

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; 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

PROPOSED ORDER

Case No. 257

Claim: 39

Contests: 3447¹ and 4094²

vs.

Patrick J. Kenneally; Pauline Mary Kenneally;
Christine Margaret Kenneally,
Claimants.

HISTORY OF THE CASE

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 waters of the various streams and reaches within the Klamath Basin.

On October 12, 1990, Patrick J. Kenneally, Pauline Mary Kenneally, and Christine Margaret Kenneally (Claimants) filed Claim 39 as a non-Indian successor to a Klamath Indian Allottee. The claim is for .7 cfs for irrigation of approximately 26.4 acres of land, and .03 cfs for livestock, with a claimed period of use from April 1 through October 1 for irrigation, and year around for livestock.

¹ Don Vincent voluntarily withdrew from Contests 3447 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contests 3447 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3447 on January 16, 2004.

² The Klamath Tribes voluntarily withdrew Contest No. 4094 on May 7, 2004.

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On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation denying the claim based on the Wood River adjudication.³ On May 8, 2000, the Klamath Project Water User's (KPWU) filed Contest 3447, and the Klamath Tribes filed Contest 4094. The Klamath Tribes subsequently withdrew from Contest 4094, disposing of the contest in its entirety. Claimant did not file a contest.

On August 16, 2004, a Scheduling Order was issued that outlined a discovery process and scheduled a hearing for March 14, 2005.

Pursuant to a Notice of Hearing mailed to all participants on February 10, 2005, a hearing was held by telephone on March 14, 2005, for the purpose of admitting evidence into the record and setting a briefing schedule. Administrative Law Judge Dove L. Gutman presided at the hearing. Attorney at Law Donald Crane represented Christine Margaret Kenneally, the sole surviving Claimant. Attorney at Law Dan Kelly represented KPWU. Assistant Attorney General Jessie Ratcliffe represented OWRD. The record closed on June 8, 2005.

EVIDENTIARY RULINGS

On March 14, 2005, Claimant's Exhibits C1 through C15, KPWU's Exhibit K1, and OWRD's Exhibit A1 were admitted into evidence without objection.

ISSUES

- (1) Whether the claim contains documentation to support the elements of a *Walton* claim?
- (2) 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?

FINDINGS OF FACT

(1) All of the land included in this Claim is within the former boundaries of the Klamath Indian Reservation. (Exs. C2, C15.)

(2) All of the land included in this Claim was allotted on March 3, 1910, by the United States to Mary Wilson ECKE a member of the Klamath Tribes, to be held in trust by the Secretary of the Interior for a period of 25 years and then to be conveyed to her or her heirs at the end of that period. Mary Wilson died November 16, 1933, and her heir, Robert Wilson died May 17, 1935. (Exs. C1, C2, C15.)

³ Although the adjudicator denied the claim based on the previous Wood River Adjudication, this property was in trust with the United States until 1935. Since only claims based on property allotted in fee prior to August 21, 1928 could be included in the Wood River adjudication, this claim is not precluded by the Wood River adjudication. *See* Order Amending Rulings on Motions for Ruling on Legal Issues issued by Administrative Law Judge William Young in Case No. 900 on April 20, 2004.

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(3) By Land Status Report issued October 29, 1958, the Klamath Indian Agency declared that the owners of the property were Paul Captain Wilson and Nora Bernice Merritt Captain Wilson Hawk, both members of the Klamath Indian Tribes. (Exs. C1, C2, C7, C8.)

(4) On November 1, 1964, Paul Wilson and Nora Hawk conveyed the property to Timothy Kenneally, the first non-Indian owner of the land and the uncle of Claimant. The property was used as pasture land and to water cattle before Timothy Kenneally purchased it. (Exs. C3, C14-C15.)

(5) The land was subsequently conveyed within the Kenneally family to Claimant. Claimant owns the real property described in the Claim and is the sole survivor after the deaths of her sister and father. (Exs. C3-C6, C15.)

(6) During the ownership of the property by the Kenneally family, they have continually taken irrigation water from the Crooked Creek Ditch by means of the wooden box head gate and canvas dams to irrigate grass pasture land and water livestock. The amount of water taken is .7 cubic feet per second for irrigation and .03 cubic feet per second for watering livestock. A total of 26.4 acres are irrigated from April 1 to October 1, while approximately 80 head of livestock is watered year around. (Exs. C14-C15.)

(7) The irrigation ditches presently being used on the property were constructed during the period that the property was owned by the Department of Interior in trust for an Indian or subsequently during Indian ownership. (Exs. C9, C10, C15.)

(8) A 1963 Soil Survey issued by the Klamath County Soil and Water Conservation District contains an aerial photo of the subject property showing the irrigation ditch and reports the property to have soils used for pasture. (Ex. C11.)

(9) An aerial photo taken May 17, 1979 on file in the records of the Klamath County Assessor shows the land to be used as pasture land with damp spots along the Crooked Creek. The Klamath County Assessor assessed the land as pasture land. (Exs. C12-C13.)

(11) OWRD verified the point of diversion, claimed use, and the capacity of the ditch was adequate to supply the water as claimed. (Ex. A1 at 26, 28-29.)

(12) The legal description of the irrigated acreage is the following:

Section 35, Township 33 South, Range 7 ½ East, Willamette Meridian:

NW ¼ NE ¼	.8 acres
SW ¼ NE ¼	9.7 acres
NE ¼ NW ¼	2.2 acres
SE ¼ NW ¼	13.7 acres
Total	26.4 acres

(Ex. A1 at 3.)

(13) The point of diversion from Crooked Creek is the following: NW ¼ NE ¼, Section 26, Township 33 South, Range 7 ½ East. (Ex. A1 at 3.)

OPINION

Claim 39 is a claim for water rights for lands purportedly within the boundaries of the former Klamath Indian Reservation. Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" water rights.⁴

Elements of a *Walton* water right that must be proven are:⁵

- (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 is assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.⁶

⁴ A "*Walton*" right refers to a term derived from the *Colville Confederated Tribes v. Walton* line of cases that address the issue of a claim for a water right of non-Indian successors to Indian allottees. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert den* 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), *cert den* 475 U.S. 1010 (1986) (*Walton III*). An Indian "allotment" is a parcel of land on an Indian reservation awarded to an individual member of an Indian tribe, *i.e.*, an allottee, pursuant to the General Allotment Act of 1887, 24 Stat. 388. *See, e.g., Walton II*, 647 F2d at 45.

⁵ *See, Walton II*, 647 F2d at 51; *see also*, Decision by Administrative Law Judge William D. Young, Klamath Basin Adjudication, Case No. 272, dated August 4, 2003.

Claimant has the burden of proof to establish 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 a 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 not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). Claimant has met her burden.

Claimant presented evidence that her land is within the boundaries of the former Klamath Indian Reservation, that irrigation was initiated by Indian predecessors and was continued by the first non-Indian owner of the land with diligence within a reasonable period of time after transfer of the land, and that the land has been irrigated continuously by all subsequent successors. In addition, OWRD verified the point of diversion, the claimed use, and the capacity of the ditch was adequate to supply the water as claimed. KPWU presented no evidence to contradict claimant's evidence. Therefore, the elements of a Walton water right are established and the record supports the rate, actual use, points of diversion, place of use, seasons of use and acreage claimed. Consequently, the claim is assigned a priority date of October 14, 1864.

PROPOSED ORDER

I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order as follows:

Claimants have established the elements of a Walton water right for 26.4 acres, more specifically as follows:

Section 35, Township 33 South, Range 7 ½ East, Willamette Meridian:

NW ¼ NE ¼	.8 acres
SW ¼ NE ¼	9.7 acres
NE ¼ NW ¼	2.2 acres
SE ¼ NW ¼	13.7 acres
Total	26.4 acres

Point of diversion from Crooked Creek:

NW ¼ NE ¼, Section 26, Township 33 South, Range 7 ½ East.

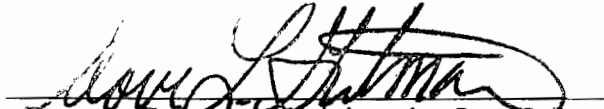
⁶ The Klamath Reservation was established on October 14, 1864. *Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians*, October 14, 1864, 16 stat. 707. "The priority date of Indian rights to water for irrigation and domestic purposes is 1864 [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).

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The irrigation rate should be .7 cfs for irrigation of approximately 26.4 acres of land, and .03 cfs for livestock, with a period of use from April 1 through October 1 for irrigation, and year around for livestock.


Dove L. Gutman, Administrative Law Judge
Office of Administrative Hearings

Date: August 31, 2005

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

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2005, 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:

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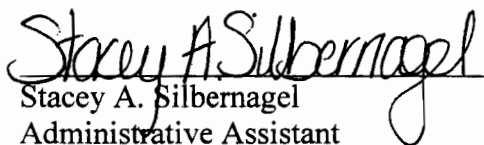
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