

**BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of)	PARTIAL ORDER OF
RAYMOND J. DRISCOLL, AND)	DETERMINATION
BARBARA A. DRISCOLL)	
_____)	
)	Water Right Claim 50

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

**A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS
TO THE PROPOSED ORDER**

1. Claim 50 (Claimants: RAYMOND J. DRISCOLL AND BARBARA A. DISCROLL, 43411 HWY 62, CHILOQUIN, OR 97624) and its associated contests (1713, 3738, and 4105) were referred to the Office of Administrative Hearings for a contested case hearing. The Office of Administrative Hearings designated these matters as Case 185.
2. On May 6, 2003, Claim 50 was consolidated with Case 900 “for the sole purpose of determining whether [this and other] claims for rights to water from the Wood River system . . . which have been previously adjudicated, bar the Claimants from participation in this adjudication.” See ORDER GRANTING MOTION TO CONSOLIDATE AND SCHEDULING PREHEARING CONFERENCE (May 6, 2003) at 3.
3. On April 20, 2004, an ORDER AMENDING RULINGS ON MOTIONS FOR RULING ON LEGAL ISSUES (April 20, 2004) was issued in Case 900, and is adopted and incorporated in its entirety as if set forth fully herein.
4. On May 27, 2004, the consolidation of claims and cases in Case 900 was reversed; the law of the case in each case is set out in the ORDER AMENDING RULINGS ON MOTIONS FOR RULING ON LEGAL ISSUES (referenced in Finding 3, above). See ORDER VACATING ORDER TO CONSOLIDATE (May 27, 2004).
5. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued an ORDER GRANTING MOTION FOR LEGAL RULING AND FOR SUMMARY JUDGMENT, AND PROPOSED ORDER DENYING CLAIM on January 31, 2005 (Proposed Order).
6. No exceptions were filed to the Proposed Order.

7. On August 11, 2011, OWRD referred Claim 50 back to the Office of Administrative Hearings for further proceedings in order to take further evidence in support of or opposition to the Claimants' claim to a Klamath Termination Act right based on beneficial use of water for domestic use. The Deemed Admissions in the Proposed Order insufficiently addressed the domestic use portion of the claim.
8. On September 20, 2011, James Root and Valerie Root partially withdrew Contest 1713 to the extent that the contest relates to the Claimants' claim to 5 gallons per minute for domestic use. *See* CONTESTANTS' NOTICE OF PARTIAL WITHDRAWAL OF CONTEST 1713 (September 20, 2011).
9. On September 22, 2011, the United States partially withdrew Contest 3738 to the extent that the contest relates to the Claimants' claim to 5 gallons per minute for domestic use. *See* NOTICE OF PARTIAL WITHDRAWAL OF CONTEST (September 22, 2011).
10. Because all contests pertaining to the domestic use portion of Claim 50 have been withdrawn, the Adjudicator withdrew the Case 185 from the Office of Administrative Hearings on June September 23, 2011.
11. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
 - a. The "Findings of Fact" is adopted with modifications, as set forth in Section A.12, below.
 - b. The "Conclusions of Law" is adopted is adopted with modifications, as set forth in Sections A.13, below.
 - c. The "Opinion" is adopted with modifications, as set forth in Section A.14, below.
 - d. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 50, which also incorporates any modifications made in Section A.15, below. Consistent with Sections A.12, A.13, and A.14, below, the outcome of the Order has been modified to approve a right for domestic use for one household including non-commercial irrigation of 0.32 acre of lawn and garden.

12. **Findings of Fact.**

- a. The second sentence in the Proposed Order Finding of Fact #1 is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

Claimants made a Klamath Termination Act claim for water as a non-Indian successors to a ~~Klamath Indian Allottee~~ unallotted Klamath Indian Reservation lands, claiming an amount of water sufficient to irrigate the allotment's share of the Tribe's "practically irrigable acreage" (PIA).

Reason for Modification: To correct the basis of the claim.

- b. Footnote #4 of Proposed Order Finding of Fact #2 is deleted in its entirety. In its place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS.

Reason for Modification: To correct and clarify the elements of a Walton water right.

- c. The Proposed Order Finding of Fact #8 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strike through~~” text):

(8) Through Claimants’ deemed admissions, Claimants have admitted, among other things, that: (1) They have not provided sufficient title information regarding Indian Allottee ownership of the claimed place of use and/or transfer of the property to the second non-Indian ownership for Claim No. 50 (*Id.*, Ex. A at pp. 5-6, Request for Admission (“RFA”) Nos. 1, 2 and 7); (2) The place of use was not used for bottling water by the last Indian owner (*Id.*, Ex. A, at pp. 5-6, RFA Nos. 3, 5 and 8); (3) The claimed place of use was not developed for bottling water by the first non-Indian within a reasonable period of time (*Id.*, Ex. A, pp. 5-7, RFA Nos. 3-6, 9, 11); and (4) The claimed place of use of bottling water has not been continually ~~irrigated~~ used for the bottling water since it was first owned by a non-Indian. (*Id.*, Ex. A, p. 7, RFA No. 10.)

Reason for Modification: ALJ’s original finding is not supported by a preponderance of evidence in the record, it failed to fully set forth the evidence on the record.

- d. The Proposed Order Finding of Fact #9 is added as follows:

(9) The property appurtenant to Claim 50 was formerly part of the Klamath Reservation, and was held in trust by the United States. The property was purchased in 1960 by a group of withdrawing Indian Tribal members (*See* DEED OF TRIBAL PROPERTY, 55979, Vol. 325, page 507 – OWRD Ex. 1 at 47-50). Use of water from Agency Spring was developed for domestic use while the property was part of the Klamath Reservation, and has continued to be used for domestic purposes for one household since that time. (OWRD Ex. 1 at 7, 29-32.)

Reason for Modification: The ALJ's failed to fully set forth the evidence on the record. The claimed lands were unallotted and transferred from the Klamath Tribes to a non-Indian purchaser pursuant to the express language of the Klamath Termination Act.

13. **Conclusions of Law.** The Proposed Order's "Conclusions of Law" section is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

The United States' Motion for Ruling on Legal Issues should be granted in ~~its entirety~~ in part.

(1) Pursuant to OAR 137-003-0570(12), the requests for admissions served by the United States upon Claimants, and not responded to by them, are deemed admitted; and

(2) Claimants' deemed admissions establish that there is no factual basis for the bottled water portion of Claim No. 50.

(3) The Klamath Tribes Termination Act is a valid basis for this claim. The elements for a Klamath Termination Act right are satisfied for domestic use for one household with irrigation of non-commercial lawn garden on 0.32 acres.

Reason for Modifications: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports certain conclusions other than those in the 2005 Proposed Order.

14. **Opinion.**

- a. Within the section titled "Opinion" of the Proposed Order, the final paragraph is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

Claimants are deemed to have admitted, among other things, ~~that because they cannot establish the elements of an Allottee right,~~ that they cannot establish the elements of a *Walton* water right,¹ and that there was "no

factual basis to support a water right for the claimed place of use for bottled water portion of ~~in~~ Claim No. 50. The United States, which seeks summary judgment and denial of the portion of the Claimants' claim pertaining to the bottling of water ~~in its entirety~~ on the basis that they have admitted that they cannot establish the elements of the claimed water right for the use of bottled water, and that there is no factual support for the bottling of water portion of the claim, is entitled to the ruling it seeks. The deemed admissions are not sufficient to deny the domestic use portion of the claim. In addition, all contests pertaining to the domestic use portion of the claim have been withdrawn.

- b. OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS.
- c. OWRD incorporates into the Opinion section the following segment titled "Application of Klamath Termination Act Elements to the Modified Proposed Order Findings of Fact."

Application of Klamath Termination Act Elements to the Modified Proposed Order Findings of Fact

The record establishes that the property appurtenant to Claim 50 was formerly part of the Klamath Reservation, and was held in trust by the United States. The property was purchased in 1960 by a group of withdrawing Indian Tribal members. Prior to transfer out of Indian ownership, use of water from Agency Spring was developed for domestic use and has continued to be used for domestic purposes since that time.

Pursuant to the provisions of the Klamath Termination Act, these findings are sufficient to establish a vested federal reserved water right, and to conclude that

[†]~~The claim was initially filed as an Allottee claim. If the land transferred into non-Indian ownership, the claim would be for a water right as a non-Indian successor to an Allottee (*i.e.*, a *Walton* claim.) Because Claimants cannot establish the elements of a valid Allottee claim, no right would exist to succeed to as a *Walton* claim. Reason for striking the footnote: This footnote is incorrect; the claim was initially filed as a non-Indian successor to unallotted Klamath Indian Reservation lands under the Klamath Termination Act.~~

the established right passed with the land when the land was conveyed out of trust.²

² Although this appears to be a question of first impression in Oregon, it is apparent that federal reserved water rights can be transferred pursuant to the Klamath Termination Act when the reserved lands pass into private ownership. Similar treatment occurred with the Ute termination process. *Hackwork v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994) (express Congressional determination that the transfer of the former tribal lands included right to use water.)

Reasons for Modification: To correct and clarify the elements of a Klamath Termination Act right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein, especially pertaining to beneficial use of water for domestic use prior to transfer from Indian ownership; to apply the appropriate legal bases to the Proposed Order’s modified findings of fact.

15. **Order.** The section titled “Order” is modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):

Based on the foregoing, a recommendation is made to the Adjudicator for the Klamath Basin General Stream Adjudication to enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below:

The elements of a water right cognizable under ORS chapter 539 are not established for the bottling of water portion of Claim No. 50. ~~and This portion of the claim is denied.~~

The record establishes the elements of a Klamath Termination Act right for the domestic use portion of Claim 50. This portion of the claim is approved.

Reason for Modifications: To provide consistency with Sections A.12, A.13, and A.14.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated with modifications, into this Partial Order of Determination as follows:
 - a. The “Findings of Fact” is adopted with modifications, as set forth in Sections A.12, above.
 - b. The “Conclusions of Law” is adopted is adopted with modifications, as set forth in Sections A.13, above.
 - c. The “Opinion” is adopted with modifications, as set forth in Section A.14, above.

- d. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 50, which also incorporates any modifications made in Section A.15, above. Consistent with Sections A.12, A.13, and A.14, above, the outcome of the Order has been modified to approve a right for domestic use for one household including non-commercial irrigation of 0.32 acre of lawn and garden.
2. The Klamath Tribes Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 et seq. for an Indian reserved water right is a valid basis for this claim. The elements of a Klamath Termination Act claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING KLAMATH TERMINATION ACT CLAIMS is incorporated as if set forth fully herein.
3. All contests pertaining to the domestic use portion Claim 50 have been withdrawn.
4. Based on the file and record herein, IT IS ORDERED that a portion of Claim 50 is denied for the bottling water use and is of no force or effect.
5. Based on the file and record herein, IT IS ORDERED that a portion of Claim 50 is approved for domestic use including irrigation of non-commercial lawn and garden as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 50

CLAIM MAP REFERENCE:

OWRD INVESTIGATION MAP – T 34 S, R 7 E, and CLAIM # 50 MYLAR MAP
(NOV.17, 1998)

CLAIMANT: RAYMOND J. DRISCOLL
BARBARA A. DRISCOLL
43411 HWY 62
CHILOQUIN OR 97624

SOURCE OF WATER: AGENCY SPRING, tributary to AGENCY CREEK

PURPOSE or USE:

DOMESTIC FOR ONE HOUSEHOLD INCLUDING IRRIGATION OF 0.32 ACRES OF NON-COMMERCIAL LAWN AND GARDEN

RATE OF USE: 0.01 CFS MEASURED AT THE POINT OF DIVERSION,

PERIOD OF ALLOWED USE: JANUARY 1 - DECEMBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:


Twp	Rng	Mer	Sec	Q-Q
34 S	7 E	WM	18	SW SW

THE PLACE OF USE IS LOCATED AS FOLLOWS:

DOMESTIC INCLUDING LAWN AND GARDEN					
Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	7 E	WM	18	SW SW	0.32

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013



Dwight French, Adjudicator
Klamath Basin General Stream Adjudication