

**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**

**Klamath Irrigation District; Klamath
Drainage District; Tulelake Irrigation
District; Klamath Basin Improvement
District; Ady District Improvement
Company; Enterprise Irrigation District;
Klamath Hill District Improvement Co.;
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.; Reames Golf and Country Club;
Van Brimmer Ditch Company; Plevna
District Improvement Company; Collins
Products, LLC,
Contestants**

PROPOSED ORDER

Case No. 97

Claim: 701

Contests: 1768 and 3579²

vs.

**Jennie Sabin,
Claimant/Contestant¹**

¹ Claimant Sabin sold the property in Claim 701 to Patrick and Blanche Nord in 2004. The Nords sold the property to John and Margaret Camara in 2006. The Camaras have not filed formal documents to become claimants in this proceeding, although the contestants did not object to them participating in the contested case hearing. I have included a discussion of both Allottee and *Walton* rights and treated the Camaras as Claimants.

² Don Vincent voluntarily withdrew from Contest 3579 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3579 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3579 on January 15, 2004.

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HISTORY OF THE CASE

Claimant Jennie Sabin filed Claim 701 on January 31, 1991, contending she was entitled to water for existing uses and for practically irrigable acreage (PIA) as a Klamath Indian Allottee. The claim is for 702.1 acre-feet for 25 head of cattle (existing use) and 225.9 acres of PIA. The claimed period of use is year 'round for livestock and March 1 through October 16 for irrigation.

On October 4, 1999, the Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation in this and all other claims in the Klamath Adjudication. OWRD approved the claim for the stock watering use but, based on the information in its possession as of August 20, 1999, denied the PIA claim.

On May 3, 2000, Claimant filed Contest 1768. On May 8, 2000, the Klamath Project Water Users³ (KPWU) filed Contest 3579.

Claimant thereafter sold the property to Patrick and Blanche Nord, who then sold the property to John and Margaret Camara. On February 15, 2006, OWRD contacted Mr. and Mrs. Camara to inform them of the filing by Claimant Sabin and to determine whether they wished to file a change of ownership form and continue in the Adjudication.

On October 27, 2006, OWRD filed a Motion to Submit Late Filed Testimony. The motion was unopposed and was granted.

On November 14, 2006, Administrative Law Judge (ALJ) Charlotte B. Rutherford conducted a hearing in Salem, Oregon. Jesse Ratcliffe appeared as counsel for OWRD; Andrew Hitchings appeared as counsel for KPWU; and John and Margaret Camara appeared unrepresented as successors to Claimant. All of the participants appeared by telephone.

On November 15, 2006, ALJ Rutherford issued a Post-Hearing Scheduling Order. Claimants' Closing Argument was due on December 29, 2006; Responses to Claimants' Closing were due January 30, 2007; and Claimants' Replies to Responses were due on February 14, 2007.⁴ The record closed on that date.⁵

³ Klamath Project Users is a group of Contestants, comprised of all of the parties (other than Claimant) that appear in the caption of this Notice of Hearing.

⁴ The participants stated if Claimants did not file a Closing Argument, no Responses would be filed. Subsequently, no Closing Argument or Responses were filed.

⁵ On or about December 26, 2007, Claimants filed a letter stating that they did not intend to participate further in the proceeding. That letter is marked Ex. 2 and is admitted to the record.

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EVIDENTIARY RULINGS

OWRD's Exhibit 1, including supplemental pages 156 to 166, were admitted into the record. Objections to reports filed by the Natural Resources Consulting Engineers, Inc. (Ex. 1 at 3-8 and 53-68) for a lack of foundation and constituting hearsay are overruled by this Proposed Order. The documents are admitted and the objections will be considered when weighing the evidence. A letter from Mr. and Mrs. Camara is marked Exhibit 2 and also is admitted into the record.

ISSUES

1. Whether the elements of an Allottee Right have been met.
2. Whether the elements of a PIA claim have been established by Claimant and her Engineer's findings.
3. Whether equity requires granting to Allottees the same rights as *Walton* claimants, with regard to allowing additional water rights on the basis of beneficial use.
4. Whether Claimant has provided sufficient information to prove her stock water and PIA claims.
5. Whether there is sufficient evidence to support the right claimed.
6. Whether the required elements of an Allottee Right have been established, with a priority date of October 14, 1864.
7. Whether the record supports the PIA claimed, or whether it would be technically possible or economically feasible to develop an irrigation system to serve such acreage.

FINDINGS OF FACT

1. Claim 701 involves property that was originally part of the Klamath Indian Reservation. Claim 701 was filed by Jennie Sabin, an enrolled Klamath Indian. (Ex. 1 at 20.) The claim was filed on January 31, 1991 (Ex. 1 at 150),⁶ for a total of 480 acres. (Ex. 1 at 33.) The general location of the claimed use is Township 35 South, Range 13 East, W.M. (Ex. 1 at 21.)

2. Claim 701 is for a total of 702.1 acre-feet from points of diversion located on Mill Creek and Poinina Creek, tributary to Snake Creek, for 25 head of cattle, and 225.9 acres of practicable irrigable acreage. (Ex. 1 at 150.) The claim was also for domestic use for ½ acre of lawn and garden area. (Ex. 1 at 54.)

⁶ A statement and proof of claim was filed on June 1, 1992, supplementing the earlier filing. (Ex. 1 at 28.)

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3. The claimed period of use is March 1 through October 16 for irrigation and year-round for livestock. The claimed priority date is October 14, 1864. (Ex. 1 at 151.)

4. The claim is for irrigation and stock water on the following described place of use:

NW ¼, NE ¼
SW ¼, NE ¼
SE ¼, NE ¼
SE ¼, NW ¼
NW ¼, SE ¼
LOT 2 SW ¼, NW ¼
SECTION 30
TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M.

(Ex. 1 at 21-22 and 152.)

5. No developed water delivery system exists on Claim 701. (Ex. 1 at 88 and 90.)

6. No point of diversion for water exists in Claim 701. (*Id.*)

7. The amount of water actually beneficially used by livestock is 300 gallons of water per day. Livestock drink directly from Mill Creek and Poinina Creek. (Ex. 1 at 88.)

8. Claimant Sabin sold the property in Claim 701 on or about October 22, 2004 to Patrick and Blanche Nord. (Ex. 1 at 156-157 and 163.) Patrick and Blanche Nord sold the property to John and Margaret Camara on or about January 26, 2006. (Ex. 1 at 159 and 163.)

9. Neither John nor Margaret Camara is a Klamath Indian. (Ex. 2.)⁷

10. The Camaras use available surface water for “[their] animals, domestic and wild.” They have not built an irrigation system and do not intend to block the flow of water. The water on their property comes from snow fall upstream and the water dries up by late Spring. (*Id.*)

CONCLUSIONS OF LAW

1. The elements of an Allottee Right have not been met.

2. The elements of a PIA claim have not been established by Claimant and her Engineer’s findings.

3. Whether equity requires granting to Allottees the same rights as *Walton* claimants, with regard to allowing additional water rights on the basis of beneficial use is not relevant because no Allottee Right has been established.

⁷ John Camara is Blackfoot Indian. (Ex. 2.)

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4. Claimants have provided sufficient information to prove stock water claims. Claimants have not provided sufficient information to prove PIA claims.

5. There is insufficient evidence to support the right claimed.

6. The required elements of an Allottee Right have not been established.

7. The record does not support the PIA claimed.

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* 308 Or 660 (1989). Thus, if considering all of the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

The following five elements are necessary to establish a valid Allottee claim in this proceeding:

1. The claim must be for water (current or future) on land that was formerly part of the Klamath Reservation;
2. The claimant must be a Klamath Indian;
3. The land must be arable;
4. It must be both technically possible and economically feasible to irrigate the "practically irrigable acreage" (PIA); and
5. The right must not have been lost during any intervening non-Indian ownership.⁸

⁸ The elements of an Allottee claim are derived from a series of cases: *Winters v. United States*, 207 US 564 (1908)(Under the "Winters doctrine," water is implicitly reserved to fulfill the primary purposes of the reservation, i.e., the purposes set forth in the Treaty); *Arizona v. California*, 373 US 546 (1963) (the Supreme Court articulated the "practicably irrigable acreage" standard in order to quantify the Winters right); *In re Rights to Use Water in Big Horn River*, 753 P2d 76, 101 (Wyo. 1988)(the PIA must be susceptible of sustained irrigation and irrigable 'at reasonable cost'); *United States v. Anderson*, 736 F2d 1358 (9th Cir. 1984)(Indian reacquisition of land after allotment and sale to non-Indians is limited to the amount of water used at time title passed to non-Indian successor plus the amount of water which the successor puts to beneficial use with reasonable diligence following transfer of title; on reacquisition the Tribe acquires only those rights which have not been lost through nonuse); *see also*, OAR 690-028-0026(1) and (3).

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The first element is established because the record shows that the water was on land that was formerly part of the Klamath Reservation. The second element was established by the original Claimant who was a Klamath Indian. However, the successors to that Claimant are not Klamath Indians. Therefore, the second element has not been established. It is unnecessary to determine whether the remaining elements are met because all five elements must be met to establish a valid Allottee claim.

Because there is no evidence that the Nords are Klamath Indians, when they became owners of the land, Claim 701 become a claim for *Walton* rights as successors to a Klamath Indian owner. When the Camaras acquired the property from the Nords, the Camaras became the second non-Klamath Indian owners and any water rights would be established by a claim for *Walton* rights.

To establish a *Walton* right, claimants must meet the elements of a *Walton* right, as defined by a line of cases⁹ and a Ruling from ALJ William Young in another Klamath Adjudication case.¹⁰ Having reviewed the relevant authorities, I adopt ALJ Young's statement of the required elements in a *Walton* case. Those elements are:

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

Ruling on United States' Motion for Ruling on Legal Issues, Case No. 272, Claim Nos. 301-307, dated August 4, 2003, by ALJ William D. Young, at 9.

⁹ *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)(*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), cert denied, 475 US 1010 (1986)(*Walton III*).

¹⁰ Ruling on United States' Motion for Ruling on Legal Issue, Case No. 272, Claim Nos. 301-307, dated August 4, 2003, by ALJ William D. Young.

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The first two elements of a *Walton* right are established. Under the rulings in the line of *Walton* cases, the Camaras are entitled to the amount of water used by the Allottee prior to the transfer of land to the Nords and any amount of water developed by the Nords and used continually. The Allottee used stock water for 25 head of cattle at the rate of 12 gallons per day per head for a total of 300 gallons per day. No contest has been filed contending that this amount of water was not used continually.

The Camaras acquired whatever rights the Nords developed or that the Nords acquired as a present right from the last Indian owner. The only right of which there is evidence in the record is the stock water right. There is no evidence of any developed irrigation on the property, nor are the Camaras claiming any.

Therefore, the only right I can allow to the Camaras is 300 gallons per day for stock water. The remainder of the original claim is denied.

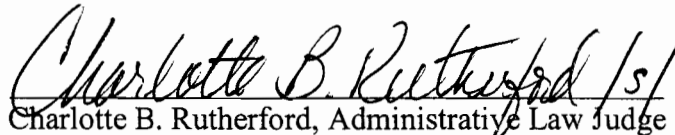
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PROPOSED ORDER

I propose that the Adjudicator GRANT stock water in the amount of 300 gallons per day to John and Margaret Camara and DENY the remainder of Claim 701.


Charlotte B. Rutherford, Administrative Law Judge
Office of Administrative Hearings

ISSUED AND MAILED: February 23, 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.

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 February 22, 2007, I served a true copy of the following: **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

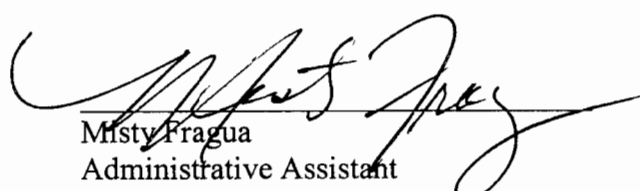
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COURTESY COPY:
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Misty Pragua
Administrative Assistant

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