

260F00010002
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 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; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC,
Contestants,

v.

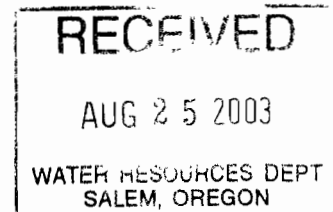
Rodney N. Murray,
Claimant/Contestant.

PROPOSED ORDER

Case No. 260

Claim No. 79

Contests 4 and 3470¹



HISTORY OF THE CASE

THIS PROCEEDING under the provisions of ORS Ch. 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.

Rodney N. Murray filed Claim 79 on November 14, 1990, as a non-Indian successor to a Klamath Indian Allottee. He claimed water use of 20 gallons-per-minute for domestic use and irrigation of a lawn. The claimed period of use is February through

¹ On November 28, 2000, Contestant Don Vincent informed the Adjudicator that he had sold his interest in the property giving rise to his claims and this contest and was no longer a participant in this contested case. On June 24, 2002 Contestant Berlva Pritchard informed the Office of Administrative Hearings that she had sold her interest in the property giving rise to her claims and contest and was no longer a participant in this contested case.

November for domestic use, and May through October for irrigation. On October 4, 1999, the Adjudicator of the Klamath Basin General Adjudication issued a Preliminary Evaluation of this claim, preliminarily denying the claim. Mr. Murray filed Contest 4 on April 6, 2000, contesting the Preliminary Evaluation. The individuals and entities identified in this proceeding as the Klamath Project Water Users² (KPWU) filed Contest 3470 on May 8, 2000, contesting the claim and the Adjudicator's Preliminary Evaluation.

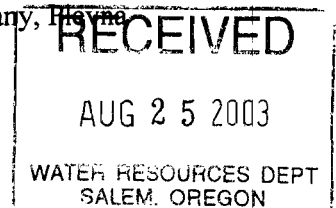
The Water Resources Department (OWRD) referred this matter to the Office of Administrative Hearings (OAH) for a contested case hearing. On November 29, 2002, OAH served a letter and an Order Requiring Pre-Hearing Statements on the individuals and entities on the service list for this case, including Mr. Murray. Pursuant to that Order, a prehearing conference was held by telephone on January 22, 2003. KPWU and OWRD filed prehearing statements as required by the order. Mr. Murray, an attorney representing KPWU and an Assistant Attorney General representing OWRD appeared at the prehearing conference and agreed to a Prehearing Schedule that included deadlines for filing discovery, including written testimony, and to the hearing date.

On July 3, 2003, OAH served a Notice of Telephone Hearing on all participants, including Mr. Murray. The notice, sent by Certified Mail, Return Receipt Requested, informed the participants that the hearing would be held on August 19, 2003, at 9:00 a.m. PDT, and that they could take part in the hearing by telephone or by meeting at the OAH offices in Salem, Oregon. Mr. Murray did not appear at the hearing scheduled for August 19, 2003. Andrew M. Hitchings, attorney for Contestants KPWU, appeared for the hearing, as did Justin Wirth, Assistant Attorney General, representing OWRD.

EVIDENTIARY RULINGS

I admitted OWRD's Exhibit 1 (Ref. No. 260E00020001) and the affidavit and testimony of Teri Hranac (Ref. No. 260E00020001) without objection. No participant had identified any other documents as evidence or provided written testimony in this contested case. I noted that the record included additional documentation provided by Mr. Murray after the January 22, 2003, prehearing conference, but that these documents were not identified as exhibits or potential evidence in the hearing.

² 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, Hrvna District Improvement Company, and Collins Products, LLC.



ISSUES

Does Rodney N. Murray have a claim to water as a non-Indian successor to an Indian allottee under criteria set out in the *Colville Confederated Tribes v. Walton* line of cases.

FINDINGS OF FACT

1. The Bureau of Indian Affairs transferred a 160 acre property included in the allotment of Hobson Lynch from the United States of America to Ellingson Lumber Company on March 1, 1956, described as:

Willamette Meridian, Oregon

T. 34S. R 13E

Sec. 36 S½ NE¼ and N½ SE¼

(OWRD exhibit 1, pg. 31.)

2. On May 10, 1959 Percy Murray and Rodney N. Murray filed a Notice of Intention to File a Claim form with the OWRD regarding Five Mile Creek and Five Mile Springs. They identified the property appurtenant to that notice as being located in Township 34S, Range 13E, Section 36. They also identified the date beneficial use of water began as 1959. (OWRD exhibit 1, pg. 35.)

3. On May 25, 1959, Ellingson Lumber Company sold a portion of the property described in Finding of Fact No. 1 to Percy and Rodney Murray. (OWRD exhibit 1, pg. 32.)

4. There was no development on the property before two cabins were built in the 1960s. The cabins are now provided water for domestic use and irrigation by two unnamed springs for which Claim 79 was filed. (OWRD exhibit 1, pg. 33.)

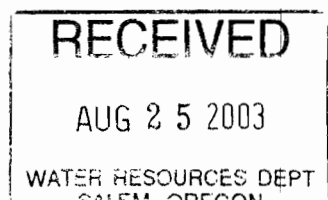
5. On November 14, 1990, Mr. Murray filed Claim 79 as a non-Indian successor to a Klamath Indian Allottee. His claim identifies an unnamed spring, tributary to Five Mile Creek, as his source of water, claiming 20 gallons-per-minute for domestic use and a lawn. The claimed period of use is February through November for domestic use, and May through October for irrigation of a lawn. (OWRD exhibit 1, pgs. 1-12.)

CONCLUSIONS OF LAW

Rodney N. Murray does not have a claim to water as a non-Indian successor to an Indian allottee under criteria set out in the *Colville Confederated Tribes v. Walton* line of cases.

OPINION

Claim 79 is a claim for water rights for lands 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" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *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. denied, 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986) (*Walton III*).

Mr. Murray had the burden of establishing the claim by a preponderance of the evidence. See ORS 539.110; ORS 183.450(2); *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 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). He did not meet his burden.

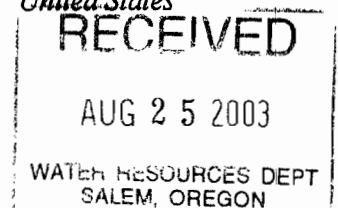
Elements of a *Walton* claim that must be proven include:

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 had been proven, the claim would have been assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.³

The only evidence in the record of this contested case was OWRD's exhibit 1. The greater weight of the evidence established the Bureau of Indian Affairs (BIA) transferred property included in the allotment of Hobson Lynch from the United States of America to

³ The Klamath Reservation was established on October 14, 1864. *Treaty between the United States of America and the Klamath and Modoc 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) (*Adair I*).



Ellingson Lumber Company on March 1, 1956. (OWRD exhibit 1, pg. 31.) Ellingson Lumber Company sold that property to Percy and Rodney Murray on May 25, 1959. With this evidence, it appears that Mr. Murray could easily have met the first two of the requirements as little additional testimony would be needed to lead to an inference that land transferred by the BIA as part of an allotment was on land formerly part of the Klamath Reservation and that the allottee was a member of an Indian tribe. The claim fails for lack of proof on the other elements.

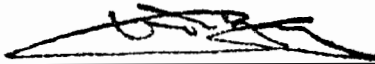
There is no evidence that water use was occurring on property appurtenant to Claim 79 at the time of transfer from Indian ownership, or that water use was developed by the first non-Indian owner. To the contrary, the evidence suggests that the first non-Indian owner, Ellingson Lumber Company, bought the land for timber, logged the property, and sold it to the Murrays without making any improvements to the property. (OWRD exhibit 1, pg. 15.) At any rate, there is no evidence suggesting that Ellingson Lumber Company developed any water use relevant to Claim 79. Also, statements by Mr. Murray clearly show that there had been no development before two cabins were built in the 1960s. (OWRD exhibit 1, pg. 33.)

Even though a *Walton* claim may include water use based on the Indian allottee's undeveloped irrigable land to the extent that the additional water use is developed with reasonable diligence by the *first* purchaser of land from an Indian owner, here it seems that the *second* purchasers developed the water source. A *Walton* right does not go so far. Mr. Murray did not provide testimony or offer exhibits to support his claim and has not met his burden of proving that he has a valid *Walton* water right in Claim 79.

PROPOSED ORDER

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

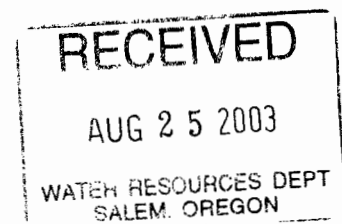
The required *Walton* elements are not established for claim 79. Therefore, the claim is denied.



William D. Young, Administrative Law Judge
Office of Administrative Hearings

Date: August 22, 2003

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

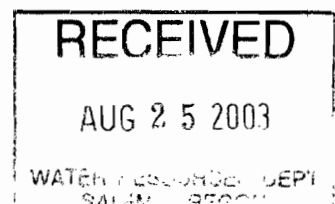


EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

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:

Dick Bailey
Klamath Basin Adjudication
Oregon Water Resources Dept
158 12th Street NE
Salem OR 97301



CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2003, 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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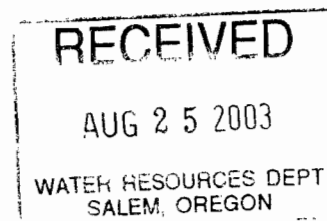
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