

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 Tribes;
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;
Contestant(s)

AMENDED PROPOSED ORDER AFTER
FURTHER PROCEEDINGS

Case No. 157

Claim(s): 4

Contest(s): 2039, 3430, 3710, and 4066

vs.

Thomas J. Shaw;
Claimant/Contestant.

HISTORY OF THE CASE

This proceeding under the provisions of ORS Chapter 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.

Thomas J. Shaw (“Shaw” or “Claimant”) filed Claim 4 on or about January 31, 1991 for water as a non-Indian successor to a Klamath Indian Allottee. Claimant claimed an amount of water sufficient to irrigate the allotment’s share of the Tribe’s practicably irrigable acreage (PIA), commonly known as “Walton claims.”

On October 4, 1999, Richard D. Bailey, then Klamath Basin Adjudicator, issued a Preliminary Evaluation (PE) denying Claim 4 in its entirety. Claimants filed Contest 2039 on or

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about May 4, 2000, contesting the PE. On May 8, 2000, the United States filed Contest 3710 and the Klamath Tribes filed Contest 4066 contesting the water rights claimed in Claim 4.

On June 28, 2004, Claimant and the United States of America filed cross motions under former OAR 137-003-0580 for rulings on legal issues for Claim 4 as to whether a *Walton*¹ right exists for a wildlife purpose of use, and whether a *Walton* right exists for an irrigation purpose of use when the claim is based upon water being provided to plants by natural overflow and sub-irrigation. On August 24, 2004, Administrative Law Judge (ALJ) Ken Betterton issued an Order on Motions for Ruling on Legal Issues granting in part and denying in part Claimant's motion, and denying the United States' motion in its entirety.

On September 13, 2007, the United States filed a Motion for Reconsideration of Ruling on Legal Issues. The United States argued the ALJ had misinterpreted and misapplied applicable law in denying its motion for ruling on legal issues. Upon reconsideration, ALJ Betterton agreed and, on December 10, 2004, issued an Amended Proposed Order² on United States' Motion for Reconsideration of Ruling on Legal Issues and Dismissal of Claimant's Claim (APO). The APO found an irrigation claim based on natural overflow is not entitled as a matter of law to a *Walton* water right. On January 5, 2005 Claimant filed exceptions to the APO with the Oregon Water Resources Department (OWRD). On January 25, 2005, the United States filed its opposition to Claimant's exceptions.

On July 7, 2008, OWRD referred this matter back to the Office of Administrative Hearings (OAH) for further proceedings. ALJ Joe L. Allen was assigned to preside over this matter. In its referral, OWRD disagreed with ALJ Betterton's determination that irrigation from natural overflow may not, as a matter of law, serve as the basis for a *Walton* right. OWRD asked the ALJ to take further evidence in support of or opposition to Claimant's claim to a *Walton* right based on beneficial use of natural overflow.

A telephonic pre-hearing conference was scheduled for September 11, 2008. The following parties appeared at the conference: Tom Snodgrass, Assistant U.S. Attorney, representing the United States (U.S.), Carl Ullman, Attorney at Law, representing the Klamath Adjudication Project, Justin Gericke, Attorney at Law, representing Claimant Thomas Shaw (Claimant), Jesse Ratcliffe, Assistant Attorney General, representing OWRD, and Daniel Kelly, Attorney at Law, representing the Klamath Project Water Users (KPWU).

¹ A "*Walton*" right refers to a term derived from the *Colville Confederated Tribes v. Walton* line of cases that address the issue of a claim for a water right of non-Indian successors to Indian allottees. *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*). An Indian "allotment" is a parcel of land on an Indian reservation awarded to an individual member of an Indian tribe, i.e., an allottee, pursuant to the General Allotment Act of 1887, 24 Stat. 388. See, e.g., *Walton II*, 647 F2d at 45.

² An earlier Proposed Order was issued on November 12, 2004. This Proposed Order was amended because it was mailed out without the ALJ's signature. No other changes were made to the Proposed Order.

A second prehearing conference was held on May 15, 2009. The parties were each represented by counsel identified above.³ At the prehearing, the parties waived cross examination hearings and closing briefs. The parties each rested on the record as of that date.

EVIDENTIARY RULINGS

The evidentiary record in the Amended Proposed Order dated December 10, 2004 is hereby adopted and incorporated by reference.

In addition the following evidence, offered by Claimant, was admitted into the record without objection: direct written testimony and affidavit of Donovan (Jack) L. Nicol, with Exhibits 1 through 3 attached; direct written testimony and affidavit of Mark Nicol, with Exhibits 1 through 3 attached; and direct written testimony of Thomas J. Shaw, with Exhibits 1 through 7 attached.

OWRD Exhibit 1 was also admitted into evidence without objection.

ISSUE

Whether an irrigation claim based on natural overflow can form the basis for a *Walton* right based on beneficial use of the natural overflow.

STIPULATED FACTS

(1) The places of use (POU's) as identified in the Statement of Claims filed herein and as owned by Shaw total 54 acres located within the following tracts of land:

- a. NENW, Sec. 5, T 30 S, R 9 E, W.M. (15.2 acres);
- b. NWNE, Sec. 5, T 30 S, R 9 E, W.M. (38.8 acres).

(2) The POU's are within the former Klamath Indian reservation.

(3) The POU's are within former Indian Allotment 550 (Allotment 550).

(4) Allotment 550 was conveyed from Indian ownership to Modoc Lumber Company on May 17, 1957. Modoc Lumber Company was the first non-Indian owner of Allotment 550.

(5) Allotment 550 was conveyed by Modoc Lumber Company to Thomas Shaw, the second non-Indian owner, on August 31, 1965.

(6) The POU's have been leased as livestock pasture since 1960.

(7) The uses claimed are irrigation, livestock watering, and wildlife.

³ Bruce Bernard, Assistant U.S. Attorney, appeared on behalf of the United States.
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(8) The amount claimed is three (3) acre feet per acre.

(9) The claimed priority date is October 14, 1864.

(10) The claimed source is the Williamson River.

(11) There is no actual physical diversion of water from its natural source. Rather, Claim 4 relies upon natural overflow from the Williamson River.

(12) The period of use claimed is December 1 to July 1 for irrigation, and year-round for wildlife.

FINDINGS OF FACT

(1) In or about November of each year, Allotment 550 is inundated by overflow from the Williamson River. Allotment 550 remains submerged until at least April of each following year. (Test. of D. Nicol and M. Nicol.)

(2) From at least 1960 until it transferred the property to Claimant, Modoc Lumber Company leased Allotment 550 to members of the Klamath tribes for grazing purposes. (Test. of Shaw; Ex. 6 attached thereto.)

(3) From 1965 until 1977, Claimant leased Allotment 550 to tribal members for cattle grazing purposes. In 1977, Claimant began leasing the subject property to the Nicol Land & Cattle Company (Nicol). Claimant continued to lease the property to Nicol until at least 1991 when Claim 4 was filed. (Test. of Shaw, D. Nicol, and M. Nicol.)

OPINION

Claimant has the burden of proof to establish the claim by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); *see also, Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is a preponderance of the evidence). Proof by a preponderance of the evidence means the fact-finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

1. OWRD's referral.

In 2004, ALJ Betterton dismissed Claim 4 finding that natural overflow could not, as a matter of law, serve as the basis for a *Walton* right. OWRD disagreed and referred the case back for further proceedings. In its referral, OWRD requested "further hearing to take evidence on support of or opposition to Claimant's claim to a *Walton* right based on beneficial use of natural overflow." *See*, OWRD Klamath Adjudication Referral Form, July 7, 2008. Implicit in the referral is OWRD's request that the ALJ issue an amended proposed order within the scope of the referral. Unfortunately, an order so limited in scope would be untenable as it would necessarily ignore well established case law pertaining to this adjudication.

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2. *Claimant's claim to a Walton right base on natural overflow.*

Claim 4 is a claim for water rights for lands purportedly 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*” water rights.

Elements of a *Walton* water right that must be proven are:⁴

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 are proven, the claim is assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.⁵ The amount of water claimed for irrigation is “limited to that amount *appropriated* with reasonable diligence after the passage of title from the original Indian allottees (or their heirs), and maintained by continued use by each subsequent successor.” *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 402 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*), internal citations omitted (emphasis added).

The pertinent facts are not in dispute. Allotment 550 was formerly part of the Klamath Indian Reservation and remained under Indian ownership until 1957. During this time no owner of allotment 550 diverted water onto the property. Instead, allotment 550 was seasonally irrigated by natural overflow from the Williamson River. In late fall of each year, Allotment 550

⁴ See, *Walton II*, 647 F2d at 51; see also, Decision by Administrative Law Judge William D. Young, Klamath Basin Adjudication, Case No. 272, dated August 4, 2003.

⁵ The Klamath Reservation was established on October 14, 1864. *Treaty Between the United States of America and the Klamath and Moadoc 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).

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becomes submerged as the waters of the Williamson River rise. As the waters recede in about April, Allotment 550 becomes suitable for cattle grazing.

In 1957, allotment 550 was transferred to Modoc Lumber Company, the first non-Indian owner. Modoc Lumber Company held the property until 1965. During this approximately eight year period, Modoc Lumber Company made no attempts to divert water onto the property. Instead, the property remained irrigated by natural overflow. Modoc Lumber Company leased allotment 500 to the members of the Klamath tribes for grazing purposes.

In 1965, Modoc Lumber Company conveyed allotment 550 to Claimant. Claimant became the second non-Indian owner of allotment 550. Since taking ownership of allotment 550, Claimant has made no actual physical diversion of water from its natural source. Allotment 550 remains irrigated solely by means of natural overflow from the Williamson River. Claimant continued to lease allotment 550 for this purpose until at least 1991.

3. *Appropriation.*

Claimant asserts ALJ Betterton erred in finding natural overflow, as a matter of law, cannot serve as the basis for a *Walton* right. Claimant argues the ALJ should have found beneficial use of the natural overflow was sufficient to establish a *Walton* right. I cannot agree. Claimant's argument ignores the plain language of the Ninth Circuit opinions which gave rise to the very right he now claims.

In *Walton III*, the Ninth Circuit Court of Appeals addressed the issue of appropriation as it applies to *Walton* water rights. The court stated, “[u]nder the doctrine of prior appropriation, (followed in most western states * * *), one acquires a right to water by diverting it from its natural source *and* applying it to some beneficial use.” *Walton III*, 752 F. 2d at 402, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (emphasis added). Accordingly, a *Walton* right requires, in part, both a diversion of water and application of that water to a beneficial use.

4. *Diversion.*

A valid appropriation requires a diversion of water from its natural source by some artificial or mechanical means. Claimant stipulates there is no actual physical diversion of water from its natural source onto Allotment 550. Claimant posits, instead, a different interpretation of the *Walton* line of cases.

Claimant asserts the court in *Walton* inferred reliance upon state law to determine the scope of *Walton* rights. Claimant's argument relies upon language in *Walton III* which indicates it may be “appropriate to look for state law for guidance.” *Walton III*, 752 F.2d at 400. Claimant argues that Oregon law and Washington law differ in regard to the requirement of diversion. Claimant's arguments fail for two reasons.

First, the court in *Walton* made clear, reserved rights are federal water rights and are not dependent upon state law or state procedures. *Id.*, citing *Cappaert v. United States*, 426, U.S.

128, 145 (1976). Where federal law is clear, it is unnecessary and inappropriate to look to state law for guidance. Here, the *Walton* line of cases make it abundantly clear, where prior appropriation is applicable, federal water rights require both diversion of water and application of that water to some beneficial purpose.

Second, assuming it is appropriate to look to Oregon law for guidance on the issue of diversion, the court has done so. In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (*Adair II*), the court noted, “[O]ne of the standard requirements of the prior appropriation doctrine [followed in Oregon] is that some *diversion of the natural flow of a stream is necessary* to effect a valid appropriation.” *Id.*, at 1410 (emphasis added). *Adair II* addressed water rights of the Klamath Tribes, its members, and non-Indian successors to former Klamath Reservation land. This is the very land at issue in this case. To now ignore the courts leading in favor of the interpretation of state law urged by Claimant would be impermissible.

5. *Conclusion.*

Claimant seeks a *Walton* right based upon natural overflow from the Williamson River. *Walton* rights require appropriation. Appropriation requires diversion of water from its natural source and application of that water to some beneficial use. Claimant cannot demonstrate appropriation because there is no diversion of water onto Allotment 550. Beneficial use, without diversion is insufficient to serve as the basis for a *Walton* right.

I must agree with ALJ Betterton. An irrigation claim based on natural overflow is not entitled as a matter of law to a *Walton* right.

AMENDED PROPOSED ORDER

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

- (1) An irrigation claim based on natural overflow cannot, as a matter of law, form the basis for a *Walton* right regardless of the beneficial use of the natural overflow;
- (2) Claim 4 is dismissed.

Joe L. Allen, Administrative Law Judge
Office of Administrative Hearings

Date: September 11, 2009

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

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2009, I mailed a true copy of the following: **AMENDED PROPOSED ORDER AFTER FURTHER PROCEEDINGS**, 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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