

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

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SALEM, OREGON

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

**ORDER GRANTING UNITED
STATES' MOTION FOR RULING ON
LEGAL ISSUES; PROPOSED ORDER**

v.

Rodney N. Murray,
Claimant.

Case No. 218

Claim: 105

Contests: 3484¹, 3751, and 4138

HISTORY OF THE CASE

Pursuant to a Scheduling Order issued September 3, 2003 and a Hearing Notice mailed October 13, 2004, this case is set for hearing on November 17, 2004. On October 18, 2004, the United States of America (United States) filed a Motion for Ruling on Legal Issues (Summary Judgment). Neither Claimant nor any other participant has filed a response to the United States' motion.

ISSUES

(1) Is the United States entitled to a ruling in its favor on its Motion for Ruling on Legal Issues?

(2) Is Claimant entitled to a water right? If so, what are the properties of that water right?

¹ Don Vincent voluntarily withdrew from Contest 3484 on November 28, 2000. Berlva Pritchard voluntarily withdrew from Contest 3484 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew, without prejudice, from Contest 3484 on January 16, 2004.

Klamath Irrigation District; Klamath Drainage District; Tulalake 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; and Collins Products, LLC voluntarily withdrew from Contest 3484 on April 8, 2004, thereby disposing of Contest 3484 in its entirety.

EVIDENTIARY MATTERS

The record consists of Exhibit 1, submitted by the Oregon Water Resources Department (OWRD); the written direct testimony of the United States' witness, Ed Everaert, along with Exhibits 1-8; and Claimant's responses to discovery requests. Claimant did not submit any written direct testimony, nor did he submit any written rebuttal testimony in response to Mr. Everaert's testimony.

LEGAL STANDARD FOR RULING ON LEGAL ISSUES

Motions for rulings on legal issues (Summary Judgment) are governed by OAR 137-003-0580, which establishes standards for evaluating the motion and states in material part:

(6) The administrative law judge shall grant the motion for a legal ruling if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party ***.

Considering the evidence in a manner most favorable to the non-moving party, I make the following:

FINDINGS OF FACT

(1) Claimant filed Claim 105 on November 4, 1990, claiming water at the rate of 2.51 cubic feet per second (cfs) from two diversion points on Five Mile Creek, a tributary to the Sprague River, for watering 200 head of livestock and irrigating 72.6 acres. The priority date claimed is 1864, and the season of use claimed is April 1 to November 1. (OWRD Ex. 1 at 1-6.) The place of use includes two former Klamath Indian allotments, Allotment Nos. 1461 and 734, as well as 32.4 acres of unallotted Tribal land. (Testimony of Everaert at 3.)

(2) OWRD filed its Preliminary Evaluation of the claim on October 4, 1999, finding that the elements of a *Walton* water right had been established. (OWRD Ex. 1 at 111-14.)

(3) On May 8, 2000, the Klamath Project Water Users (KPWU) filed Contest 3484, the United States filed Contest 3751, and the Klamath Tribes filed Contest 4138.

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(OWRD Ex. 1 at 54, 94, 98.) Subsequently, on April 8, 2004, KPWU withdrew Contest 3484 in its entirety.

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(4) Allotment No. 1461 passed into non-Indian ownership on September 13, 1960, at which time there was no irrigation on the 37.3 acres claimed in former Allotment No. 1461. The first non-Indian owners were W.V. and Doris C. Meade and Percy and Marcella Murray. As of 2000, only 34.74 acres were under irrigation. (Testimony of Everaert at 3-4.)

(5) The lands in Allotment No. 734 first passed into non-Indian ownership on May 29, 1957 when the land was purchased by the Weyerhaeuser Timber Company. The second non-Indian owners were W.V. and Doris C. Meade and Percy and Marcella Murray, who purchased the land on February 27, 1963. The claim is for 2.9 acres of irrigation on former Allotment No. 734. There was no irrigation on this land in 1960. (*Id.* at 4.)

(6) The former Tribal lands that were not allotted passed into non-Indian ownership on August 4 and August 7, 1959. The second non-Indian owners were W.V. and Doris C. Meade and Percy and Marcella Murray who purchased the property March 16, 1960. The claim is for 32.4 acres of irrigation. The land was not irrigated in 1960. (*Id.* at 5.)

(7) All 72.6 acres claimed in Claim 105 are covered by OWRD water right Certificate 38088, Permit 28441, with a priority date of October 4, 1962. The water right certificate is limited to a water duty not to exceed 3 acre-feet per acre and a rate of 1/40th of one cfs per acre. The notice of beginning of construction was filed July 15, 1963, and the notice of complete application of water to a beneficial use was filed May 1, 1968. (*Id.* at 3.) An irrigation ditch was constructed in the fall of 1963, with additional construction in 1965 and 1967. All the lands in Claim 105 first received irrigation water on October 1, 1966, when 80 acres were seeded and irrigation water was applied for the first time. (*Id.* at 6.) Claimant admitted that a water duty of 3.0 acre-feet per acre is reasonable. (*Id.* at 7; Ex. 8.)

OPINION

Because claimant is claiming water rights as a non-Indian successor to a Klamath Indian allottee, the water right is governed by the *Colville Confederated Tribes v. Walton* line of cases.² As outlined by Administrative Law Judge William D. Young in *Nicholson*

² 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*).

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

It is uncontested that Claimant's land was formerly part of the Klamath Indian Reservation, and that with respect to the two allotments involved, the land was transferred from an Indian allottee to a non-Indian successor. It is uncontested that the land was not under irrigation at the time of transfer from Indian ownership.

Therefore, the question is whether water use was developed with reasonable diligence by the first purchaser of land from an Indian owner, and whether the water claimed has been continuously used by all subsequent successors. With respect to Allotment No. 734, the first non-Indian purchaser was Weyerhaeuser Timber Company in 1957. The evidence is uncontested that Weyerhaeuser did not irrigate the land. Therefore, since the first non-Indian purchaser of the land did not develop water use on the lands that were formerly in Allotment No. 734, no *Walton* water right can be claimed on this land by subsequent owners.

With respect to Allotment No. 1461, the evidence establishes that the land passed into non-Indian ownership September 13, 1960, and that the first non-Indian owners, the Meades and Murrays, built an irrigation ditch in the fall of 1963, pursuant to a water right certificate with a priority date of October 4, 1962. Additional construction occurred in 1965 and 1967. The United States concedes that additional water use was developed on the lands that were formerly part of Allotment No. 1461 with reasonable diligence by the first non-Indian owners. Claimant claimed 37.3 acres in former Allotment No. 1461, but the uncontroverted evidence establishes that as of 2000, only 34.74 acres were under irrigation. Therefore, a *Walton* water right, with a priority date of October 14, 1864, has been established for 34.74 acres that were formerly part of Allotment No. 1461.

Rodney N. Murray (218)

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Claim 105 also includes 32.4 acres of unallotted Tribal land.³ This land first passed into non-Indian ownership in August 1959. The land was not under irrigation when it passed into non-Indian ownership, nor was it irrigated by the first non-Indian owners. Therefore, a *Walton* water right cannot be established for this land.

The uncontested evidence establishes that Claimant is entitled to a *Walton* water right for only 34.74 acres of land in former Allotment No. 1461, with a priority date of October 14, 1864. A water rate of 1/40th of one cfs per irrigated acre is the standard in the Klamath Basin, as well as the rate approved for the subject lands by Certificate 38088, Permit 28441. There is no evidence to support a different rate. Claimant acknowledged that a water duty of 3.0 acre-feet per acre is reasonable, which is the same as the duty approved by Certificate 38088, Permit 28441. The evidence does not support the balance of water claimed in Claim 105.

Because the record in this case shows that there is no genuine issue as to any material fact that is relevant to resolution of this case, and because the United States is entitled to a ruling in its favor as a matter of law, the United States' Motion for Ruling on Legal Issues is granted.

ORDER

- (1) The United States' Motion for Ruling on Legal Issues is granted.
- (2) It is proposed that Claimant should be entitled to a water right with the following properties:
 - (a) Place of Use: 34.74 acres in former Allotment No. 1461 located at
 - 9.45 acres in NESE, Section 28, T35S, R13E⁴
 - 24.26 acres in NWSW, Section 27, T35S, R13E
 - 1.03 acres in NESW, Section 27, T35S, R13E
 - (b) Point of Diversion: SW1/4 SE1/4 Section 27, T35S, R13E, W.M.
 - (c) Rate: .87 cfs (34.74 acres divided by 40 = .87 cfs).
 - (d) Priority Date: October 14, 1864
 - (e) Season of Use: April 1 – November 1
 - (f) Source: Five Mile Creek, tributary to the Sprague River

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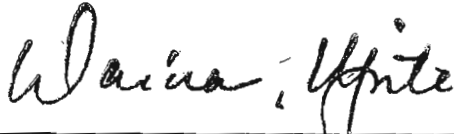
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³ The United States refers to a water right derived from unallotted Tribal lands as a Klamath Termination Act water right, and establishment of such a water right is subject to a similar legal standard as a *Walton* water right. See United States' Motion for Ruling on Legal Issues at 6, footnote 5.

⁴ Township 35 South, Range 13 East.

(g) Use: irrigation of 34.74 acres and livestock watering.

(3) The remaining water right claims asserted in Claim 105, filed November 4, 1990, should be denied.



Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: November 10, 2004

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:

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

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CERTIFICATE OF SERVICE

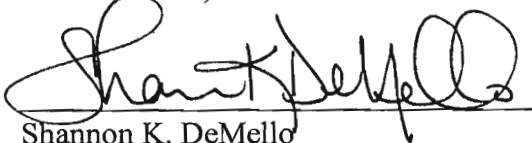
I hereby certify that on November 10, 2004, I mailed a true copy of the following: **LETTER TO PARTIES CANCELING HEARING AND ORDER GRANTING UNITED STATES' MOTION FOR RULING ON LEGAL ISSUES; PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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