

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

**ORDER GRANTING MOTION FOR  
RULING ON LEGAL ISSUES  
AGAINST CLAIMANT RICHARD W.  
GRAHAM; PROPOSED ORDER  
PARTIALLY DENYING CLAIM**

Case No. 251

Claim: 697

Contests: 3118, 3510<sup>1</sup>, 3816, and 4240<sup>2</sup>

vs.

Richard W. Graham;  
Claimant, and  
Allan Klus; Irene Klus;  
Claimants/Contestants.

On March 25, 2005, the United States filed a Motion for Ruling on Legal Issues  
Against Claimant Richard W. Graham,<sup>3</sup> seeking determinations that (1) pursuant to OAR 137-

<sup>1</sup> Don Vincent voluntarily withdrew from Contest 3510 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contest 3510 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3510 on January 15, 2004.

<sup>2</sup> The Klamath Tribes voluntarily withdrew Contest 4240. See Klamath Tribes' Voluntary Withdrawal of Contest, Case 251, Claim 697, dated August 3, 2004).

<sup>3</sup> The United States recognizes that Claimants/Contestants Allan Klus and Irene Klus remain active in this case as to the Klus Lands, and the United States' motion does not seek the entry of a ruling against them or their lands. United States' Motion at 2.

003-0570(12), the requests for admissions served on Claimant, Richard W. Graham, should be deemed admitted because Claimant Graham failed to provide responses despite the order requiring discovery; and (2) Claimant Graham's deemed admissions establish that the elements of a Walton<sup>4</sup> water right are not met and, therefore, the claim on Graham's land should be denied. Neither Claimant Graham nor any party filed a response to the motion.

### ISSUES

(1) Whether the requests for admissions served on Claimant Graham by the United States and not responded to by Claimant Graham despite the Order Requiring Discovery should be deemed admitted.

(2) Whether Claimant Graham's deemed admissions establish that Claim 697, with respect to lands owned by Graham ("Graham Lands"), fails to meet the basic elements of a Walton claim and, therefore, should be denied.

### LEGAL STANDARD FOR SUMMARY JUDGMENT

Motions for Ruling 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

---

<sup>4</sup> 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 (9<sup>th</sup> Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

*Richard W. Graham; Allan & Irene Klus* (251)

Order Granting Motion for Ruling on Legal Issues; Proposed Order Partially Denying Claim

Page 2 of 6

RECEIVED

JUN 10 2005

WATER RESOURCES DEPT  
SALEM, OREGON

(1) On January 31, 1991, Vina Kirk filed Claim 697, as a Klamath Indian Allottee. (OWRD Ex. 1 at 1, 12, 157.) The claim is for an amount of water sufficient to irrigate the allotment's share of the Tribe's "practicably irrigable acreage" (PIA). The claim is for 164 acre-feet per year for irrigation of approximately 52.9 acres of land. (Id. at 11, 157) The source of water is the Fort Creek, a tributary of the Wood River. (Id. at 22,157.) The claimed period of use is March 1 through October 16, and the claimed priority date is October 14, 1864. (Id. at 27,157.)

(2) Subsequently, the original Claimants sold the property to Richard W. Graham. (OWRD Ex. 1 at 32.) Graham maintained an interest in tax lot 1400 (9 acres), and conveyed tax lot 1401 (46.53 acres) to Allan & Irene Klus. The portion retained by Graham is described as that portion of the SW1/4 SW1/4 lying west of Crater Lake Highway 62, Section 1, Township 34 South, Range 7.5 East, W.M. (OWRD Ex. 1 at 32, 37, 48.)

(3) On October 4, 1999, the Adjudicator for the Oregon Water Resources Department (OWRD), Richard D. Bailey, issued a Preliminary Evaluation, denying this claim as previously adjudicated in the Wood River Adjudication. (OWRD Ex. 1 at 158.)

(4) On May 8, 2000, Allan and Irene Klus filed Contest 3118, the Klamath Project Water Users (KPWU) filed Contest 3510, and the United States filed Contest 3816. (OWRD Ex. 1 at 95, 99, and 140.) The Klamath Tribes filed Contest 4240, but later withdrew. (OWRD Ex. 1 at 144.)

(5) On November 15, 2004, a prehearing conference was held, pursuant to written notice sent to participants. Claimant Graham did not submit a prehearing statement or participate in the prehearing conference. (See Prehearing Order; Scheduling Order, Case 251, dated November 22, 2004.)

(7) On November 29, 2004, consistent with the Scheduling Order dated November 22, 2004, counsel for the United States served discovery requests on Claimant Graham, including requests for admissions. Claimant Graham did not respond to the discovery requests by the deadline of January 7, 2005, or at any time thereafter. On January 14, 2005, the United States filed a Motion for an Order Requiring Discovery, based on Claimant Graham's failure to respond to discovery requests.

(9) On February 14, 2005, ALJ Daina Upite issued a Discovery Order, which required Claimant Graham to respond to discovery requests made by Contestant United States on or before February 25, 2005. As of March 25, 2005, Claimant Graham had not responded to the discovery requests or filed any objections. (U.S. Motion for Ruling on Legal Issues Against Claimant Richard W. Graham at 3.)

(10) The United States' discovery request included the following warning:  
"FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION TO ANY REQUESTS FOR ADMISSION WITHIN THE TIME ALLOWED MAY RESULT IN ADMISSION OF

RECEIVED

JUN 10 2005

WATER RESOURCES DEPT  
SALEM OREGON

THE REQUEST. OAR 137.003-0570(12).” (United States’ Requests for Admission, Interrogatories, Requests and Interrogatories at 3, ¶ J.) (Emphasis in original.)

(11) Based on his deemed admissions, Claimant Graham has admitted, among other things, that: (1) the required Walton elements have not been established for Claim 697; (2) Claimant failed to provide sufficient information documenting a chain of title; (3) the claimed place of use was not developed for irrigation within a reasonable period of time after leaving Indian ownership; (4) the claimed place of use has not been continuously irrigated every year since the property left Indian ownership; and (5) Claimant has no present intent to prosecute the claim. (United States’ Requests for Admission, Interrogatories, Requests and Interrogatories, Request Nos. 1, 3-6, 9,10,12, 19.)

### CONCLUSIONS OF LAW

(1) Pursuant to OAR 137-003-0570(12), the requests for admissions served on Claimant Graham by the United States and not responded to by Claimant Graham despite the Order Requiring Discovery are deemed admitted; and

(2) Claimant Graham’s deemed admissions establish that Graham’s portion of Claim 697 fails to meet the basic elements of a Walton claim and, therefore, should be denied.

### OPINION

#### Motion for Summary Judgment

OAR 137-003-0570(12) states:

Failure to respond to a request for admissions required by a discovery order shall be deemed an admission of matters that are the subject of the request for admissions, unless the party or agency failing to respond offers a satisfactory reason for having failed to do so, or unless excluding additional evidence on the subject of the request for admissions would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the administrative law judge does not treat failure to respond to the request for admissions as admissions, the administrative law judge may grant a continuance to enable the parties and the agency to develop the record as needed.

Pursuant to OAR 137-003-0570(12), Claimant Graham’s failure to respond to the United States’ requests for admissions despite an Order Requiring Discovery shall be deemed an admission of matters that were the subject of the request for admission, unless two narrow exceptions apply. The first exception does not apply because Claimant Graham has not provided any reason for his failure to respond to the requests for admissions. Since this matter

has not come to a hearing yet, the second exception also does not apply. Accordingly, each request for admission is deemed admitted.

### Walton<sup>5</sup> Water Right Claim

As outlined by Administrative Law Judge William D. Young in *Nicholson 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.

Ruling on United States' Motion for Ruling on Legal Issues at 9 (August 4, 2003).

Claimant Graham is deemed to have admitted, among other things, that he failed to provide sufficient chain of title documentation regarding ownership of the claimed place of use after it left Indian ownership; that he failed to provide sufficient information to show that an irrigation system was developed within a reasonable time after leaving Indian ownership; and that the claimed place of use has not been irrigated every year since the property left Indian ownership. Therefore, Claimant Graham cannot establish each element of a Walton water right. Consequently, Claimant Graham has failed to prove the basic elements of a Walton water right and Graham's portion of Claim 697 should be denied.

**ORDER**

**RECEIVED**

JUN 10 2005

WATER RESOURCES DEPT  
SALEM, OREGON

---

<sup>5</sup> The Claimant Graham is a non-Indian successor to an Allottee. Therefore, the claim must be evaluated as a *Walton* water right claim.

*Richard W. Graham; Allan & Irene Klus* (251)

Order Granting Motion for Ruling on Legal Issues; Proposed Order Partially Denying Claim

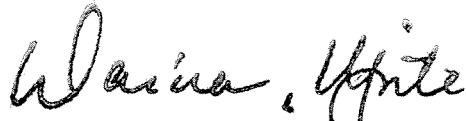
Page 5 of 6

(1) The United States' Motion for Ruling on Legal Issues Against Claimant Richard W. Graham is granted. Claimant Graham's failure to respond to the United States' requests for admissions is deemed an admission of the matters that are the subject of the request for admissions.

(2) Based on the foregoing, I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as more specifically set out below:

The elements of a water right cognizable under ORS Chapter 539 are not established for Claim 697 with respect to the lands owned by Claimant Graham, described as that portion of the SW1/4 SW1/4 of Section 1 lying west of Crater Lake Highway 62, Township 34 South, Range 7.5 East, W.M., and Claim 697 is denied as to the Graham lands.

This order shall have no effect on Claim 697 or Contest 3118 with respect to the property owned by Allan and Irene Klus that is subject to their contest.



Daina Upite, Administrative Law Judge  
Office of Administrative Hearings

Date: June 9, 2005

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

RECEIVED

JUN 10 2005

WATER RESOURCES DEPT  
SALEM, OREGON

725 Summer Street N.E., Suite "A"  
Salem OR 97301

**RECEIVED**

JUN 10 2005

WATER RESOURCES DEPT  
SALEM, OREGON

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2005, I served a true copy of the following: **ORDER GRANTING MOTION FOR RULING ON LEGAL ISSUES AGAINST CLAIMANT RICHARD W. GRAHAM; PROPOSED ORDER PARTIALLY DENYING CLAIM**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Richard D. Bailey  
Oregon Water Resources Department  
725 Summer Street N.E., Suite "A"  
Salem, OR 97301  
[richard.d.bailey@wrд.state.or.us](mailto:richard.d.bailey@wrд.state.or.us)

Richard W. Graham  
475 Kaer Ave  
Red Bluff, CA 96080

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](mailto:Teri.Hranac@wrд.state.or.us)

Thomas K. Snodgrass  
U.S. Department of Justice  
General Litigation Section  
Ben Franklin Station  
P.O. Box 663  
Washington D.C. 20044-0663  
Phone: (202) 305-0489  
Fax: (202) 305-0274  
[Thomas.snodgrass@usdoj.gov](mailto:Thomas.snodgrass@usdoj.gov)

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](mailto:psimmons@lawssd.com)  
[ahitchings@lawssd.com](mailto:ahitchings@lawssd.com)

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

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 / Justin Wirth  
Oregon Dept. of Justice  
1162 Court St NE  
Salem, OR 97310  
Phone: 503-378-4409  
Fax: 503-378-3802  
[jesse.d.ratcliffe@doj.state.or.us](mailto:jesse.d.ratcliffe@doj.state.or.us)  
[justin.wirth@doj.state.or.us](mailto:justin.wirth@doj.state.or.us)

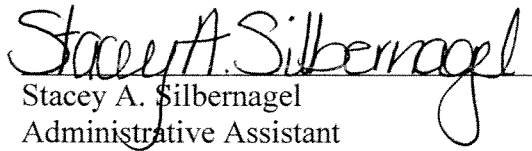
RECEIVED

JUN 10 2005

WATER RESOURCES DEPT  
SALEM, OREGON



Ronald S. Yockim  
Attorney at Law  
548 SE Jackson St., Suite 7  
PO Box 2456  
Roseburg, OR 97470  
Phone: (541) 957-5900  
Fax: (541) 957-5923  
[ryockim@mcsi.net](mailto:ryockim@mcsi.net)

  
Stacey A. Silbernagel  
Administrative Assistant

**RECEIVED**  
JUN 10 2005  
WATER RESOURCES DEPT  
SALEM, OREGON