

**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;
Contestant,

v.

Cecil Saxon;
Claimant/Contestant.

PROPOSED ORDER ON STIPULATION

Case No. 171

Claim No. 26

Contest Nos. 3439¹, 3781, 4083², and 5655

HISTORY OF THE CASE

On December 7, 1990, Claimant Cecil Saxon filed Claim No. 26 in the Klamath Basin Adjudication. (Ex. 1 at 1-5.)

On October 4, 1999, the Adjudicator issued his Preliminary Evaluation of Claim No. 26 preliminarily denying the claim for failing to establish that water for the claimed use was used by the last Indian owner of the property or was diligently developed by non-Indian owners of the property after transfer from the last Indian owner. (Ex. 1 at 143-144.)

On May 8, 2000, the United States filed Contest No. 3781 alleging insufficient evidence for the right claimed and alleging that the required elements are not established for the claim.

On May 8, 2000, the Klamath Tribes filed Contest No. 4083 alleging insufficient evidence for the right claimed and alleging that the required elements are not established for the claim.

On May 8, 2000, the KPWU filed Contest No. 3439 alleging insufficient evidence for the right claimed and alleging that the required elements are not established for the claim.

On April 1, 2004, the KPWU voluntarily withdrew Contest No. 3439.

On June 22, 2004, the United States, Claimants, the Klamath Tribes, and OWRD filed a document titled "Stipulation of Facts" with the Office of Administrative hearings.

On August 18, 2004, the Klamath Tribes voluntarily withdrew Contest No. 4083.

¹ On April 1, 2004, the Klamath Project Water Users ("KPWU") voluntarily withdrew Contest No. 3439.

² On August 17, 2004, the Klamath Tribes voluntarily withdrew Contest No. 4083.

On October 5, 2004, the remaining parties and OWRD filed a Superseding Stipulation, superseding the prior Stipulation of Facts filed with the Office of Administrative Hearings on June 22, 2004.

EVIDENTIARY RULINGS

OWRD Exhibit 1, and Exhibits CL 26 00001, 00004-14, 00019, 00020, 00022-29, 00035, 00037, 00038, 00041, 00050 and 00052 were admitted into the record upon stipulation.

ISSUE PRESENTED

Whether the required elements are satisfied for the claim.

FINDINGS OF FACT

The parties have stipulated to the following facts:

1. Claimant owns all lands identified as the Place of Use in Claim No. 26. (Ex. 1 at 1, 3-10, 16-18, 23, and 143; CL 26 00019-20, 26 00025-27.)
2. The claimed Place of Use for Claim No. 26 is located within the boundaries of the former Klamath (Indian) Reservation. (Ex. 1 at 8-10, 17-18; CL 26 00024-27, 00037, 00041, 00052.)
3. The lands within the Place of Use are unallotted lands that were formerly held in trust by the United States for the Klamath Tribes. On October 20, 1959, Vernie and Delores Hood initially took fee title to lands within the claimed Place of Use by Deed of Tribal Property from the United States, acting through the Bureau of Indian Affairs, to Lots 3 & 4, Section 36, Township 31 South, Range 13 East, Willamette Meridian, Oregon, containing 66.20 acres, more or less ("the Property"). This deed was later corrected by a corrected Deed of Tribal Property on June 1, 1961, to correct an error in the county name. (Ex 1 at 9-10; CL 26 00004-6, 00050.) The Property included the claimed Place of Use in Claim No. 26.
4. The United States transferred title to the Property pursuant to the express language of the Klamath Termination Act.
5. Vernie and Delores Hood are Klamath Tribal members. (CL 26 00022-23, 00025.)
6. In 1962, Linda Van Atter and Nicholas Vernon Hood took title to an undivided $\frac{1}{2}$ interest in the Property through probate, subject to the curtesy right of Vernie Hood, from Delores Hood. (Ex. 1 at 16.)

RECEIVED

AUG 31 2005

**WATER RESOURCES DEPT
SALEM, OREGON**

7. On or about April 30, 1965, Vernie Hood conveyed an undivided $\frac{1}{2}$ interest in the Property to Eleven-77 Motors, Inc. by warranty deed. (CL 26 00007.)
8. In 1968, Florence Watah, as guardian of the estate of Linda Van Atter, a minor, conveyed an undivided $\frac{1}{4}$ interest in the Property to Linda Van Atter Brown by quitclaim deed. (CL 26 00008.)
9. On or about November 4, 1971, Eleven-77 Motors, Inc. conveyed an undivided $\frac{1}{2}$ interest in the Property to Harold and June Coe, husband and wife. (CL 26 00009.)
10. On or about June 27, 1973, Lake County, Oregon foreclosed on the undivided $\frac{1}{4}$ interest in the Property held by Linda Van Atter Brown and the undivided $\frac{1}{4}$ interest in the Property held by Nicholas Vernie Hood by sheriff's deed. (CL 26 00010-13.)
11. On or about March 22, 1978, Lake County, Oregon conveyed an undivided $\frac{1}{2}$ interest in the Property to Gordon C. and Ethel Lou York. (CL 26 00014.)
12. On or about January 28, 1989, Harold and June Coe conveyed an undivided $\frac{1}{2}$ interest in the Property to Cecil and Beverly Saxon. (CL 26 00019.)
13. On or about April 28, 1989, Gordon York conveyed an undivided $\frac{1}{2}$ interest in the Property to Cecil and Beverly Saxon. (CL 26 00020.)
14. The Place of Use is irrigated by diverting water from Long Creek and carrying it through three lateral ditches in an eastward direction to the Property. (Ex. 1 at 47-48.)
15. The Place of Use has been irrigated continuously since at least 1953. (CO 26 00001; CL 26 00024-25, 00035; Ex 1 at 41.)
16. Subject to a determination that the claim otherwise satisfies the conditions for a water appropriation in the Klamath Basin Adjudication, the parties have stipulated that the terms of the water right, if any, associated with Claim No. 26 are as follows:
 - a. **Point of Diversion Locations:** SW1/4 NE1/4, Section 4, T32S, R13 E, Willamette Meridian, Lake County, Oregon.
 - b. **Source:** Long Creek.
 - c. **Use:** Irrigation.
 - d. **Amount Beneficially Used:** 1.43 cubic feet per second (c.f.s.), measured at the point of diversion and further limited to a diversion not to exceed 3.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.

RECEIVED

AUG 31 2005

**WATER RESOURCES DEPT
SALEM OREGON**

- e. **Priority Date:** October 14, 1864.
- f. **Place of Use:** 28.4 acres on Lot 3, and 28.8 acres on Lot 4 in Section 36, Township 31 South, Range 13 East, Willamette Meridian, Lake County, Oregon. (OWRD Exh. 1, pp. 7, 23, 26, 41, 48, 56, 57, 59, 123, 124, 140; CL 00024, 00027-29, 00035, 00038.)
- g. **Period of Use:** March 1 to October 31.

CONCLUSIONS OF LAW

The required elements of the claim have been established.

OPINION

In the usual case of a water right connected with property that was once part of an Indian Reservation, the right would be analyzed as a *Walton*³ water right. Such a right requires satisfaction of five elements:

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

If these elements are proven, the claim will be assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.⁴

In this case, the property was formerly part of the Klamath Reservation, and was held in

³ These are claims by non-Indian successors to persons of Indian ancestry who acquired portions of land formerly part of an Indian reservation by grant from the United States as trustee. The name derives from *Colville Confederated Tribes v. Walton*, 647 F2d 42, 51 (9th Cir 1981).

⁴ *Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians*. October 14, 1864, 16 stat. 707. "The priority date of Indian rights to water for irrigation and domestic purposes is 1864 [date of reservation creation] * * * For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians." *United States v Adair*, 478 F. Supp. 336, 350 (D. Or. 1979).

RECEIVED

AUG 31 2005

WATER RESOURCES DEPT
SALEM, OREGON

trust by the United States. While the property was still in trust, in 1953, irrigation works were developed on the land. It has been continuously irrigated since that time. Once the property was conveyed out of trust, it passed out of Indian ownership, and eventually to the present claimants. However, the property was not conveyed as an "allotment" to the first Indian owners. Instead, it was conveyed to members of the Klamath Tribe by a Deed of Tribal Property pursuant to the Klamath Termination Act, and then conveyed out of Indian ownership at a later time. The claimed water right cannot, therefore, be construed as a *Walton* right.

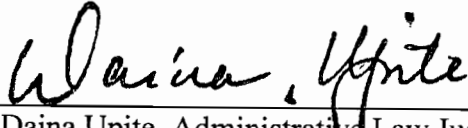
However, the claimed right was developed while the property was still held in trust by the United States, and therefore immune from state action by virtue of the Sovereign Immunity of the United States. *Colville Confederated Tribes v. Walton*, 647 F2d 42, 52. Thus, the water right was effectively appropriated before the land passed into private ownership, and thus passed with the land when the land was conveyed out of trust.⁵

Based upon the foregoing, I recommend the Adjudicator order the following:

ORDER

The claim is approved on the following terms:

- a. **Point of Diversion Locations:** SW1/4 NE1/4, Section 4, T32S, R13 E, Willamette Meridian, Lake County, Oregon.
- b. **Source:** Long Creek.
- c. **Use:** Irrigation.
- d. **Amount Beneficially Used:** 1.43 cubic feet per second (c.f.s.), measured at the point of diversion and further limited to a diversion not to exceed 3.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.
- e. **Priority Date:** October 14, 1864.
- f. **Place of Use:** 28.4 acres on Lot 3, and 28.8 acres on Lot 4 in Section 36, Township 31 South, Range 13 East, Willamette Meridian, Lake County, Oregon. (OWRD Exh. 1, pp. 7, 23, 26, 41, 48, 56, 57, 59, 123, 124, 140; CL 00024, 00027-29, 00035, 00038.)
- g. **Period of Use:** March 1 to October 31.


Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Dated: August 30, 2005

⁵ Although this appears to be a question of first impression in Oregon, it is apparent that federal reserved rights can be transferred when the reserved lands pass into private ownership. Although this is established as to "allotments" under *Walton*, *ibid.* formal allotment is not necessary (*cf. Hackford v. Babbitt* 14 F3d 1457 (10th Cir. 1994) transfer of reservation lands to a corporation, and distribution of lands by corporation, results in private landowner acquiring a water use.)

RECEIVED

AUG 31 2005

WATER RESOURCES DEPT
SALEM OREGON

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
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301

RECEIVED

AUG 31 2005

**WATER RESOURCES DEPT
SALEM OREGON**

CERTIFICATE OF SERVICE

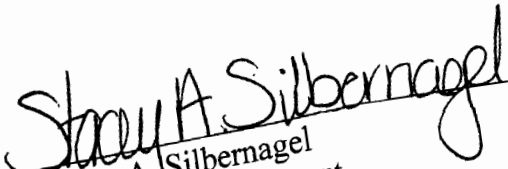
I hereby certify that on August 30, 2005, I mailed a true copy of the following: **PROPOSED ORDER ON STIPULATION**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Dwight W. French / Teri Hranac
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Dwight.W.French@wrđ.state.or.us
Teri.Hranac@wrđ.state.or.us

Steven L. Shorpsire
Jordan Schrader PC
PO Box 230669
Portland, OR 97281
Phone: 503-598-7070
Fax: 503-598-7373
Steve.shorpsire@jordanschrader.com

Barbara Scott-Brier
US Dept of Interior
500 NE Multnomah St., Suite 607
Portland, OR 97232
Phone: 503-231-1239
Fax : 503-231-2166

Jesse D. Ratcliffe / Stephen E.A. Sanders
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-378-4500
Fax: 503-378-3802
Jesse.d.ratcliffe@doj.state.or.us
Steve.sanders@doj.state.or.us


Stacey A. Silbernagel
Administrative Assistant

RECEIVED
AUG 31 2005
WATER RESOURCES DEPT
SALEM, OREGON