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; ~~The Klamath Tribes;~~ 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

vs.

NBCC, LLC[1];
Claimants/Contestants.

PROPOSED ORDER

Case No. 180

Claim: 41

Contests: 2825[2], 3267, 3448[3], 3786, and 4096[4]

HISTORY OF THE CASE

On February 1, 1991, Lloyd Nicholson Trust and Dorothy Nicholson Trust filed Claim 41 (the "Claim") in the Klamath Basin Adjudication with the Oregon Water Resources Department ("OWRD"). Claimant NBCC, LLC is the successor in interest to the original claimants.

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[1] Change of Ownership filed April 7, 2006 – Lloyd Nicholson Trust and Dorothy Nicholson Trust to Roger Nicholson and Richard Nicholson; and Roger Nicholson and Richard Nicholson to NBCC, LLC.

[2] WaterWatch of Oregon, Inc.'s Contest 2825 was dismissed. *See* ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

[3] Don Vincent voluntarily withdrew from Contest 3448 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3448 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3448 on January 15, 2004.

[4] The Klamath Tribes voluntarily withdrew Contest 4096. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated January 19, 2005.

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On October 4, 1999, the Adjudicator issued his Preliminary Evaluation of the Claim, which preliminarily denied the Claim. Various contests were filed to the Claim and/or the Preliminary Evaluation of the Claim, including Contest 3786, 3448 by Klamath Project Water Users (KPWU)[5] filed by the United States and Contest 3267 filed by the original claimants.

The case was referred to the Office of Administrative Hearings for a contested case hearing. This case was then consolidated with a number of other cases for determination of common issues of law. That consolidated case was styled Case 900. On April 20, 2004, Administrative Law Judge (ALJ) William Young issued an Order Amending Rulings on Motions for Rulings on Legal Issues in Case 900, designating that Order as stating the Law of the Case for all cases included within Consolidated Case 900. On May 27, 2004, ALJ Young issued an order vacating the order of consolidation, effectively severing this case from the others in Case 900, while maintaining the rulings in Case 900 as the Law of the Case.

On March 7, 2005, ALJ Michael Andrew Francis issued a Scheduling Order requiring that Written Direct and Rebuttal testimony be filed before March 27, 2006, and setting this case for hearing on April 18, 2006.

On December 9, 2005, ALJ Francis entered an Order on Motions for Ruling on Legal Issues on the Motion for Ruling on Legal Issues filed by the United States, which ruled that Claim 41 is precluded by a prior adjudication with respect to certain lands located within the boundaries of the Claim (the "Precluded Lands"). The Precluded Lands are described as follows:

Township 33 South, Range 7.5 East, Willamette Meridian
Section 35: NW/4SE/4 (40.0 acres), NE/4SE/4 (15.0 acres), SW/4SE/4 (26.0 acres), SE/4SE/4 (31.0 acres)

Containing approximately 112.0 acres

ALJ Francis further ruled that the remaining lands located within the boundaries of the Claim are subject to adjudication in this proceeding. The remaining lands, comprised of approximately 2.8 acres (the "Non-Precluded Lands"), are described as follows:

Township 33 South, Range 7.5 East, Willamette Meridian
Section 35: NE/4SW/4 (2.8 acres)

Containing approximately 2.8 acres

[5] KPWU is an informal association of water use districts and water users who use water from the Klamath Project. It's membership is composed of the following: 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.

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On January 10, 2005, the original claimants filed a petition for reconsideration of ALJ Francis's Ruling. On April 12, 2006, Administrative Law Judge Maurice L. Russell, II, entered a Ruling on Claimant's Petition for Reconsideration ("ALJ Russell's Ruling"), which denied the petition for reconsideration.

On April 10, 2006, after the time set for the filing of Direct and Rebuttal Testimony, ALJ Donna Brann convened a prehearing conference at which all participants agreed that a hearing was unnecessary, as the only evidence in the record other than OWRD's file was the Direct Testimony of Ronald Yockim, counsel for claimants, who had submitted this testimony to offer a number of documents for the record. ALJ Donna Brann then set a schedule for argument regarding objections to the exhibits offered by claimants, and a briefing schedule on the merits, and closed the evidentiary record.

Claimant filed a closing brief on May 19, 2006. On June 19, 2006, KPWU announced that it did not intend to file a closing argument in this case, but relied upon the argument filed by the other participants. The United States did not file closing argument in this case.

Thereafter, on July 3, 2006, the United States moved to admit into the record a stipulation reached between it and claimant for the resolution of Contest 3786. On October 31, 2006, there being no objection from the other participants, ALJ Brann granted the motion and admitted the stipulation into the record in this case.

I have reviewed the entire record, including the digital recording of the prehearing conference, in preparation to write this Proposed Order.

EVIDENTIARY RULINGS

OWRD Exhibit 1, including the affidavit of Teri Hranac, was offered and admitted into evidence without objection.

Pursuant to unopposed motion by the United States, the Stipulation entered into between Claimant and the United States for resolution of Contest 3786 was admitted into the record by order of ALJ Brann on October 31, 2006.

Contestant United States objected to numerous exhibits filed with the Direct Testimony of Ronald Yockim. KPWU joined in these objections. Except for the objection to Exhibit C-19, all objections are overruled for several reasons.

First, to the extent the objections were to portions of the exhibit that did not refer to the subject of this claim, it is better to admit entire documents than to redact those portions that may be of tangential relevance to the case, but provide some context.

Second, to the extent the objections were to exhibits related to portions of the claim that have been found to have been precluded by a determination in a previous water basin adjudication, the exhibits may not be technically relevant to the remaining claim. Nonetheless, it is noted that in the Stipulation entered between Claimant and the United States, Claimant

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reserved the right to except to the preclusion decision. Inasmuch as this evidence is relevant to the underlying claim, it is appropriate to admit it into the record if only to avoid the necessity of taking further evidence if the exception is successful.

As to Exhibit C-19, however, this document was offered in support of the "Fish and Wildlife" portion of the claim, which was disclaimed by claimant in the Stipulation, and is therefore no longer at issue. Consequently, the exhibit has no relevance to any issue remaining, or potentially remaining, in the case. As to Exhibit C-19, therefore, the objection is sustained.

ISSUES[6]

(1) Whether the benefited land was developed by a member of the Klamath Indian Tribe before it was sold to a non-Indian.

(2) Whether the benefited land was developed with reasonable diligence after it passed to non-Indians.

(3) Whether the current use was developed within a reasonable time after the claimed date of appropriation.

(4) Whether sufficient proof exists to support the season of use claimed.

(5) 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. This claim was originally for a total of 7.75 cubic feet per second (cfs) of water for approximately 114.8 acres of land, stock and fish and wildlife. The claimed period of use is April 1 through November 1 for irrigation. Of the original claim, 112 acres, located in the SE ¼ Section 35, T33S R7½E.W.M. were the subject of a previous adjudication of the Wood River, and are therefore precluded from inclusion within this adjudication. (Order on Motions for Ruling on Legal Issues, Dec. 9, 2005.) The remaining 2.8 acres was held in trust by the United States at the time of the Wood River Adjudication, and was therefore not a part of that adjudication. (*Id.*)

2. On March 3, 1910, the United States allotted the SW ¼ of Section 35, T33S R7½E.W.M. to Ellen Nimrod, a Klamath Indian. Ms. Nimrod died March 17, 1911, and her allotment passed to William Moore, her heir, but was held in trust by the United States until 1938. On July 20, 1938, the United States issued out of trust a deed to Fred L. Pope, a non-Indian, to a strip of land 250 feet wide along the entire East side of the allotment. (Ex. C-43.) That strip of land included the 2.8 acres that is the remaining property subject to this claim. (Ex. C-40; OWRD Ex. 1 at 9.) The

[6] Because the United States has now withdrawn its contest, pursuant to stipulation, the issued presented by that contest are not addressed in this order. Additionally, in the same stipulation claimant unconditionally disclaimed that portion of the claim related to Fish and Wildlife uses. Consequently, the issues related to Fish and Wildlife uses are moot, and will not be addressed in this order.

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remainder of the Allotment was held by the United States in trust for William Moore until 1945, when it was sold to Fred Pope, as well. (Ex. C-41.) By 1960, the adjoining quarter-section to the east (SE ¼ Section 35 T33S, R7½E.W.M.) was also in Fred Pope's ownership. (Ex. C-21 at 10.) This latter portion was the subject of the Wood River Adjudication in 1928, wherein the court allowed a rate of 1/50th cfs per acre from April 1 to July 20, and 1/80th cfs per acre through the remainder of the allowed season of use of April 1 through October 1. The court also allowed a duty of 5 acre-feet of water per acre per year. (OWRD Ex. 1 at 111.)

3. Between 1907 and 1915, prior to the transfer of the property out of Indian ownership, the Crooked Creek Canal was constructed, running from the source of Crooked Creek, through the 2.8 acres subject to this order, and connecting with the Fort Creek Canal at a point within Ellen Nimrod's original allotment. (Ex. C-21 at 9.) In 1925, and again in 1928, the entire allotment was leased for grazing, under a lease that authorized the lessee "the right to use water from the ditch constructed by William Moore for the benefit of the land." (Ex. C-48, C-49.) The record does not disclose where this ditch was located, or what land received water from it. The 2.8 acres subject to this order was noted as part of the "area benefited by construction" in a map showing the location of the Crooked Creek Canal drawn June 1916. (Ex. C-21 at 9.) In 1938, 8 acres, out of a total of 12.9 acres transferred to Fred L. Pope, were noted as irrigated acres in an appraisal of the property prior to its sale. (Ex. C-44.)

4. The Stipulation between the United States and Claimant provided for the following terms to the claim:

> Point of Diversion: NW¼ NE¼ of Section 26, T33S, R7½E.W.M.
>
> Source: Crooked Creek, tributary to Wood River.
>
> Use: Irrigation of 2.8 acres.
>
> Diversion Rate: 0.07 cubic feet per second (cfs) (2.8 acres x 1/40 cfs/acre), measured at the point of diversion.
>
> Duty: 12.04 acre-feet of water per year (4.3 acre-feet/acre x 2.8 acres).
>
> Place of Use: 2.8 acres in the NE¼ SW¼ of Section 35, T33S, R7½E.W.M.
>
> Period of Use: April 1 to November 1.
>
> Priority Date: October 14, 1864.

(Stipulation between Claimant and the United States to Resolve the United States' Contest 3786.)

5. The description of the works in the Field Inspection Report establishes that the works are adequate to deliver the rate and duty of water noted. (OWRD Ex. 1 at 115, 116.) The adjoining property in common ownership that was subject to the Wood River Adjudication has an allowed

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season of use pursuant to the Decree in that adjudication of April 1 to October 1, an allowed rate of 1/50th cfs per acre from April 1 through July 20, and 1/80th cfs per acre from July 20 through October 1, and a duty of 5 acre feet of water per acre during the entire season of use. (*Id.* at 111.) No evidence has been presented for a different rate, duty and season of use, except as limited by the Stipulation.

CONCLUSIONS OF LAW

(1) The benefited land was developed by a member of the Klamath Indian Tribe before it was sold to a non-Indian.

(2) The benefited land was developed prior to passage to non-Indians.

(3) The current use was developed within a reasonable time after the claimed date of appropriation.

(4) Sufficient proof exists to support the season of use claimed.

(5) The record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use and/or acreage claimed as to the unprecluded portion of the claim.

OPINION

In basin-wide adjudications, a claimant has the burden of proof as to all required elements of the claim. ORS 539.110. Where property that was part of the Klamath Reservation that was originally allotted to Klamath Indians is transferred out of Indian ownership, the non-Indian purchasers acquire part of the water right reserved to the Indian owner under federal law. This right is called a *Walton* right, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir. 1985).

In his ruling, 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.

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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 for this claim.

As noted in the History of the Case, above, most of the original claim was found by ALJ Francis to have been subject to a previous adjudication, which precludes its inclusion in these proceedings. The remainder, 2.8 acres, was still held in trust until it was transferred to Fred Pope, the first non-Indian owner, in 1938. Immediately prior to that transfer, the property was appraised. That appraisal listed eight acres as being irrigated. Given that the Crook Creek Canal passes through the 2.8 acres in question, it is more likely than not that this 2.8 acres was included in the eight acres under irrigation at that time, before transfer to the first non-Indian owner. Again, given its location, it is probable that it has been continuously irrigated since that time. Thus, a preponderance of the evidence establishes the elements of a *Walton* claim for these 2.8 acres.

This parcel adjoined, and was in common ownership from 1960 on with a parcel that was subject to the Wood River Adjudication. There is no evidentiary basis for allowing a different rate, duty and season of use for this property, than for the adjoining parcel, although the claim was for a longer season of use and a higher rate than was allowed in the prior adjudication. At the same time, the allowed duty in the Wood River Adjudication was 5 acre-feet of water per acre, whereas the Stipulation limited the duty to 4.3 acre-feet of water per acre. Except as limited by stipulation, I conclude that the rate, duty and season of use for this parcel should be the same as for the connected property that was previously adjudicated.

Based upon the foregoing, I propose that OWRD issue the following:

ORDER

Point of Diversion: NW¼ NE¼ of Section 26, T33S, R7½E.W.M.

Source: Crooked Creek, tributary to Wood River.

Use: Irrigation of 2.8 acres.

Diversion Rate: 0.056 cfs (1/50= 0.02; 2.8 X 0.02= 0.056) from April 1 through July 20, 0.035 cfs (1/80 = 0.0125; 0.0125 X 2.8 = 0.035) for the remainder of the season of use, measured at the point of diversion.

Duty: 12.04 acre-feet per year (4.3 acre-feet/acre x 2.8 acres).

Place of Use: 2.8 acres in the NE¼ SW¼ of Section 35, T33S, R7½E.W.M.

Period of Use: April 1 to October 1.

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Priority Date: October 14, 1864.

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

Dated: February 28, 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 February 28, 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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