

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; 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. 248

Claim: 279

Contests: 3558¹, 3815, and 4209²

vs.

Ambrose McAuliffe; Susan McAuliffe;
Claimants.

HISTORY OF THE CASE

This claim was originally filed on January 31, 1991 by Paul Wilson as a claim by a Klamath Indian Allottee for a water right, including acreage under irrigation and sufficient water to irrigate additional land as "practicably irrigable acreage" (PIA). Subsequently, Claimants Ambrose McAuliffe and Susan McAuliffe purchased the property. Claimants seek a water right as non-Indian successors to a Klamath Indian Allottee, claiming an amount of water put to beneficial use prior to transfer from Indian ownership, as well as sufficient water to irrigate the

¹ Don Vincent voluntarily withdrew from Contest 3558 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contest 3558 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3558 on January 15, 2004.

² The Klamath Tribes voluntarily withdrew Contest 4209. See KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST (August 3, 2004).

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allotment's share of the Tribe's PIA³ as to additional property. This *Walton* claim is for 174.8 acre-feet of water for irrigation of approximately 26.2 acres presently irrigated, an additional 19.9 practicably irrigable acres of land, and for livestock use for 20 head of cattle. The claimed period of use is March 1 through October 16 for irrigation, and year-round for livestock.

Oregon Water Resources Department (OWRD) issued its preliminary evaluation of the claim on October 4, 1999, preliminarily denying the claim.

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; (hereinafter collectively called Klamath Project Water Users or KPWU) filed Contest 3558 on May 8, 2000. The United States of America filed Contest 3815 on May 8, 2000. Klamath Tribes filed Contest 4209 on May 8, 2000 as well, but this contest was subsequently withdrawn.

On November 29, 2005, Claimants and the United States entered into a stipulation whereby the United States agreed to withdraw Contest 3815 in return for an agreement from Claimants as to maximum rate and duty to be allowed.

This matter came on for hearing on December 19, 2005, before Administrative Law Judge Maurice L. Russell, II. Claimants Ambrose and Susan McAuliffe appeared through their counsel, Ronald Yockim. Contestant the United States of America appeared through its attorney, Larry A. Brown. Contestant KPWU appeared through attorney Jacqueline L. McDonald. The Oregon Water Resources Department appeared through Jesse Ratcliffe, Assistant Attorney General.

EVIDENTIARY RULINGS

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

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

Direct Testimony of Ambrose W. McAuliffe
Direct Testimony of Douglas E. Atkins

Prior to the hearing, Claimants' attorney Ron Yockim filed a corrected exhibit list, correctly listing the exhibits that Claimants offered in evidence. This offer was accepted and the exhibits therein listed were admitted into the record. Those exhibits were Exhibits AMc2 through AMc55, AMc94 through AMc96.

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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Contestant KPWU objected on relevancy grounds to Exhibits AMc5, AMc9, AMc11, AMc13 through AMc20, and AMc21. After argument, however, KPWU withdrew its objection, and these exhibits were admitted subject to consideration as to weight. The record closed on the date of the hearing.

ISSUES⁴

- 1) Whether there is sufficient evidence to support the right claimed.
- 2) Whether the required elements are established for an Allottee [now *Walton*] water right with a priority date of October 14, 1864.
- 3) Whether the claimed source was previously adjudicated and Claimants present issues that can be legally redetermined.

FINDINGS OF FACT

1) For all allowed water rights for irrigation in Claim 279, the rate is 1/40th cubic foot per second (cfs) per acre. For a portion of the property (26.2 acres) the Duty for irrigation is 3.5 acre feet per acre per year. For the remainder of the allowed irrigation acres, the Duty is 3.1 acre-feet per acre per year. The Period of Use for irrigation is March 1 through October 16. For livestock watering, the rate is 240 gallons per day, the Duty is 0.3 acre-feet per year, and the period of use is January 1 through December 31. For all uses the priority date is October 14, 1864. (Stipulation between Ambrose McAuliffe, Susan McAuliffe, and the United States and Withdrawal of Contest by the United States at 2, 3.)⁵ (hereafter "Stipulation")

2) This property was first allotted to Mary Wilson, a Klamath Indian, as Allotment No. 96. It is composed of the W ½ of the NE ½ and the E ½ of the NW ½ of Section 35, T33S, R7½E.W.M. originally totaling 160 acres. (OWRD Ex. 1 at 30.) Prior to the claim, a portion of the property was transferred, resulting in a total parcel subject to this claim of 59 acres. (*Id.* at 14.) The property remained in Indian ownership until 2001. (Direct Testimony of Ambrose McAuliffe at 2.) Of this parcel, 26.2 acres were being irrigated while the property was in Indian ownership. The point of diversion for this irrigation is from Crooked Creek, tributary to Wood River, in the SW ¼ NE ¼, Section 26 T33S R7½E.W.M. (*Id.*; OWRD Ex. 1 at 17; Stipulation at 2.)

3) On March 14, 2001 Myona Wilson, widow of Paul Wilson and last Indian owner of the property, transferred the property by deed to Will J. McAuliffe, the present Claimants' son, for \$110,000. (*Id.* at 92.) Will J. McAuliffe transferred the property the same day, March 14, 2001, to his parents, by a deed reciting consideration for the transfer as "Love and Affection." (OWRD Ex. 1 at 94.) In purchasing the property from Myona Wilson, Will J. McAuliffe was

⁴ Other issues were originally raised in this case, but as the parties that presented them have withdrawn their contests, the issues are no longer before me and will not be discussed.

⁵ Although KPWU was not a party to this Stipulation, it relied upon its enforceability in its argument, and did not contest the rate and duty. Consequently, the rate and duty for the allowed portions of the claim are those agreed upon in the Stipulation.

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acting as agent for Ambrose McAuliffe and Susan McAuliffe, his parents, who supplied the consideration for the purchase of the property. (Direct Written Testimony of Ambrose McAuliffe at 2.)

4) Subsequent to their purchase of the property, between 2001 and 2005, Claimants developed irrigation works for an additional 15.5 acres on the property. (Direct Testimony of Ambrose McAuliffe at 4, 5.) A portion of the additional acreage, 5.2 acres, is irrigated from the diversion point on Crooked Creek noted above. (*Id.*) The remainder, 10.3 acres, is irrigated from a diversion point on Fort Creek, located in the SW ¼ NW ¼ Section 26, T33S, R7½E.W.M. (*Id.*) All irrigation works for the claimed property were in place by the end of 2005. (*Id.*)

CONCLUSIONS OF LAW

- 1) **There is sufficient evidence to support the right claimed.**
- 2) **The required elements are established for a water right with a priority date of October 14, 1864.**
- 3) **The claimed source was not previously adjudicated as to this parcel⁶.**

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.

This case was originally a claim based upon ownership by a Klamath Indian Allottee. In 2001, however, the property was transferred to a non-Indian. Consequently, the claim is to be analyzed as a claim by a non-Indian successor to an Indian owner, also called a *Walton* right, after the line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985). 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;

⁶ No evidence was presented on this issue, and no argument raised at closing. Consequently, the issue is resolved against Contestant, which had the burden of proof. ORS 183.450(2)

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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.

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

I adopt that formulation as the correct interpretation of the *Walton* line of cases.

KPWU argues that the claim should be limited to the amount agreed upon in the Stipulation. Since Claimants agreed to the Stipulation, and KPWU does not object to its terms, except in one particular to be discussed later, and since, for the most part, the terms of the Stipulation are congruent with the claim as proven by evidence, this issue is resolved by allowing the claim in the amount specified in the Stipulation.

However, KPWU also argues that 15.5 acres claimed were not developed by the last Indian owner or the first non-Indian owner. Since the property was first transferred to Will McAuliffe, KPWU argues, the current claimants, who developed the irrigation on the 15.5 acres at issue, are the second non-Indian owners, and should not receive the benefit of the 1864 priority date for this acreage.

In other cases in this adjudication, when an Allotment was purchased by a non-Indian and transferred to a second non-Indian a short time after, it has been held that the inchoate right to develop irrigation does not pass to the second non-Indian purchase, following the *Walton* cases noted above. However, in those cases there has been no evidence that the second transaction was not an arms-length transaction between seller and buyer. Likewise, in cases in which an entity such as a trust or partnership has acquired an Allotment from an Indian and some time later transferred the Allotment to a non-Indian who previously held an interest in the entity, no evidence has been offered that would show that the entity was holding the property for the individual the entire time.⁷ In the absence of such evidence, it is inferred that the ordinary course of business has been followed, and that the entity originally acquired the property for its own account. ORS 40.135(L), (m)⁸

In this case, however, contrary evidence is to be found in the record. Will McAuliffe, the first non-Indian purchaser of record, acquired the property as agent for

⁷ See, for example, Proposed Order in Klamath Adjudication Case 272, issued December 5, 2006.

⁸ Although the Oregon Evidence Code, ORS Chapter 40, is not binding in administrative proceedings, its provisions are nonetheless persuasive, and form the basis for proper inferences.

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his parents, who supplied the consideration and immediately took title themselves, and not for his own account. Consequently, while the title passed through Will McAuliffe to Claimants, ownership was vested in Claimants from the moment the property was transferred by the last Indian owner. *Barnes v. Eastern and Western Lumber Co.*, 205 Or 553 (1955); *John I. Haas, Inc. v. Tax Com.* 227 Or 179, 180-81 (1961). In reality, then, Claimants were the first non-Indian owners of the property, and developed the remaining 15.5 acres of irrigated land during that ownership.

Based upon the foregoing, I conclude that the claim should be allowed according to the terms of the Stipulation.

ORDER

I propose that the Adjudicator issue the following order:

Claim 279 is allowed as follows:

0.3 acre-feet/year for water for 20 head of cattle with a period of use of January 1 through December 31 and priority of October 14, 1864.

Irrigation use as follows:

Season of Use (all diversion points): March 1 to October 16.

Purpose of Use (all diversion points): Irrigation

Priority Date: (all diversion points) October 14, 1864

Point of Diversion: SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 26 T33S R7 $\frac{1}{2}$ E.W.M.

Source: Crooked Creek, a tributary to Wood River.

Rate: 0.78 cfs

Duty: 91.7 acre-feet

Acres: 31.4

Place of Use:

For 9.1 acres—NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 35 T33S R7 $\frac{1}{2}$ E.W.M.

For 22.3 acres—NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 35 T33S R7 $\frac{1}{2}$ E.W.M

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

Source: Fort Creek, a tributary to Wood River.

Rate: 0.25 cfs

Duty: 31.9 acre-feet

Acres: 10.3

Place of Use:

NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 35 T33S R7 $\frac{1}{2}$ E.W.M.



Maurice L. Russell, II, Administrative Law Judge

Office of Administrative Hearings

Dated: February 20, 2007

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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 February 20, 2007, 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:

Dwight W. French / Teri Hranac
Oregon Water Resources Dept.
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Phone: 503-986-0826
Fax: 503-986-0901
Teri.Hranac@wrд.state.or.us

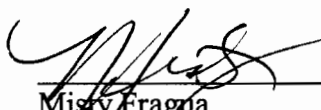
Paul S. Simmons/Andrew M. Hitchings
Somach, Simmons & Dunn
Hall of Justice Building
813 Sixth Street, Third Floor
Sacramento, CA 95814-2403
Phone: 916-446-7979
Fax: 916-446-8199
psimmons@lawssd.com
ahitchings@lawssd.com

Ronald S. Yockim
Attorney at Law
430 SE Main Street
PO Box 2456
Roseburg, OR 97470
Phone: (541) 957-5900
Fax: (541) 957-5923

Barbara Scott-Brier
US Dept of Interior
500 NE Multnomah St., Suite 607
Portland, OR 97232
Phone: 503-231-2139
Fax: 503-231-2166

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St. NE
Salem, OR 97301
Phone: 503-947-4500
Fax: 503-378-3802
Jesse.D.Ratcliffe@doj.state.or.us

William M. Ganong
Attorney at Law
514 Walnut Street
Klamath Falls, OR 97601
Phone: 541-882-7228
Fax: 541-883-1923
wganong@aol.com



Misty Fraga
Administrative Assistant

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