and equitable, if not absolutely essential, that such date be deemed to be when the proprietor of the land accepts the gift made by nature, and garners the produce of the irrigation by harvesting or utilizing the crops grown on the land, or making preparation for so doing, or in some substantial way indicated that it is his intention to reap the benefit of the fruit of the irrigation. When no "ditch, canal, or other structure" is necessary to divert the water from its natural channel, the law does not vainly require such works, prior to an appropriation. We do not intend to suggest that in most cases the building of some kind of an irrigation system is not *requisite after the appropriation is made* in order to effect an economical beneficial use of such water and prevent waste. This should be accomplished within a reasonable time as circumstances permit and necessities require....

Id. (Emphasis added). This principle was affirmed and clarified in *Warner Valley Stock Co. v. Lynch*, 215 Or 523 (1959), which specifically states that it is "consistent" with the statements of the Oregon Supreme Court in *Silvies River*, 115 Or 27 (1925), as well as *In re Willow Creek*, 74 Or 592 (1915), and *Hough v. Porter*, 51 Or 318 (1908).

The *Warner Valley Stock Co.* case involved interpretation of the findings and order of determination as well as the 1929 decree for the waters of Warner Lakes and their tributaries. 215 Or at 532-33. Plaintiffs filed the suit after the Lake County Circuit Court directed the State Engineer to issue permits to Warner Valley Stock Company for the construction of two reservoirs in Warner Valley. *Id.* at 526. Plaintiffs, who had water rights based on natural overflow from Hart Lake under the 1929 decree, argued the permits would violate their vested water rights. *Id.* at 532. Based on the 1929 decree, the Supreme Court affirmed the circuit court's decision that the method of diversion by overflow was wasteful and, accordingly, held "the *method of diversion* by way of natural over-flow is a privilege only and cannot be insisted upon by the objectors if it interferes with the appropriation by others of the waters for a beneficial use."[3] *Id.* at 537 (Emphasis added). It is important to note that the Warner Valley

[3] In 1909, the Oregon Supreme Court reached a similar conclusion in *Hough v. Porter,* 51 Or 318, 420 (1909). The *Hough* court found that "wasteful *methods* so common with early settlers can...be deemed only a privilege

court, consistent with other court decisions, such as *Hough v. Porter* and *Silvies River*, specifically states only that the *method* of diversion by natural overflow cannot be insisted upon where it is wasteful. These decisions still allow an appropriator to establish a water right for use of that quantity of water obtained by beneficial use. In fact, the *Warner Valley* court went on to emphasize that the appellants had acquired vested water rights that they retained after the court's decision. *Id.* at 538.

Similarly, in *Masterson v. Pacific Livestock Company*, the court found that prior to the adjudication, the defendants had only irrigated their lands by means of natural overflow. 144 Or 397, 401-2 (1933). The *Masterson* court found that, although the decree had not provided the quantity of water to be taken under the right, the natural irrigation equaled no more than five acres "in the regular way." 144 Or at 406-8.

Thus, the case law indicates that appropriators may acquire pre-1909 water rights using natural overflow as the method of diversion. To avoid the waste of water, Oregon courts have held that the natural overflow diversion method is only a privilege. This does not negate the right, but does limit the appropriator's ability to demand delivery of water by the natural overflow method. Specifically, for any portions of any water rights recognized in the Findings of Fact and Order of Determination that continue to employ natural overflow as a method of irrigation, the holders of such rights cannot make a call on water appropriated under any other water rights. Further, any future 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.

C. Reasonable Time

The requirement of an "application of (the water) within a reasonable time to some useful industry," *Silvies River*, 115 Or 27 at 65, is synonymous with "reasonable diligence" or "due diligence." *See, e.g., Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or 663, 669 (1996) (noting a showing of "due" diligence under ORS 537.230, which requires "reasonable" diligence). The *Silvies River* court, for example, defined the "reasonable time" element in terms of "reasonable diligence," explaining that such determination must be fact-specific:

> 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.")

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permitted merely because it could be exercised without substantial injury to any one; and *no right to such methods of use was acquired thereby.*" *Id.* (Emphasis added.)

On several occasions, the Oregon Supreme Court has considered what constitutes a reasonable time given the particular circumstances of the case. From these cases, it is possible to determine several of the factors relevant to determining whether water use has been developed within a reasonable time. These factors include the size of the planned development, the technical and economic difficulty of the development, the consistency (or lack thereof) of development, and other extenuating circumstances (such as drought and economic recession).

In *Seaweard 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. Rizor*, 21 Ore. 112 (27 P. 13); *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 85 (45 P. 472: 60 Am. St. Rep. 777).

The 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." *Seaweard* 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.

Similarly, in *Low v. Rizor*, 25 Or 551, 557 (1894), where an irrigator failed to increase the area under irrigation for a period of 13 years, he "abandoned the right to increase the appropriation."

In *Smyth v. Neal*, 31 Or 105 (1897), the plaintiff settled on the land in 1873, and, by 1888, had appropriated and applied water sufficient to raise 120 acres of wild grasses that were cut for hay and also irrigated 18 acres of grain and garden. In 1882 plaintiff recorded a notice of appropriation. Notwithstanding that plaintiff had installed a new dam and partially dug a new ditch, between 1882 and the institution of the litigation in 1895, plaintiff did not make any additional use of water. Plaintiff also expressly disclaimed any intent to increase his previous (1873) appropriation. Under these circumstances, the Court held that plaintiff's water right was limited to the lands and quantities that were used before 1882. Thus, plaintiff's statements and his failure to expand his irrigated land for a period of 13 years showed lack of reasonable diligence. *Id.* at 108-110.

In *In re Rights to Use of Silvies River*, 115 Or 27 (1925), the predecessor to the Burns Flour Milling Co., Brown, posted a notice of appropriation in 1884. *Id.* at 58-59. Brown dug a

ditch (mill race) and took water to a mill site within one to two years. However, local attempts to raise grain largely failed, and there was no grain to grind until about 1899, when the first successful crops were harvested. *Id.* at 59-60. The milling machinery was installed in 1899. The Court held that this was diligence, under the circumstances, since it would have been futile to install the milling machinery when there was nothing to mill.

Larger, more difficult projects have been allowed greater periods for development. For example, one of the water rights adjudicated in *In re Water Rights of Deschutes River and Tributaries*, 134 Or 623, 641, 676 (1930), involved several notices of appropriation filed by the Pilot Butte Reclamation Company, predecessor in interest to the Central Oregon Irrigation District. The earliest notice of appropriation, filed in 1900, contemplated that about 140,000 acres would be reclaimed under the appropriation. However, over a period of 20 years, only approximately 48,000 acres of land were reclaimed, and the court determined that this was a reasonable time period for development under the circumstances of that case. *Deschutes* at 635, 655-656. Other land brought under irrigation in excess of the approximately 48,000 acres, were assigned a later priority date under a 1907 notice of appropriation. *Id.* at 635, 655-656.

In *In re Hood River*, 114 Or 112, 147 (1924), the Oregon Supreme Court determined that a 20-year period of development was reasonable, given the technical difficulty of the undertaking. The Court described the challenges involved:

> Owing to the topography of the country being mountainous, the water had to be conducted from the bank of a mountain stream to a point 20 miles away, passing through and crossing over ravines and canyons, falling over a precipice at one place and many flumes, pipes and siphons were necessary. It was a stupendous task.

Id. at 138 (Emphasis added). Thus, even where construction of the irrigation system was determined to be a "stupendous task," the Supreme Court set the diligence period at 20 years.

Finally, in *Wapinitia Irrigation Co. v. Water Users Corp. of Juniper Flat*, 141 Or 504, 507-08 (1932), a decree was issued in 1923 allowing for development of certain inchoate rights, to be developed in five years, or pursuant to any extension(s) that the State Engineer may allow. Under the decree, the rights were assigned priority dates of 1904 (direct flow) and 1905 (storage), for a maximum of 12,000 acres. *Id.* at 507. Irrigation under these rights occurred first in 1917, covering between 1,000 and 2,000 acres. The project was not complete by 1928 when the five-year period expired, and the State Engineer refused to grant any extension. The Court found that considering the circumstances—which included a drought (*id.* at 519), the great depression and associated difficulties in financing further development of the project at (*id.* at 512-14), the fact that the irrigation project was a "mammoth undertaking" (*id.* at 513), and the existence of delivery contracts (*id.* at 516-17), the State Engineer should have granted the extension under the statutory provisions of § 517 Or L (§ 47-403, Or Code 1930). Significantly, however, the Court allowed only two additional years for completion of the irrigation system and actual reclamation of land (up to 8,000 acres) on or before June 1, 1938. *Id.* at 522-23. Thus, the court allowed a maximum of 34 years (1905 to 1938) for development, given the size of the

undertaking, intervening drought, and severe economic problems that made development difficult.

OWRD's determinations with respect to reasonable diligence are based on the principles expressed above, as applied to the facts of each individual claim.

II. Use of Subirrigation

"Subirrigation" describes the use of ground water (water found below the surface) for irrigation without the pumping of water from a well. There are two types of subirrigation. The first is uncontrolled, or "natural" subirrigation. This is subirrigation that occurs due to an unusually high groundwater table or seepage from a nearby stream or lake, for example. A user of this type of subirrigation has no means of controlling the subirrigation or improving the efficiency of the irrigation. Since the user of subirrigation does not have the ability to improve the method of irrigation, the logic of *Warner Valley* dictates that subirrigation may never form the basis for a vested water right. As a result, adjudication claims based on natural subirrigation are denied.

The second type of subirrigation is controlled subirrigation. This is subirrigation that is created by an artificial diversion work (e.g., a dam that causes water levels to rise and increases the area of land being subirrigated). In such a case, the irrigation is being caused by a diversion, and, depending on whether the other elements of a water right claim are met, may form the basis for a vested water right.

B-2. GENERAL CONCLUSIONS OF LAW CONCERNING ALLOTTEE CLAIMS

I. Introduction

"Allottee" claims are federal reserved water right claims based on one of the primary purposes of the Klamath Treaty of 1864. When the United States reserves land for particular purposes, it implicitly reserves sufficient water to accomplish those purposes. *Winters v. United States,* 207 US 564, 577 (1908). These rights are commonly referred to as "federal reserved water rights." Federal reserved water rights are limited to "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States,* 426 US 128, 141 (1976). In addition, water is reserved only to meet the "primary" purpose of the reservation, not "secondary" purposes. *United States v. New Mexico,* 438 US 696, 715 (1978). Evaluation of a claim based on an implied reservation of water requires examination of the specific purposes for which the land was reserved, and a determination that that the water is necessary to accomplish those purposes. *Id.* at 700, 702. The primary purposes of a federal reservation are determined by examining the legislation, executive order, or treaty that established the reservation. In *United States v. Adair*, 723 F2d 1394 (9th Cir 1983), the Ninth Circuit determined that one of the primary purposes of the Klamath Indian Reservation (as established by the Klamath Treaty of 1864) was "the purpose of supporting Klamath agriculture."[4] *Id.* at 1410.

[4] The Treaty with the Klamath Indians of October 14, 1864, states in part: "(T)he design of the expenditure [in payment for the country ceded by this treaty] ... (is) to promote the well-being of the Indians, advance

Water rights associated with the agricultural purpose of the Klamath Indian Reservation were transferred to individual members of the Klamath Tribes in certain circumstances. Specifically, in 1887, Congress passed the General Allotment Act, which provided that land on Indian reservations could be allotted for the exclusive use of individual Indians. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 USC.) Under section 7 of the General Allotment Act, Indian allottees are entitled to a "just and equal distribution" of reservation water. 25 USC § 381. Following the recognition of federal reserved water rights in *Winters*, the United States Supreme Court recognized an Indian allottee's right to use some of an Indian tribe's water reserved for irrigation purposes in *United States v. Powers*. Specifically the Court affirmed the position that "when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners...." 305 US 527, 532 (1939). Subsequently, in *Arizona v. California*, 373 US 546 (1963), the Court articulated a standard for determining agricultural water rights held by tribal members as the result of the creation of federal Indian reservations. This is generally referred to as the "practicably irrigable acreage" (PIA) standard.

A number of claimants to water rights in the Klamath Basin Adjudication are Klamath Indian allottees (i.e., holders of lands within the Klamath Indian Reservation allotted to them by the federal government), claiming an amount of water sufficient to irrigate the allotment's share of the Klamath Tribes' PIA, with a priority date of October 14, 1864 (the Treaty date). As described in more detail below, five elements are necessary to constitute a valid claim: 1) The claim must be for water use (current or future) on former Klamath Indian Reservation land; 2) The claimant must be a member of the Klamath Tribes; 3) The land must be arable; 4) Irrigation system development must be both technically possible and economically feasible; and 5) The right must not have been lost during any intervening non-Indian ownership. These rights are entitled to a priority date of October 14, 1864 if the elements of the right are established and the right is otherwise valid.

II. Elements #1 and #2

In *Arizona v. California*, 373 US 546 (1963), the Court held that PIA rights are the rights to water sufficient to fulfill the agricultural purposes of an Indian treaty and are therefore confined to former reservation land. The Court further held that such rights may only be claimed by a member of the tribe(s) for which the reservation was created, and that the rights carry a priority date defined by the Treaty. *Id.* at 600-601. The PIA rights held by Klamath Indian allottees are the rights to water sufficient to fulfill the Treaty purposes of promoting the adoption of an agricultural lifestyle by the Klamath Tribes within the Reservation boundaries. Such rights are therefore confined to former Reservation land and must be claimed by a member of the Klamath Tribes.

III. Elements #3 and #4

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them in civilization, and *especially in agriculture*, and to secure their moral improvement and education." 16 Stat. 707, 708, Art. II (emphasis added).

Elements 3 and 4, echoed in OAR 690-28-026(1), reflect the analyses applied in *In re Rights to Use Water in Big Horn River*, 753 P2d 76 (Wyo. 1988) ("*Big Horn I*") and other cases. *See, e.g., State ex rel. Martinez v. Lewis*, 861 P2d 235, 247 (N.M.App. 1993). In *Big Horn I*, the court explained: The determination of (PIA) involves a two-part analysis, i.e., the PIA must be susceptible of sustained irrigation (not only proof of the *arability* but also of the *engineering feasibility* of irrigating the land) and irrigable "at *reasonable cost*." *Id.* at 101 (emphasis added).

IV. Element #5

The 5th element, echoed in Oregon Administrative Rules 690-028-0026(3), is consistent with the Ninth Circuit's decision in *United States v. Anderson*, 736 F2d 1358 (9th Cir. 1984), regarding Indian reacquisition of land after allotment and sale to non-Indians. In *Anderson*, the court explained:

> ...(A) non-Indian successor acquires a right to that quantity of water being utilized at the time title passes, plus that amount of water which the successor puts to *beneficial use* with *reasonable diligence* following the transfer of title. Where "the full measure of the Indian's reserved water right is not acquired by this means and maintained through continued use, it is lost to the non-Indian successor." Consequently, *on reacquisition the Tribe reacquires only those rights which have not been lost* through nonuse....[6]

Id. at 1362. Thus, a non-Indian successor to an Indian allottee can lose both the developed and the "inchoate" portions of the Indian's PIA right by failing to diligently put such water to beneficial use, and those rights, if lost, are not revived by subsequent Indian reacquisition.

B-3 GENERAL CONCLUSIONS OF LAW CONCERNING *WALTON* CLAIMS

I. Introduction

Walton claims are federal reserved water right claims based on one of the primary purposes of the Klamath Treaty of 1864. When the United States reserves land for particular purposes, it implicitly reserves sufficient water to accomplish those purposes. *Winters v. United States,* 207 US 564, 577 (1908). These rights are commonly referred to as "federal reserved water rights." Federal reserved water rights are limited to "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States,* 426 US 128, 141 (1976). In addition, water is reserved only to meet the "primary" purpose of the reservation, not "secondary" purposes. *United States v. New Mexico,* 438 US 696, 715 (1978). Evaluation of a claim based on an implied reservation of water requires examination of the specific purposes for which the land was reserved, and a determination that that the water is necessary to accomplish those purposes. *Id.* at 700, 702. The primary purposes of a federal reservation are determined by examining the legislation, executive order, or treaty that established the reservation. In *United States v. Adair*, 723 F2d 1394 (9th Cir 1983), the Ninth Circuit determined that one of the

primary purposes of the Klamath Indian Reservation (as established by the Klamath Treaty of 1864) was "the purpose of supporting Klamath agriculture."[5] *Id.* at 1410.

Water rights associated with the agricultural purpose of the Klamath Indian Reservation were transferred to individual members of the Klamath Tribes in certain circumstances. Specifically, in 1887, Congress passed the General Allotment Act, which provided that land on Indian reservations could be allotted for the exclusive use of individual Indians. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 USC.) Under section 7 of the General Allotment Act, Indian allottees are entitled to a "just and equal distribution" of reservation water. 25 USC § 381. Following the recognition of federal reserved water rights in *Winters*, the United States Supreme Court recognized an Indian allottee's right to use some of an Indian tribe's water reserved for irrigation purposes in *United States v. Powers*. Specifically the Court affirmed the position that "when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners...." 305 US 527, 532 (1939). Subsequently, in *Arizona v. California*, 373 US 546 (1963), the Supreme Court articulated a standard for determining agricultural water rights held by tribal members as the result of the creation of federal Indian reservations. This is generally referred to as the "practicably irrigable acreage" (PIA) standard.

A number of claimants to water rights in the Klamath Basin Adjudication have made claims as non-Indian successors to Klamath Indian allottees (i.e., holders of lands within the Klamath Indian Reservation allotted to them by the federal government), claiming an amount of water sufficient to irrigate the allotment's share of the Klamath Tribes' PIA, with a priority date of October 14, 1864 (the Treaty date). In *Colville Confederate Tribes v. Walton*, 647 F2d 42 (9th Cir. 1981) (*Walton* II), the Ninth Circuit held that these "allottee" water rights could be transferred to non-Indian successors under certain conditions. The Ninth Circuit subsequently expressly applied the *Walton* analysis to non-Indian successors to Klamath Indian allottees in *United States v. Adair*, 723 F2d 1394, 1417 (9th Cir. 1983). These rights are entitled to a priority date of October 14, 1864 if the elements of the right are established and the right is otherwise valid.

The elements of a *Walton* right are described below.

II. *Walton* Right Elements

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;

[5] The Treaty with the Klamath Indians of October 14, 1864, states in part: "(T)he design of the expenditure [in payment for the country ceded by this treaty] ... (is) to promote the well-being of the Indians, advance them in civilization, and *especially in agriculture*, and to secure their moral improvement and education." 16 Stat. 707, 708, Art. II (emphasis added).

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 and put to beneficial use with reasonable diligence following transfer from Indian ownership.

The authority for each of these elements is described below. The remainder of these conclusions of law then addresses issues related to the *Walton* doctrine that have arisen in certain of the *Walton* claims.

III. Element #1

The *Walton* doctrine derives initially from the federal government's authority, described above, to reserve water in certain circumstances, and from *Arizona v. California*, 373 US 546 (1963), in which the Court held that PIA rights are the rights to water sufficient to fulfill the agricultural purposes of an Indian treaty and are therefore confined to former reservation land. The PIA rights held by Klamath Indian allottees, claimed by non-Indian successors to those allotments as "*Walton* rights," are the rights to water sufficient to fulfill the Treaty purposes of promoting the adoption of an agricultural lifestyle by the Klamath Tribes within the Reservation boundaries.[6] Such rights are therefore confined to former Reservation land and carry a priority date defined by the Treaty.

IV. Elements #2, #3, and #4

Elements 2, 3, and 4 are derived from the seminal case of *Colville Confederate Tribes v. Walton*, 647 F2d 42 (9th Cir. 1981) (*Walton* II). Element #2 is derived from the *Walton* court's holding that "(t)he full quantity of water available to the Indian allottee ... may be conveyed to the non-Indian purchaser." *Id.* at 51. Therefore, title must be traced to an Indian allottee. The *Walton* court went on to place the following limitations on the transfer, reflected in elements #3 and #4:

> The non-Indian successor acquires a right to water *being appropriated* by the Indian allottee *at the time title passes*. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with *reasonable diligence after the passage of title*. If the full measure of the Indian's

[6] The Treaty with the Klamath Indians of October 14, 1864, states in part: "(T)he design of the expenditure [in payment for the country ceded by this treaty] ... (is) to promote the well-being of the Indians, advance them in civilization, and *especially in agriculture*, and to secure their moral improvement and education." 16 Stat. 707, 708, Art. II (emphasis added).

> reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

Id. (emphasis added).

V. Development of Water Use Following Transfer from Indian Ownership

Certain contestants to individual *Walton* claims in the Adjudication have contended that the inchoate portion of an allottee right transferred to a non-Indian successor is valid only if it is developed with reasonable diligence by the first non-Indian successor. These contestants contend that if the claimed right is transferred a second time prior to development of the inchoate right, the right is necessarily lost. OWRD agrees that the principle of reasonable diligence applies to the inchoate portions of claimed *Walton* rights, but concludes that the number of ownership transfers occurring within the period of reasonable diligence is irrelevant to a determination of the claim.

Western water law measures the development of a water right by the standard of reasonable diligence. The *Walton* cases, borrowing from this principle, require that the inchoate portion of a *Walton* water right either be developed with reasonable diligence, as measured from the date of the initial transfer to non-Indian ownership, or it will be lost. Therefore, OWRD concludes that if the inchoate portion of the right is developed with reasonable diligence, as measured from the initial transfer to a non-Indian, the inchoate right properly vests and intervening transfers to subsequent non-Indians are irrelevant.

Like other western states, Oregon courts have subscribed to the reasonable diligence doctrine. Sometimes referred to as "reasonable time" or "due diligence," the reasonable diligence standard requires that water is developed "within a reasonable time to some useful industry." *In re Water Rights of Silvies River*, 115 Or. 27, 65 (1925). Determination of reasonable diligence is dependent upon the facts and circumstances of a particular situation. *See Seaweard v. Pacific Livestock Co.*, 49 Or. 157, 160-161 (1907) ("[reasonable time] depends upon the magnitude of the undertaking and the natural obstacles to be encountered in executing the design.").

The *Walton* cases did not establish that the inchoate portion of a Walton water right must be developed with reasonable diligence by the *first* non-Indian owner. Unfortunately because the language in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (*Walton II*) and *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985) (*Walton III*) is not entirely clear on this issue, a detailed review of the *Walton* cases is required.[7]

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[7] Although *United States v. Adair*, 478 F. Supp. 336, 348-349 (D. Or. 1979) (*Adair I*), *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (*Adair II*), and *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) touch on this issue, they do not add appreciably to the analysis. The Department does note, however, that in *Adair I*, the court found "once land passes out of Indian ownership, all subsequent conveyances are subject to the doctrine of prior appropriation." 478 F. Supp. at 348-49. This doctrine, as commonly understood throughout the arid West, requires only that water be applied with reasonable diligence following an initial intent to appropriate, and does not require that development be completed by the initial appropriator.

The district court in *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) (*Walton I*) found the following facts pertaining to ownership and development of the parcels at issue:

> The allotments now owned by the Waltons passed from Indian ownership in 1942. The former Indian allottees had not irrigated these lands. In 1946, this land was again sold, and although the purchaser was Indian, he was not a member of the Colville Tribes. When Walton bought the property in 1948, approximately 32 acres were under irrigation.

Id. at 1324. The Waltons were therefore not the second non-Indian owners, but the third.[8] The *Walton I* court concluded that water rights based on the reservation did not transfer from Indian allottees to non-Indian owners. *Id.* at 1328. Likely due to this conclusion, the court did not provide a more detailed history of development.

On review, the *Walton II* court affirmed the above findings of fact, but reversed the lower court's determination on the issue of alienability of allottee rights. "The general rule is that the termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history." *Walton II*, 647 F.2d at 50. The court concluded the allottee's reserved water right would be reduced in value if the allottee could only convey the portion of the right already appropriated and therefore characterized this restriction on transferability as a diminution of Indian rights requiring a clear inference of Congressional intent. The court found no such intent by Congress to limit the alienability of the allottee's reserved water right. *Id.*

The court in *Walton II* considered specific aspects of the allottee's rights. Among them, the court found:

> Third, the Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.
>
> The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey. We think Congress would have intended, however, that the non-Indian purchaser, under no competitive disability vis-a-vis other water users, may not retain the right to that quantity of water despite non-use.

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[8] The 1946 purchaser, although an Indian, is considered a "non-Indian owner" for the purposes of this analysis, because only members of the Colville Tribes were entitled to allottee status for rights arising from the Colville Indian Reservation.

...

> The district court's holding that Walton has no right to share in water reserved when the Colville reservation was created is reversed. On remand, it will need to determine the number of irrigable acres Walton owns, and the amount of water *he* appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

Id. at 51. (Emphasis added). The *Walton II* court understood the Waltons were not the first, nor the second, non-Indian purchasers of the parcel at issue. It is clear from the court's remand instructions that it did not create a "first non-Indian owner" rule. Had the court intended to make such a rule, its instructions would have been quite different. First, determining the amount Walton appropriated with reasonable diligence would have been unnecessary and irrelevant. Second, only 32 acres would have been eligible for a *Walton* right (the amount of acreage under irrigation at the time of Walton's purchase). Therefore, the only question would have been whether those 32 acres were developed with reasonable diligence prior to the sale to the second non-Indian owner in 1946.

The *Walton II* court extended the allottee's reserved right to non-Indian successors to prevent diminution of the right already restricted. The court viewed the reasonable diligence requirement as a restriction, but not a diminution, because non-Indian purchasers were perceived to be on equal footing with "other water users" i.e., non-Indians appropriating under state water laws. If the court established a first non-Indian owner requirement, this equal footing would have been eliminated. A prospective non-Indian purchaser would have to discount the value of the allottee's inchoate right by the risk that the purchaser might sell the parcel prior to development, even if under state law, the period of reasonable diligence would have not yet run. A first non-Indian requirement would be a restriction on alienability that would diminish the value of the allottee's right, as compared to appropriations under state law, and run counter to the court's rationale.

Walton II thus established a requirement that, irrespective of the number of ownership transfers during the period of reasonable diligence, water must be applied with reasonable diligence after transfer to non-Indian ownership. However, the court created confusion by suggesting that the actions of Walton's predecessors were irrelevant to the analysis by referring in its remand instructions only to acres that Walton appropriated with reasonable diligence. As a result, the district court on remand considered its duty to determine only Walton's diligence. "[T]he Circuit is abundantly clear in its mandate: this court is to determine 'the amount of water he [Walton] appropriated with reasonable diligence.' There is no mention whatever of the weight to be accorded performance or non-performance of intervening owners..." *Colville Confederated Tribes v. Walton*, August 31, 1983, Memorandum Decision at 5-6 (E D Wash) (attached hereto as Attachment 1).

The district court's interpretation of *Walton II* would have allowed any distant purchaser of allottee lands to attain a new reasonable diligence period, regardless of the actions of his or her predecessors. If allowed to stand, this interpretation would have undermined the principle of reasonable diligence as understood throughout the arid West, and granted non-Indian purchasers

of allottee rights (whom the *Walton II* court had determined did not need any special advantages) a significant advantage over non-Indians developing water rights pursuant to state law.

In *Walton III*, the circuit court corrected this error, and required that the reasonable diligence period begin running upon transfer to non-Indian ownership and *continue* running despite subsequent transfers to other non-Indians. In clarifying the Ninth Circuit's mandate to the district court, the *Walton III* court stated "the immediate grantee of the original allottee must exercise due diligence..." The court then elaborated:

> Calculating Walton's share required an investigation into the diligence with which the immediate grantee from the Indian allottees appropriated water, and the extent to which successor grantees, up to and including Walton, continued to use the water thus appropriated. Otherwise, any remote purchaser could appropriate enough water to irrigate all irrigable acreage with a priority date as of the creation of the Reservation. The reasonable diligence requirement of *Walton II* would be meaningless.

Walton III, 752 F.2d at 402. Therefore, the court's concern was to uphold the reasonable diligence principle by rejecting the district court's view that "any remote purchaser" would be entitled to a new reasonable diligence period. A first non-Indian owner rule is not necessary to uphold the reasonable diligence principle. Rather, all that is needed to make a reasonable diligence rule effective begins with measuring the diligence period of the immediate grantee from the Indian allottees and to continue measuring this period, despite any subsequent transfers.[9]

Had the *Walton III* court established a first non-Indian owner rule, it would have rendered the reasonable diligence principle meaningless. Not only would such a rule create the possibility that, in the case of an immediate conveyance from the first to the second non-Indian owner, the period of reasonable diligence would begin and end instantaneously, but would also be at odds with reasonable diligence as it had been understood throughout the arid West. The *Walton III* court, by coming to the defense of the reasonable diligence principle, did not then choose to undermine it in a different manner.

Further evidence of the *Walton III* court's intent is demonstrated by its reliance on Washington State's law of reasonable diligence as a sufficient limit on development following transfer to a non-Indian. After citing to a Washington case supporting the principle of reasonable diligence,[10] the court stated:

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[9] Under the reasonable diligence standard, an analysis of the immediate grantee's diligence in appropriating water is necessary, and depending on diligence of the immediate grantee and the length of the immediate grantee's ownership, may be dispositive.

[10] The cited case, *Longmire v. Smith*, 26 Wash 439 (1901), involved initial development by the plaintiff's predecessors and the expansion of that development by the plaintiff. The court did not restrict the scope of the right to the development accomplished by plaintiff's predecessors, but rather included within the right to plaintiff's reasonably diligent expansion.

> The tests developed to determine whether or not an appropriator has been sufficiently diligent in applying water to a beneficial use to justify relating the priority date back to the initial diversion are appropriate to determine how much water Walton's *predecessors* appropriated with reasonable diligence, after the passage of title.

Id. at 402. (Emphasis added). The court proceeded to analyze the intent and diligence of *all* the non-Indian owners prior to Walton's ownership, rather than of the Whams, the first non-Indian owners. *See id.* at 402-403. The court concluded that the reasonable diligence period had run prior to Walton's purchase in 1948. Id. at 403. ("We are unable to infer an intent to appropriate an increasing amount of water from over two decades of relatively static irrigation practices.") The court based its decision on the lack of development over a period of time, and not on the number of intervening non-Indian owners.

For the above-stated reasons, the Department concludes that *Walton II* and *III* do not create a first non-Indian owner rule. Instead, these decisions require that water be developed and applied with reasonable diligence upon transfer from Indian ownership, regardless of the number of ownership transfers during that period. The Department also concludes that *Walton II* and *III* provide a role for state law in defining reasonable diligence for *Walton* claims.[11]

VI. "Continued Use" of Water Following Transfer from Indian Ownership and Reasonably Diligent Development

Once a water right has been put to beneficial use it is subject to loss for nonuse. This concept applies to both *Walton* rights and rights appropriated under state law. Certain contestants to individual *Walton* claims have contended that a *Walton* claimant has the burden of establishing that water use has continued since the initial application of water to a beneficial use. This is inconsistent with both the *Walton* line of cases and generally recognized principles of western water law. Continued use of a water right is not an element that must be proven in the first instance but, rather, is an affirmative defense that a claimant may assert if challenged for nonuse. Identical to appropriations under state law, it is the *contestants*, not the claimants, that bear the burden of proving that a properly developed *Walton* right has been lost by nonuse.

As the court stated in *Walton II*, *Walton* rights must be "maintained by continued use." 647 F.2d 42, 51 (1981) (*Walton II*). The *Walton II* court did not significantly elaborate on the meaning of the phrase. However, given the decision's heavy reliance on principles of state law in announcing the elements of the *Walton* doctrine, the "continued use" requirement almost certainly refers to the principle that, in a prior appropriation system, water rights may be lost through nonuse. In Oregon, there are two standards for determining loss of a water right through nonuse: abandonment and forfeiture. OWRD concludes that abandonment is more appropriate for determination of unadjudicated water rights in Oregon. Abandonment was the common standard used during the creation of most Indian reservations in the west and, it also remains an

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[11] In *Walton III*, the court determined that where there are no governing federal law principles, "[i]t is appropriate to look to state law for guidance." *Walton III*, 752 F.2d at 400. The *Walton III* court then relied upon Washington State's law pertaining to reasonable diligence in determining Walton's claim.

applicable standard for determining loss of water rights in several states that follow the doctrine of prior appropriation. The bases for OWRD's conclusions are described in detail below.

The *Walton* decisions adopted the prior appropriation doctrine and relied heavily on state law in determining the requirements of a *Walton* right. The court explicitly acknowledged its reliance on state law in incorporating the principles of reasonable diligence and water duty in determining and qualifying *Walton* rights. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 402-403 (1985) (*Walton III*). Given the courts' dependence on state law principles, the Department concludes it is similarly appropriate to look to state law for guidance in defining the continued use requirement.

It is a generally accepted principle of the doctrine of prior appropriation that water rights may be lost through nonuse. Most states that apply this doctrine determine nonuse based on the concepts of abandonment or forfeiture, or a combination of both. In order to find that a water right has been abandoned, "there must be a concurrence of the intention to abandon it and actual failure in its use." *Hough v. Porter*, 51 Or. 318, 434 (1909). The burden of establishing abandonment lies with the proponent of the abandonment (in this case, the contestant(s) to the claim). *Id.*

In contrast, forfeiture is based solely on the nonuse of water over a statutorily defined period of time, regardless of the intent of the water right holder. In Oregon, a rebuttable presumption of forfeiture is established "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." ORS 540.610. The burden of proving this rebuttable presumption lies with the proponent of the forfeiture. *Rencken v. Young*, 300 Or. 352, 364 (1985).

In Oregon, forfeiture applies to "perfected and developed" water rights. A "developed" right is one that has been applied to the intended beneficial use. In *Green v. Wheeler*, the court defined the term "perfected" as it is used in Oregon's Water Code. 254 Or 424 (1969) (*Green*). The court explained that *prior* to the enactment of the Water Code appropriation of water was sufficient to establish a "vested" interest in the use of water. *Id.* at 430. In contrast, a water right acquired under the Water Code is not "vested" until the "appropriation has been perfected." *Id.* "Perfection," as defined by the court, requires appropriation of water, the fulfillment of conditions specified in or authorized by the Water Code, and a determination by OWRD that the right has been perfected. *Id.* at 430-31. *See also Hale v. Water Resources Department*, 184 Or App 36, 41 (2002) (citing to *Green*, and holding that "whether an appropriation has been 'perfected' within the meaning of ORS 537.250(1) is expressly left 'to the satisfaction of the department'").

Perfection then, requires an administrative determination of the validity of the right. An unadjudicated right, which has not been subject to administrative determination, is not a perfected right for the purposes of ORS 540.610. Although the court in *Green* did not cite specifically to ORS 540.610, there are no textual or contextual bases for interpreting "perfected," as that term is used in ORS 540.610, differently than *Green* interpreted it.

When a water right has been perfected, ORS 540.610 applies and supersedes the common-law abandonment doctrine. *Rencken v. Young*, 300 Or at 361. However, where a common-law doctrine has not been superseded by statute, it remains applicable. *See, e.g., Olsen v. Deschutes County*, 204 Or App 7, 13-17 (2006). Because ORS 540.610 does not apply to unadjudicated rights initiated under state law, the abandonment doctrine does.

OWRD concludes that abandonment is the appropriate doctrine to be applied to unadjudicated *Walton* rights in Oregon. First, it is the doctrine that is applied to Oregon's unadjudicated, state-initiated water rights. Consistency with state water law principles has significant value. The court in *United States v. Anderson*, found a Congressional policy of ensuring the "full economic benefit" of the allotment to the Indian allottee. 736 F2d 1358, 1362 (9th Cir 1984). This policy was the rationale behind allowing Indian allottees to transfer their water rights to non-Indians. Non-Indian purchasers of Indian allotments would have understood *Walton* rights in terms of the benefits and conditions of state-initiated water rights. The possibility that *Walton* rights would have different, unknown benefits and restrictions would have caused non-Indian purchasers of Indian allotments to account for this risk by discounting the value of the allotment. This discounting process would interfere with the intent to provide Indian allottees with the full economic benefit of their allotments.

Second, the abandonment doctrine is the proper standard to apply to unadjudicated *Walton* rights because abandonment was the common standard during the time period in which most Indian reservations were established in the western states (the date of reservation is considered to be the date of appropriation, and thus the priority date for *Walton* rights). *See* 2 Waters and Water Rights § 17.03 (Robert E. Beck ed., 1991 Edition, 2001). Although the terms and conditions of water rights can be changed in certain respects after the priority date for the right, the general rule is that terms and conditions remain consistent through time.

Third, abandonment remains and applicable standard for determining loss of water rights in several states with prior appropriation systems. *See* 2 Waters and Water Rights § 17.03 (Robert E. Beck ed., 1991 Edition, 2001). Although forfeiture is now the more common standard, there is no universally consistent standard in these western states. Given the above reasons, OWRD concludes that abandonment is the more appropriate doctrine for determining whether an unadjudicated *Walton* right has been lost as a result of nonuse.

Finally, OWRD notes two limits on the applicability of abandonment in the context of *Walton* rights. First, abandonment is only applicable where a *Walton* right has been developed, but then suffers a period of nonuse. In cases where a *Walton* right has remained undeveloped for a lengthy period following transfer from Indian ownership, the reasonable diligence principle, and not abandonment, will apply. Second, OWRD concludes only that abandonment applies to *unadjudicated Walton* rights in Oregon. OWRD expresses no opinion as to whether abandonment or forfeiture applies following an order of determination or a decree determining a *Walton* right.

VII. Use of Natural Overflow as the Basis of a *Walton* Right

Oregon law provides that while natural overflow as a method of irrigation is only a privilege, beneficial use of natural overflow may nonetheless provide a basis for a vested water right. OWRD concludes that this principle is equally applicable to *Walton* claims made subject to the Department's jurisdiction. Because the *Walton* cases did not create federal law on the subject of natural overflow, OWRD appropriately relies on Oregon law.

"Natural overflow" refers to the presence of surface water (water that is above-ground) without the use of an artificial diversion structure. In Oregon, beneficial use of natural overflow is sufficient to acquire a vested pre-1909 water right. *Warner Valley Stock Co. v. Lynch*, 215 Or. 523, 538 (1959). To avoid the waste of water, Oregon courts have held that the natural overflow diversion method is only a privilege. This does not negate the right, but does limit the appropriator's ability to demand delivery of water by the natural overflow method. Specifically, for any portions of any water rights recognized in the Findings of Fact and Order of Determination that continue to employ natural overflow as a method of irrigation, the holders of such rights cannot make a call on water appropriated under any other water rights. The reasoning behind Oregon's doctrine is sound. It allows the acquisition of a water right in a circumstance where an artificial point of diversion is unnecessary, while conditioning the right to prevent unreasonable impositions on the rights of other water users.

The *Walton* litigation did not involve natural overflow; rather, it concerned the method of subirrigation. *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (1985) (*Walton III*). "Subirrigation" describes the use of ground water (water found below the surface) for irrigation without the pumping of water from a well. There are two types of subirrigation. The first is uncontrolled, or "natural" subirrigation. This is subirrigation that occurs due to an unusually high groundwater table or seepage from a nearby stream or lake, for example. The second type of subirrigation is controlled subirrigation. This is subirrigation that is created by an artificial diversion work (e.g., a dam that causes water levels to rise and increases the area of land being subirrigated). The subirrigation at issue in the *Walton* cases was naturally occurring subirrigation. Unlike a user of natural subirrigation, a beneficial user of natural overflow has the ability to control the water by creating a diversion, thus preventing natural overflow on the property. A user of natural overflow can take steps to improve the efficiency of the irrigation; a beneficial user of natural subirrigation cannot.

To the extent that *Walton III* holds that subirrigation may not form the basis for a *Walton* right, it is not at all clear that the court would have extended this holding to apply to natural overflow. It is appropriate for OWRD to rely on Oregon law because the *Walton* cases did not create federal law on the subject of natural overflow.

Even if the *Walton III* court had intended its discussion of subirrigation to apply to natural overflow, there is no indication that the court intended to create federal law on the issue. Instead, the analysis in *Walton III* pertaining to subirrigation applies Washington state law. Where subirrigation is discussed, nearly all the cases cited by the court are Washington state court decisions. *Walton III*, 752 F.2d 397, 402-403. Even the reference to a federal district court opinion cites both to the opinion and the "cases cited therein *interpreting Washington law*." *Id.* at 402 (emphasis added). Under Washington law, a diversion is a required element of a valid

appropriation. *See Ellis v. Pomeroy Improvement Co.*, 21 P. 27, 29 (1889) (requiring an "open, physical demonstration" of intent to take water for some valuable use). Because subirrigation and natural overflow do not require a diversion, they may not form the basis for a valid appropriation under Washington law.

Had the *Walton III* court intended to create federal law on the issue of natural overflow, it would have considered – or at least mentioned – the law of other western states, which are split on the question. The court in *Walton III* gave no indication that it intended to use Washington law to form the basis for federal law on natural overflow or subirrigation. Indeed, it would have been inappropriate for the court to simply rely on Washington law in creating federal law, at least with respect to use of natural overflow. The western states are divided on this issue. Colorado and Montana, in addition to Oregon, have determined that natural overflow could form the basis of valid appropriation for irrigation use initiated prior to the enactment of the respective state's modern water code. *See Matter of the Adjudication of Missouri River Drainage Area*, 55 P.3d 396, 406 (Mont. 2002); *Humphreys Tunnel & Mining Co. v. Frank*, 105 P. 1093, 1095 (Colo. 1909).[12]

Where no governing federal law principles exist with respect to an issue related to the determination of a *Walton* right, "[i]t is appropriate to look to state law for guidance." *Walton III*, 752 F.2d at 400. The *Walton* cases were based on Washington state law and did not create federal law with respect to either beneficial use of natural overflow or subirrigation. Therefore, the Department relies on Oregon law principles governing natural overflow as a method of beneficial use.[13]

More specifically, the Department relies on Oregon's pre-1909 principles governing natural overflow as a method of beneficial use. The law relevant to the determination of whether a claimant has established a vested water right is, generally speaking, the law in place at the time the appropriation is initiated, rather than when water is first applied to beneficial use. See 539.010(4).[14]

Under Oregon's pre-1909 common law, an appropriator was entitled to relate the priority date of the right back to the date of first intent to appropriate. Therefore, if all other elements are proven for a *Walton* claim, those claimants are entitled to relate the priority date of their rights

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[12] Nevada, New Mexico, and Washington have required a manmade diversion for irrigation use. *See Steptoe Livestock Co. v. Gulley*, 295 P 772, 774-775 (Nev. 1931); *State ex rel. Reynolds v. Miranda*, 493 P.2d 409, 411 (N.M. 1972).

[13] The Department does not necessarily intend that Oregon law pertaining to natural overflow be applied to every state in which the *Walton* claims are heard. There is nothing in the *Walton* doctrine that requires the creation of federal common law governing every single attribute of *Walton* rights. Instead, where appropriate, a federal court may choose to apply some aspects of the state law in which the water right claim is made. This is the approach the *Walton III* court took with respect to subirrigation.

[14] ORS 539.010(4) provides, in part: "The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act (as defined in ORS 537.010) *where appropriations were initiated prior to February 24, 1909*, and such appropriators, their heirs, successors or assigns did, in good faith and compliance with the *laws then existing*, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion" (emphasis added).

back to October 16, 1864, the date of the Klamath Treaty. The Klamath Treaty provides the best analog to the "intent" element of Oregon's pre-1909 common law. Through the Klamath Treaty, Congress effectively established its intent to reserve water for certain uses by the Klamath Tribes and their members.[15] Thus, it is appropriate to apply pre-1909 principles with respect to the issue of the natural overflow method.

As described in detail below, Oregon law provides while natural overflow as a method of irrigation is only a privilege, beneficial use of natural overflow may nonetheless give rise to a vested water right, where the appropriation was initiated prior to the enactment of the Water Code in 1909.

A "diversion from the natural channel by means of a ditch, canal or other structure," *Silvies River*, 115 Or 27, 64-65 (1925), or the "construction of works," ORS 539.010(4), for the diversion and delivery of water to a beneficial use is generally a required element of a pre-1909 water right. There is, however, an exception to this requirement. No initial diversion is required where the appropriator's land is "naturally irrigated" and the appropriator "in some substantial way indicates that it is his intention to reap the benefit of the fruit of the irrigation." *Id.* at 66. In such case, the priority date is "deemed to be when the proprietor of the land accepts the gift made by nature..." *Id.*

The *Silvies River* court described the reasoning behind this exception to the diversion requirement:

> [D]iversion of the water has a special application or exception to much of the land in the Harney Valley. It involves the matter of the natural irrigation of the land. Nature has been very generous to the Harney Valley in this respect. With practically no artificial works for irrigation, thousands of acres are naturally watered.... It would seem to be fair and equitable, if not absolutely essential, that such date be deemed to be when the proprietor of the land accepts the gift made by nature, and garners the produce of the irrigation by harvesting or utilizing the crops grown on the land, or making preparation for so doing, or in some substantial way indicated that it is his intention to reap the benefit of the fruit of the irrigation. When no "ditch, canal, or other structure" is necessary to divert the water from its natural channel, the law does not vainly require such works, prior to an appropriation. We do not intend to suggest that in most cases the building of some kind of an irrigation system is not *requisite after the appropriation is made* in order to effect an economical beneficial use of such water and prevent waste. This should be accomplished within a reasonable time as circumstances permit and necessities require....

Id. (Emphasis added). This principle was affirmed and clarified in *Warner Valley Stock Co. v. Lynch*, 215 Or 523 (1959), which specifically states that it is "consistent" with the statements of

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[15] As described above, one of the Treaty's primary purposes was to promote an agrarian lifestyle among members of the Klamath Tribes. The amount of water impliedly reserved was to satisfy both present and future needs, measured to irrigate all "practicably irrigable lands" on the reservation.

the Oregon Supreme Court in *Silvies River*, 115 Or 27 (1925), as well as *In re Willow Creek*, 74 Or 592 (1915), and *Hough v. Porter*, 51 Or 318 (1908).

The *Warner Valley Stock Co.* case involved interpretation of the findings and order of determination as well as the 1929 decree for the waters of Warner Lakes and their tributaries. 215 Or at 532-33. Plaintiffs filed the suit after the Lake County Circuit Court directed the State Engineer to issue permits to Warner Valley Stock Company for the construction of two reservoirs in Warner Valley. *Id.* at 526. Plaintiffs, who had water rights based on natural overflow from Hart Lake under the 1929 decree, argued the permits would violate their vested water rights. *Id.* at 532. Based on the 1929 decree, the Supreme Court affirmed the circuit court's decision that the method of diversion by overflow was wasteful and, accordingly, held "the *method of diversion* by way of natural over-flow is a privilege only and cannot be insisted upon by the objectors if it interferes with the appropriation by others of the waters for a beneficial use."[16] *Id.* at 537 (Emphasis added). It is important to note that the Warner Valley court, consistent with other court decisions, such as *Hough v. Porter* and *Silvies River*, specifically states only that the *method* of diversion by natural overflow cannot be insisted upon where it is wasteful. These decisions still allow an appropriator to establish a water right for use of that quantity of water obtained by beneficial use. In fact, the *Warner Valley* court went on to emphasize that the appellants had acquired vested water rights that they retained after the court's decision. *Id.* at 538.

Similarly, in *Masterson v. Pacific Livestock Company*, the court found that prior to the adjudication, the defendants had only irrigated their lands by means of natural overflow. 144 Or 397, 401-2 (1933). The *Masterson* court found that, although the decree had not provided the quantity of water to be taken under the right, the natural irrigation equaled no more than five acres "in the regular way." 144 Or at 406-8.

Thus, the case law indicates that appropriators may acquire pre-1909 water rights using natural overflow as the method of diversion. To avoid the waste of water, Oregon courts have held that the natural overflow diversion method is only a privilege. This does not negate the right, but does limit the appropriator's ability to demand delivery of water by the natural overflow method. Specifically, for any portions of any water rights recognized in the Findings of Fact and Order of Determination that continue to employ natural overflow as a method of irrigation, the holders of such rights cannot make a call on water appropriated under any other water rights. Further, any future 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.

VIII. Use of Subirrigation as the Basis of a *Walton* Right

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[16] In 1909, the Oregon Supreme Court reached a similar conclusion in *Hough v. Porter,* 51 Or 318, 420 (1909). The *Hough* court found that "wasteful *methods* so common with early settlers can...be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and *no right to such methods of use was acquired thereby.*" *Id.* (Emphasis added.)

"Subirrigation" describes the use of ground water (water found below the surface) for irrigation without the pumping of water from a well. There are two types of subirrigation. The first is uncontrolled, or "natural" subirrigation. This is subirrigation that occurs due to an unusually high groundwater table or seepage from a nearby stream or lake, for example. A user of this type of subirrigation has no means of controlling the subirrigation or improving the efficiency of the irrigation. Since the user of subirrigation does not have the ability to improve the method of irrigation, the logic of *Warner Valley* dictates that subirrigation may never form the basis for a vested water right. As a result, adjudication claims based on natural subirrigation are denied.

The second type of subirrigation is controlled subirrigation. This is subirrigation that is created by an artificial diversion work (e.g., a dam that causes water levels to rise and increases the area of land being subirrigated). In such a case, the irrigation is being caused by a diversion, and, depending on whether the other elements of a water right claim are met, may form the basis for a *Walton* right.

B-4 GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS

I. Introduction

Klamath Termination Act (KTA) claims are closely related to *Walton* claims. Like *Walton* claims, KTA claims are claims made by successors in interest to lands that were part of the Klamath Indian Reservation (Reservation), and are based on one of the primary purposes of the Klamath Treaty of 1864.

The sole distinction between *Walton* claims and KTA claims is that KTA claims are for lands that were a part of the Reservation, but were unallotted at the time of the termination of the Reservation pursuant to the KTA. The question is whether or not the non-Indian purchasers of these lands acquired the lands' share of the Reservation's "practicably irrigable acreage" (PIA). *See Arizona v. California*, 373 US 546 (1963) (establishing the PIA standard for determining agricultural water rights on allotted lands within Indian reservations).

The general rule is that where unallotted Indian tribal lands were returned to the public domain and transferred to a non-Indian under a homestead or land grant program, no portion of an Indian tribe's reserved water right was transferred with the land. *United States v. Anderson*, 736 F2d 1358 (9th Cir 1984). The KTA provides an exception to the rule. Based on the specific language of the KTA, Congress expressly intended that a share of the Klamath Tribes' consumptive water rights associated with the unallotted Klamath Tribal lands and transferred pursuant to the express language of the KTA may be sold with the lands. The definitions of "Lands" and "Tribal property" in the KTA state as follows:

> "Lands" means real property, interests therein, or improvements thereon, and *include water rights*.

> "Tribal property" means any real or personal property, *including water rights*, or any interest in real or personal property, that belongs to the tribe and either is held by the United States in trust for the tribe or is subject to a restriction against alienation imposed by the United States.

25 USC § 564a (Emaphsis added.) Further, the KTA specifically provided that the Klamath Tribal lands were to be appraised, sold, and the proceeds of the sale distributed among the members of the Tribes. 25 USC § 564d.

Based on the above language, Congress intended the appurtenant Klamath Tribes' consumptive water rights to be included in a conveyance of tribal lands sold pursuant to the KTA. By including water rights in the definition of the "lands" and "tribal property" that were to be transferred pursuant to the Act, Congress expressly indicated that the sale of the Klamath Tribal lands under the KTA is to include appurtenant water rights held by the Tribes.

Although this is an issue of first impression, OWRD concludes that the elements and standards applicable to a *Walton* claim are applicable to a KTA claim, with the exception that a KTA claimant is required to show that he is a successor in interest to ownership of former unallotted lands within the Reservation. The KTA does not itself create a separate standard for the determination of KTA claims, and no arguments as to why KTA claims should be subject to a separate standard have been advanced.

The elements of a KTA claim are provided below. Because the elements of a KTA claim, with the single exception described above, are identical to the elements of a *Walton* claim, OWRD's General Conclusions of Law Concerning *Walton* Claims is equally applicable to KTA claims, and is incorporated as if set forth fully herein.

II. Elements of a KTA Claim

1. The claim is for water use on unallotted lands that were formerly part of the Klamath Indian Reservation;

2. The unallotted lands were transferred from the Klamath Tribes to a non-Indian purchaser pursuant to the express language of the Klamath Termination Act, and the claimant is the non-Indian purchaser or a successor in interest to the non-Indian purchaser;

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 undeveloped irrigable land, to the extent that the additional water use was developed and put to beneficial use with reasonable diligence following transfer from Indian ownership.

B-5. GENERAL CONCLUSIONS OF LAW CONCERNING FEDERAL RESERVED WATER RIGHTS[17]

When the United States reserves land that it owns for particular purposes, it implicitly reserves sufficient water to accomplish those purposes. *Winters v. United States,* 207 US 564, 577 (1908). These rights are commonly referred to as "federal reserved water rights." Federal reserved water rights are limited to "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States,* 426 US 128, 141 (1976). In addition, water is reserved only to meet the "primary" purpose of the reservation, not "secondary" purposes. *United States v. New Mexico,* 438 US 696, 715 (1978). Evaluation of a claim based on an implied reservation of water requires examination of the specific purposes for which the land was reserved, and a determination that the water is necessary to accomplish those purposes. *Id.* at 700, 702. The primary purposes of a federal reservation are determined by examining the legislation or executive order that established the reservation. *See United States v. New Mexico,* 438 US 696 (1978). The United States may also expressly reserve water for particular purposes. The priority date of a federal reserved water right is the date of the reservation of the land owned by the United States. *Cappaert*, 426 US at 138.

To summarize, in order to establish a federal reserved water right, the United States has the burden of proving the following elements by a preponderance of the evidence:

1. The United States owns the claimed place of use for the claimed water rights.

2. The date of the reservation of land owned by the United States.

3. The primary purpose(s) meant to be served by the reservation of land.

4. The reservation of land included an express or implied reservation of water.

5. The quantity of water necessary to fulfill the primary purpose(s) of the reservation.

See, e.g., Cappaert v. United States, 426 US 128, 138 (1976); *United States v. New Mexico,* 438 US 696, 715 (1978).

B-6. GENERAL CONCLUSIONS OF LAW CONCERNING THE 1897 ORGANIC ACT

I. Federal Reserved Water Rights Generally

[17] These general conclusions do not pertain to claims filed by the Klamath Tribes or the United States as trustee for the Klamath Tribes concerning water rights deriving from the Treaty of 1864. Conclusions of law pertaining to those claims are included in the claims' partial final orders of determination.

When the United States reserves land that it owns for particular purposes, it implicitly reserves sufficient water to accomplish those purposes. *Winters v. United States,* 207 US 564, 577 (1908). These rights are commonly referred to as "federal reserved water rights." Federal reserved water rights are limited to "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States,* 426 US 128, 141 (1976). In addition, water is reserved only to meet the "primary" purpose of the reservation, not "secondary" purposes. *United States v. New Mexico,* 438 US 696, 715 (1978). Evaluation of a claim based on an implied reservation of water requires examination of the specific purposes for which the land was reserved, and a determination that the water is necessary to accomplish those purposes. *Id.* at 700, 702. The primary purposes of a federal reservation are determined by examining the legislation or executive order that established the reservation. *See United States v. New Mexico,* 438 US 696 (1978). The United States may also expressly reserve water for particular purposes. The priority date of a federal reserved water right is the date of the reservation of the land owned by the United States. *Cappaert*, 426 US at 138.

To summarize, in order to establish a federal reserved water right, the United States has the burden of proving the following elements by a preponderance of the evidence:

1. The United States owns the claimed place of use for the claimed water rights.

2. The date of the reservation of land owned by the United States.

3. The primary purpose(s) meant to be served by the reservation of land.

4. The reservation of land included an express or implied reservation of water.

5. The quantity of water necessary to fulfill the primary purpose(s) of the reservation.

See, e.g., Cappaert v. United States, 426 US 128, 138 (1976); *United States v. New Mexico,* 438 US 696, 715 (1978).

II. The 1897 Organic Act

The 1897 Organic Act, 16 USC §§ 471a-539k, authorized the President to establish national forests. The Organic Act provides:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States * * *

16 USC § 475.

The Organic Act sets forth two primary purposes for which water may be claimed: 1) to

secure favorable conditions of water flows; and 2) to furnish a continuous supply of timber. *See also New Mexico,* 438 US at 718 ("Congress intended that water would be reserved [under the Organic Act] only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law"). The specific purposes of use claimed by the Forest Service must be necessary to serve the primary purposes listed here.

B-7 GENERAL CONCLUSIONS OF LAW CONCERNING PWR-107 CLAIMS

I. Federal Reserved Water Rights Generally

When the United States reserves land that it owns for particular purposes, it implicitly reserves sufficient water to accomplish those purposes. *Winters v. United States,* 207 US 564, 577 (1908). These rights are commonly referred to as "federal reserved water rights." Federal reserved water rights are limited to "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States,* 426 US 128, 141 (1976). In addition, water is reserved only to meet the "primary" purpose of the reservation, not "secondary" purposes. *United States v. New Mexico,* 438 US 696, 715 (1978). Evaluation of a claim based on an implied reservation of water requires examination of the specific purposes for which the land was reserved, and a determination that the water is necessary to accomplish those purposes. *Id.* at 700, 702. The primary purposes of a federal reservation are determined by examining the legislation or executive order that established the reservation. *See United States v. New Mexico,* 438 US 696 (1978). The United States may also expressly reserve water for particular purposes. The priority date of a federal reserved water right is the date of the reservation of the land owned by the United States. *Cappaert*, 426 US at 138.

To summarize, in order to establish a federal reserved water right, the United States has the burden of proving the following elements by a preponderance of the evidence:

1. The United States owns the claimed place of use for the claimed water rights.
2. The date of the reservation of land owned by the United States.
3. The primary purpose(s) meant to be served by the reservation of land.
4. The reservation of land included an express or implied reservation of water.
5. The quantity of water necessary to fulfill the primary purpose(s) of the reservation.

See, e.g., Cappaert v. United States, 426 US 128, 138 (1976); *United States v. New Mexico,* 438 US 696, 715 (1978).

II. Public Water Reserve No. 107

The Bureau of Land Management (BLM) filed several claims based on the "Public Water Reserve No.107" for human and animal consumption at water holes.

In 1926 President Calvin Coolidge signed an Executive Order entitled "Public Water Reserve No. 107" (PWR 107). 43 CFR § 2321.1-19 (a). PWR 107 provides:

> It is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

The Executive Order was authorized under the Stock Raising Homestead Act (SHRA). 43 USC §§ 218-219, 222, 291-302. This Act authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes.The Secretary of the Interior's recommendation to the president stated:

> The control of water in the semi-arid regions of the west means the control of the surrounding grazing areas, possibly in some regions millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon unreserved public domain, it is believed important to retain the title to and supervision of such spring and water holes on the unreserved public domain as have not already been appropriated.

Letter of April 17, 1926 from Hubert Work, Secretary of the interior to Calvin Coolidge.

The United States made claims under this Executive Order in adjudications in Colorado and Idaho, and the Supreme Courts of those states recognized those claims. The Colorado Supreme Court stated: "Reserved water from public springs and water holes is available for the purposes of human and animal consumption in the amount necessary to prevent monopolization of the water resources." *United States v. City and County of Denver*, 656 P2d 1, 31 (Colo. 1982). The Idaho Supreme Court came to a similar conclusion. *In the Matter of SRBA - Basin Wide Issue #9*, 959 P2d 449 (Idaho 1998), *cert. den., Idaho v. United States*, 119 S Ct 1158 (1999); *cert. den., Hoagland v. United States*, 119 S Ct 1158 (1999). OWRD concludes that the reasoning in these cases is correct. Therefore, OWRD concludes that water is reserved under PWR 107 for the primary purposes of stock watering and human consumption and carries a priority date of April 17, 1926.

B-8. GENERAL CONCLUSIONS OF LAW CONCERNING ACQUIRED LANDS

In certain claims in the Klamath River Basin Adjudication (Adjudication), the United States has claimed a federal reserved water right for land formerly in the historic public domain that was conveyed into private ownership and later reacquired by the United States and reserved for specific purposes. OWRD concludes that the period of private ownership does not prevent a

successful federal reserved water right claim if the other elements of the claim are established. The priority date of any such right is the date of reacquisition or reservation, whichever is later.

The term "public domain lands" typically refers to land that was acquired by various methods by the United States in the 18th and 19th centuries but that had never been reserved by the United States for any specific purposes; such land was, in that sense, as yet *unreserved*. This land is referred to herein as the "historic public domain." In defining the federal reserved water rights doctrine, the United States Supreme Court has referred to land affected by the doctrine as land withdrawn "from the public domain." See, e.g., *Cappaert v. United States*, 426 US 128, 139, 96 S Ct 2062, 48 L Ed 2d 523 (1976) (federal reserved water rights can be implied "when the federal government *withdraws its land from the public domain* and reserves it for a specific purpose"); *United States v. Eagle County*, 401 US 520, 522, 91 S Ct 998, 28 L Ed 2d 278 (1971) ("it is clear from our cases that the United States often has reserved water rights based on *withdrawals from the public domain*").

In the watershed cases on the federal reserved water rights doctrine, the land in question had been directly reserved from the historic public domain. Most cases in which the doctrine of federal reserved water rights has been applied have also involved federal withdrawals of land directly from the historic public domain, accompanied by the simultaneous reservation of that land for specific purposes. *Winters v. United States,* 207 US 564, 576, 28 S Ct 207, 52 L Ed 340 (1908); *Arizona v. California,* 373 US 546, 596, 83 S Ct 1468, 10 L Ed 2d 542 (1963); *Cappaert*, 426 US at 139; *New Mexico*, 438 US at 696. The implied federal reserved water rights in such cases stemmed from the need for water to effectuate those specific purposes. *Id.*

The issue is whether land must always be *directly* withdrawn "from the public domain" at the time of the reservation in order for the United States to claim a federal reserved water right, or whether the United States may acquire land from private ownership and claim a federal reserved water right, when the United States has reserved the land for a specific purpose and the water right is necessary to effectuate the specific purpose of the reservation.

United States v. Anderson, 736 F2d 1358 (9th Cir 1984) comes the closest to squarely addressing the issue in question. *Anderson* involved the Spokane Indian Reservation. After creation of that Reservation, the United States classified some of the Reservation land as "excess" land and opened it to homesteading, a form of private ownership by non-tribal members. The United States subsequently reacquired some of the homesteaded land, reserved it for tribal use, and placed the reserved land back in trust for the Spokane Tribe.

The Ninth Circuit held that the United States could reserve water rights on the land with a priority date as of the later date of reacquisition and re-reservation. In reaching that conclusion, the court acknowledged that the homesteaders had not acquired any water rights along with their acquisition of land. There were therefore no existing water rights for the United States to acquire when it reacquired the homesteaded land, and hence the water rights needed for the re-reserved land had to be created by implication. *Id.* at 1363.

In reaching its conclusion, the court characterized the reacquired and re-reserved lands as "analogous" to "a newly created federal reservation." *Id.* at 1363. The court reasoned that, "on return of the property to tribal status, it becomes necessary to utilize the *Winters* doctrine to assure that the tribe has sufficient water to 'fulfill the very purpose for which [the] reservation was created." *Id.*

Anderson involved tribal land that had previously been reserved and was later re-reserved from private ownership. The land at issue in *Anderson* had previously been reserved for a specific purpose (the Reservation) before the United States opened the lands for conveyance into private ownership. In that sense, the land involved in *Anderson* was not only reacquired but also re-reserved for a similar, tribal purpose. In comparison, the reacquired lands at issue in the Klamath adjudication have been reserved for purposes unrelated to any previous reservation of the land.[18]

But that distinction does not appear to make a difference. The *Anderson* court gave the federal reserved water rights a priority date as of the second reservation, indicating that it was the re-reservation that was the operative event, not the timing or purpose of a previous reservation. The second reservation for a specific purpose established the right to claim a federal reserved water right with a later priority date, regardless of the intervening private ownership.

Anderson may not be completely dispositive of the issue, both because of the factual circumstances of the case and because *Anderson* did not directly address the United States Supreme Court's characterization of federal reserved water rights as being for land "reserved from the public domain." Nonetheless, the *Anderson* court's reasoning indicates that the fundamental concept of a federal reserved right does not depend on the nature of the land from which the land is withdrawn, but rather on the reservation of land for specific purposes by the United States where a supply of water is needed to effectuate the specific purposes of the reservation.

B-9. GENERAL CONCLUSIONS OF LAW CONCERNING AMENDMENT OF CLAIMS

The statutes and rules governing the Klamath River Basin Adjudication (Adjudication) impose limits on the amendment of Adjudication claims. Specifically, ORS 539.210 prohibits upward amendments of claim attributes after the applicable deadline for the filing of claims. OAR 690-030-0085 provides additional limits on the amendment of claims after the period for Open Inspection of claims in the Adjudication commenced.[19] OWRD describes these limits in detail below.

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[18] Some of the reacquired lands may have previously been a part of the Klamath Indian Reservation, while some do not appear to have previously been part of any federal reservation of land for a specific purpose.

[19] As described in detail below, Open Inspection allowed Adjudication claimants and all potential contestants to inspect information in OWRD's record pertaining to Adjudication claims and to inspect OWRD's Preliminary Evaluation of the claims.

I. ORS 539.210

> ORS 539.210 provides:
> Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, *at the time and in the manner required by law*. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant.

(Emphasis added). OWRD concludes that ORS 539.210 means that Adjudication claimants must file claims by the applicable claim filing deadline ("at the time and in the manner required by law") or they are estopped from subsequently asserting a claim.[20] OWRD also concludes that ORS 539.210 prohibits certain increases in claim terms after the applicable claim filing deadline, because the increases so markedly change the claim as to effectively constitute a new claim made after the applicable claim filing deadline. These changes, which include a claim for a more senior priority date, for a greater quantity of water, or a longer season of use, are therefore not made "at the time and in the manner required by law" and are time-barred by ORS 539.210.

OWRD's interpretation of ORS 539.210 is required by the plain meaning of the statute. Because ORS 539.210 requires prospective claimants to make a claim "at the time and in the manner required by law" or "be barred and estopped from subsequently asserting" a claim, OWRD must distinguish between claim amendments that are allowed after the claim filing deadline, and "new" claims that are time barred.

The determination of whether a change to the terms of a claim constitutes an untimely "new" claim depends on the attribute(s) of the claim that a claimant wishes to modify. The attributes of a water right claim include the priority date, the quantity (i.e., the rate and duty of water use), the place of use, the purpose of use, the season of use, and the point(s) of diversion. If claimants were freely allowed to amend any and all of these attributes after the claim filing deadline, a claim would essentially become an empty shell, to be filled at a later time with whatever attributes a claimant might desire. This would allow a claimant to substitute an unrelated claim for the claim initially (and timey) filed. For example, consider a claim timely filed with an 1880 priority date for the use of water from the Williamson River on a parcel of land located adjacent to that river. After the claim filing deadline, the claimant wants to "amend" the claim to an 1870 priority date for the use of water from the Wood River on a parcel of land adjacent to the Wood River. This "amendment" is quite obviously a new claim, deriving from a separate appropriation of water - with an earlier date of appropriation, a different source and a

[20] Pursuant to ORS 539.040, OWRD has the authority to set the claim filing deadline and to allow for extensions to it. As described in the General Findings of Fact, and in certain of the Partial Orders of Determination, extensions were allowed for certain types of claims for a number of reasons, such as pending litigation or the collection of additional information. Claims made by the United States and the Klamath Tribes were subject to an April 30, 1997 deadline. In general, claims made by other entities and individuals were subject to a February 1, 1991 deadline.

completely unrelated place of use. Allowing this "amendment" after the claim filing deadline would render the deadline meaningless, and fail to give effect to the phrase "at the time and in the manner required by law."

OWRD does not consider all changes to a claim's attributes after the applicable claim filing deadline to constitute impermissible "new" claims. OWRD concludes that those changes that claim increased water use or that refer to a substantially different event of appropriation are significantly different enough from the original, timely claim as to constitute an impermissible "new" claim. Changes that result in increased water use include an increase to the claimed quantity of water (rate or duty or both), a longer season of use, or an overall larger place of use.[21] Changes that refer to a substantially different event of appropriation include an earlier priority date, a different purpose of use, or an unrelated place of use.

Certain types of changes to claims after the applicable claim filing deadline do not claim increased water use or refer to a substantially different event of appropriation, and do not constitute impermissible "new" claims. Adjudication claimants may amend their claims after the claim filing deadline by making certain, limited modifications to the location of a place of use without increasing the overall size of the place of use. Claimants may also make changes to the location of a point of diversion or increase the number of claimed points of diversion, as long as the overall claimed quantity of water does not increase.[22]

Finally, ORS 539.210 does not prohibit the reduction of any of the attributes of a claim after the applicable claim filing deadline. A reduced claim is tantamount to a partial withdrawal of the original claim. It is not a new claim.

II. OAR 690-030-0085

OAR 690-030-0085 provides, in relevant part:

> (1)***[T]he Water Resources Director (Director) may not permit any alteration or amendment of the original claim after the period for inspection has commenced, but any new matter that the claimant may wish to set forth must be set forth in the form of an affidavit, regularly verified before a proper officer and filed with the Director prior to the close of the period for public inspection.[23]

The "period for inspection" referred to in this rule is the inspection period identified in ORS 539.090, and is commonly referred to as "Open Inspection." Open Inspection began on October 4, 1999, and closed on March 31, 2000. The Open Inspection period and the limitations

[21] Some changes that claim increased water use may also refer to a different event of appropriation.

[22] There are other principles of law that may, depending on the circumstances, limit OWRD's ability to recognize these types of changes, but ORS 539.210 does not.

[23] OAR 690-030-0085 also provides a process for changes to claimed points of diversion following the beginning of open inspection. This process is not at issue in this case.

on claim amendments after the beginning of Open Inspection ensure a process where all who may have an interest in the Adjudication are provided an adequate opportunity to determine the nature of the claims made and to determine whether they need to contest any of the claims.

While alterations and amendments of claims were not permitted after October 4, 1999, OWRD does not conclude that downward claim amendments as impermissible "alteration or amendment." Instead, OWRD concludes that downward claim amendments are voluntary partial withdrawals of claims. The reasoning behind this conclusion is sound. Downward amendments do not prejudice potential contestants. By reducing the scope of the claim, downward amendments benefit potential contestants. In addition, it does not make sense to require a claimant to continue claiming a right a part of which the claimant knows it either cannot prove or cannot beneficially use. Therefore, to the extent that a claimant has downwardly amended a claim after the beginning of open inspection, this is treated as a permissible partial withdrawal of the claim, and not an impermissible amendment

C. PARTIAL ORDERS OF DETERMINATION

The Partial Orders of Determination pertaining to the individual Adjudication claims are a part of the Findings of Fact and Order of Determination and are incorporated herein by reference. To the extent a Partial Order of Determination adopts and incorporates by reference portions of an underlying decision document from the proceedings before the Office of Administrative Hearings, including stipulations or settlement agreements, Proposed Orders, Amended Proposed Orders, and Corrected Proposed Orders, those portions of the underlying decision documents are also, by extension hereby incorporated into the Findings of Fact and Order of Determination.

Dated at Salem, Oregon on February 28, 2014

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

AO 72
(Rev. 8/82)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES,

Plaintiff,

-vs-

BOYD WALTON, JR., et ux, et al.,

Defendants,

STATE OF WASHINGTON,

Defendant/Intervenor,

No. 3421

FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington

AUG 31 1983

J. R. FALQUIST, Clerk
Deputy

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

WILLIAM BOYD WALTON, et ux, et al, and THE STATE OF WASHINGTON,

Defendants.

No. 3831

MEMORANDUM DECISION

The history underlying this action is set forth in Colville Confederated Tribes v. Walton (Walton I), 460 F. Supp. 1320 (E.D. Wash. 1978), modified and remanded, 647 F.2d 42 (Walton II), (9th Cir.), cert. denied, 454 U.S. 1092 (1981). On remand, this court is faced with resolution of two major issues.

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The first is predominately one of fact:

> On remand, [the court] will need to determine the number of irrigable acres Walton owns, and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water.

647 F.2d at 51.

The second is somewhat more fraught with pure legal overtones which, most observers would agree, tend toward the esoteric.[1] Once having ascertained the amount of irrigable acreage held by defendant and the quantity of water appropriated, it will then be necessary to "calculate the respective rights of the parties," bearing in mind the Tribe's implied reservation of water for maintenance of its fishery. 647 F.2d at 48 & 53.

During the course of the most recent hearings, credible testimony was presented in support of the following findings.[2] Walton's lands passed out of Indian ownership between 1921 and 1925. More specifically, the Whams purchased allotment 2371 in 1921; 894 in 1923; and 525 in 1925. See also, 460 F. Supp. at 1334, stipulated fact #22. To the north of these allotments was 892, owned by Joe Peters, a member of the Colville Tribe. See area map, id. at 1336. To the south lay 901 and 903 owned by the Timentwa family, also members of the Tribe, who irrigated approximately 30 acres utilizing water from No Name Creek. The Whams ran some 100 head of cattle, and in addition to water diverted for stock, also irrigated about 30 acres employing gravity flow rill method as well as a small

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gasoline-powered pump.[3] Additionally, because of the unique geological characteristics of this area, allotments 2371 and 894 were sub-irrigated at that time and required no application of water.[4] Sub-irrigated acreage was estimated at about 40. Throughout the 20's and 30's, well prior to the advent of electrical power being brought in, this state of affairs remained more or less stable, with the Whams thus cultivating a total of approximately 70 acres.[5]

Walton acquired 2371, 894 and 525 in July of 1948. The following month he applied to the state for a permit to divert 1.0 c.f.s. for irrigation of 75 acres.[6] The next year, after successful negotiations and the commitment of substantial capital, Walton was able to bring electricity into the valley for the first time.

The availability of electricity led to the installation of two five-horsepower pumps in the creek which, together with the use of newly available aluminum pipe, allowed Walton to engage in considerably more sprinkler irrigation as opposed to the less efficient rill method. During the period of 1949 and 1950, Walton had a minimum of 104 acres under irrigation.[7] At that point in time, Wilson Walton believed that he potentially had some 155 acres susceptible to irrigation and intended to eventually develop a system capable of delivering sufficient water to accomplish that end. Thereafter, a series of surveys were completed by the Soil Conservation Service and the Bureau of Indian Affairs which established that the Walton land contained

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at least 170 acres of potentially irrigable cropland.

Amount of Water Appropriated:

A two-step inquiry, it is first necessary to determine the amount appropriated, and then ascertain to what extent that quantity was appropriated with reasonable diligence. Prior to culmination of the instant conflict, diversion was not accurately recorded. Thus, there is no way of ascertaining with any degree of precision the exact amount of water beneficially applied. Having quantified the acreage, however, it is a simple matter to work backwards.

Judge Neill determined that reasonable irrigation practice required the application of four acre feet per year. No one disputes that Walton obtains a respectable yield from his farming efforts, and thus it is a fair inference that he is applying, and has applied, at least that amount of water minimally necessary for effective crop propagation.[8] The answer to the first prong of the question is therefore equational in nature. Walton has 170 irrigable acres, and has consistently irrigated at least 104 of these. Each acre requires the application of four feet per year for sustained productivity. Walton has demonstrated that sustained productivity. Ergo, he has beneficially applied 416 acre feet per year.

As far as Walton's diligence is concerned, where an individual, within sixteen months of purchasing land, demonstrates an intention to divert by applying for a permit, expends considerable sums to bring in electricity, designs a

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delivery system utilizing the most modern and efficient equipment, undertakes a comprehensive inventory of the suitability of his acreage for crop production by eliciting the aid of the Soil Conservation Service, and then proceeds to actually apply water beneficially, the only conclusion that can be drawn is that diligence is not only reasonable, but expeditious. I have no difficulty finding that Walton exercised reasonable diligence in irrigating a minimum of 104 acres.[9]

The Tribe raises the contention, however, that it is a legal impossiblity for Walton to establish due diligence unless it can be demonstrated that such diligence was exercised by the original allottee or his immediate grantee, and thereafter preserved by each subsequent non-Indian owner. The argument proceeds as follows. Only the original allottee had a vested right in reserved waters. He could convey that vested, but inchoate, right to his immediate grantee, but in order to perfect that right the grantee himself must exercise reasonable diligence, and that grantee could reconvey that perfected right to a subsequent non-Indian purchaser only to the extent of its perfection by appropriation with due diligence. Stated another way, if the immediate grantee did not exercise due diligence, the inchoate right was lost forever and could not thereafter be revived by a subsequent grantee because that later purchaser would have no inchoate right capable of being perfected.

The argument is not without some appeal, and indeed is alluded to in Walton II. In this case, however, the Circuit is

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abundantly clear in its mandate: this court is to determine the "amount of water he [Walton] appropriated with reasonable diligence." 647 F.2d at 51 (emphasis supplied). There is no mention whatever of the weight to be accorded performance or non-performance of intervening owners, and yet is is apparent that the Court was well aware that the land had passed out of Indian ownership many years and several grantors removed from Walton's acquisition in 1948.[10] It may well be areas such as this which prompted the Circuit to urge further review. See note 1 supra. In any event, this court is unable to conclude that the Circuit would include in its mandate a useless issue.

Alternatively, if the performance of intervening owners is relevant, there is ample evidence to conclude that Walton's land was in production throughout most of the period from 1921-25 when it passed out of Indian ownership, until 1948 when Walton purchased it. Obviously, it is impossible to quantify the exact acreage in production during the relevant time frame. Those who testified were asked to turn their minds back fifty years and more. Some were asked to recall childhood memories. That the amount of land subject to irrigation cannot now be precisely ascertained is certain, but that the land was in fact in crops, and was in fact irrigated to at least some extent by all of the intervening owners throughout most of the time span at issue, is equally certain.

Walton argues that certain practical considerations must necessarily play a role in determining what is reasonable

where diligence in appropriating water is involved. The court is asked to bear in mind that there was a depression throughout the 1930's, and that a major war followed; that irrigation equipment was primitive during the 30's and 40's and that irrigation was thus labor-intensive; that aluminum pipe had not yet been perfected; that electricity was non-existent until Walton financed the first powerline into the area in 1949.[11] In short, defendant asserts that what is "reasonable" is ascertainable with reference to what is practical, and that the economic realities of life and the then-existing state of the art in agricultural practice cannot be wholly divorced from a "reasonableness" determination. I am persuaded that this position has merit, and that each of the intervening owners exercised diligence in beneficially applying water for agricultural purposes to the maximum extent reasonably possible given prevailing economic and technological conditions. United States v. Big Bend Transit Co., 42 F. Supp. 459, 468-69 (E.D. Wash. 1941) and authorities cited therein.

Allocation:

Having quantified the number of irrigable acres owned by Walton and the amount of water he appropriated with reasonable diligence, the specific mandate enunciated in Walton II, 647 F.2d at 51, has been satisfied. The more general mandate to "calculate the respective rights of the parties," id. at 53, is a more difficult task. If Walton holds 170 irrigable acres, and has diligently made beneficial application of water from No Name

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Creek on 104 of those, and if Tribal members hold 166.6 irrigable acres and are currently irrigating 107.2 of those,[12] and if the respective rights to share in reserved waters are equal in priority, and if any shortfall in available water must be borne ratably, then certain conclusions can be reached with some measure of confidence.

Even assuming that the law of the case doctrine would not be binding on this court's factual determinations with respect to those quantifications developed by Judge Neill, nothing presented in evidence would give cause to modify those findings except as mentioned in note 10, supra. In an average year, 1,000 acre feet is available from No Name Creek.[13] Average duty is four acre feet per year. Walton I, 460 F. Supp. at 1330. Ignoring for the moment the fish hatchery issue, the respective rights of the parties may therefore be tentatively quantified thusly:

Walton	104 acres	at 4 acre feet	416 acre feet
Other allottees	166.6 acres	" " " "	666.4 " "
			1,082.4 " "

Since only 1,000 acre feet are available, however, these respective shares must be ratably reduced. Walton II, 647 F.2d at 50-51. The amount of water available represents 92.4% of that potentially reserved. The above figures must therefore be factored by that amount in order to arrive at actual allocation:

Walton	416 acre feet (92.4%)	384 acre feet
Other allottees	666.4 acre feet (92.4%)	616 " "
		1,000 " "

The Tribe, however, as lessee of the other allotments in the

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basin, is irrigating only 107.2 acres and, applying a duty of four acre feet, has no present need for more than 428.8 acre feet per year.[14] The final result thus becomes:

Walton's allocated share	384 acre feet
Other allottees' allocated share	428.8 " "
Available for other uses	187.2 " "
	1,000 " "

Could the court's task be considered completed at this point, everyone could heave a sigh of relief at the prospect of seeing this protracted litigation finally come to a close. Unfortunately, this is not to be, for interjection of the fishery issue throws what might have been a simple exercise in mathematics into a quagmire guaranteeing the Circuit another opportunity to finally quantify allocations as sought by the competing interests herein.

It is important to take a conceptual shift in attitude from that exhibited by the parties up to this juncture. It has been all too easy in the past to view this litigation as a contest between Indians and non-Indians. Walton II makes it abundantly clear that this is not the case. Once the threshold issues of the ownership of irrigable acreage and the beneficial application of water thereto with reasonable diligence has been resolved in Walton's favor, he no longer stands in an adversarial posture vis a vis any other individual owner of allotted lands. The battleground, rather, concerns the Tribe as sovereign, and the individual allottees.

The Circuit held categorically that the "Colvilles have

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a reserved right to the quantity of water necessary to maintain the Omak Lake Fishery." Walton II, 647 F.2d at 48. This conclusion was based on the premise that "[a]n implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation." Id. at 46. Applying the test set forth in United States v. New Mexico, 438 U.S. 696 (1978), the Court found that "preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation." 647 F.2d at 48. The lesson emerging from this sequential reasoning is that the Tribe has the right to whatever portion of the 1,000 acre feet available, up to and including all of it, if required for the maintenance of the fishery.

At the same time, the Circuit just as firmly held that "one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society" and thus irrigation is also a purpose resulting in an implied reservation under New Mexico, supra. 647 F.2d at 47. Quoting Arizona v. California, 373 U.S. 546, 600-01 (1963), the Court noted that:

> the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage. We conclude that, when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation.

Id. at 47-48 (citation omitted).

More strongly yet, the Court noted that:

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> [W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.

Id. at 50 (quoting United States v. Powers, 305 U.S. 527, 532 (1939)); see also Walton I, 460 F. Supp. at 1326 and authorities cited therein.

Such individual rights are not subject to diminution absent "express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history." 647 F.2d at 50. Thus, just as the Tribe, as sovereign, has a vested right to share in available reserved waters to whatever extent might be necessary for the maintenance of the hatchery, so the individual allottee, or his successor, has a vested right to share in available reserved waters to whatever extent might be necessary for irrigation. Obviously, these competing interests, each vested and each with the same priority date, are irreconcilable unless the quantity of water available is sufficient to satisfy both needs. In this case, it is not.

Expert testimony detailing the operation of the hatchery produced some surprises. One might tend to think of water used in connection with a hatchery as merely a medium in which the fish swim and feed. So it is, but a critical factor in such operation is the temperature of the water, and since the water at issue is drawn from the underground aquifer and is exposed to ambient air temperature for only a brief period during its sojourn along No Name Creek, it serves a cooling function so

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as to maintain the temperature of the pools at a level conducive to propagation. Thus, in periods of high ambient air temperature and low humidity, the warming of the pools by tranference and evaporation will necessitate a higher flow to maintain the temperature at the desired level. Unfortunately, it is at precisely this time that crops will require a higher level of irrigation. The irreconcilability of use is therefore inescapable. Also, unfortunately, because the hatchery's use requirements are neither stable nor predictable on a long term basis, quantification is a distinct problem.

Dr. Koch's testimony as to hatchery needs was uncontroverted. Based on his experience over the preceding six years, he urged that a flow of 1.5 c.f.s. would be required between May 1st and June 1st; 2.0 c.f.s. between June 1st and July 15th; and 0.5 c.f.s. thereafter for the remainder of the spawning season. There being no other evidence in the record on this area, and no reason to question Dr. Koch's credibility, those figures will be accepted.

So concluding, however, does not answer the question of whose needs will take precedence. For that answer, the Circuit's adoption of the following quote is instructive:

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses . . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree

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> establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

647 F.2d at 48 (emphasis original) (quoting Report from Simon H. Rifkind, Special Master, to the Supreme Court 265-66 (December 5, 1960)).

The parties have cited no "relevant law" which would allow the Tribe to dispossess its members, or other persons succeeding to the vested rights of those members, of an important property right; so important, indeed, that the value of the land to which the water right is appurtenant may be entirely destroyed without it. See Winters v. United States, 207 U.S. 564, 576 (1908). It could be argued, and probably will be on appeal, that language in Walton II could be construed as impliedly allowing the Tribe itself to determine whether its rights or those of its individual members should prevail. Not only would such a result nullify the concept that these competing rights are equal in priority with each arising out of purposes for which the reservation was created; but allowing a substantial, and perhaps total, diminution of vested property rights without resort to any definable process of law would fly in the face of provisions contained in the Indian Civil Rights Act codified at 25 U.S.C. § 1301 et seq.

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of

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> sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

647 F.2d at 52 (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

In 1968, Congress imposed an express limitation on tribal sovereignty in the form of the Indian Civil Rights Act:

> No Indian tribe in exercising powers of self-government shall--
>
> * * * *
>
> (5) take any private property for a public use without just compensation [or]
>
> * * * *
>
> (8) . . . deprive any person of liberty or property without due process of law.

25 U.S.C. § 1302.

Exactly what type of process may be due, or what remedies may be available for a breach, or what forum may be appropriate for enforcing the manifest intent of Congress to impose upon tribal government certain restrictions akin to those contained in the Bill of Rights, are all hotly debated and somewhat less than settled. See, e.g., Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d. 951, 964 n.31 (9th Cir), cert denied, ____ U.S. ___, 103 S.Ct. 314 (1982); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1345-46 (10th Cir. 1982); F. Cohen, Handbook of Federal Indian Law 242-44 (1982) and authorities cited therein. The existence of such questions, however, does not, by some means of prestidigitation, render the

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above-cited congressional mandate ineffective. Whatever "relevant law" may afford the predicate for extinguishing an individual's property rights in favor of the Tribe must take into account and reconcile this congressional limitation upon tribal sovereignty.

Absent some showing that relevant law provides for divesting allottees or their successors of otherwise vested property rights, I am inclined to conclude that the assimilation policy so evident in congressional intent underlying the General Allotment Act prevents the Tribe from unilaterally assigning weights and priorities to mutually legitimate reservation purposes.[15] See Walton II, 647 F.2d at 49; United States v. Powers, supra, 305 U.S. at 533; 25 U.S.C. § 381.

The final allocation, therefore, will be as set forth supra. Out of the 1,000 acre feet available, Walton is entitled to 384 acre feet; the remaining allotments to 428.8; and the hatchery to 187.2. At first glance this may appear to run afoul of the portion of Walton II which arguably gives the Tribe unlimited access to hatchery water. That access, however, is conditioned on the existence of a legal mechanism whereby one may be divested of valuable property rights. 647 F.2d at 48. The Tribe is hardly without recourse. Should the Secretary of Interior, by appropriate regulation or proceedings, alter the structure of allocation pursuant to 25 U.S.C § 381, or should the Tribe seek to condemn water rights appurtenant to allotted lands in the No Name Creek Basin under 25 U.S.C. § 1302(5),[16] the

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currently envisioned impediment to unilateral impairment of allottee property rights would likely disappear.

Gratuitous though it may appear, this court is of the opinion that no matter what result obtains when the final chapter in this litigation is at long last written, the parties are going to have to come to grips with the proposition that a spirit of cooperation may be the best answer to efficient and fair utilization of water in the No Name Creek Basin. If the thrust and motivation underlying the instant suit is merely to provide attorneys with a forum for launching abstruse forays into matters esoteric, then the entire project has been a phenomenal success. On the other hand, if the purpose of this action is to provide each of the competing interests an equitable share and thereby promote maximum utilization of a limited resource for the mutual benefit of all concerned, a little more unity of purpose may be indicated.

In the final analysis, the 1,000 acre feet now available would be adequate to service all needs except for a brief period, perhaps four to six weeks, during portions of June and July each year. Some use is already being made of holding pools to serve as reservoirs. Expansion of such a device might well render full irrigation possible even during maximum water utilization by the fishery.[17] Further, while there may be some engineering problem of which the court is presently unaware, no one has satisfactorily explained from the witness stand why fishery waters could not be recaptured prior to flowing into Omak

Lake for application on irrigable land upstream.[18] If the parties are to avoid the expense and aggravation of having their day-to-day operations controlled by a water master, such cooperative ventures may be the ultimate answer.

There is one remaining issue which is not reflected in the Circuit's mandate, but which the parties have suggested be resolved. The Tribe has significantly enhanced the natural flow of No Name Creek by pumping water from the aquifer to the natural creek channel for delivery downstream.[19] Walton has been pumping out of the creek for irrigation purposes. Now that the respective shares to which the parties are entitled have been quantified, it would appear only equitable that Walton reimburse the Tribe for the costs of pumping to the extent that he is withdrawing more water than would be available were the flow of No Name not enhanced. If the parties are unable to arrive at a fair fee, the court will retain jurisdiction to settle the matter either directly or through a water master.

THEREFORE IT IS ORDERED:

(1) Walton is entitled to share in the reserved waters of the No Name Creek Basin in the amount of 384 acre feet per year and will be enjoined from diverting more than that quantity from either the Creek or the underground aquifer.

(2) The other allottees, represented herein by the United States, are entitled to share in the reserved waters of the No Name Creek Basin in the amount of 428.8 acre feet per year and will be enjoined from diverting more than that quantity from

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either the Creek or the underground aquifer.

(3) The Tribe is entitled to share in the reserved waters of the No Name Creek Basin in the amount of 187.2 acre feet per year and will be enjoined from diverting more than that quantity from either the Creek or the underground aquifer.

(4) The Clerk shall enter judgment accordingly.

DONE BY THE COURT this 30th day of August, 1983.

Robert J. McNichols
United States District Judge

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FOOTNOTES

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1 Rarely has an appellate court more strongly urged review by the Supreme Court:

> We are persuaded of the correctness of our analysis and conclusion concerning the transferability of the water rights involved in this litigation. Nevertheless, we recognize that reasonable minds hold conflicting views. State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.

647 F.2d at 54 n.18.

2 Rule 52(a), Fed.R.Civ.P. It should be noted at the outset that most of the witnesses apearing in the recent round of hearings were both candid and forthright in presenting testimony. Two notable exceptions were Mr. Clark and Mr. Kaczmarek, whose partisanship shone through. Their purported ability to identify irrigated lands from ancient aerial photographs did not survive the rigors of cross-examination and the court places little weight on their opinions.

3 Estimates by persons familiar with this area varied from a low of 17 to a high of 40. Selection of the figure 30 is not merely an averaging, but rather is based upon what I consider the most focused and trustworthy recollections.

4 Bordering the south of the Walton property is an impermeable granitic lip which tends to maintain ground water at a high level in immediately adjacent areas. This geologic fact tends to support witness testimony that sixty years ago, these areas were sub-irrigated.

5 These were happier times. Mary Ann Timentwa Sampson, who lived on 901 and 903 as a young girl, offered the following:

> Q. And in addition to [the Whams] leasing your mother's property, they were farming some of their own property, were they not?
>
> A. Yes, they were.
>
> Q. And as I understand it, from time to time they

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did assist you in tilling the land, or farming the land, or in developing the irrigation.

A. Well, we were neighbors, and if they needed help, we went and helped them, and that was the same with Joe Peter. We were neighbors, the three of us, and we helped one another.

The tribe makes much of the admitted fact that the Whams were not piggish about taking only their fair share of the natural flow of No Name Creek, always allowing a sufficient amount to flow to the south for the benefit of their neighbors on 901 and 903. It is contended that this is incontrovertible proof that the Whams deliberately failed to exercise due diligence in fully developing their potentially irrigable acreage and that this deliberate by-pass forever freezes the amount of irrigable acreage at the level under cultivation during the time frame the Whams were in possession. This is utter nonsense. That Wham, Peters and Timentwa had the prescience to foresee the Circuit's doctrine of ratable reduction is much to their credit.

[6] The state ultimately issued a Certificate of Water Right in 1950 for 1.0 c.f.s. for the irrigation of sixty-five acres. This water right was declared a nullity in Walton II, 647 F.2d at 52.

[7] This is the figure adopted by the Circuit as the amount "currently irrigated" by Walton. 647 F.2d at 45. It also closely approximates the figures found in Judge Neill's opinion. 460 F. Supp. 1324; see also id. at 1334, stipulated fact #20. That does not supply the answer to what Walton may have been irrigating shortly after acquiring the land, bringing in electricity, and modernizing his irrigation equipment. Had this court been instructed to try the entire matter de novo, then I would have to consider the possibility that substantial evidence exists to fix the quantity of acreage at a significantly higher figure. For reasons set forth in note 10, infra, however, I am inclined to view the 104 acre figure as the law of the case insofar as the question of due diligence is concerned.

[8] This analysis has the salutory effect of establishing a ceiling on Walton's claim. That is to say, even if, as asserted by the Tribe, Walton has appropriated more water than could be beneficially applied, he will be given "credit" for having appropriated only that amount which would be necessary to efficient farming efforts.

[9] As testimony established during trial, any year-to-year deviation can be explained with reference to such universal farming practices as crop rotation, emphasizing one crop over another in response to market conditions, and allowing land to stand fallow as a conservation practice.

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10 An extremely troubling aspect of this case lies in the uncomfortable feeling that not all "facts" are. For example, with respect to the fishery issue, Judge Neill found that "No Name Creek is the only fresh water source into the lake." 460 F. Supp. at 1325. In fact, the Tribe's own expert, who is intimately familiar with the fishery operation, testified before this court that at least two other creeks would have been equally suitable for use as a spawning ground. Perhaps far more critically, the trial court found that "[t]he allotments now owned by the Waltons passed from Indian ownership in 1942." Id. at 1324. In fact, as all parties freely agree, Hettie Justice Wham was not an Indian. See id. at 1334, Appendix 22(a) and (c). The allotments at issue thus passed out of Indian ownership in 1921-25.

It would be less than honest to pass on the questions raised without disclosing the above. On the other hand, the mandate does not contemplate this court now retrying the matter in its entirety. Perhaps the dilemma can be laid to rest by making the reasonable assumptions that: (1) the parties had a full and fair opportunity to litigate all factual issues in this action in front of Judge Neill; (2) the parties had full opportunity to appeal those findings of fact not supported by the evidence; and (3) the Circuit gave appropriate attention to all challenges of the fact-finding process and chose to accept the facts as found by the trial court.

With these assumptions in place, perhaps it would be presumptuous for this court to now question the validity of some very basic, and arguably dispositive, factual predicates. The facts found by the trial court and relied upon by the Circuit will thus be considered to constitute the law of the case, and this court will refrain from original fact-finding except insofar as may be necessary to fulfill the mandate.

11 The argument is buttressed in the record by testimony from Mr. Apple, who was a pioneer in installing irrigation systems in that part of the country.

12 460 F. Supp. at 1330. This figure does not include allotment 526 which is beneficially owned by the Tribe. Id., approved in Walton II, 647 F.2d at 49. This may be an appropriate point at which to clarify language contained in an earlier order of this court where it was noted that although 526 is not entitled to participate in the waters of No Name Creek, either by means of surface diversion or drawing from the aquifer, the Tribe could nevertheless continue to irrigate this allotment provided that whatever water was applied would be subtracted from the share which would otherwise be available for 892, 901 and 903. For reasons addressed infra, this does not mean that the Tribe may unilaterally divest individual allottees or their successors of their vested shares. It merely means that the Tribe, as lessee of the individual allotments, could place water under its

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control by virtue of those leases wherever it might deem appropriate.

13 460 F. Supp. at 1330. Expert testimony at trial ranged from a low estimate of 550 acre feet to a high of 1,300 available for comsumptive use. Id. at 1329. The plain fact of the matter is that no one knows what the maximum output of the No Name aquifer might ultimately be. The figure employed in both Walton I and II of 1,000 acre feet is far in excess of the natural flow of the creek due to the pumping stations installed by the litigants. The parties are in agreement that this enhancement of the natural flow has not yet resulted in a "mining" situation; i.e., the aquifer has demonstrated the ability over the course of a number of years now to replenish itself cyclically. Thus, the figure of 1,000 acre feet is simply Judge Neill's best guess. On the evidence available, this court could do no better.

14 This result might appear to give the Tribe an advantage since, although its maximum potential allocation was ratably reduced, the same reducing factor was not applied to its actual allocation. That is to say, the Tribe will have the ability to apply a full four acre feet to its irrigated land, while Walton will have to make do with that water available after reduction, thereby giving him the choice of either irrigating slightly less land, or of applying slightly less water to the total quantity of irrigable land. This apparent anomaly is dictated by the analysis supplied in Walton II which holds due diligence on Walton's part to be the cornerstone of his right to share at all, whereas such diligence is an irrelevancy with respect to the tribal members. That is to say, it would seem that the reduction factor is to be applied to the gross potential allocation, rather than to the actual allocation.

15 Even assuming that the internal political framework of tribal government would accord member/allottees sufficient due process with respect to restructuring or quantifying water rights, that in itself would be no guarantee that a non-member would find himself similarly situated. Cf., Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 685 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981).

16 See generally, Seneca Constitutional Rights Organization v. George, 348 F. Supp. 51, 59 (W.D. N.Y. 1972) (power to condemn is a function of sovereignty subject to congressional limitation). By noting this theoretical possibility, the court does not mean to imply that the Tribe's power of eminent domain is by any means a settled proposition, or that such authority could be employed with equal ease against both tribal members and non-Indians alike.

17 Understandably, capital expenditure in this area would be unwise until such time as the parties' respective rights are fully and

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finally adjudicated.

18 Dr. Koch expressed some reservations as to the economic and technical feasibility of such diversion, but he did agree that it would be possible.

19 It has previously been settled that the creek and the aquifer constitute but a single hydrological unit. The Tribe's contention that its pumping efforts fall within the doctrine of "developed waters" has been soundly rejected. Likewise, I reject the new, but parallel, argument that such pumping is merely a withdrawal of "stored waters."

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