

168F00010003
**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT**

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

United States of America; The Klamath Tribes,
Contestants

PROPOSED ORDER

v.

Edward D. Tompkins and Merrie L. Tompkins, as
Trustees of the Don and Merrie L. Tompkins Family
Revocable Trust dated July 13, 1998; Willis Stanley
Tompkins,

Case No. 168

Claim No. 21

Claimants/Contestants

Contests 14, 15, 3723, and 4079

This proceeding, under the provisions of ORS Chapter 539, is part of a general stream adjudication to determine the relative rights of the parties to the waters of the various streams and reaches within the Klamath River Basin.

HISTORY OF THE CASE

On January 31, 1991, Claimants or their predecessors-in-interest filed the above-entitled claim as non-Indian successors to a Klamath Indian Allottee,¹ claiming 3 acre-foot per acre for irrigation of 2,631.1 acres of land with incidental uses for livestock and wildlife. The claimed period of use is June 15 to November 15 for irrigation, and April 15 to November 15 for livestock.

On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation (PE) recommending approval of this claim for fewer acres than claimed, but the PE did not recommend approval for wildlife use.

¹ Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "Walton" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

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On April 11, 2000, Claimant Willis S. Tompkins filed Contest 14, and Claimants Edward D. and Merrie L. Tompkins filed Contest 15. On May 8, 2000, the United States filed Contest 3723, and the Klamath Tribes filed Contest 4079.

A Scheduling Order issued March 26, 2003, as modified March 30, 2004, established a schedule for discovery and filing written direct and rebuttal testimony, as well as a hearing for June 22-23, 2004.

Pursuant to a Hearing Notice mailed by certified mail on May 6, 2004, a hearing was held in Salem, Oregon on June 22, 2004. Administrative Law Judge Daina Upite presided. Claimants appeared and were represented by William Ganong, attorney-at-law. Larry Brown, trial attorney, represented the United States. Justin Wirth, Oregon assistant attorney general, represented the Oregon Water Resources Department (OWRD). Lorna Babby, attorney-at-law, represented the Klamath Tribes.

Willis Tompkins and Edward Tompkins testified on cross-examination. Ralph Saunders and Ross Waples were present on behalf of the United States, but did not testify.

Claimants and the United States submitted written closing arguments on July 30, 2004. On August 31, 2004, Claimants, the United States, and OWRD submitted responsive briefs. The Klamath Tribes did not submit written argument, but relied on the United States' argument.

On September 13, 2004, the United States filed notice that it had filed a Motion for Reconsideration in Klamath Basin Adjudication Case No. 157, regarding a ruling on which Claimants relied in their argument in this case. On October 21, 2004, the United States filed notice of filing a Memorandum in Reply in Case No. 157. On November 16, 2004, the United States filed notice of filing of Order on Reconsideration of Ruling on Legal Issues in Case No. 157, regarding an issue central to this case. No further documents were filed, and the record closed on November 16, 2004.

ISSUES

1. Whether the period of use for this claim should be November 15 to April 15 for natural irrigation and April 15 to November 15 for irrigation using drains and control structures, and year-round use for livestock.
2. Whether natural flooding/sub-irrigation/natural overflow constitutes a valid water right.
3. Whether wildlife is a valid purpose of a *Walton* right derived from the 1864 Treaty.
4. Whether there is sufficient title information to establish a *Walton* right.
5. Whether there is sufficient information on the development or continuous use of water on this Place of Use to establish a *Walton* right.
6. Whether the total acreage in the Place of Use exceeds the irrigated acreage supported by the evidence.

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7. Whether the diversion rate is too large for the number of irrigated acres supported by the evidence within the Place of Use.
8. Whether the duty of water in the Preliminary Evaluation exceeds the amount claimed.

EVIDENTIARY RULINGS

OWRD's Exhibit 1 (Ex. Nos. 168E000200001 and 168E000200002) was admitted into evidence without objection.

The direct testimony of Edward Tompkins (Ex. 168E00030100) with Attachment A, and the direct testimony of Willis Tompkins (Ex. 168E00030101) with Attachments A and B were admitted into evidence without objection.

The United States submitted the testimony of Ross Waples (Ex. 168E00040000), along with Exhibits 168E00040001 through 400026, and the direct testimony of Ralph Saunders (Ex. 168E000400027), along with Exhibits 168E000400028 through 400030. All were admitted into evidence without objection.

FINDINGS OF FACT

(1) On January 31, 1991, T/S Ranch, a joint venture of Edward D. Tompkins and Merrie L. Tompkins (husband and wife), the estate of Mabel L. Tompkins, Willis Stanley Tompkins, and Wilma L. Hill, filed Claim 21 for an Indian reserved right for practicably irrigable acreage (PIA) with a priority date of October 14, 1864. The claimed sources are Cow Creek, Big Springs Creek, and unnamed artesian springs, which are tributary to the Williamson River, which is tributary to the Klamath River. The purposes claimed are irrigation for pasture and grass hay, stock water for 1,300 head, and wildlife. The claim is for three acre-feet per acre for irrigation, and no additional water for stock and wildlife. (OWRD Ex. 1 at 1.)

(2) Subsequently, the land in the estate of Mabel L. Tompkins was conveyed to the devisees of the estate, and Edward D. and Merrie L. Tompkins acquired land owned by Wilma Hill. (OWRD Ex. 1 at 43.) The current claimants are Edward D. Tompkins and Merrie L. Tompkins, Trustees of the Don and Merrie L. Tompkins Family Revocable Trust dated July 13, 1998; and Willis S. Tompkins. (OWRD Ex. 1 at 44.) The respective ownership is shown on Exhibits A and B, filed April 11, 2000. (OWRD Ex. 1 at 46-47.)

(3) On October 4, 1999, Richard Bailey, Adjudicator for the Klamath Basin General Stream Adjudication, issued a Preliminary Evaluation of Claim 21. The Preliminary Evaluation recommended allowing the claim as follows: irrigation of 2,241.1 acres and for livestock, 3 acre-feet per acre per year, period of use being September 21 to March 21 for irrigation by natural overflow, and April 15 to November 15 for livestock use, with a priority date of October 14, 1864. (OWRD Ex. 1 at 126-29.)

(4) On April 11, 2000, Willis Tompkins filed Contest 14, and Edward and Merrie Tompkins filed Contest 15. (OWRD Ex. 1 at 97-105.) Claimants asserted the following water right: natural irrigation from November 15 to April 15, irrigation using drains and control structures from April 15 to November 15, year-round use for livestock, rate of diversion of 1/40th cubic foot per second (cfs) per acre, a duty of 3.0 acre feet/acre for irrigation, and a duty of 12 gallons per day (gpd) for livestock, with a priority date for all uses of October 14, 1864. (OWRD Ex. 1 at 98, 103.)

(5) On May 8, 2000, the United States of America (United States) filed Contest 3723; and the Klamath Tribes filed Contest 4079. (OWRD Ex. 1 at 106, 113.)

(6) The claim is for a total of 2,631.1 acres located in Sections 4 and 5, T 31 S, R 8 E, W.M., and Sections 32, 33, 34, 28, 27, and 22, T 30 S, R 8 E, W.M. (OWRD Ex. 1 at 6-7.)

(7) All the land included in this claim is within the former boundaries of the Klamath Indian Reservation. (Ex. 168E00030100: Direct Testimony of Edward Tompkins at 3.) All the land included in Claim 21 was allotted by the United States to members of the Klamath Tribes. (*Id.* and Attachment A.)

(8) There are numerous allotments involved in this claim. With respect to allotments 183, 185, 186, 198, 536, 535, 643, 1201, 1494, 252, and 434, Claimants' parents, Henry Willis and Mabel Tompkins were the first non-Indian purchasers. These allotments total 1,325.2 acres. Most of these allotments were purchased between 1955 and 1959. Allotment 1494 was purchased in 1964, while allotments 183, 185, and 186 were purchased January 7, 1971. (Ex. 168E00040000: Table 1 attached to Affidavit and Testimony of Ross Waples.)

(9) With respect to allotments 538, 45, 130, 164, 4, 569, 250, 196, 249, and 433, Claimants' parents were not the first non-Indian purchasers. These allotments total 1,305.9 acres. These allotments passed out of Indian ownership between 1914 and 1958. (*Id.*) There is no evidence that owners prior to Claimants' parents did anything other than take advantage of the naturally marshy land.

(10) All the land included in Claim 21 is irrigated by natural overflow of Big Springs Creek, Cow Creek, Pothole Spring, and unnamed springs located on or about the land included in this claim. All are tributary to the Williamson River, which is tributary to the Klamath River. (Ex. 168E00030101: Direct Testimony of Willis Tompkins at 2.)

(11) In 1956, Claimants' father, Henry Willis Tompkins, constructed a drain/canal system, which serves to remove excess surface water from the claim lands in the spring. The surface water is natural overflow of Cow Creek, Big Springs Creek, Pothole Spring, and other unnamed springs on the property, as well as surface run-off from winter snow pack.

Later, as the land dries and the water table drops, the headgates on the drains/canals are closed to capture surface water and allow it to spread over the land. (Ex. 168E00030100: Direct Testimony of Edward Tompkins at 2-4.)

(12) Claimants explained the irrigation season as follows:

Generally, the land is irrigated by natural overflow, however, during the period of June 15 to November 15 the drains are checked up to raise the water table and provide irrigation. Livestock is released on the land from April 15 to November 15. The actual season varies with the weather conditions.

(OWRD Ex. 1 at 4.)

(13) Claimants explained the water diversion system as follows:

During the spring of the year the ditches help drain the land. During the period from June 15 to November 15, the drains are "check up" to raise the water level in the drains and subirrigate the pastures.

Because no water is diverted from a specific source and through a control structure, it is difficult to determine the quantity of water consumed. However, irrigated pasture land typically requires three acre feet of water per year.

OWRD Ex. 1 at 6.)

(14) The irrigated land is used as cattle pasture and has a carrying capacity of 700 to 1,000 head of livestock. (Ex. 168E00030100: Direct Testimony of Edward Tompkins at 4.)

CONCLUSIONS OF LAW

Claim 21 should be denied in its entirety because the water right claimed is based entirely on natural overflow and/or sub-irrigation, not on actual diversion of water from a stream.

OPINION

Because Claimants are claiming water rights as non-Indian successors to a Klamath Indian Allottee, the water right is governed by the *Colville Confederated Tribes v. Walton* line of cases² and is commonly referred to as a *Walton* water right. As stated

² *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*), *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*).

by Administrative Law Judge William D. Young in *Nicholson et al. v. United States*, OAH Case No. 272, in the context of the Klamath Basin Adjudication, the following elements must be proved to establish a Walton water right:

1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe;
2. 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.

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

Claimants have the burden of establishing the claim by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); *see also Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). Claimants did not meet their burden of proof.

There is no dispute that the land appurtenant to Claim 21 was formerly part of the Klamath Indian Reservation, that the land was allotted to members of an Indian tribe, and that the land was transferred to non-Indian successors. Claimants assert a water right of three-acre-fee per acre for irrigation of 2,631.1 acres used for grass hay and pasture for livestock. Claimants stated that the irrigation method is overflow and sub-irrigation, and that there are no discrete points where water is diverted from the claimed sources of Cow Creek, Big Springs Creek, Pothole Spring, and unnamed springs on Claimants' property.

Overflow and sub-irrigation, however, do not establish a *Walton* water right. In *Walton III*, the Ninth Circuit reversed and remanded to the District Court with specific instructions regarding how to allocate the water at issue. In fulfilling the Circuit Court's mandate, the District Court observed:

Id., *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 U.S. 1019 (1986) (*Walton III*).

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The Tribe continues to maintain that Walton is being awarded water for application on his "soggy boggy" lands. That was true at the time the findings were entered, but not at the present time. Findings were made in a two-step process. First the Court determined that the initial non-Indian purchaser had beneficially applied water to thirty acres and that all subsequent owners continued such irrigation. Second, it was determined that if Walton's diligence (as opposed to the diligence of intervening owners) was controlling, then he had beneficially applied water to a minimum of 104 acres. The circuit expressly adopted the first findings, and just as expressly rejected the second on the dual bases that (1) Walton's diligence would be of weight only to the extent that his predecessors had exercised like diligence; and (2) to "award additional water [to the water-saturated lands] would result in a double allocation."

The 104 acres did in fact include the water-saturated lands adjacent to the granitic lip. The 30 acres does not, consisting as it does of the portion of the property referred to by several witnesses as the "corn patch," which was far removed from the granitic lip.

Order, *Colville Confederated Tribes v. Walton*, No. C-3421 RJM (DE Wash, filed June 25, 1987) at 2-3.

Based on the Ninth Circuit's holding in *Walton III*, as implemented by the District Court by Order filed June 25, 1987, Administrative Law Judge Betterton previously held in Case No. 157 in the Klamath Basin Adjudication that water use based on natural overflow and sub-irrigation does not establish a *Walton* water right. Amended Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues and Dismissal of Claimant's Claim, December 10, 2004.

The same principles apply in this case. To the extent that Claimants' *Walton* water right claim is based on natural overflow and sub-irrigation, it should be denied.

Claimants argue that Oregon law, particularly as expressed in *In re: Water Rights of the Silvies River*, 115 Or 27, (1925), recognizes that a diversion from the natural channel is not necessary to establish a water right by appropriation where land is naturally irrigated. 115 Or at 66. However, the Ninth Circuit stated in *Walton III* that federal reserved water rights are not dependent upon state law or procedures, and that while it is appropriate to look to state law for guidance, the volume and scope of particular reserved rights remain federal questions. *Colville Confederated Tribes v. Walton*, 752 F2d at 400, quoting from *Cappaert v. United States*, 426 US 128, 145 (1976) and *Colorado River Water Conservation Dist. v. United States*, 424 US 800, 813 (1976). Therefore, Claimants' argument fails.

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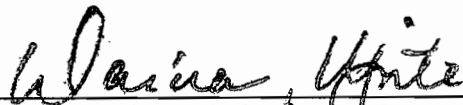
In 1956 Claimants' predecessors started building drains/canals on the land. Claimants explained that during the period when the land is irrigated by natural overflow (generally November 15 to June 15, or earlier in the spring), the drains/canals serve to help drain the land. During the period June 15 to November 15, the headgates on the drains/canals are closed or blocked to raise the water table and water level in the drains, in order to sub-irrigate the pastures. The diversion works – *i.e.*, the drains or canals built by Claimants' father – divert only the water that has naturally overflowed the banks of Big Springs Creek and Cow Creek; they do not divert water directly from either stream. As Claimants have repeatedly acknowledged, there are no points of diversion from the streams. In a similar fashion, the drains/canals divert water that bubbles up on Claimants' lands from naturally occurring springs. The drains/canals simply capture and spread out naturally occurring surface water to make more efficient use of the water.

The United States' witnesses, Ross Waples and Ralph Saunders, offered the opinion that the drainage ditches re-direct ground water onto lower lands, the source of the water for the area served by the drainage ditches is groundwater, and no surface water is being diverted into the drainage ditches for redistribution. These opinions are not supported by the evidence and testimony of Claimants. Therefore, I do not find that the ditches re-direct groundwater. Rather, they help to redistribute natural overflow from Big Springs Creek and Cow Creek, as well as redistribute water from naturally occurring springs on the land.

The United States also argued that Claimants' claimed wildlife use should be denied, and that Claimants failed to prove that the first non-Indian owners installed artificial irrigation on 1,305.9 acres of the claimed place of use. The United States' arguments are well-taken. However, because I recommend that the claim be denied in its entirety, I do not address these specific arguments.

PROPOSED ORDER

I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication render a Final Order denying Claim 21 in its entirety.



Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: February 23, 2006

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

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2006, I sent by mail 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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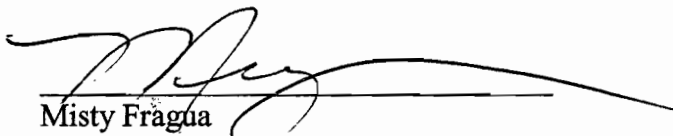
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