

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.; Reames Golf and
Country Club; Van Brimmer Ditch Company;
Plevna District Improvement Company; Collins
Products, LLC;

Contestants

PROPOSED ORDER

Case No. 83

Claim: 676

Contests: 1756 and 3563¹

vs.

Cecil R. and Mildred K. Sommers; Nora L.
Flynn; LaVina Arlene Anderson; Robert U.
Burch;

Claimants/Contestants.

HISTORY OF THE CASE

This claim was originally filed as a claim by a Klamath Indian holding parts of several allotments of land from the Klamath Indian Reservation, claiming an amount of water put to beneficial use as of the date of the claim, plus an amount of water sufficient to irrigate the allotments' share of the Klamath Tribe's "practically irrigable acreage" (PIA). At least part of the property in question was later sold to non-Indians. As to that property, Claimants Cecil R. and Mildred K. Sommers, and Claimant Nora L. Flynn seek a water right as non-Indian successors to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the

¹ Don Vincent voluntarily withdrew from Contest 3563 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3563 on June 24, 2002. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3563 on January 15, 2004.

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allotments' share of the Tribe's PIA.² As presently stated the portion of this claim for land held by persons who participated in this case is for 3.1 acre-feet of water per acre for irrigation of approximately 156 acres of land either under irrigation while in Indian ownership or developed after the filing of the claim (60 acres for Claimant Flynn, and 96 acres for Claimants Cecil and Mildred Sommers). One other parcel subject to the original claim is held by Claimant LaVina Arlene Anderson (2 acres).³ The claimed period of use is April 26 through October 18. The claimed priority date is October 14, 1864.⁴

On January 31, 1991, Norman Miller Anderson, a Klamath Indian, filed Claim 676 as a Klamath Indian Allottee. Subsequently, Claimants Nora L. Flynn, Cecil R. and Mildred Sommers and LaVina Arlene Anderson acquired portions of the property. On October 4, 1999, Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation preliminarily approving the claim for a lesser quantity of water and acreage than claimed. Contest 1756 was filed in support of the Claim on May 3, 2000. 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; (hereafter collectively called Klamath Project Water Users or KPWU) filed Contest 3563 on May 8, 2000.

OWRD referred the matter for hearing to the Office of Administrative Hearings (OAH). The OAH issued a Hearing Notice on June 1, 2006. KPWU filed its Amended Statement of Contest on June 28, 2006.

A hearing was held pursuant to the hearing notice by telephone on July 11, 2006, beginning at 9:00 a.m., with Administrative Law Judge Donna Brann presiding. The following participated: Ron Yockim representing Claimants Nora L. Flynn, and Cecil R. and Mildred K. Sommers; Andrew Hitchings representing the Klamath Project Water Users (KPWU); and Jesse Ratcliffe representing the Oregon Water Resources Department (OWRD). No testimony was taken at this hearing, but evidentiary issues were discussed and resolved.

² 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).

³ Claimant Anderson did not appear in these proceedings, but is shown in the record as successor to Norman Miller Anderson, the original claimant. Although the claim maps include a parcel presently owned by Robert U. Burch, and the legal description of the claim in the Statement and Proof of Claim filed January 31, 1991 would seem to include it (OWRD Ex. 1 at 46), the metes and bounds description of the property transferred to Norman Miller Anderson by the estate of George Anderson, a Klamath Indian, on April 4, 1973 did not include Burch's property, and, indeed, described it as having been previously conveyed by deed. (Ex. C-22.) All subsequent conveyances exclude Burch's property, as well. There is no evidence that Norman Miller Anderson owned Burch's property at the time he filed the claim. Therefore, Burch's property was not properly part of this claim, and will not be discussed further.

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

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Pursuant to a schedule arrived-at during the hearing on July 11, 2006, the various participants supplemented the record with corrected exhibits and testimony, and submitted closing, response and reply briefs. The record closed on November 15, 2006.

After the record closed, the case was assigned to me to prepare this Proposed Order. I have reviewed the entire record, including the record of the telephone hearing and all argument, 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.
Direct Testimony of Ronald S. Yockim, including Exhibits C-1 through C-29.⁵
Direct Testimony of John Flynn.
Direct Testimony of Cecil Sommers.
Corrected Direct Testimony of Mildred Sommers.⁶

KPWU argued that the two Natural Resource Consulting Engineers, Inc. (NCRE) reports included in OWRD Exhibit 1 as pages 3 through 17 and 68 through 88, were hearsay and, being unsigned, lacked foundation. Therefore, KPWU argued, these reports are inadmissible and may not form the basis for a determination of practicable irrigable acreage in this claim. This objection was overruled at hearing, subject to consideration of the appropriate weight to be given the documents.

ISSUES

1. **Whether there is sufficient evidence to support the right claimed.**
2. **Whether the required elements are established for an Allottee water right with a priority date of October 14, 1864.**
3. **Whether the record indicates the practicably irrigable acreage claimed or that it would be technically possible or economically feasible to develop an irrigation system to serve such acreage.**
4. **Whether there is sufficient title information to establish a *Walton* right on portions of the claimed place of use.**
5. **Whether irrigation of portions of the claimed place of use was developed by the Indian owner before the land was transferred to the first non-Indian owner.**

⁵ Exhibit C-29 was submitted after hearing under agreement by the participants.

⁶ The Corrected Testimony of Mildred Sommers was filed after the hearing under agreement by the participants.

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6. **Whether irrigation of portions of the claimed place of use was developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.**
7. **Whether irrigation of portions of the claimed place of use was developed with reasonable diligence by the non-Indian owner(s) after the first non-Indian purchaser from an Indian owner.**
8. **Whether irrigation of portions of the claimed place of use has been continuous.**
9. **Whether the total acreage in the claimed place of use exceeds the irrigated acreage supported by the evidence.**
10. **Whether the irrigation season of use can be more than the season of use claimed; and whether the claimed irrigation season of use exceeds the actual season of use supported by the evidence for portions of the claimed place of use.**
11. **Whether the diversion rate for any lands awarded a water right should be greater than one cfs per forty acres.**
12. **Whether the water duty should be more than 3.5 acre-feet per acre for any part of the claimed place of use awarded a water right.**
13. **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) The original claim in this case was for 708 acre-feet of water per year for irrigation for 11.0 acres of land, 20 head of livestock and 213.1 acres of PIA. (OWRD Ex. 1 at 4-7.) After non-Indians acquired the property, they asserted that additional acres had been diligently developed either while in Indian ownership, or soon after the property passed into non-Indian hands. (Direct Testimony of John Flynn; Direct Testimony of Cecil Sommers; Corrected Direct Testimony of Mildred Sommers.)

2) For all allowed water rights in Claim 676, the Rate is 0.0165 cfs/acre. (OWRD Ex. 1 at 87.) The Duty is 3.1 acre-feet of water per acre per year. (*Id.* at 80.) The Period of Use for irrigation is April 26 through October 18. (*Id.* at 24.) The Priority date is October 14, 1864.⁷

3) The land subject to this claim was originally two parcels composed of portions of lots 9, 11, 12, and 13 and all of lots 10, 14, 15 and 16, located in S ½ N ½ Section 15, T36S R12 E.W.M., and portions of lots 21, 27, 28, 29 and 30 and all of lots 18, 19, 20 and 22, located in SW ¼ Section 14, T36S R12 E.W.M. (*Id.* at 22.) All parcels were part of the Klamath Indian

⁷ The date of the Klamath Indian Treaty, October 14, 1864, was held to be the priority date for agricultural rights reserved by that treaty in *United States v. Adair*, 723 F.2nd 1394 (9th Cir. 1983).

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Reservation and parts of allotments allotted to several different Klamath Indians. (Ex. C-2, C-11, C-12.) The parcels remained in Indian ownership until the early 1990s, after Norman Miller Anderson, the last Indian owner, had filed this claim. In 1992 Anderson sold all of the property in Section 15 to Claimant Nora Flynn, a non-Indian, except 2 acres that were retained by Anderson and subsequently transferred to LaVina Arlene Anderson, his wife. (Ex. C-23.) In 1993 Anderson sold all the property in Section 14 to Claimants Cecil R. and Mildred K. Sommers, also non-Indians.

4) Although Norman Miller Anderson was a Klamath Indian (OWRD Ex. 1 at 18), there is no evidence in the record that LaVina Arlene Anderson is also an Indian. (Ex. C-6.) There is no evidence of irrigation on the property held by LaVina Anderson.

5) Beginning in 1916 the Indian Irrigation Agency constructed the Spring Creek Project, including the Brown Ditch which diverts water from springs at the head of Spring Creek in the SW ¼ NE ¼ Section 23, T36S R12E.W.M., and passes through both the parcels in this claim. The ditches were completed through both parcels by 1920. (Ex. C-25 at 4, 8.)

6) At the time Nora Flynn purchased the property in Section 15 in 1993, pipes were in place in the Brown Ditch to allow irrigation of the property. Although this system was in disrepair, Flynn's son, John Flynn, repaired the system and irrigated 60 acres between the Brown Ditch and a railroad track the first year. This property has been irrigated continuously since that time. (Direct Testimony of John Flynn.)

7) At the time Cecil and Mildred Sommers purchased the property in Section 14 in 1992, 11 acres were irrigated from the Brown Ditch. Five acres were watered by a spring on the property. Anderson had also irrigated 80 acres with a tractor-mounted pump. Claimants Sommers continue to irrigate the 11 acres from Brown Ditch but have not irrigated the 80-acre parcel since 1992. It is unclear whether the five acres are watered by natural flow from the springs or has been diverted. The evidence does not include a description of any diversion works. (Direct Testimony of Cecil Sommers; Corrected Direct Testimony of Mildred Sommers.)

8) Although Norman Miller Anderson grazed 20 head of cattle on the property (OWRD Ex. 1 at 3), there is no evidence of use of water for livestock since he sold the property in 1992 and 1993.

CONCLUSIONS OF LAW

1. **There is sufficient evidence to support some of the right claimed.**
2. **The required elements are not established for an Allottee water right with a priority date of October 14, 1864.**
3. **While the record indicates the practicably irrigable acreage claimed, much of that acreage has not been diligently developed since passage of the property from Indian ownership.**

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4. **There is sufficient title information to establish a *Walton* right on portions of the claimed place of use.**
5. **Irrigation of portions of the claimed place of use was developed by the Indian owner before the land was transferred to the first non-Indian owner.**
6. **Irrigation of portions of the claimed place of use was developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.**
7. **The first non-Indian purchasers from an Indian owner remain in title to the property.**
8. **Irrigation of portions of the claimed place of use has been continuous.**
9. **The total acreage in the claimed place of use exceeds the irrigated acreage supported by the evidence.**
10. **The irrigation season of use cannot be more than the season of use claimed; and the claimed irrigation season of use does not exceed the actual season of use supported by the evidence for portions of the claimed place of use.**
11. **The diversion rate for any lands awarded a water right should be less than one cfs per forty acres.**
12. **The water duty should be less than 3.5 acre-feet per acre for any part of the claimed place of use awarded a water right.**
13. **While the record supports the existence of a water right, it does not support the rate, duty, actual use, place of use, and acreage as claimed. The record does support some of the points of diversion and re-diversion, and the season of use 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.

At this point, there is no evidence that an Indian owns any part of the property. Although LaVina Arlene Anderson was Norman Miller Anderson's wife, this does not, of itself, show she is an Indian. She is not listed on the part of the Final Roll of the Klamath Tribe prepared in 1956

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that was entered into the record. Consequently, all water use on the property will be analyzed as claims to water by non-Indian successors to Klamath Indian Allottees, also called *Walton* claims.

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.

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

I adopt ALJ Young's formulation.

In addition, unlike some other types of water rights subject to this adjudication, *Walton* rights cannot be based upon appropriations using natural overflow or subirrigation, but must be supported by an artificial diversion of water. As stated by Administrative Law Judge Ken Betterton in Klamath Adjudication Case 157:

It is clear to me after reading the District Court's Memorandum Decision in *Colville Confederated Tribes v. Walton*, No. 3421 (D E Wash, filed December 31, 1983, which *Walton III* [*Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985)] reversed and remanded with a mandate in 1985, and the District Court's Order, *Colville Confederated Tribes v. Walton*, No. C-3421-RJM (D E Wash, filed June 25, 1987), based on the Ninth Circuit's mandate in *Walton III*, that sub-irrigation does not constitute a valid *Walton* water right. (Note omitted.)

Klamath Adjudication Case 157, Amended Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues, December 10, 2004, at pages 3, 4.

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Indian Ownership

The parties did not argue that Klamath Indian Allottees did not own the property up until Norman Miller Anderson sold the property in 1992 and 1993. Hence the present claimants are the first non-Indian owners of the property.

Indian Beneficial Use

In 1991, the field inspector found only 11 acres being irrigated. This acreage is also evidenced by the NRCE report issued in 1992. However, as Claimants point out, that inspection was conducted in November, after the irrigation season. Moreover, because an Indian still held the property, the inspection is only relevant to show what acreage the Indian owner was irrigating at the time. The field inspection does not show what acreage might have once been irrigated, or what acreage could be practically irrigated.

Non-Indian Beneficial Use and Development

The sworn testimony of John Flynn shows that Norma Flynn began irrigating 60 acres from Brown Ditch immediately after she acquired the property, and continues to do so. John Flynn's Direct Testimony states: "When the water from these sources is not adequate to irrigate these lands, I use the wells that were drilled by Mr. Anderson to supplement the irrigation water." His use of the present tense shows continued irrigation of the 60 acres. He also testified that when he first came on the property, the works for irrigating the 60 acres were installed, but in disrepair. This is not inconsistent with the field inspection, although the inspector never mentioned such works. However, given that Flynn, the first non-Indian owner, irrigated the 60 acres within a year after Anderson sold the property, and continues to do so today, the evidence is sufficient to allow that portion of the claim.

The Sommers testified that they have continued to irrigate 11 acres from Brown Ditch since they acquired the property from Anderson. Although they testified that Anderson irrigated 80 acres out of Brown Ditch from a tractor-mounted pump, they did not testify that they have done so since they acquired the property, 14 years ago. Thus, they cannot be found to have diligently developed or continuously irrigated the 80 acres previously noted.⁸ Of the 16 acres to which the Sommers testified, the field inspector reported 11 acres. The other five acres are not evidenced as irrigated anywhere else in the record. The Sommers' testimony in regard to the five acres is equivocal as to whether the springs water the five acres through natural overflow or sub-irrigation or are artificially diverted. Their testimony makes no mention of diversion. Instead, they say: "Further there were Five [sic] acres that were irrigated by springs in the Northwest corner of the property." (Direct Testimony of Cecil Sommers; Corrected Direct Testimony of Mildred Sommers.) (emphasis added) The phrase "were irrigated by springs" leaves open the question whether this water is diverted or not. As noted above, these claimants have the burden of proving by a preponderance of the evidence all the elements of a *Walton*

⁸ This conclusion only applies to surface water. In 1994 the Summers applied for a permit to irrigate 116 acres in Section 14 from groundwater that is not subject to this adjudication. (OWRD Ex. 1 at 115.)

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claim. That would include evidence of a diversion. The Sommers' testimony leaves this question in equipoise. It does not reach the level of a preponderance. Therefore, as to the five acres, Claimants Sommers have not met their burden of proof.

Practically Irrigable Acreage

Given that by the time of the hearing 13 or 14 years had passed since the properties passed out of Indian ownership, the amount of practically irrigable acreage is no longer an issue, as any acreage beyond what is currently irrigated has not been diligently developed.

ORDER

I propose that the Adjudicator issue the following order:

Claim 676 is allowed in part as follows:

Flynn:

Stock Water: None

Irrigation use as follows:

Season of Use : April 26 through October 18

Purpose of Use : Irrigation

Priority Date: October 14, 1864

Rate: 0.99 cfs

Duty: 186 acre-feet of water per year

Acres: 60

Source: Springs tributary to Brown Ditch tributary to Sprague River

Place of Use:

SW ¼ NW ¼ Section 15 T36S R12E.W.M.

SE ¼ NW ¼ Section 15 T36S R12E.W.M.

SW ¼ NE ¼ Section 15 T36S R12E.W.M.

SE ¼ NE ¼ Section 15 T36S R12E.W.M.

Point of Diversion:

SW ¼ NE ¼ Section 23, T36S R12E.W.M.

Sommers:

Stock Water: None

Irrigation use as follows:

Season of Use : April 26 through October 18

Purpose of Use : Irrigation

Priority Date: October 14, 1864

Rate: 0.1815 cfs

Duty: 34.1 acre-feet of water per year

Acres: 11

Source: Springs tributary to Brown Ditch tributary to Sprague River

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Place of Use

NW ¼ SW ¼ Section 14, T36S R12E.W.M. 5.3 acres
NE ¼ SW ¼ Section 14, T36S R12E.W.M. 4.3 acres
SE ¼ SW ¼ Section 14, T36S R12E.W.M. 1.4 acres
Total 11 acres

Point of Diversion:

SW ¼ NE ¼ Section 23, T36S R12E.W.M.

The remaining portions of the claim should be denied.



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

Dated: April 2, 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 2, 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:

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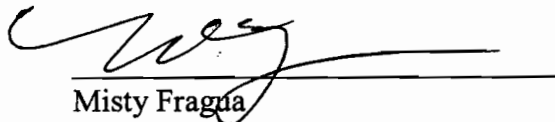
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