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

~~WaterWatch of Oregon, Inc.;~~ United States of America; ~~the Klamath Tribes;~~ 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; Collins Products, LLC;
Contestants

vs.

Nature Conservation Trust;
Claimant/Contestant.

PROPOSED ORDER

Case No. 253

Claims: 703 and 704

Contests: 1692, 1693, ~~3073~~, ~~3074~~[1], 3511, 3512[2], 3817, 3818, ~~4242~~[3], and ~~4243~~[4]

HISTORY OF THE CASE

Claimant seeks a water right as a non-Indian successor to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the allotments' share of the Tribe's "practically irrigable acreage" ("PIA").[5] Claim 703 is for 10,145.85 acre-feet of

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[1] WaterWatch of Oregon, Inc.'s Contests 3073 and 3074 were dismissed. *See* ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003

[2] Don Vincent voluntarily withdrew from Contests 3511 and 3512 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3511 and 3512 on June 24, 2002. On January 15, 2004, Klamath Hills District Improvement Co. voluntarily withdrew from Contests 3511 and 3512.

[3] The Klamath Tribes voluntarily withdrew Contest 4242. *See,* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST (CORRECTED) dated April 4, 2005.

[4] The Klamath Tribes voluntarily withdrew Contest 4243. *See,* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated April 1, 2005.

[5] Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985).

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water per year for irrigation of 889.6 acres of land. Claim 704 is for 26.23 acre-feet of water per year for irrigation of 2.3 acres of land. The claimed period of use for both claims is May 3 through October 16. The claimed priority date is October 14, 1864.[6]

On January 31, 1991, Phil Tupper, a Klamath Indian, filed claims 703 and 704 as a Klamath Indian Allottee.[7] Subsequently, after passing through several hands, The Nature Conservation Trust purchased the property. On October 4, 1999, Oregon Water Resources Department (OWRD) issued its Preliminary Evaluations preliminarily approving both claims for a lesser quantity and acreage than claimed. Claimant filed Contests 1692 (Claim 704) and 1693 (Claim 703) on May 3, 2000. WaterWatch of Oregon, Inc. (WaterWatch) filed Contests 3073 and 3074 on May 8, 2000.[8] 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; Collins Products, LLC; (hereafter collectively called Klamath Project Water Users or KPWU) filed contests 3511 (Claim 703) and 3512 (Claim 704) on May 8, 2000. The United States filed Contests 3817 (Claim 703) and 3818 (Claim 704) on May 8, 2000. Also on May 8, 2000, the Klamath Tribes filed Contests 4242 (Claim 703) and 4243 (Claim 704), but withdrew these contests on April 4, 2005 and April 1, 2005, respectively. At various times after the claim was filed, different parts of the property changed hands. The property is currently in two parcels, owned by Nature Conservation Trust. The current owner has been substituted in as claimant.

OWRD referred the matter for hearing to the Office of Administrative Hearings (OAH). The OAH issued a Hearing Notice on March 23, 2006. A hearing was held pursuant to that notice by telephone on April 25, 2006, beginning at 9:00 a.m., with Administrative Law Judge Daina Upite presiding. The following participated: Ron Yockim representing Claimant; Kelly Moser and David Harder, representing the United States; Andrew Hitchings representing the Klamath Project Water Users (KPWU); and Walter Perry III representing the Oregon Water Resources Department (OWRD). No testimony was taken at this hearing, but evidentiary issues were discussed and resolved.

Pursuant to a post-hearing order issued April 28, 2006, the various participants submitted closing, response and reply briefs. The record closed on August 28, 2006.

After the record closed, the case was assigned to me to prepare this Proposed Order. I have reviewed the entire record, including the record of the telephone hearing and all argument, prior to preparation of this order.

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[6] This is the priority date of all allowed *Walton* claims in the Klamath Adjudication, as it is the date on which the Klamath Reservation was formed by treaty.

[7] At the time the property was in the ownership of Hi Robbins Corporation, of which Phil Tupper was manager.

[8] WaterWatch's Contests No. 3073 and 3074 were dismissed on May 20, 2003.

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EVIDENTIARY RULINGS

The following exhibits, written testimony and affidavits were admitted into the record at hearing.

OWRD Exhibits 1 and 2 including the Affidavit and Testimony of Teri Hranac. Documents offered by Claimant and the United States were admitted into evidence, as follows:

Offered by Claimant:

- Direct and rebuttal testimony of James R. Goold, admitted over the United States' objections.
- Rebuttal testimony of Tim Cummins
- Exhibits C1 through C104, except Exhibits C12, C13, C14, C15, and C64.

Offered by the United States and admitted without objection:

- Direct and rebuttal testimony of Dale Book, with corrections
- Declaration and supplemental declaration of Phil Tupper
- Exhibits U1 through U55
- Stipulation dated April 7, 2005, between United States and OWRD, along with all supporting documents.

The United States' witness, Dale Book, was accepted as an expert witness in water rights, engineering, and aerial photography interpretation.

At Claimant's request, Ms. Moser agreed to provide a copy of a letter dated April 24, 2006, which clarifies certain testimony. This document, marked as Exhibit U56, was submitted by the United States on April 26, 2006. No participant objected to admission of this letter. It is hereby admitted into evidence.

The pagination of Claimant's Exhibit C50 was corrected to show that the first page should be labeled C50, not C70.

ISSUES

1. Whether lands identified as 16.3 acres within the NE1/4 NW1/4 of Section 16, T36S R10E.W.M. should be listed as being within Section 21.

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2. Whether certain lands in Section 9, T36S R10E.W.M. listed as supplemental irrigation should be listed as primary irrigation and livestock use.

3. Whether lands within what is known as Riddle Field should have been included in the Preliminary Evaluation.

4. Whether lands located in Sections 16 and 21, T36S R10E.W.M. should have been included in the Preliminary Evaluation.

5. Whether practicable irrigable acres should have been included in the allowed claim.

6. Whether the lands listed in Section 16 should be listed as being within Section 28, T36S, R10E.W.M.

7. Whether the record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use and/or acreage claimed.

8. Whether the Claimant has changed the use of the claimed water from irrigation to fish and wildlife habitat and/or wetlands, but has not complied with Oregon statutory procedures for securing a change of use.

9. Whether Claimant's changed use and application of water is detrimental to KPWU's prior water rights.

10. Whether Claimant's use of the claimed water is wasteful for fish and wildlife habitat and/or wetlands.

11. Whether the Klamath River and its tributaries were over-appropriated at the time Claimant began its use of the claimed water for fish and wildlife habitat and/or wetlands.

12. Whether the record establishes the water use season claimed.

13. Whether to the extent water is used for fish, wildlife habitat and/or wetlands, Claimant has abandoned permitted uses.

14. Whether Claimant abandoned any rights acquired with the lands included in the claim when it was purchased by Claimant.

15. Whether Claimant is asserting a right to store water which interferes with the direct diversion and storage of waters for domestic and irrigation uses, thereby violating Article III.C. of the Klamath River Basin Compact.

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16. Whether any rights to store water for the purpose claimed is subordinate to domestic and irrigation rights of KPWU as provided in the Klamath River Basin Compact, Article II and XIII.

17. Whether the current use was developed within a reasonable time after the claimed date of appropriation.

18. Whether wildlife is a valid purpose of a *Walton* right derived from the 1864 Klamath Treaty.

19. Whether natural flooding/sub-irrigation/natural overflow constitutes a valid water right.

20. Whether there is sufficient title information to establish a *Walton* right on all or a portion of the claimed place of use.

21. Whether there is sufficient information on the development or continuous use of water on the claimed place of use to establish a *Walton* right.

22. Whether the period of use for irrigation in the Preliminary Evaluation exceeds the period of use claimed. Whether Claims 703 and 704 are limited to the number of presently irrigated acres included in the June 1, 1992 claim form (889.6 for claim 703 and 2.3 acres for claim 704).

23. Whether filing fees were ever paid for portions of the claimed place of use.

24. Whether filing fees were ever paid for some of the claimed uses of the claimed place of use.

25. Whether a map prepared by a Certified Water Rights Examiner was ever submitted for portions of the claimed place of use.

26. Whether a map prepared by a Certified Water Rights Examiner was ever submitted showing some of the claimed uses of the claimed place of use.

27. Whether irrigation of portions of the claimed place of use was developed by the Indian owner before the land was transferred to the first non-Indian owner.

28. Whether irrigation of portions of the claimed place of use was developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.

29. Whether irrigation of portions of the claimed place of use was developed with reasonable diligence by the non-Indian owner(s) after the first non-Indian purchaser from an Indian owner.

30. Whether irrigation of portions of the claimed place of use has been continuous.

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31. Whether the total acreage in the claimed place of use exceeds the irrigated acreage supported by the evidence.

32. Whether use of water on portions of the claimed place of use is wasteful and does not constitute a beneficial use.

33. Whether water provided to the claimed place of use for the purposes of a wildlife use can be the basis for a *Walton* right.

34. Whether water provided to the claimed place of use by natural means (flooding in the spring or through sub-irrigation) and not through a diversion system created by humans, can be the basis for development of a *Walton* right or constitute irrigation under a *Walton* right.

35. Whether the irrigation season of use can be more than the season of use claimed; whether the claimed irrigation season of use exceeds the actual season of use supported by the evidence for portions of the claimed place of use.

36. Whether the diversion rate for any lands awarded a water right should be greater than one cubic foot per second (cfs) per forty acres.

37. Whether for any part of the claimed place of use awarded a water right, the water duty should be more than 3.0 acre-feet per acre.

38. Whether the Preliminary Evaluations for Claim Nos. 703 and 704 (including Appendix A to the Preliminary Evaluation entitled "Standards for Rates, Duties, and Seasons of Use Within Previously Adjudicated Areas of the Klamath Basin") should be accorded any weight in this contested case.

FINDINGS OF FACT

1) For all allowed water rights in Claims 703 and 704, the Rate is 1/40th cfs per acre. The Duty is 3 acre-feet per acre per year.[9] The Period of Use for irrigation is May 3 through October 18. (OWRD Ex. 1 at 1.) The Priority date is October 14, 1864.[10]

2) The property subject to these claims was originally part of the Klamath Indian Reservation. It is composed of 19 parcels that were allotted to Klamath Indians, and one parcel of 2.1 acres that was conveyed directly by the Klamath Tribe. (Affidavit and Testimony of Dale E. Book at 11.) The property was subsequently transferred to non-

[9] The original claim sought in excess of 11 acre-feet per acre, but no evidence justifying that duty was submitted or argued. I have therefore adopted the rate and duty proposed by the United States, and supported by the testimony of Dale Book. (Affidavit and Correction to Direct Testimony of Dale Book at 3.)

[10] This is the date the Klamath Indian Reservation was created by treaty. Proven *Walton* rights relate back to the date of the Indian treaty that reserved the water rights in the tribes. *Colville Confederated Trib* *Walton*, 752 F2d 397 (9th Circuit, 1985).

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Indian ownership, as discussed in more detail, below.

3) The property subject to Claim 703 receives water from four sources: Sprague River; an unnamed stream that flows north to the Sprague River through Allotments 441,442, 836, 837, and 838; Cherry Creek, which flows north through Allotments 465, 701, 794, 795, and 1139 to the Sprague River; and an unnamed stream that flows through Allotment 794 before joining Cherry Creek in Allotment 795. In the late 1940s, the Indian Agency constructed a ditch from the Sprague River south to the middle of Allotment 835. The point where this ditch diverts from Sprague River is "Diversion Point #1" located in the NW ¼ NW ¼ Section 9, T 36S R10E.W.M. Phil Tupper then constructed ditches east and west from the terminus of this ditch. Several years before 1968, Phil Tupper placed a pump in the junction of the three ditches. The ditches were completed in 1968, stretching east to the eastern end of Allotment 1016, and west to Allotment 836. A headgate was installed in the western terminus in the 1970s to allow water to flow north, as well as south into Riddle Field. (Declaration of Phil Tupper.) In the late 1960s and early 1970s Phil Tupper built a check dam in Allotment 441 on the unnamed creek to back water up to flood-irrigate parts of Allotments 441 and 442. The point where the unnamed creek is diverted is "Diversion Point #2," located in the SW ¼ SE ¼ Section 17, T 36S R10E.W.M. (*Id.*) Tupper also built three check dams on Cherry Creek in Allotments 701 and 795 and on the unnamed tributary to Cherry Creek to back water to flood-irrigate parts of those allotments. The diversion on Cherry Creek is "Diversion Point #3", located in the SW ¼ SE ¼ Section 16, T 36S R10E.W.M. The Diversion on the unnamed tributary to Cherry Creek is "Diversion Point #4," located in NE ¼ NW ¼ Section 21, T 36S R10E.W.M. Prior to 1986, an owner of Allotment 836 built a check dam on the unnamed creek to back water for flood-irrigating Allotments 836, 837 and 838. (*Id.* at 14, 187.) This dam washed out and was repaired in 1991. (Ex. U40 at 97-98.)

4) Prior to the date when the original claim was filed, Klamath Allottee Water Users, an association chartered by the Klamath Tribes (OWRD Ex. 1 at 135-138), entered into a stipulation with OWRD whereby the tribal members could file their claims in stages, with all required information and fees to be filed no later than November 2, 1992. (*Id.* at 145-150.) Claimant timely filed the original claim for 28,219 acre-feet of water for 3,100 acres irrigation and "non-agricultural uses" on January 31, 1991. (*Id.* at 11.) Within the time allowed, the original claimant paid $989.60 in fees for 889.6 acres of irrigation in Claim 703, and $30 for the minimum fee for irrigation in Claim 704. (*Id.* at 145.) Because the original claimant lost the property through bankruptcy, counsel for the claimant sent a letter to the Department on October 30, 1992 purporting to withdraw the claims. The Department accepted this withdrawal and provided a credit for the fees paid, thus effectively refunding them. (*Id.* at 149.) On May 13, 1999, the Department sent a letter to TJ Lindbloom and Tim Cummins, who were at that time the owners of the property, advising that the purported withdrawal of the claims had been invalid, as the withdrawal was not filed by the owner of the property. Consequently, the Department allowed Lindbloom and Cummins to continue processing the claims, provided fees were again paid. (*Id.* at 40.)

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5) By letter of July 31, 1999, counsel for the predecessors of the current claimant sought to amend the claim by adding 100.6 acres in Allotments 441, 442, 833, 836, 837, and 838 for an area known as Riddle Field. This area had been omitted from the original claim. In this letter, counsel clarified that the "non-agricultural uses" claimed were for wildlife. (*Id.* at 46.) The same letter also sought to include a storage right for an additional 20.5 acres in Allotments 794, 795 and 1139 that had not been claimed in the original claim. (*Id.* at 47-49.) On August 31, 1999, $200 was paid for livestock use. (*Id.* at 51.) After checks for irrigation fees had been returned once for insufficient funds, $990 was paid for irrigation in Claim 703 and $30 was paid for irrigation in Claim 704 on September 1, 1999. (Ex. U44.)

6) **Allotment 216**

This allotment, located in S ½ SW ¼ SE ¼ Section 4, T36S, R10E.W.M. and NE ¼ NW ¼ and N ½ NW ¼ NE ¼ Section 9, T36S R 10E.W.M., was allotted to Allie Skellock, a Klamath Indian, by instrument dated March 3, 1910. (Ex. U6 at 1.) The property was conveyed to Manuel Vieira, a non-Indian, on May 15, 1924. (OWRD Ex. 1 at 80.) The property may have been conveyed to Rose Vieira, also a non-Indian, at an unknown date prior to December 8, 1943, but was held by James Vieira and Joseph Vieira, non-Indians, on that date.[11] (Ex. U80 at 1, 2.).

The claim is for 71.3 acres irrigated by water diverted down the western ditch from Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) The part of the property north of the Sprague River was subject to natural overflow. It was also irrigated by an 8-inch pipe beginning prior to 1946, but has not been irrigated since at least 1996. The part of the property south of the Sprague River was not irrigated until at least 1991. (Declaration of Phil Tupper; Ex. U40 at 83-84.)

7) **Allotment 441**

This allotment, located in the SW ¼ Section 17, T36S R10E.W.M., was allotted to Frank Riddle, a Klamath Indian, by instrument dated March 7, 1910. (OWRD Ex. 1 at 69.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The original claim was for 32.7 acres irrigated by water diverted from Diversion Point 2, an unnamed creek. (Ex. U3; OWRD Ex. 1 at 7, 14.) Claimant attempted to add 0.2 acres by letter in 1999. (OWRD Ex. 1 at 47-49.) Phil Tupper installed the first diversion facilities for irrigating this property, a check dam, in the late 1960s and early 1970s, prior to conveyance to Hi Robbins Corporation in 1978. (Declaration of Phil Tupper.)

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[11] Rose Vieira executed a quit-claim deed to James Vieira and Joseph M. Vieira on December 8, 1943. Because a quit-claim deed does not warrant title to the property, but only conveys whatever interest the grantor had to convey on the date of the instrument (ORS 93.865) it is not clear evidence that Rose Vieira had any interest in the property. It could, for example, have been executed to remove a potential cloud on title incident to the probate of Manuel Vieira's estate. Without recourse to additional documents, such as probate filings, which are not presently in the record, the interest conveyed by this instrument cannot be ascertained.

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8) **Allotment 442**

This allotment, located in SE ¼ Section 17, T36S R10E.W.M., was allotted to Toby Riddle, a Klamath Indian, by instrument dated March 7, 1910. (Ex. U6 at 10.) The property was conveyed to Dan Wann, a non-Indian, on May 23, 1925. (Ex. U8 at 25.) The property was subsequently conveyed to Minerva Brown, a Klamath Indian, on September 29, 1941. (*Id.* at 26-27.) Hiram Robbins, also a Klamath Indian, acquired the property from Minerva Brown and her husband Harry by deed executed on September 25, 1941 but recorded after September 29, 1941. (*Id.* at 28-29.)

The original claim was for 22.2 acres irrigated by water diverted from Diversion Point #2 an unnamed stream (11.7 acres) and Sprague River, Diversion Point #1 mixed with water from the unnamed creek Diversion Point #2 (10.5 acres). (Ex. U3; OWRD Ex. 1 at 7, 14.) Claimant attempted to add 13.4 acres by letter in 1999 (OWRD Ex. 1 at 47-49.) Phil Tupper installed the first diversion facilities for irrigating this property from the unnamed stream in the late 1960s and early 1970s, prior to conveyance to Hi Robbins Corporation in 1978. He finished the western ditch from Diversion Point #1 in 1968 to irrigate Riddle Field. (Declaration of Phil Tupper.)

9) **Allotment 465**

This allotment, located in W ½ E ½ NE ¼, E ½ E ½ NW ¼, W ½ NE ¼ of Section 16, T36S R10E.W.M., was allotted to Dora Grant Walker, a Klamath Indian, by instrument dated February 4, 1926. (OWRD Ex. 1 at 67.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 42.4 acres irrigated by water diverted from Cherry Creek. (Ex. U3; OWRD Ex. 1 at 6, 14.) No diversion facilities were constructed until at least 1991, when the property passed to the second non-Indian owner.

10) **Allotment 565**

This allotment, located in SW ¼ Section 5, T36S R10E.W.M., was allotted to Ellen Miller (Hecocta), a Klamath Indian, by instrument dated August 13, 1920. (OWRD Ex. 1 at 63.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 117.0 acres irrigated by water diverted from Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) This property was not irrigated until after it was transferred to Alan B. Tyler in 1991. (Declaration of Phil Tupper.)

11) **Allotment 699**

This allotment, located in the E ½ NE ¼, N ½ NE ¼ SE ¼, SW ¼ NE ¼, S ½ NW ¼ NE ¼ of Section 9, T36S R10E.W.M., was allotted to James Copperfield, a Klamath

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Indian, prior to August 6, 1920. (OWRD Ex. 1 at 75.) The property was conveyed to A.C. Beals, a non-Indian, on August 6, 1920. (*Id.*) The property was subsequently conveyed to Manuel Vieira, also a non-Indian, prior to December 8, 1943. (Ex.U8 at 1-2.).

The claim is for 157.2 acres irrigated by water diverted from Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) This property was irrigated, beginning before 1946 by a box pump installed at the northeast boundary of the allotment. Either Manuel Vieira or a subsequent owner installed that pump. (Declaration of Phil Tupper.) After the pump was installed in Diversion Point #1 and the eastern ditch completed in the 1960s, irrigation was changed to that facility. (*Id.*)

12) **Allotment 701**

This allotment, located in N ½ SW ¼, N ½ SE ¼ of Section 16, T36S R10E.W.M., was allotted to Mary Clinton, a Klamath Indian, by instrument dated March 7, 1910. (Ex. U6 at 13.) The property was conveyed to Dan Wann and B. Wolford, non-Indians, on June 16, 1925. (Ex U8 at 32.) Dan Wann's wife, Catherine Wann, also a non-Indian, acquired an undivided interest in the property prior to October 6, 1938 when the Wanns transferred it to Hiram Robbins. (*Id.* at 33-34.)

The claim is for 17.1 acres irrigated by water diverted from Cherry Creek at Diversion Point #3. (Ex. U3; OWRD Ex. 1 at 6, 7, 14.) Phil Tupper installed the first diversion facilities, a series of check dams, in the 1960s and 1970s. (Declaration of Phil Tupper.)

13) **Allotment 794**

This allotment, located in NE ¼ NW ¼, NW ¼ NE ¼ of Section 21, T36S R10E.W.M., was allotted to Eda Jackson (Cole), a Klamath Indian, by instrument dated November 19, 1920. (OWRD Ex. 1 at 77.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim was originally for 16.3 acres irrigated by water diverted from Diversion Point #4, the unnamed stream tributary to Cherry Creek. (Ex. U3; OWRD Ex. 1 at 7, 14.) Claimant attempted to add 12.0 acres by letter in 1999. (OWRD Ex. 1 at 47-49.) Phil Tupper installed the first irrigation facilities, a series of check dams to back water for irrigation of this property, in the 1960s and 1970s. (Declaration of Phil Tupper.)

14) **Allotment 795**

This allotment, located in SE ¼ SW ¼, SW ¼ SE ¼ of Section 16 (Claim 703), and E ½ E ½ NE ¼ of Section 28, T36S R10E.W.M. (Claim 704), was allotted to Birdie Jackson, a Klamath Indian, by instrument dated February 11, 1921. (OWRD Ex. 1 at 78.) The property was apparently conveyed to Hiram Robbins, also a Klamath Indian, at some time before 1978, when it was conveyed by Robbins' heirs to the Hi Robbins

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Corporation, an Oregon Corporation. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, also a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The portion of the property subject to Claim 703 is composed of 22.8 acres irrigated by water diverted from Diversion Point #3 on Cherry Creek. (Ex. U3; OWRD Ex. 1 at 6, 7, 14.) Claimant attempted to add 5.2 acres to Claim 703 by letter in 1999 (OWRD Ex. 1 at 47-49.) The portion of the property subject to Claim 704 is composed of 2.3 acres irrigated by water from the only Diversion Point for Claim 704, diverted from a pool and ditch constructed at a spring at the headwaters of Cherry Creek some time before 1986,[12] when the pond and an "old ditch" were observed. (Ex. U3; OWRD Ex. 2 at 6, 14.) In the late 1960s or early 1970s, Phil Tupper installed the first irrigation facilities for the part of the property subject to original Claim 703, a check dam on Cherry Creek to back water for flood-irrigation. (Declaration of Phil Tupper.)

15) **Allotment 833**

This allotment, located in SE ¼ Section 8, T36S R10E.W.M., was allotted to Jefferson Davis Riddle, a Klamath Indian, by instrument dated September 27, 1918. (OWRD Ex. 1 at 41.) The property was conveyed to Dan Wann, a non-Indian, on June 17, 1925. (Ex U8 at 36.) The property was subsequently conveyed to Hiram Robbins, a Klamath Indian, on September 25, 1941. (*Id.* at 28-29.)

The claim is for 10.2 acres irrigated by water diverted from the Sprague River. (Ex. U3; OWRD Ex. 1 at 6, 14.) Claimant attempted to add 13.7 acres to the claim by letter in 1999 (OWRD Ex. 1 at 47-49.) Diversion facilities were not developed on this property until the late 1960s, when the Riddle Field was developed. (Declaration of Phil Tupper.)

16) **Allotment 835**

This allotment, located in W ½ NW ¼, NW ¼ SW ¼, SE ¼ NW ¼ of Section 9, T36S R10E.W.M., was allotted to Anna May Riddle (Copperfield), a Klamath Indian, by instrument dated November 21, 1919. (OWRD Ex. 1 at 74.) The property was conveyed to Manuel Vieira, a non-Indian, on May 5, 1920. (Ex. U7 at 4.) The property was subsequently conveyed to Hiram Robbins, a Klamath Indian, on February 11, 1947. (Ex. U8 at 3-4.)

The claim is for 127.1 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) After Phil Tupper installed that pump and built the western ditch, he began irrigating this property in the 1960s. (Declaration of Phil Tupper.)

17) **Allotment 836**

This allotment, located in SW ¼ Section 8, T36S R10E.W.M., was allotted to Emanual George Riddle, a Klamath Indian, by instrument dated March 7, 1910. (OWRD Ex. 1 at 85.) The property was conveyed to Hi Robbins Corporation, an Oregon

[12] This is the Diversion Point for Claim 704, located in the SW ¼ NE ¼ Section 28, T 36S R10E.W.M.

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Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 45.6 acres irrigated by water diverted from the Sprague River at Diversion Point #1 (35.9 acres) and the unnamed creek at Diversion Point #2 (9.7 acres). (Ex. U3; OWRD Ex. 1 at 6, 14.) Claimant attempted to add 5.9 acres to the claim by letter in 1999. (OWRD Ex. 1 at 47-49.) A portion of the property, 9.7 acres, was first irrigated some time prior to 1986 when a check dam was observed on the unnamed stream on this allotment. (*Id.* at 187.) In addition, a headgate was installed in the early 1970s to irrigate a portion of this property from Diversion Point #1. The parts of the property included in the Riddle field were irrigated from Diversion Point #1 from 1968 on. (Declaration of Phil Tupper.)

18) **Allotment 837**

This allotment, located in N ½ N ½ of Section 17, T36S R10E.W.M., was allotted to Birdie Riddle, a Klamath Indian, by instrument dated March 7, 1924. (OWRD Ex. 1 at 71.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 29.1 acres irrigated by water diverted from the Sprague River at Diversion Point #1 (10.6 acres) and the unnamed creek at Diversion Point #2 (18.5 acres). (Ex. U3; OWRD Ex. 1 at 7, 14.) Claimant attempted to add 32.3 acres to this claim by letter in 1999. (OWRD Ex. 1 at 47-49.) Part of the property was first irrigated from the unnamed creek at some time prior to 1986 when the check dam was installed in Allotment 836 to back water for irrigation of part of this property. (*Id.* at 187.) The remainder is part of the Riddle Field, which was irrigated beginning in 1968. (Declaration of Phil Tupper.)

19) **Allotment 838**

This allotment, located in S ½ N ½ of Section 17, T36S R10E.W.M., was allotted to Sim Riddle, a Klamath Indian, by instrument dated February 11, 1921. (OWRD Ex. 1 at 62.) The property was conveyed to Dan Wann, a non-Indian, on June 17, 1925. (Ex. U8 at 36.) The property was subsequently conveyed to Minerva Brown, a Klamath Indian, on March 29, 1941. (*Id.* at 26-27.)

The claim is for 30.0 acres irrigated by water diverted from the Sprague River at Diversion Point #1 (16.4 acres) and the unnamed creek at Diversion Point #2 (13.6 acres). (Ex. U3; OWRD Ex. 1 at 7, 13.) Claimant attempted to add 35.1 acres to this claim by letter in 1999. (OWRD Ex. 1 at 47-49.) Part of the property was first irrigated from the unnamed creek at some time prior to 1986 when the check dam was installed in allotment 836 to back water for irrigation of part of this property. (*Id.* at 187.) The remainder is part of the Riddle Field, which was irrigated beginning in 1968.

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20) **Allotment 839**

This allotment, located in NW ¼ Section 8, T36S R10E.W.M., was allotted to Bidwell J. Riddle, a Klamath Indian, by instrument dated March 7, 1910. (OWRD Ex. 1 at 87.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 29.9 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) Phil Tupper installed a headgate in the early 1970s to irrigate this property from Diversion Point #1 by the western ditch. (Declaration of Phil Tupper.)

21) **Allotment 851**

This allotment, located in NE ¼ Section 8, T36S R10E.W.M., was allotted to Lizzie Schonchin, a Klamath Indian, by instrument dated March 7, 1910. (OWRD Ex. 1 at 89.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 13.2 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) Phil Tupper began irrigating this property after finishing the western ditch from Diversion Point #1 in the 1960s. (Declaration of Phil Tupper.)

22) **Allotment 1016**

This allotment, located in S ½ SE ¼, S ½ NE ¼ SE ¼, E ½ NE ¼ SW ¼, NW ¼ SE ¼ of Section 9, T36S R10E.W.M., was allotted to Mary Ann Copperfield, a Klamath Indian, by instrument dated March 15, 1915. (Ex. U6 at 18.) The property was conveyed to Manuel Vieira, a non-Indian, on August 6, 1920. (OWRD Ex. 1 at 76.) The property was subsequently conveyed to James and Joseph Vieira, also non-Indians, on or before December 8, 1943. (Ex. U8 at 1-2.)

The claim is for 100.4 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) This property was not irrigated until the pump was installed at Diversion Point #1 in the 1960s. (Declaration of Phil Tupper.)

23) **Allotment 1018**

This allotment, located in W ½ NE ¼ SW ¼ Section 9 T36S R10E.W.M., was allotted to Gilbert Copperfield, a Klamath Indian, by instrument dated March 15, 1915. (OWRD Ex 1 at 72.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 1.7 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) Phil Tupper began irrigating this

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property after the eastern ditch from Diversion Point #1 was completed in the 1960s. (Declaration of Phil Tupper.)

24) **Allotment 1139**

This allotment, located in SE ¼ SE ¼ Section 16 and NE ¼ NE ¼ Section 21, T36S R10E.W.M., was allotted to Nathaniel Jackson, a Klamath Indian, by instrument dated March 15, 1915. (OWRD Ex. 1 at 73.) The property was conveyed to Hi Robbins Corporation, an Oregon Corporation, in April 1978. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

The claim is for 1.3 acres irrigated by water diverted from Cherry Creek. (Ex. U3; OWRD Ex. 1 at 6, 7, 14.) Claimant attempted to add 3.3 acres to this claim by letter in 1999. (OWRD Ex. 1 at 47-49.) No diversion of water occurred respecting the portion of the property originally claimed until at least 1991, when the property passed to Alan Tyler, the second non-Indian owner. (Declaration of Phil Tupper.)

25) **Unallotted Tribal Land**

This parcel, located in W ½ NW ¼, W ½ E ½ NW ¼ of Section 16, and S ½ SW ¼ of Section 9, T36S R10E.W.M., was conveyed by the United States, as trustee for the Klamath Tribe, to Rachel Tupper, a Klamath Indian, on April 7, 1959. (OWRD Ex. 1 at 83-84.) The property was then conveyed to Hiram Robbins, a Klamath Indian, in 1965. (Ex. U8 at 52.)

The claim is for 2.1 acres irrigated by water diverted from the Sprague River at Diversion Point #1. (Ex. U3; OWRD Ex. 1 at 6, 14.) The parcel was irrigated from the west ditch after the pump at Diversion Point #1 was installed in the mid-1960s. (Declaration of Phil Tupper.)

CONCLUSIONS OF LAW

1. It is immaterial that lands were identified by the Preliminary Evaluation as 16.3 acres within the NE1/4 NW1/4 of Section 16, T36S R10E.W.M., which should be listed as being within Section 21, T36S R10E.W.M.

2. It is immaterial that certain lands in Section 9, T36S R10E.W.M. were listed in the Preliminary Evaluation as supplemental irrigation that should be listed as primary irrigation and livestock use.

3, 4 Because the Preliminary Evaluation is not legally controlling, it is irrelevant whether particular lands should, or should not, have been included in the Preliminary Evaluation.

5. Practicably irrigable acres should not have been included.

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6. It is undisputed that 2.3 acres listed in Section 16 should be listed as being within Section 28.

7. The record does not support the rate and duty claimed, but does support some of the actual use, points of diversion and re-diversion, place of use, season of use and/or acreage claimed.

8. To the extent that Claimant has changed the use of the claimed water from irrigation to fish and wildlife habitat and/or wetlands, that use cannot be allowed in this case.

9. Since a fish and wildlife claim cannot be allowed in this case, it is irrelevant whether Claimant's changed use and application of water is detrimental to KPWU's prior water rights.

10. Since a fish and wildlife claim cannot be allowed in this case, it is irrelevant whether Claimant's use of the claimed water is wasteful for fish and wildlife habitat and/or wetlands.

11. Since a fish and wildlife claim cannot be allowed in this case, it is irrelevant whether the Klamath River and its tributaries were over appropriated at the time Claimant began its use of the claimed water for fish and wildlife habitat and/or wetlands.

12. The record establishes the water use season claimed as to a portion of the claim.

13. Since a fish and wildlife claim cannot be allowed in this case, it is irrelevant whether to the extent water is used for fish, wildlife habitat and/or wetlands, Claimant has abandoned permitted uses.

14. Claimant did not abandon any rights acquired with the lands included in the claim when it was purchased by Claimant.

15. Although Claimant has asserted a right to store water that claim cannot be allowed, as it was untimely submitted. It is therefore moot whether this storage claim interferes with the direct diversion and storage of waters for domestic and irrigation uses, thereby violating Article III.C. of the Klamath River Basin Compact.

16. Since no storage right was timely claimed, it is moot whether any rights to store water for the purpose claimed is subordinate to domestic and irrigation rights of KPWU as provided in the Klamath River Basin Compact, Article II and XIII.

17. Part of the current use was developed within a reasonable time after the claimed date of appropriation.

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18. Wildlife is not a valid purpose of a *Walton* right derived from the 1864 Klamath Treaty.

19. Natural flooding/sub-irrigation/natural overflow can constitute a valid water right in some cases, but cannot form the basis for a *Walton* right, such as the claims in this case.

20. There is sufficient title information to establish a *Walton* right on a portion of the claimed place of use.

21. There is sufficient information on the development or continuous use of water on a portion of the place of use to establish a *Walton* right.

22. The period of use for irrigation in the Preliminary Evaluation exceeds the period of use claimed. Claims 703 and 704 are limited to the number of presently irrigated acres included in the June 1, 1992 claim form (889.6 for claim 703 and 2.3 acres for claim 704).

23. Filing fees were paid for 889.6 acres in Claim 703, and 2.3 acres in Claim 704, the acreage originally claimed in June 1, 1992. The remaining portions of the place of use as claimed in July 1999 cannot be allowed in any event.

24. Filing fees were timely paid for irrigation uses, but not for livestock.

25. A map sufficient to satisfy the requirements of statute and rule was submitted for portions of the claimed place of use.

26. Some of the uses claimed in 1999 were not included on a map satisfying the requirements for a water right.

27. Irrigation of portions of the claimed place of use was developed by the Indian owner before the land was transferred to the first non-Indian owner.

28. Irrigation of portions of the claimed place of use was developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.

29. Any irrigation developed after transfer of the property from the first non-Indian owner cannot be allowed as the basis for a *Walton* claim.

30. Irrigation of portions of the claimed place of use has been continuous.

31. The total acreage in the claimed place of use exceeds the irrigated acreage supported by the evidence.

32. Any use of water on portions of the claimed place of use that is wasteful is not part of the allowed claim.

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33. Water provided to the claimed place of use for the purposes of a wildlife use cannot be the basis for a *Walton* right.

34. Water provided to the claimed place of use by natural means (flooding in the spring or through sub-irrigation) and not through a diversion system created by humans, cannot be the basis for development of a *Walton* right or constitute irrigation under a *Walton* right.

35. The irrigation season of use cannot be more than the season of use claimed. The claimed irrigation season of use does not exceed the actual season of use supported by the evidence for portions of the claimed place of use.

36. The diversion rate for any lands awarded a water right should not be greater than one cfs per forty acres.

37. The water duty should be 3.0 acre-feet per acre.

38. The Preliminary Evaluations for Claim Nos. 703 and 704 (including Appendix A to the Preliminary Evaluation entitled "Standards for Rates, Duties, and Seasons of Use Within Previously Adjudicated Areas of the Klamath Basin") should not be accorded any weight in this contested case.

OPINION

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division,* 47 Or App 437 (1980); *Metcalf v. AFSD,* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

Claimant seeks a water right under two somewhat different categories. Originally, individual Indians owned most of the property, under an allotment of reservation land by the Federal Government. The property then transferred to non-Indians, who acquired the water rights held by the Indians, with some limitation. These are called *Walton* claims. The tribe itself, however, held a small part, and transferred that property in fee after the allotment system had been terminated. This is called a Klamath Termination Act claim. These two types of claims have similar, but slightly different attributes.

In his Ruling on United States' Motion for Ruling on Legal Issues in Klamath Case 272, Administrative Law Judge William Young stated the elements of a *Walton* claim as follows:

> 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;

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2. The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor;

3. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except that:

4. The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first purchaser of land from an Indian owner.

5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

Ruling on United States' Motion for Ruling on Legal Issues, Klamath Adjudication Case 272, August 4, 2003, at 9.

Although, as discussed below, Claimant takes issue with these elements, I adopt ALJ Young's formulation as the correct interpretation of the *Walton* line of cases.

The Klamath Termination Act claim, however, was not allotted to or conveyed by a member of the Klamath Tribe, but by the Tribe, itself. Thus, this claim is distinguishable from a *Walton* claim. However, this does not end the matter. The policies underlying the decisions in the *Walton* cases, together with peculiarities within the Klamath Termination Act, require recognition of a water right similar to a *Walton* right, and having the same priority date, October 14, 1864.

Generally, a person acquiring land from the public domain does not acquire a water right by virtue of that acquisition. *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 158-162 (1935). This is true even if the land was previously part of an Indian Reservation, so long as it has been treated as surplus and returned to the public domain. *United States v. Anderson* 736 F2d 1358, 1362 (9th Cir. 1984). However, in this case, the property was not treated as surplus and returned to the public domain. To the contrary, under the Klamath Termination Act, 25 USC Section 564a, the Tribes retained parts of the Klamath Indian Reservation not previously allotted to individual members of the Tribes. The Tribes, or a trustee on behalf of the Tribes, conveyed the property directly, with the proceeds distributed to the Tribal members pro-rata. 25 USC §564d. The Termination Act also retained the ownership of the water rights in the Tribes until the property was transferred. *Id.*

In the *Walton* line of cases, the federal courts concluded that Congress, in the General Allotment Act, ch. 119, 24 Stat. 388, intended that Indians allotted a portion of the reservation should be able sell the allotment with its accompanying water rights, thereby maximizing its value to the Indians. *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir. 1981), *cert*

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den 454 U.S. 1092 (1981). Only after allotments come into non-Indian hands is the protection afforded by treaty and federal oversight changed in any way. Once a non-Indian acquires the property, the *Walton* courts have concluded that the first non-Indian owner obtains the rights of the Indian seller, but must use diligence in developing beneficial use of the water in order to retain the benefit acquired, and may not sell the undeveloped right to another. *Walton*, 647 F.2nd at 51. The same factors are present with respect to land retained by the Klamath Tribes, and sold directly by the Tribes. Particularly in cases such as this, where Congress has expressed the intent to preserve the Tribes' interest in a water right appurtenant to Tribally-owned properties, I conclude that Congress also intended that the Tribes be able to transfer that water right, as a way of maximizing the value of the property to the members of the Tribe. Once the property has passed from Tribal ownership, there is no particular reason to distinguish the water right obtained from the water rights obtained from allottees. In both cases, the federal interest in protecting the water right is limited to the means necessary to assure that the Tribes received the appropriate value for their properties.[13] Consequently, I conclude that the property subject to Claim 703 that was transferred directly from the Tribes into private ownership, should be treated in a fashion analogous to a *Walton* right, with the following required elements:

> a. The property must have been part of the Klamath Indian Reservation.
>
> b. The property must have been transferred by or on behalf of the Klamath Tribes or an Indian successor to the Tribes to a non-Indian purchaser, without becoming part of the public domain.
>
> c. 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:
>
> d. The claim may include water use based on the Tribes' undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first non-Indian purchaser of the land.
>
> e. After initial development, the water claimed must have been continuously used by the first non-Indian purchasers and by all subsequent successors.

Claimant asserts that the *Walton* line of cases is distinguishable on its facts from the present case with respect to the limitation on the appropriation of water to the first non-Indian appropriator. Claimant suggests that the court in the *Walton* cases was not confronted by the situation presented in this case, where property changed hands from Indian to the first non-Indian

[13] In this case the purchaser was also a member of the tribe. In cases where Klamath Indians purchased an allotment, rather than inheriting it, however, the land has been considered to be still in Indian ownership for *Walton* purposes, and no-one has argued differently in this case. Thus, when the Tribe sells Termination Act property to its members, the property will continue to be treated as Indian owned until it passes to a non-Indian purchaser.

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purchaser, then back into Indian ownership. Claimant suggests that to the extent the non-Indian predecessors of the Indian purchaser lost through nonuse the right to develop irrigation with an 1864 priority date the transfer back to Indian ownership reinstated the inchoate water right attaching to the property while it was originally held by the tribe.

The Ninth Circuit foreclosed this argument in *United States v. Anderson,* 736 F2nd 1358 (9th Cir. 1984). In that case, the court considered whether the tribal rights were revived if the tribe reacquired ownership of land previously transferred out of Indian ownership. Considering the *Walton* cases, the court held:

> [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." [citing *Walton,* 647 F2d at 51.] *Consequently, on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse and those rights will have an original, date-of-reservation priority.*

United States v. Anderson 736 F2nd at 1362 (emphasis added).

If reacquisition by the tribe itself does not revive any rights lost by an intervening non-Indian owner through non-use, neither can the reacquisition by an Indian in the same circumstances. This is especially so, since the individual Indian's right is defined as a *pro rata* share of the tribal right, as secured by treaty. *United States v. Adair,* 723 F2d 1394, 1415-1416 (9th Cir. 1983).

It might be suggested that the *Walton* courts did not intend to limit further development of the right to the first non-Indian purchaser, so long as additional irrigation was developed with reasonable diligence after the land passed out of Indian ownership. The *Walton* cases do contain language that suggest that the court was primarily concerned with assuring diligent development after transfer, rather than enunciating a strict rule based on transfer of title. Three factors cut against this suggestion, however.

In its first foray into the *Walton* cases, the Ninth Circuit, in discussing the passage of irrigation rights from Indians to non-Indians, stated:

> 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.

Colville Confederated Tribes v. Walton, 647 F2nd 42, 51 (9th Cir. 1981).

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After the district court applied this principle to allow 104 acres of irrigation to Walton, who was the third non-Indian owner of the property, in *Walton III* the circuit court revisited the subject, quoted the above passage from its previous opinion, and explained it as follows:

> A careful reading leaves no doubt that the *immediate grantee of the original allottee* must exercise due diligence to perfect his or her inchoate right to the allottee's ratable share of reserved waters.
> * * * *
> 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.*

Colville Confederated Tribes v. Walton 758 F2nd at 401, 402 (emphasis added)

Such an explicit reference to diligent development by the immediate grantee from the Indian allottees, together with the apparent limitation of successor grantees to "the water thus appropriated" is difficult to explain except as a limitation on further development of the water right to development by the first non-Indian owner.

Second, the court discussed the requirement of intent to appropriate as shown by an initial development, plus evidence that development "gradually but surely increased" in the ensuing years, without regard to transfers in ownership. This might suggest that the court did not intend to impose a first successor rule. However, the court also concluded that the intervening owners did not increase irrigation beyond the 30 acres developed by the first non-Indian owners, and only allowed Walton those 30 acres for irrigation as first developed. Thus, the court's discussion of intent to appropriate as shown by increased irrigation by the intervening owners was *dicta,* as the evidence in the *Walton* case did not support a finding of such intervening development in any event. (*Id.* at 402, 403.) The court's actual holding is consistent with limitation of further development to the first non-Indian owner. Indeed, the concluding paragraph in this portion of the opinion states as follows:

> We affirm the trial court's finding that sufficient water to irrigate 30 acres was appropriated with reasonable diligence by *the original non-Indian purchaser* and continually used by each subsequent owner, including Walton.

Walton, 758 F.2nd at 403 (emphasis added).

Third, the court's primary interest in these cases was in assuring that Indians maximized the value of their land on sale, thus preserving to the Indians the value of rights that the court was treaty-bound to protect. Once the property passed out of Indian ownership, the court had no obligation to protect its value. Thus, the focus of the court's analysis was on protecting the value of the right during the transition from Indian to non-Indian.

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In this connection, it is noteworthy that the first non-Indian successor rule as applied in the Klamath Adjudication has very little significance in the bulk of cases, where the first non-Indian purchaser held the property for some years after acquisition. In most of those cases, the purchaser would lose the right of future development in any event through lack of diligence unless the purchaser developed irrigation in the years prior to transfer to the second purchaser. The limitation of future development to the first non-Indian owner would only defeat the right in those cases where the purchaser bought the property from Indians and transferred it in a relatively short time without developing the water right. It is permissible to infer from a quick turnover of the property that it was first acquired from the Indian as a speculative investment. There is no suggestion in the cases that the federal courts feel bound to give special protection to the interests of speculators in Indian land, or their successors. Thus, there can be no suggestion that the imposition of a first non-Indian successor rule would affect a diminution of the value of the right guaranteed to the Indian by treaty. In the normal case, a purchaser who intended to farm the property would obtain all of the value held by the Indian, including the right to future development. Presumably, such a purchaser would be expected to pay for such a right.

Claimant also argues that a *Walton* right may be established through natural overflow of water, without any artificial diversion works. Claimant argues that the *Walton* line of cases has been misconstrued, and does not actually prevent appropriation of water from natural overflow. Claimant also argues that the Indian owner could have developed the water right through natural overflow, and that right could then have been transferred to the first non-Indian successor.

With respect to the construction of the *Walton* cases, I am persuaded by the opinion of Administrative Law Judge Ken Betterton in Klamath Adjudication Case 157, which was noted in the arguments of the United States, that sub-irrigation and natural overflow are not contemplated as a basis for a *Walton* right under federal law. As Judge Betterton noted:

> It is clear to me after reading the District Court's Memorandum Decision in *Colville Confederated Tribes v. Walton*, No. 3421 (D E Wash, filed December 31, 1983, which *Walton III* [*Colville Confederated Tribes v. Walton,* 752 F2d 397 (9th Cir 1985)] reversed and remanded with a mandate in 1985, and the District Court's Order, *Colville Confederated Tribes v. Walton*, No. C-3421-RJM (D E Wash, filed June 25, 1987), based on the Ninth Circuit's mandate in *Walton III*, that sub-irrigation does not constitute a valid *Walton* water right. (Note omitted.)

Klamath Adjudication Case 157, Amended Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues, December 10, 2004, at pages 3, 4.

In *Walton III,* the Ninth Circuit concluded that 40 acres of land that had been subject to sub-irrigation could not be included as land subject to a federally reserved water right. The court noted:

> Walton argues that each preceding owner has farmed the water-saturated or subirrigated portion of his allotments, near the granitic

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> lip. This, he urges, demonstrates reasonable diligence for purposes of perfecting a reserved right to water for irrigating other areas of his land. We find his argument unpersuasive.
>
> The record indicates that this same acreage is subirrigated today. See, e.g., Reporter's Transcript, May 7, 1982, p. 612 (testimony of Walton, Sr.). Thus, assuming arguendo that the subirrigated acreage may give rise to an entitlement, it is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation.

Colville Confederated Tribes v. Walton, 752 F.2nd at 403.

The court then went on to point out that the Indians' water rights were a creature of federal law, not state law.

> Reserved rights are 'federal water rights' and 'are not dependent upon state law or state procedures.' *Cappaert v. United States*, 426 U S 128, 145 ***(1976); (citations omitted). It is appropriate to look to state law for guidance*** although the "volume and scope of particular reserved rights... [remain] federal questions." *Colorado River Water Conservation Dist. v. United States*, 424 US 800, 813 (1976).

Id. at 400.

Based on the foregoing, I agree with Judge Betterton that sub-irrigation cannot form the basis for a *Walton* claim. I further conclude that natural overflow likewise cannot form the basis for a *Walton* right. Natural overflow is legally indistinguishable from sub-irrigation in this respect. Both natural overflow and sub-irrigation put water on the land without any action or intent by the property owner, and both can be changed by the development of diversion works. It is apparent from the passage from the Ninth Circuit decision quoted above, that the court was not inclined to allow a *Walton* right based on land that already had water applied to it naturally. In any event, there is no logical basis for allowing a right based on either natural irrigation or sub-irrigation with a priority date of 1864. Such a right was allowed in pre-1909 claims only because the owner of the land showed the requisite intent to appropriate the water by harvesting the crop the water nurtured. *In re Silvies River,* 115 Or 27, 66 (1925). In those cases, the priority date was the date the intent to appropriate the water was manifested by harvesting the crop watered by natural overflow, after the appropriator held the property exclusively under claim of right. In this case, such an intent could not be formed until after the property was allotted to individual Indians, and would logically have a priority no earlier than the date the allotment was created, not 1864. The water must have been artificially diverted in order for it to form the basis for a *Walton* right.

Claimant argues, however, that after 1909 natural overflow could be the basis for a water right permit. Therefore, it is suggested, the Indian owner who harvested the crop watered

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through natural overflow could thereby establish a water right that could be transferred. Aside from the difficulty in relating such a right back to an 1864 priority date as claimed, Claimant is not quite correct on this point. In 1987, OWRD adopted OAR 690-300-0010(26). The Court of Appeals has commented on the effect of that rule as follows:

> The department has promulgated an administrative rule defining "irrigation" to mean "the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants. Examples of these uses include, but are not limited to, watering of an agricultural crop, commercial garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement." OAR 690-300-0010. The department has construed that rule to mean that only "artificial application" of water constitutes irrigation and that naturally occurring subirrigation does not qualify.

Staats v. Newman 164 Or App 18, 23 (1999).

In *Staats*, the court was considering the cancellation of a water right for a period of non-use beginning in 1982. The right-holder contended that the water was applied, but by subirrigation rather than artificial irrigation, and that therefore cancellation for non-use was not appropriate. The court concluded that the definition of irrigation adopted by the Department controlled, that natural sub-irrigation did not meet that definition, and that, therefore, natural sub-irrigation was not "beneficial use" required to avoid forfeiture for non-use. Significantly, the court applied this rule, which was promulgated in 1987, to a period of non-use alleged to have begun in 1982. Although the court did not address this point, it is apparent that the court found no difficulty in applying OAR 690-300-0010(26) to water rights that had vested prior to the promulgation of the rule.[14] Consequently, neither do I. Since OAR 690-300-0010(26) defines irrigation to require an artificial diversion, water rights sought under state law based on post-1909 use cannot be based on natural overflow or sub-irrigation.[15]

Claimant has also argued that to the extent the property subject to this claim is not eligible for treatment as a *Walton* claim, some parts of it could be subject to a pre-1909 water right under state law.[16] In order to establish such a water right, Claimant must show that (1)

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[14] This would not, however, control pre-1909 rights, since ORS 537.120 expressly excludes them from the Water Rights Act.

[15] The United States submitted Exhibit 42 to the Affidavit of David Harder, which is a letter dated December 20, 1977 from OWRD regarding an earlier water permit application submitted by the Robbins estate. In that letter, the Water Rights Engineer stated that a water right permit could not be issued for water that came on the land as natural overflow, because the point of diversion could not be defined with sufficient specificity, and the amount of water put to beneficial use could not be measured or controlled. The legal basis for this statement is unknown, but it may be the Department's interpretation of ORS 537.140(1)(a)(C) and (4), which require the application to state the amount of water used and to provide the location of the point of diversion.

[16] ORS 539.010(4) 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 (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 in compliance with the laws then existing, commence the construction of works for the

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prior to February 24, 1909, the appropriator had an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) water was subsequently diverted from the natural channel by means of a ditch, channel or other structure; and (3) water was applied within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930). Contestants have vigorously opposed this suggestion, arguing that it is untimely, and outside the proper scope of the case. It is unnecessary to decide whether, in the proper case, such a change of legal theory could be allowed because none of the properties qualifies for treatment as a pre-1909 claim under state law. The property was all previously part of the Klamath Indian Reservation. It was allotted to various individual members of the tribe in 19 separate parcels. Those allotments were confirmed to their original allottees no earlier than March 1910.

While it is possible that the land was subject to use by the Tribes as a whole, or their members, the Tribes held the property, so far as the evidence shows, in the tribal equivalent of the public domain. No tribal member held an exclusive interest before the allotments were confirmed in 1910. It has been held that harvesting of hay and other products nurtured by natural overflow of water and sub-irrigation of land can be sufficient water use to establish a pre-1909 appropriation. *In re Silvies River,* at 66. However, under Oregon law as it existed prior to 1909, use of water could not form the basis for a water right until it coincided with evidence of a claim of right in the land to which the water was applied. *Hough v. Porter,* 51 Or 318, 421 (1909). Since there was no claim of right in the land except by the tribe as a whole until after 1909, no pre-1909 water right can be found on the evidence in this case.

The property in question in this case was pieced together by Hiram Robbins, a Klamath Indian, over a period of years. Robbins acquired some of the property from the allottees, or their Indian successors. He obtained other parcels from non-Indian purchasers. After Robbins died, his heirs transferred their various interests in the property into Hi Robbins Corporation, an Oregon Corporation. While there is some indication that the heirs formed the corporation to hold their various interests, the quit-claim deeds from the heirs to the corporation recite substantial consideration for their conveyances. Moreover, the corporation is recited in these conveyances as "an *Oregon* corporation." Consequently the existence and incidents of the corporation are controlled by Oregon law, rather than the law of the tribe. Generally speaking, a corporation is a separate entity from its shareholders, such that, for example, the shareholders have no liability for corporate actions other than the value of their shares. *Amfac v. International Systems*, 294 Or 94, 108 (1982); ORS 60.151. Thus, the fact that a corporation has been formed by, or held exclusively by, Klamath Indians, does not make it an Indian owner. In any event, the claimants have the burden of proof in this case. The evidence is not sufficient to show the governance of the corporation or who its shareholders were, apart from a general statement by Phil Tupper that "The Hi Robbins Corp. was all owned by my family members, who are members of the Klamath Tribe." (Declaration of Phil Tupper.) When the heirs of Hiram Robbins sold their inherited properties to the corporation, they transferred the property out of Indian ownership, triggering the requirement of due-diligence, and causing any inchoate rights conveyed to the corporation to be cut off, at the latest, when the property was subsequently transferred to Alan Tyler in 1991.

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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."

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In 1999, Claimant sent OWRD a letter seeking to increase the acreage included in the claim. Claimant argues that this increase was effective. The United States argues that any attempt to increase the claim after the deadline was invalid. OWRD agrees, but in addition notes that fees were only timely paid for the 889.6 acres originally claimed in Claim 703 and the 2.3 acres claimed in Claim 704. Consequently, OWRD opines, the claim is limited to 889.6 acres for Claim 703, and 2.3 acres for 704, and any increase in acreage over acres in the places of use claimed prior to the deadline may not be allowed.

Both the United States and OWRD are correct. ORS 539.210 provides that a claim must be filed "at the time and in the manner required by law." If a claim is not filed within the time provided, the claimant is "barred and estopped from subsequently asserting any rights theretofore acquired." ORS 539.210. Additionally, OAR 690-030-0085 expressly prohibits the Water Resources Director from permitting any alteration or amendment of the claim after the commencement of the period of open inspection. In this case, OWRD entered into a stipulation with the Klamath Allottee Water Users Association, providing for a staged filing of claims, with the last part of the required information to be filed no later than November 2, 1992. To the extent Claimant's letter of 1999 sought to include land not previously included in filings prior to November 2, 1992, it was not effective. Moreover, as noted, the original claimant only paid fees enough for the number of acres originally claimed, and no fees for livestock. Although OWRD refunded those fees by mistake, the Department allowed Lindbloom and Cummins to pay the same fees to revive the claim. Even though Claimant attempted to pay additional fees to secure a livestock claim, those additional fees cannot be held to have permitted an upward amendment of the claim, or a claim for livestock that was not filed within the time allowed. Thus, the claim as discussed below will only include the property described in the initial claim. All property and uses described in the 1999 letter but not in the initial claim will be denied as outside the claim.[17]

With the foregoing principles in mind, I will now consider the situation of each of the separate properties.

Allotment 216:

Allotment 216 was transferred out of Indian ownership in 1924. It passed to the second non-Indian owner in 1943 at the latest. Although there was evidence that the part of the property north of the Sprague River was irrigated for some time prior to 1946, the evidence is insufficient to show that irrigation occurred soon enough after 1924 to be considered diligent development, or, in any case, before 1943 when it was transferred out of the ownership of the first non-Indian owner. In any event, irrigation of that part of the property was discontinued in 1996. There is no evidence of irrigation south of the Sprague River until at least 1991. The claim cannot be allowed as to this allotment.

[17] The original claim also sought a *Walton* right for fish and wildlife. However, this was not pursued in any of the briefs submitted by the parties, and in any case cannot be allowed. The Ninth Circuit held, in *United States v. Adair*, 723 F2d at1418, that water rights for fish and wildlife reserved to the Tribes by treaty are still held by the Tribes, and are not transferable.

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Allotment 441:

Allotment 441 passed out of Indian ownership in 1978, when it was transferred into the Hi Robbins Corporation. Prior to that date, however, a series of check dams had been installed in the unnamed stream, causing water to back up and flood irrigate this parcel. Consequently, 32.7 acres of irrigation is allowable. The additional .2 acres claimed in 1999 is not allowable.

Allotment 442:

Allotment 442 was transferred out of Indian ownership in 1920. In 1941 it was transferred again, to someone who was a Klamath Indian. As has been noted, the fact that the second owner was a Klamath Indian is not significant. Moreover, irrigation on this parcel was not commenced until the 1960s, more than 40 years after it passed from Indian ownership. The claim as to this parcel cannot be allowed.

Allotment 465:

Allotment 465 remained in Indian ownership until 1978, when it was transferred to the Hi Robbins Corporation. The first non-Indian owner did not construct diversion facilities during the 13 years before the property passed to the second successor in 1991. Thus, the first non-Indian owner did not diligently develop the right, and it was cut off when the property transferred. This portion of the claim cannot be allowed.

Allotment 565:

Allotment 565 remained in Indian ownership until 1978, when it was transferred to the Hi Robbins Corporation. The first non-Indian owner did not construct diversion facilities during the 13 years before the property passed to the second successor in 1991. Thus, the first non-Indian owner did not diligently develop the right, and it was cut off when the property transferred. This portion of the claim cannot be allowed.

Allotment 699:

Allotment 699 passed out of Indian ownership in 1920. It passed to the second successor, Manuel Vieira, some time prior to December 8, 1943. A box pump irrigated the property from an overflow channel from the Sprague River in 1946, after Hiram Robbins acquired it. It is unknown, however, when that box pump was installed. As the property had been out of Indian ownership since 1920, as many as 26 years could have passed before irrigation was developed. Consequently, diligent development of irrigation has not been shown, and a *Walton* right cannot be allowed.

Allotment 701:

Allotment 701 passed out of Indian ownership in 1925. The first non-Indian purchaser transferred the property to Hiram Robbins on October 6, 1938. Phil Tupper installed the first diversion facilities, check dams to back water for irrigation, in the 1960s, more than 35 years after the property passed from Indian ownership. This portion of the claim cannot be allowed.

Allotment 794:

Allotment 794 passed out of Indian ownership when it was transferred into the Hi Robbins Corporation in 1978. A portion of it, 16.3 acres, was irrigated while still in Indian

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ownership, beginning in the 1960's when Phil Tupper installed check dams to back water for irrigation. This part of the claim for 16.3 acres should be allowed.

Allotment 795:

Allotment 795 passed from Indian ownership in 1978, when it was acquired by the Hi Robbins Corporation. It was divided between Claim 703 and 704. Most of that portion that is subject to Claim 703 was irrigated while still in Indian ownership beginning in the 1960s when Phil Tupper installed check dams to back water for irrigation. This portion of the claim, 22.8 acres, should be allowed.

The portion subject to claim 704 was irrigated by a diversion from a small spring at the head of Cherry Creek, prior to 1986, while held by the first non-Indian owner, Hi Robbins Corporation. Given its description as an "old ditch," it is likely that this diversion was put in place some time before, either while the property was in Indian ownership or soon after it was transferred to the Corporation. Thus, the portion of the property subject to Claim 704, 2.3 acres, should be allowed.

Allotment 833:

Allotment 833 was transferred to Dan Wann, the first non-Indian owner, in 1925. Wann transferred the property to Hiram Robbins in 1941. It was not irrigated until the 1960s, more than 35 years after passing from Indian ownership. Therefore, irrigation was neither diligently developed, nor developed prior to transfer to the second non-Indian owner. This portion of the claim should not be allowed.

Allotment 835:

Allotment 835 was transferred to the first non-Indian owner, Manuel Vieira, in 1920. Hiram Robbins acquired it in 1947. The property was not irrigated until the mid-1960s, 40 years after passing out of Indian ownership, when a pump was installed in a ditch dug across this allotment by the Indian Agency. Thus, irrigation was neither diligently developed, nor developed prior to the transfer to the second successor. This part of the claim should not be allowed.

Allotment 836:

Allotment 836 was held in Indian ownership until Hi Robbins Corporation acquired it in 1978. A check dam was installed prior to 1986 to back water up on a portion of this property. Because Hi Robbins Corporation, the first non-Indian owner, held the property until 1991, and this check dam was in existence in 1986, it was probably installed some time earlier, either while the land was in Indian ownership, or soon after the corporation acquired it. The remainder of the original claimed acres was under irrigation when Hi Robbins Corporation acquired the allotment. This portion of the claim, 45.6 acres, should be allowed.

Allotment 837:

Allotment 837 was in Indian ownership until 1978 when the Hi Robbins Corporation acquired it. A portion of the property was in irrigation when the corporation acquired it. The remainder was irrigated from the check dam that was constructed in Allotment 836 prior to 1986.

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Since that check dam was constructed while the land was in Indian ownership or soon after, under the first non-Indian owner, this portion of the claim, 29.1 acres, should be allowed.

Allotment 838:

Allotment 838 passed out of Indian ownership in 1925. No part of it was irrigated until the 1960s, approximately 40 years later, after it had passed through several subsequent owners. Irrigation was not developed either diligently, or prior to conveyance to the second successive owner. This portion of the claim should not be allowed.

Allotment 839:

Allotment 839 was in Indian ownership until 1978 when Hi Robbins Corporation acquired it. It was under irrigation when acquired by the Corporation. This portion of the claim, 29.9 acres, should be allowed.

Allotment 851:

This allotment was in Indian ownership until 1978 when Hi Robbins Corporation acquired it. It was under irrigation from Diversion Point #1 while still in Indian ownership. This part of the claim, 13.2 acres, should be allowed.

Allotment 1016:

Manuel Vieira acquired this allotment in 1920. It was subsequently transferred to James and Joseph Vieira in 1943. It was not irrigated until the 1960s when Point of Diversion #1 was developed, more than 40 years after it passed from Indian ownership. This part of the claim was not, therefore, diligently developed and cannot be allowed.

Allotment 1018:

This property was in Indian ownership until 1978 when Hi Robbins Corporation acquired it. It was under irrigation while still in Indian ownership. Thus, this part of the claim, 1.7 acres, should be allowed.

Allotment 1139:

Allotment 1139 was in Indian ownership until 1978. However, there is no evidence of development of irrigation on the property included in the original claim until after it had passed 13 years later to Alan Tyler, the second non-Indian owner, in 1991. Therefore, it was neither diligently developed nor developed before transfer to the second successive owner. This part of the claim cannot be allowed.

Unallotted Tribal Land:

This property was held in trust for the Tribe until 1959, when it was sold to a Klamath Indian. It stayed in Indian ownership until 1978, when it was acquired by Hi Robbins Corporation. Phil Tupper irrigated the property from at least the mid-1960s when the pump was installed at Diversion Point #1. This part of the claim, 2.1 acres, should be allowed.

In view of the foregoing, I propose that the Adjudicator issue the following

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ORDER

Claim 703 is allowed in part as follows:

Season of Use: May 3 through October 18.
Priority Date: October 14, 1864.

Diversion Point #1
SW ¼ NW ¼ Section 9 T 36S R10E.W.M.
Source: Sprague River
Duty: 289.2 acre-feet of water per year
Rate: 2.335 cfs

Places of Use:

35.9 acres	SW ¼ Section 8, T36S R10E.W.M.
10.6 acres	N ½ N ½ Section 17, T36S R10E.W.M.
29.9 acres	NW ¼ Section 8, T36S R10E.W.M.
13.2 acres	NE ¼ Section 8, T36S R10E.W.M.
1.7 acres	W ½ NE ¼ SW ¼ Section 9 T36S R10E.W.M.
2.1 acres	W ½ NW ¼, W ½ E ½ NW ¼ Section 16, and S ½ SW ¼ Section 9, T36S R10E.W.M.
93.4 acres	Total

Diversion Point #2
SW ¼ SE ¼ Section 17, T36S R10E.W.M.
Source: unnamed creek tributary to Sprague River
Duty: 182.7 acre-feet of water per year
Rate: 1.523 cfs

Places of Use:

32.7 acres	SW ¼ Section 17, T36S R10E.W.M.
9.7 acres	SW ¼ Section 8, T36S R10E.W.M.
18.5 acres	N ½ N ½ Section 17, T36S R10E.W.M.
60.9 acres	Total

Diversion Point #3
SW ¼ SE ¼ Section 16, T36S R10E.W.M.
Source: Cherry Creek tributary to Sprague River
Duty: 68.4 acre-feet of water per year
Rate: 0.57 cfs

Place of Use:

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22.8 acres SE ¼ SW ¼, SW ¼ SE ¼, Section 16, T36S R10E.W.M.

Diversion Point #4
NE ¼ NW ¼ Section 21, T36S R10E.W.M.
Source: unnamed creek tributary to Cherry Creek, tributary to Sprague River
Duty: 48.9 acre-feet of water per year
Rate: 0.41 cfs

Place of Use:
16.3 acres NE ¼ NW ¼, NW ¼ NE ¼, Section 21, T36S R10E.W.M.

Claim 704 is allowed in part as follows:

Season of Use: May 3 through October 18.
Priority Date: October 14, 1864.

Diversion Point
E ½ SE ¼ NE ¼ Section 28, T36S R10E.W.M.
Source: Cherry Creek, tributary to Sprague River
Duty: 6.9 acre-feet of water per year
Rate: 0.057 cfs

Place of Use:
2.3 acres E ½ E ½ NE ¼ Section 28, T36S R10E.W.M.

Maurice L. Russell, II, Administrative Law Judge
Office of Administrative Hearings

Dated: March 28, 2007

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

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

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

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

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Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

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

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2007, I mailed a true copy of the following: **PROPOSED ORDER,** by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Dwight W. French / Teri Hranac
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