

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

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

United States of America; The Klamath Tribes,
Contestants

AMENDED PROPOSED ORDER

v.

Case No. 218

Rodney N. Murray,
Claimant.

Claim: 105

Contests: 3484¹, 3751, and 4138

After fully considering the entire record, the Adjudicator issues this AMENDED PROPOSED ORDER pursuant to OAR 137-003-0655(3). This AMENDED PROPOSED ORDER modifies the ORDER GRANTING UNITED STATES' MOTION FOR RULING ON LEGAL ISSUES; PROPOSED ORDER ("Order") issued on November 10, 2004 by Administrative Law Judge Daina Upite, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. Modifications to the ORDER are shown as follows: additions are shown in underlined text; deletions are shown in ~~strikethrough~~ text. Per OAR 137-003-0655, OWRD provides an explanation for any "substantial" modifications to the Order.

The ALJ issued the Order based on her ruling in favor of the United States' Motion for Ruling on Legal Issues. OWRD disagrees with certain of the legal conclusions reached in the Order, and concludes that the United States is not entitled to a ruling in its favor on its Motion for Ruling on Legal Issues. OWRD further concludes that, given the procedural posture in this case, it is unnecessary to refer the case for further hearing before the Office of Administrative Hearings, and that OWRD may appropriately issue an Amended Proposed Order. By the time the ALJ issued the Order, the deadlines for submission of direct and rebuttal had passed, and the deadline for

¹ Don Vincent voluntarily withdrew from Contest 3484 on November 28, 2000. Berlva Pritchard voluntarily withdrew from Contest 3484 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew, without prejudice, from Contest 3484 on January 16, 2004.

Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; and Collins Products, LLC voluntarily withdrew from Contest 3484 on April 8, 2004, thereby disposing of Contest 3484 in its entirety.

identification of witnesses for cross-examination had also passed. None of the parties identified any witnesses for cross-examination by the deadline for doing so. As a result, the record in this matter was complete by the time the ALJ issued the Order. In this circumstance, OWRD may issue an amended proposed order without further proceedings.

HISTORY OF THE CASE

THIS PROCEEDING under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

Pursuant to a Scheduling Order issued September 3, 2003 and a Hearing Notice mailed October 13, 2004, this case is was set for a cross-examination hearing on November 17, 2004. On October 18, 2004, the United States of America (United States) filed a Motion for Ruling on Legal Issues (Summary Judgment). Neither Claimant nor any other participant ~~has~~ filed a response to the United States' motion.

An ORDER GRANTING UNITED STATES' MOTION FOR RULING ON LEGAL ISSUES; PROPOSED ORDER was issued on November 10, 2004 by Administrative Law Judge Daina Upite, denying the entire claim with the exception of irrigation on 34.74 acres within Allotment 1461. The basis for denying the claimed 2.56 acres in Allotment 1461 was lack of continuous use of water for the claimed uses; the basis of denying 2.9 acres within Allotment 734 and 32.4 acres of unallotted land was that water use was not developed with reasonable diligence by the *first* non-Indian purchaser of land from an Indian owner.

ISSUES

- (1) Is the United States entitled to a ruling in its favor on its Motion for Ruling on Legal Issues?
- (2) Is Claimant entitled to a water right? If so, what are the properties of that water right?

EVIDENTIARY MATTERS

The record consists of Exhibit 1, submitted by the Oregon Water Resources Department (OWRD); the written direct testimony of the United States' witness, Ed Everaert, along with Exhibits 1-8; and Claimant's responses to discovery requests. Claimant did not submit any written direct testimony, nor did he submit any written rebuttal testimony in response to Mr. Everaert's testimony.

LEGAL STANDARD FOR RULING ON LEGAL ISSUES

Motions for rulings on legal issues (Summary Judgment) are governed by OAR 137-003-0580, which establishes standards for evaluating the motion and states in material part:

(6) The administrative law judge shall grant the motion for a legal ruling if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party ***.

~~Considering the evidence in a manner most favorable to the non-moving party, I make the following:~~ For the purposes of ruling on the United States' Motion for Ruling on Legal Issues, the ALJ appropriately considered the evidence in a manner most favorable to the non-moving party. In issuing this Amended Proposed Order, OWRD adopts or modifies the ALJ's Findings of Fact based on a preponderance of the evidence in the record.

Reason for Modification: To apply the appropriate evidentiary standard.

FINDINGS OF FACT

(1) Claimant filed Claim 105 on November 14, 1990, claiming water at the rate of 2.51 cubic feet per second (cfs) from two diversion points on Five Mile Creek, a tributary to the Sprague River, for watering 200 head of livestock and irrigating 72.6 acres. The priority date claimed is 1864, and the season of use claimed is April 1 to November 1. (OWRD Ex. 1 at 1-6.) The place of use includes two former Klamath Indian allotments, Allotment Nos. 1461 and 734, as well as 32.4 acres of unallotted Tribal land. (Testimony of Everaert at 3.)

(2) OWRD filed its Preliminary Evaluation of the claim on October 4, 1999, finding that the elements of a *Walton* water right had been established. (OWRD Ex. 1 at 111-14.)

(3) On May 8, 2000, the Klamath Project Water Users (KPWU) filed Contest 3484, the United States filed Contest 3751, and the Klamath Tribes filed Contest 4138. (OWRD Ex. 1 at 54, 94, 98.) Subsequently, on April 8, 2004, KPWU withdrew Contest 3484 in its entirety.

(4) Allotment No. 1461 passed into non-Indian ownership on September 13, 1960, at which time there was no irrigation on the 37.3 acres claimed in former Allotment No. 1461. The first non-Indian owners were W.V. and Doris C. Meade and Percy and Marcella Murray. ~~As of 2000, only 34.74 acres were under irrigation.~~ Testimony of Everaert at 3-4.

(5) The lands in Allotment No. 734 first passed into non-Indian ownership on May 29, 1957 when the land was purchased by the Weyerhaeuser Timber Company. The second non-Indian owners were W.V. and Doris C. Meade and Percy and Marcella Murray, who purchased the land on February 27, 1963. The claim is for 2.9 acres of irrigation on former Allotment No. 734. There was no irrigation on this land in 1960. (*Id.* at 4.)

(6) The former Tribal lands that were not allotted passed into non-Indian ownership on August 4 and August 7, 1959. The second non-Indian owners were W.V. and Doris C. Meade and Percy and Marcella Murray who purchased the property March 16, 1960. The claim is for 32.4 acres of irrigation. The land was not irrigated in 1960. (*Id.* at 5.)

(7) All 72.6 acres claimed in Claim 105 are covered by OWRD water right Certificate 38088, Permit 28441, with a priority date of October 4, 1962. The water right certificate is limited to a water duty not to exceed 3 acre-feet per acre and a rate of 1/40th of one cfs per acre. The notice of beginning of construction was filed July 15, 1963, and the notice of complete application of water to a beneficial use was filed May 1, 1968. (*Id.* at 3.) An irrigation ditch was constructed in the fall of 1963, with additional construction in 1965 and 1967. All the lands in Claim 105 first received irrigation water on October 1, 1966, when 80 acres were seeded and irrigation water was applied for the first time. (*Id.* at 6.) Claimant admitted that a water duty of 3.0 acre-feet per acre is reasonable. (*Id.* at 7; Ex. 8.)

Reason for modification: To correct findings not supported by a preponderance of evidence in the record.

OPINION

Because claimant is claiming water rights as a non-Indian successor to a Klamath Indian allottee, the water right is governed by the *Colville Confederated Tribes v. Walton* line of cases.² The Order adopted the elements necessary to establish a *Walton* right as identified by As outlined by Administrative Law Judge William D. Young in *Nicholson et al. v. United States*, OAH Case No. 272, in the context of the Klamath Basin Adjudication, the following elements must be proved to establish a *Walton* water right: OWRD adopts those conclusions with the following modifications:

1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe;

² Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

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

OAH Case No. 272, "Ruling on United States' Motion for Ruling on Legal Issues" at 9 (August 4, 2003.)

Reason for Modification: The reasons for these modifications are described as follows.

Development of Water Use Following Transfer from Indian Ownership

Because the Claimant cannot establish that the claimed use was developed at the time of transfer from Indian ownership, the Claimant must establish that the claimed use was developed with reasonable diligence following transfer from Indian ownership. The Order, however, concludes that the inchoate component of a *Walton* water right must be developed with reasonable diligence by the first non-Indian owner of the underlying property, or it will be lost to succeeding owners, regardless of the first non-Indian owner's period of ownership. OWRD disagrees with this conclusion, and for the following reasons concludes that as long as 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.

The Order does not explain the basis for a first non-Indian owner requirement. However, in Case 272, and in other similar cases in the Adjudication, the requirement was based on the following statement in *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981) (*Walton II*):

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.

Walton II, 647 F2d at 51. Presumably, the Order reasons that the use of “he or she” in this passage is indicative of a requirement that the first non-Indian owner must develop the inchoate portion of a *Walton* right, or the right will be lost to subsequent purchasers. When considered as a whole, however, the *Walton* line of cases does not establish a first non-Indian owner requirement. Rather, the *Walton* cases borrow from western water law principles to require that the inchoate portion of a *Walton* right either be developed with reasonable diligence, as measured from the date of initial transfer to non-Indian ownership, or be lost. Because the language in *Walton II* and *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985) (*Walton III*) is not entirely clear on this issue, it is necessary to undertake a detailed review of the *Walton* line of cases, beginning with *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton D.*)³

The district court in *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.⁴ Likely because the *Walton I* court concluded that water rights based on the reservation did not transfer from Indian allottees to non-Indian owners, the court did not provide a more detailed history of development.

On review, the *Walton II* court did not take issue with the above findings of fact, but reversed the *Walton I* court’s determination on the issue of alienability of allottee rights. The court first found that “[t]he general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history.” The court then concluded that the allottee’s reserved water right would be reduced in value if the allottee could only convey the portion of the right already appropriated. The court characterized this restriction on transferability as a diminution of Indian rights requiring a clear

³ Although *United States v. Adair*, 478 F Supp 336, 348-349 (D Or 1979) (*Adair I*), *United States v. Adair*, 723 F2d 1394 (9th Cir 1983) (*Adair II*) and *United States v. Anderson*, 736 F2d 1358 (9th Cir 1984) touch on this issue, they do not add appreciably to the analysis. The following discussion focuses on the *Walton* line of cases. OWRD does note, however, that in *Adair I* the court found that “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.

⁴ 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.

inference of Congressional intent. Finally, the court found no Congressional intent to limit the alienability of the allottee's reserved water right. *Walton II*, 647 F2d at 50.

The court then 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.

...

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 was aware that the Waltons were not the first, or the second, non-Indian purchasers of the parcel at issue. Had it intended to create a first non-Indian purchaser rule, the court's remand instructions would have been quite different. First, there would have been no need to determine the amount Walton appropriated with reasonable diligence. The question would have been irrelevant. Second, there would have been a maximum of 32 acres eligible for a *Walton* right. The only question would have been whether the 32 acres had been developed with reasonable diligence prior to the sale to the second non-Indian owner in 1946.

Additionally, the court's rationale for extending the allottee's reserved right to non-Indian successors was to prevent diminution of the allottee's right by restrictions on its alienability. The court viewed the imposition of a reasonable diligence requirement as a restriction on alienability that did not amount to a diminution, because the non-Indian purchaser was viewed to be on an equal footing with "other water users"- i.e., non-Indians appropriating under state water laws. The logic was that appropriations under state law were expected to be completed with reasonable diligence, so an equivalent

restriction on non-Indian purchasers of allottee rights would not cause the non-Indian purchaser to discount the value of the allottee right.

If the court had established a first non-Indian owner restriction, however, it would have taken away that equal footing. 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 owner rule 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 water be applied with reasonable diligence after transfer to non-Indian ownership, irrespective of the number of ownership transfers during the period of reasonable diligence. Unfortunately, by referring in its remand instructions only to the acres that Walton appropriated with reasonable diligence, the court created confusion by suggesting that the actions of Walton's predecessors were irrelevant to the analysis.

As a result, on remand the district court considered its duty to determine only Walton's diligence. August 31, 1983, Memorandum Decision at 5-6 ("the 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....") (Attachment 1). The district court also engaged in additional factfinding. The court concluded that the parcels left Indian ownership not in 1942, but in 1921 and 1925. *Id.* at 6.

The difficulty with district court's interpretation of *Walton II* is that it 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 it has been 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. The *Walton III* court did not, however, create a first non-Indian owner requirement.

In clarifying the Ninth Circuit's mandate to the district court, the *Walton III* court stated that "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 F2d at 402. From this passage, it is evident that 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. The court explicitly refers to the "reasonable diligence requirement of *Walton II*." A first non-Indian owner rule would not, of course, be necessary to uphold the reasonable diligence principle. All that is necessary to make a reasonable diligence rule effective is to begin measuring the diligence period with the immediate grantee from the Indian allottees, and to continue measuring the period despite any subsequent transfers. It is in this sense that "calculating Walton's share required an investigation into the diligence with which the immediate grantee from the Indian allottees appropriated water..."⁵

Creation of a first non-Indian owner rule would, on the contrary, render the reasonable diligence principle equally meaningless. Such a rule would 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. This would also be at odds with "reasonable diligence" as it had been understood throughout the arid West. OWRD concludes that, after coming to the defense of the reasonable diligence principle, the *Walton III* court 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,⁶ the court stated:

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.

⁵ 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.

⁶ The cited case, *Longmire v. Smith*, 26 Wash 439, 67 P 246 (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 the plaintiff's reasonably diligent expansion.

Additionally, although there had been more than one non-Indian owner prior to Walton's purchase, the court referred to the amount of "water Walton's predecessors appropriated with reasonable diligence...." The court then proceeded to analyze the intent and diligence of all the non-Indian owners prior to Walton's ownership, rather than just that of the Whams, the first non-Indian owners. See id. at 402-03. 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's decision is based on the lack of development over a period of time, and not on the number of intervening non-Indian owners.

The Waltons requested rehearing of *Walton III*. The court denied the request and Judge Sneed wrote a concurrence to the denial. *Colville Confederated Tribes v. Walton*, 758 F2d 1324 (9th Cir 1985). In other cases where the first non-Indian owner issue has arisen, the United States has argued that Judge Sneed was recognizing the existence of, although disagreeing with, the first non-Indian owner rule. A review of Judge Sneed's concurrence shows that his disagreement was with the imposition of *any* type of reasonable diligence requirement on non-Indian successors. Judge Sneed does not mention a first non-Indian owner requirement. The concurrence states:

The opinion rejects the trial court finding that 'Walton exercised reasonable diligence in irrigating a minimum of 104 acres.' This is done on the ground that the record lacks 'sufficient evidence that the non-Indian owners preceding Walton had the requisite intent to irrigate any additional acreage.' I agree with this conclusion. I write only to point out that an Indian allottee who remains in possession of his allotment is treated much more generously. Such an allottee is entitled to sufficient water to meet his essential agricultural needs 'when those needs arise.' The full measure of his rights need not be exercised immediately. The court in *Adair* refused to extend this generous treatment to a non-Indian successor to an Indian allottee because of [*Walton II*]. The combined effect of *Walton II*, as explicated by this case, *Walton III*, and *Adair*, is to have made impossible the transfer by an Indian allottee to a non-Indian successor the full economic value of the allotment. There is a serious question whether this properly reflects congressional intent.

However, the law of this court is adequately clear, and the existence of a contrary congressional intent sufficiently uncertain, to require that I concur in the court's opinion. Equal treatment of Indian allottees and non-Indian successors in interest of Indian allottees would better serve the interests of justice.

Id. (Internal citations omitted). Judge Sneed's concern was that non-Indians were not receiving "full economic value of the allotment" because non-Indians do not have the luxury of waiting to make beneficial use until the need arises: they must develop the inchoate rights with reasonable diligence. Rather than suggesting the existence of a first

non-Indian owner rule, if anything the concurrence supports the opposite inference. Despite Judge Sneed's concern about the diminishment in value of the allotment, the concurrence makes no attempt to describe the additional diminishment that would occur if the non-Indian purchaser not only had to comply with a reasonable diligence requirement but also had to take the risk that the parcel would be sold without completion of development prior to the running of the reasonable diligence period.

For the above-stated reasons, OWRD concludes that *Walton II* and *III* do not create a first non-Indian owner rule. Instead, the decisions require that water be developed and applied with reasonable diligence upon transfer from Indian ownership. OWRD also concludes that *Walton II* and *III* provide a role for state law in defining reasonable diligence for *Walton* claims. In *Walton III*, the court determined that where there are not governing federal law principles, "[i]t is appropriate to look to state law for guidance." *Walton III*, 752 F2d at 400. The *Walton III* court then relied upon Washington State's law pertaining to reasonable diligence in determining Walton's claim.

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

The Order concludes that a *Walton* claimant must prove the following element to establish a *Walton* right: After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors. While "continued use" is relevant to the determination of a *Walton* claim, the ALJ's characterization of "continued use" as an *element* of a *Walton* claim is not accurate. As discussed below, once a *Walton* right has been put to beneficial use, it, like a right appropriated under state law, is subject to loss for nonuse. As is the case under state-law appropriations, contestants bear the burden of proving that the developed right has been lost by nonuse. Therefore, continuous use after development is not an element that must be proved in the first instance by a claimant, but rather an affirmative defense that a contestant may assert if the elements of the claim have been established.

Walton rights must be "maintained by continued use." *Colville Confederated Tribes v. Walton*, 647 F2d 42, 51 (1981) ("*Walton I*"). As described below, OWRD concludes that the "continued use" requirement refers to the principle that, in a prior appropriation system, water rights may be lost through nonuse. There are two standards for determining loss of a water right through nonuse: abandonment and forfeiture. Under either standard, the burden of proof lies initially with the proponent of abandonment or forfeiture (in the case of a *Walton* claim, the contestant(s) to the claim). Abandonment is the appropriate standard for determining loss of unadjudicated water rights in Oregon. Abandonment was the common standard during the time period in which most Indian reservations were established in the area of the western states (the date of reservation is considered to be the date of appropriation, and thus the priority date, for *Walton* rights). Abandonment remains an applicable standard for determining loss of water rights in several states with prior appropriation systems. For these reasons, OWRD concludes that abandonment is the appropriate standard for determining whether a *Walton* right has been lost as a result of nonuse.

The “continued use” requirement has not been described in detail by the *Walton* cases or by subsequent decisions. In order to further define the requirement, OWRD looks to the method the *Walton* courts used in announcing the requirements of establishing and maintaining a *Walton* right.

The *Walton* decisions adopted the prior appropriation doctrine and relied heavily on state law in determining the requirements of a *Walton* right. Although *Walton* rights are federal water rights, and not dependent upon state law, the court in *Walton III* acknowledged that it looked to state law “for guidance.” *Colville Confederated Tribes v. Walton*, 752 F2d 397, 400 (1985) (“*Walton III*”). For example, the court explicitly acknowledged its reliance on state law in incorporating the principles of reasonable diligence and water duty in determining and quantifying *Walton* rights. *Id.* at 402-03. Given this reliance on state law principles in formulating the *Walton* requirements, we conclude that 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 the doctrine of prior appropriation 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 the intent to abandon and the failure of use lies with the proponent of the abandonment (in this case, the contestant(s) to the claim). *Id.* (noting the failure to establish that the water user intended to abandon the right). Intent to abandon may be inferred by the actions of the water right holder, including failure to use water over an extended period of time. *See, e.g., In the Matter of the Clark Fork River*, 902 P2d 1353 (Mont 1996).

In contrast, forfeiture is based solely on the non-use 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 the nonuse that establishes the rebuttable presumption of forfeiture lies with the proponent of the forfeiture. *Rencken v. Young*, 300 Or 352, 364 (1985). If this burden is met, the water right holder has the burden of establishing that one or more of a list of statutory excuses for nonuse applies. If the water right holder is unable to do so, the water right will be considered forfeited, and the right will be cancelled.

In Oregon, forfeiture applies to “perfected and developed” water rights. A “developed” right is one that has been applied to the intended beneficial use. *Green v. Wheeler*, 254 Or 424 (1969) defined the term “perfected” as it is used in Oregon’s Water Code. 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. 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 the Water Resources Department 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'").

Green cited to several instances of the term "perfected" in reaching this conclusion, including ORS 537.250 and ORS 537.630. The court did not cite 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.

Perfection, then, requires an administrative determination of the validity of the right. An adjudicated right, which has not been subject to administrative determination, is not a perfected right for the purposes of ORS 540.610.

When ORS 540.610 applies, it supersedes the common-law abandonment doctrine. *Rencken v. Young*, 300 Or 352, 361 (1985). 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.

Since *Walton* rights are federal rights, and rely upon state law for guidance only, OWRD must also determine whether it is appropriate to apply the abandonment doctrine also to unadjudicated *Walton* rights, or whether there is a compelling rationale for treating unadjudicated *Walton* rights differently than state-initiated, unadjudicated rights, and applying the forfeiture doctrine instead.

For the following reasons, OWRD concludes that abandonment is the more appropriation doctrine to be applied to unadjudicated *Walton* rights. First, it is the doctrine that is applied to unadjudicated, state-initiated water rights. Consistency with state water law principles has significant value. The court in *United States v. Anderson*, 736 F2d 1358, 1362 (9th Cir 1984), found a Congressional policy of ensuring the "full economic benefit" of the allotment to the Indian allottee. This policy provided the rationale for the decision to allow 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 cause 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.

The second reason for applying the abandonment doctrine to unadjudicated *Walton* rights is that abandonment was the common standard during the time period in which most Indian reservations were established in the area of 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 an 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). Forfeiture is now the more common standard, but it has not entirely superseded abandonment. Given that there is no universally consistent standard for determining loss of water rights for nonuse in states following the prior appropriation system, and given the other reasons for favoring the applicability of abandonment in this context, OWRD concludes that abandonment is the more appropriate standard 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 diligent development principle, and not abandonment, will apply. Second, OWRD conclude only that abandonment applies to *unadjudicated Walton* rights. OWRD expresses no opinion as to whether abandonment or forfeiture applies following an order of determination or a decree determining a *Walton* right.

Application of Modified *Walton* Elements to the Facts in this Case

It is uncontested that Claimant's land was formerly part of the Klamath Indian Reservation, and that with respect to the two allotments involved; the land was transferred from an Indian allottee to a non-Indian successor. It is uncontested that the land was not under irrigation at the time of transfer from Indian ownership.

Therefore, the questions is are (1) whether water use was developed with reasonable diligence by the first non-Indian purchasers of the land from an Indian owner, and (2) whether the use of the water claimed has been continued. ~~continuously used by all subsequent successors. With respect to Allotment No. 734, the first non-Indian purchaser was Weyerhaeuser Timber Company in 1957. The evidence is uncontested that Weyerhaeuser did not irrigate the land. Therefore, since the first non-Indian purchasers of the land did not develop water use on the lands that were formerly in Allotment No. 734, no *Walton* water right can be claimed on this land by subsequent owners.~~

With respect to Allotment No. 1461, the evidence establishes that the land passed into non-Indian ownership September 13, 1960, and that the first non-Indian owners, the Meades and Murrays, built an irrigation ditch in the fall of 1963, pursuant to a water right certificate with a priority date of October 4, 1962. Additional construction occurred in 1965 and 1967. The United States concedes that additional water use was developed on the lands that were formerly part of Allotment No. 1461 with reasonable diligence by the first non-Indian owners. Water was applied to beneficial use in 1966 to the 37.3 acres claimed in Allotment No. 1461. Given the evidence of diligent construction of works, the 6-year period in between transfer from Indian ownership and application of water to beneficial use constitutes reasonably diligent development. The Claimant has established each of the required *Walton* elements for 37.3 acres in Allotment No. 1461.

¶ The United States submitted evidence intended to prove a lack of continued use on a portion of these 37.3 acres. Aerial photographs taken in 1968, 1979, 1994, and 2000 show irrigation of slightly less than the full 37.3 acres. In particular, aerial photographs taken in 1994 and 2000 show irrigation of 34.74 acres. This evidence is insufficient to establish abandonment of the remaining 2.56 acres. At most, the aerial photographs are evidence of nonuse during a period leading up to the date the photographs were taken. The evidence is sporadic, at best, with aerial photographs taken in only 4 of the 35-plus years between 1968 and the submission of direct testimony, in 2004. There is no other evidence that the Claimant intended to abandon these 2.56 acres, and the Contestants have failed to prove a lack of continued use (abandonment) of any portion of these acres. There is a valid, non-cancelled water right certificate (Certificate 38088) covering all 37.3 acres claimed in Allotment No. 1461. (OWRD Ex.1 at 13, 51; Testimony of Everaert at 4, 5, 6). Claimant claimed 37.3 acres in former Allotment No. 1461, but the uncontroverted evidence establishes that as of 2000, only 34.74 acres were under irrigation.

¶ Because the Claimant has proved the elements of a *Walton* right, and the contestants have failed to prove a lack of continued use, Therefore a *Walton* water right, with a priority date of October 14, 1864, has been established for 34.74 37.3 acres that were formerly part of Allotment No. 1461.

With respect to the 2.9 acres in Allotment No. 734, the first non-Indian purchaser was Weyerhaeuser Timber Company on May 29, 1957. The evidence is uncontested that Weyerhaeuser did not irrigate the land. The description of the construction of irrigation works and application of water to beneficial use provided for Allotment No. 1461 applies to these 2.9 acres as well. This means that more than 6 years passed between transfer from Indian ownership and the beginning of construction of irrigation works. Nine years passed in between transfer form Indian ownership and the first application of water to beneficial use. Given the length of the gap without evidence of any development, the length of time before application of water to beneficial use, the small size of the parcel, and the absence of evidence of any mitigating factors, use of water on these 2.9 acres was not developed with reasonable diligence. The Claimant has not established each of the required *Walton* elements for 2.9 acres in Allotment No. 734.

Claim 105 also includes 32.4 acres of unallotted Tribal land.⁷ This land first passed into non-Indian ownership in August 1959. The land was not under irrigation when it passed into non-Indian ownership, nor was it irrigated by the first non-Indian owners. The description of the construction of irrigation works and application of water to beneficial use provided for Allotment No. 1461 applies to these 32.4 acres as well. Given the evidence of diligent construction of works beginning in 1963, the 7-year period in between transfer from Indian ownership and application of water to beneficial use constitutes reasonably diligent development. The Claimant has established each of the required *Walton* elements for these 32.4 acres of unallotted Tribal land.

¶ The United States submitted evidence intended to prove a lack of continued use on these 32.4 acres. Aerial photographs taken in 1968 and 1979 show irrigation of 24.87 acres. Aerial photographs taken in 1994 and 2000 show irrigation of 18.73 acres. This evidence is insufficient to establish abandonment of any portion of these 32.4 acres. At most, the aerial photographs are evidence of nonuse during a period leading up to the date the photographs were taken. The evidence is sporadic, at best, with aerial photographs taken in only 4 of the 35-plus years between 1968 and the submission of direct testimony, in 2004. There is no other evidence that the Claimant intended to abandon any portion of these 32.4 acres, and the Contestants have failed to prove a lack of continued use (abandonment) of any portion of these acres. There is a valid, non-cancelled water right certificate (Certificate 38088) covering these 32.4 acres. (OWRD Ex.1 at 13, 51; Testimony of Everaert at 4, 5, 6).

¶ Because the Claimant has proved the elements of a *Walton* right, and the contestants have failed to prove a lack of continued use, Therefore a *Walton* water right, with a priority date of October 14, 1864, cannot be has been established for this land these 32.4 acres.

~~The uncontested evidence establishes that the Claimant is entitled to a *Walton* water right for only 34.74 69.7 acres of land in former Allotment No. 1461, with a priority date of October 14, 1864. A water rate of 1/40th of one cfs per irrigated acre is the standard in the Klamath Basin supported by the record, as well as and is the rate approved for the subject lands by Certificate 38088, Permit 28441. There is no evidence to support a different rate. Claimant acknowledged that a water duty of 3.0 acre-feet per acre is reasonable, which is the same as the duty approved by Certificate 38088, Permit 28441. The evidence does not supports the balance use of water claimed in Claim 105. As described above, the United States was not entitled to a ruling in its favor as a matter of law; therefore, the portion of the Order granting the United States' Motion for Ruling on Legal Issues is overruled.~~

~~Because the record in this case shows that there is no genuine issue as to any material fact that is relevant to resolution of this case, and because the United States is~~

⁷ The United States refers to a water right derived from unallotted Tribal lands as a Klamath Termination Act water right, and establishment of such a water right is subject to a similar legal standard as a *Walton* water right. See United States' Motion for Ruling on Legal Issues at 6, footnote 5.

~~entitled to a ruling in its favor as a matter of law, the United States' Motion for Ruling on Legal Issues is granted.~~

Reasons for modifications to the Opinion section: To set forth the appropriate legal standards for determining the validity of *Walton* water right claims; to apply these standards to the Findings of Fact; to more fully set forth the facts in the record; to make corrections to the Opinion section to make the Opinion section consistent with the Findings of Fact.

ORDER

(1) The United States' Motion for Ruling on Legal Issues is ~~granted~~ denied.

(2) A water right for Claim 105 should be confirmed as set forth in the following Water Right Claim Description.

CLAIM NO. 105

CLAIM MAP REFERENCE: CLAIM # 105, PAGE 14

CLAIMANT: RODNEY N. MURRAY
1954 PAINTER ST,
KLAMATH FALLS, OR 97601

SOURCE OF WATER:
FIVEMILE CREEK, tributary to the NORTH FORK SPRAGUE RIVER

PURPOSE or USE:
IRRIGATION OF 69.7 ACRES WITH INCIDENTAL LIVESTOCK WATERING OF
200 HEAD

RATE OF USE:
1.74 CUBIC FEET PER SECOND, BEING 0.94 CFS FROM POD 1 AND 0.80 CFS
FROM POD 2

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

LIMIT:
1/40 CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE
IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: APRIL 1 - NOVEMBER 1

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
POD 1	35 S	13 E	WM	27	SW SE	30 FEET NORTH AND 3640 FEET EAST FROM SW CORNER, SECTION 27
POD 2	35 S	13 E	WM	34	NW NE	480 FEET SOUTH AND 3180 FEET EAST FROM NW CORNER, SECTION 34

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD
35 S	13 E	WM	27	NE SW	1.7	POD 1
35 S	13 E	WM	27	NW SW	26.7	
35 S	13 E	WM	27	SW SW	0.2	
35 S	13 E	WM	28	NE SE	8.9	
35 S	13 E	WM	27	SE SW	6.3	POD 2
35 S	13 E	WM	27	SW SE	3.3	
35 S	13 E	WM	34	NW NE	20.4	
35 S	13 E	WM	34	SW NE	2.2	

Reason for modifications to the Order section: To reflect the modifications made to the Findings of Fact and Opinion sections.

IT IS SO ORDERED.

Dated at Salem, Oregon on July 21, 2011



 Dwight French, Adjudicator
 Klamath Basin General Stream Adjudication

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

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

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

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

**Dwight French, Adjudicator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301**

CERTIFICATE OF SERVICE

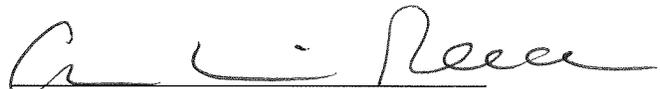
I hereby certify that on July 21, 2011, I mailed a true copy of the following: AMENDED PROPOSED ORDER, by first class mail with first class postage prepaid thereon, and addressed to:

Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
P.O. Box 957
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Rodney N. Murray
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Oregon Water Resources Department

