

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; Ambrose W.
McAuliffe; Dwight Mebane; Elmore Nicholson;
Richard Nicholson; William Nicholson;
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. 191

Claim: 59

Contests: 2753, 3101, 3457¹, 3799, and
4112²

vs.

Jack Owens Ranches;
Claimant/Contestant.

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").³ As modified by stipulation, this *Walton* claim is for 1/50th cubic

¹ Don Vincent voluntarily withdrew from Contest 3457 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3457 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3457 on January 15, 2004.

² The Klamath Tribes voluntarily withdrew Contest 4112 on July 16, 2004. See, KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST.

³ 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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foot per second (cfs) of water per acre and five acre-feet of water per acre for irrigation of approximately 77.5 acres of land. The claimed period of use is April 1 through October 1. The claimed priority date is October 14, 1864.⁴

On January 18, 1991, Jack Owens Ranches (Claimant) filed Claim 59. On October 4, 1999, Oregon Water Resources Department issued its Preliminary Evaluation for this claim, preliminarily denying the claim. Claimant filed Contest 3101 on May 8, 2000.

Ambrose McAuliffe, Dwight Mebane, Elmore Nicholson, Richard Nicholson, and William Nicholson (hereafter "Nicholsons") filed Contest 2753 on May 8, 2000. The contestants in Contest 2753 resolved their contest by stipulation filed September 23, 2003.

Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills 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, Berlva Pritchard, Don Vincent, Randy Walthall, Inter-County Title Company, Winema Hunting Lodge, Inc., Van Brimmer Ditch Company, Plevna District Improvement Company, and Collins Products, LLC (hereafter "Klamath Project Water Users" or "KPWU") filed Contest 3457 on May 8, 2000.

The United States of America (hereafter "United States") filed Contest 3799 on May 8, 2000. On January 30, 2006, the United States, Claimant and OWRD entered into a stipulation to resolve Contest 3799.

The Klamath Tribes filed Contest 4112 on May 8, 2000, and withdrew the contest on July 16, 2004. *See* Klamath Tribes' Voluntary Withdrawal of Contest.

The matter was then referred to the Office of Administrative Hearings. (OAH) The case was consolidated with a number of other cases involving *Walton* claims into Case 900, for a determination of a common issue of law. After discovery to OWRD on this matter and extensive legal briefing, on March 1, 2004, Administrative Law Judge (ALJ) William D. Young issued his Rulings on Motions for Ruling on Legal Issues in Klamath Adjudication (KBA) Case 900. This Ruling was the subject of a Motion for Reconsideration, and additional briefing. Ultimately ALJ Young withdrew his March 1, 2004 Ruling. Order Withdrawing Rulings on Motions for Ruling on Legal Issues and Allowing Reconsideration, April 15, 2004, KBA Case 900. On April 20, 2004, ALJ Young issued his Order Amending Rulings on Motions for Rulings on Legal Issues in KBA Case 900. On May 27, 2004, ALJ Young vacated the April 29, 2003 Order Granting Motion to Consolidate. Order Vacating Order to Consolidate, May 27, 2004, KBA Case No. 900. The Order Vacating Order to Consolidate provides that "the cases associated with this consolidated case shall proceed through the contested case process in the same manner as if they had not been consolidated, except that the law of the case in each case is set out in the April 20, 2004 Order Amending Rulings On Motions For Ruling On Legal Issues." *Id.* at 2.

⁴ This is the priority date for all allowed *Walton* claims, as the date on which the Klamath Indian Reservation was created by treaty.

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Based on the Law of the Case, as set out in ALJ Young's Order Amending Rulings on Motions For Ruling on Legal Issues, on July 15, 2005, Administrative Law Judge (ALJ) Daina Upite issued an Order Granting Motions for Ruling on Legal Issues, ruling that Claim 59 was precluded by previous adjudication as to the right to irrigate 190.6 acres of the land then claimed, leaving the water right to approximately 86 acres subject to determination in the Klamath Adjudication.

On March 13, 2006, ALJ Dove Gutman conducted a prehearing conference preparatory to a hearing previously scheduled for March 20, 2006. In the course of that prehearing conference, ALJ Gutman, with the concurrence of the parties, concluded that no hearing would be necessary in this case, and scheduled written argument on the case. The parties then submitted the case on the record, subject to notification by KPWU of any objections to documents in OWRD Exhibit 1, to be filed prior to Thursday, March 16, 2006. On March 13, 2006, KPWU advised that there were no objections to OWRD Exhibit 1. The United States also provided a written letter of correction to the Stipulation for resolution of Contest 3799, as had been agreed at the prehearing conference.

Claimant filed its Memorandum on April 20, 2006. KPWU filed its Response memorandum on May 22, 2006. No other participant filed argument, and the record closed on June 23, 2006.

After the record closed, the case was reassigned to me to prepare this Proposed Order. I have reviewed the entire record, including the record of the March 13, 2006 prehearing conference, prior to preparation of this order.

EVIDENTIARY RULINGS

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

OWRD Exhibit 1 including the Affidavit and Testimony of Teri Hranac.

Written Direct Testimony of William Nicholson, with exhibits attached thereto.

Written Direct Testimony of Gerald H. Hawkins with exhibits attached thereto.

Affidavit of Counsel Identifying Exhibits Submitted by Claimant/Contestant Jack Owens Ranches.

Exhibits JOR 001 through JOR 055.

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ISSUE⁵

Whether there is sufficient documentation to support the elements of a *Walton* claim, including rate, duty, actual use, priority of diversion and re-diversion, place of use, seasons of use, and/or acreage claimed.

FINDINGS OF FACT

1) For all allowed water rights in Claim 59, the Rate is 1/50th cfs/acre.⁶ The Duty is 5 acre-feet of water per acre per year. The Period of Use for irrigation is April 1 through October 1. The Priority date is October 14, 1864.

2) The land subject to this claim as limited under the Stipulation between claimant and the United States is composed of two parcels. One parcel, 46.5 acres located in NE $\frac{1}{4}$ NE $\frac{1}{4}$ (39.8 acres) and NW $\frac{1}{4}$ NE $\frac{1}{4}$ (6.7 acres) Section 2 T34S R7.5 E.W.M., is irrigated from the Crooked Creek Ditch, with a diversion point at NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 26, T33S R7.5E.W.M. from Crooked Creek, tributary to the Wood River. The second parcel, 31 acres located in NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 2 T34S, R7.5E.W.M., is irrigated from the Fort Creek Canal, with a diversion point at NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 26, T33S R7.5E.W.M. from Fort Creek, tributary to Wood River. (Direct Testimony of William Nicholson at 2; OWRD Ex. 1 at 64.) The two parcels are divided by Oregon State Highway 62. (OWRD Ex. 1 at 64.)

3) On March 15, 1915, the United States allotted to Andrew L. John, Klamath Allottee 1145, property described as N $\frac{1}{2}$ NE $\frac{1}{4}$ Section 2, T34S R7.5 E.W.M., among others, from the land of the Klamath Indian Reservation. (Ex. JOR 045 at 2.) On November 9, 1956, the United States of America, acting through the Bureau of Indian Affairs, conveyed the property in question to William and Virginia Zumbrun, non-Indians. (Ex. JOR 046.)

4) The Agency Unit, drawing water from Fort Creek and Crooked Creek, was begun in 1899, by the Indian Agency. By 1918, it was composed of three dams and eight miles of canals, and was in operation. (Ex. JOR 042 at 8.) Both the Fort Creek Canal and the Crooked Creek Ditch, which are part of the works of the Agency Unit, pass through the property in question. (OWRD Ex. 1 at 64.)

4) On August 18, 1950, while the property was still in Indian ownership, it was appraised by Mathew Spencer, an agricultural extension agent, for the purpose of determining its rental value. That appraisal described the property as having 80 acres under irrigation. (Ex. JOR 044 at 2.) After the Zumbruns purchased the property in 1956, they irrigated the property as well. (Direct Test. of William Nicholson at 2.) In 1962 William Nicholson and his father leased the

⁵ Only the issue raised by the remaining contestant, KPWU, is included. The issues raised in the other contests have not been listed, as they have been resolved by withdrawal or stipulation.

⁶ The rate and duty is based on a certificate of water right obtained by William and Virginia E. Zumbrun in 1964, after transfer out of Indian Ownership. (Ex. JOR 49 at 4.) This is also the rate and duty agreed upon in the Stipulation between Claimant and the United States. KPWU also sought that the rate and duty be limited to this amount in its argument. Season of use is as claimed. Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

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property from the Zumbruns. At that time, the irrigation works now present on the property were already in use. (*Id.* at 3.) In 1964, the Zumbruns applied for a Certificate of Water Right for irrigation of the 46.5 acres irrigated from Crooked Creek. In that application, they represented that the irrigation works for that property were already in place, having been constructed soon after 1909 when the Indian Agency build the Agency Unit. (Ex.JOR 049 at 3.) In November 1965, the Zumbruns conveyed the property to William and Donna Nicholson. (Direct Testimony of William Nicholson at 3.) The property has been continuously irrigated since 1956. (*Id.*; Direct Testimony of Gerald Hawkins at 2.)

CONCLUSIONS OF LAW

The evidence supports the elements of a *Walton* claim for 77.5 irrigated acres, including rate, duty, actual use, priority of diversion, place of use, season of use, and acreage 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* 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.

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;
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.

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

Having reviewed the legal authorities applied by ALJ Young in his ruling, I adopt ALJ Young's formulation as the correct interpretation of the *Walton* line of cases.

In this case, as ALJ Upite ruled, most of the property originally claimed had already been subject to a previous adjudication, which precluded inclusion of that property in the present case. Several parcels remained, however. In addition, Claimant limited the remaining claim to the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2, by stipulation. Consequently, only that property will be the subject of this discussion.

The property in question was part of the Klamath Indian Reservation, and allotted to an Indian in 1915. The appraisal of 1950 shows that the property was under irrigation while in Indian ownership. After it was sold to the Zumbruns, the first non-Indian owners, in 1956, it continued under irrigation, and is irrigated at the present day. The elements necessary for a *Walton* claim for the 77.5 remaining acres have been established.

Based on the evidence presented, I recommend that the Adjudicator allow the claim on the terms specified in the stipulation between Claimant and the United States.

ORDER

I propose that the Adjudicator issue the following order:

Claim 59 is allowed in part as follows:

Season of Use: April 1 through October 1.

Purpose of Use : Irrigation

Priority Date: October 14, 1864

Diversion Point #1: NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 26, T33S R7.5E.W.M.

Rate: 0.93cfs

Duty: 186 acre-feet of water per year

Acres: 46.5 acres

Source: Crooked Creek, tributary to Wood River.

Place of Use: NE $\frac{1}{4}$ NE $\frac{1}{4}$ (39.8 acres), NW $\frac{1}{4}$ NE $\frac{1}{4}$ (6.7 acres), Section 2, T34S R7.5E.W.M.

Diversion Point #2: NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 26, T33S R7.5E.W.M.

Rate: 0.62 cfs

Duty: 124 acre-feet of water per year

Acres: 31.0 acres

Source: Fort Creek, tributary to Wood River.

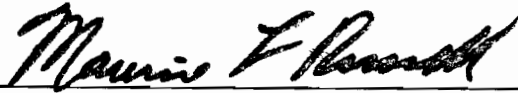
Place of Use: NW $\frac{1}{4}$ NE $\frac{1}{4}$ (31 acres) Section 2, T34S R7.5E.W.M.

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The remaining portions of the claim should be denied.



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

Dated: April 13, 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 April 13, 2007, I mailed a true copy of the following: **POST-HEARING BRIEFING SCHEDULE**, 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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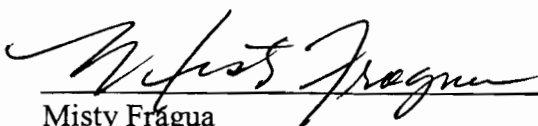
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