

**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

Mathis Family Trust; ~~Ambrose W. McAuliffe;~~
~~Dwight Mebane; Elmore Nicholson; Richard~~
~~Nicholson; William Nicholson;~~ Roger Nicholson;
Daryl Kollman; Marta Kollman; 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; ~~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,
Contestants,

v.

Daryl Kollman;
Claimant/Contestant.

**ORDER GRANTING MOTION FOR
RULING ON LEGAL ISSUES;
PROPOSED ORDER DENYING
CLAIM**

Case No. 183

Claim No. 48

Contests 2737, 2751¹, 2782, 3451²,
3793, and 4103³

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On July 26, 2005, the United States filed a Motion for Ruling on Legal Issues, seeking determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served by the United States on Claimant, Daryl Kollman, should be deemed admitted because Claimant failed to provide responses despite the order requiring

¹ Dwight Mebane voluntarily withdrew from Contest 2751 on June 25, 2004. Ambrose McAuliffe, William Nicholson, and Elmore Nicholson voluntarily withdrew from Contest 2751 on November 3, 2004. On November 3, 2004, Roger Nicholson substituted for Richard Nicholson in Contest 2751.

² Don Vincent voluntarily withdrew from Contest 3451 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3451 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3451 on January 15, 2004.

³ The Klamath Tribes voluntarily withdrew Contest 4103 on July 16, 2004. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST.

discovery; and (2) Claimant's deemed admissions establish that the elements of a *Walton*⁴ water right are not met and, therefore, the claim should be denied.

However, on July 22, 2005, Mr. Kollman filed his response to the United States' discovery requests dated April 13, 2005. He filed it with the Office of Administrative Hearings, but did not serve any other party and did not mail his response to the United States. The response was timely pursuant to the Discovery Order, which required Mr. Kollman to respond to the United States' discovery requests on or before July 22, 2005.

On August 17, 2005 the United States filed a Supplement to its Motion for Ruling on Legal Issues, seeking determinations that (1) Claimant, Daryl Kollman, violated the Discovery Order by failing to provide the United States with a timely response to the Second Discovery Requests, and (2) the Claim should be dismissed based on Claimant's admissions set forth in his response to Contestant's Discovery Requests. On August 22, 2005, Mr. Kollman filed a response to the United States' Supplement.⁵

ISSUE⁶

Whether Claim 48 should be denied based on the admissions as set forth in Claimant's response to the Discovery Requests.

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

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⁴ 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 (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*).

⁵ Mr. Kollman mailed his response to the United States' Department of Justice in Denver, Colorado. He did not serve his response on the Office of Administrative Hearings or on any other party to this proceeding.

⁶ Because I conclude that Claimant has admitted that he has not and cannot establish the elements of a *Walton* water right claim, and that therefore, the claim should be denied, it is unnecessary to address the United States' argument that all the requests for admissions should be deemed admitted because claimant failed to send his discovery responses to the United States by July 22, 2005.

(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 ***.

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Considering the evidence in a manner most favorable to the non-moving party, I make the following:

FINDINGS OF FACT

(1) On February 1, 1991, Randy Sparacino, Bradford J. Aspell, Della-Rose Aspell, and Richard Aspell filed Claim 48. (OWRD Ex. 1 at 2.) Daryl Kollman is the current claimant.

(2) Claim 48 is for water rights of non-Indian successors to Indian allottees. This *Walton* claim seeks 0.5 cubic foot per second (cfs) from Fort Creek and 1.0 cfs from an unnamed spring to irrigate 32 acres of land in the SW/4SE/4 (20 acres) and the SE/4SW/4 (12 acres) of Section 23, T. 33 S., R. 7.5 E., W.M., as well as water for livestock watering (40 head), domestic, and aquaculture uses. (OWRD Ex. 1 at 3; Claimant's Response to the United States' Second Request for Admissions, Nos. 1 and 2.) The claimed period of use is May 1 through September 30 for irrigation, May 1 through December 31 for stock, and year round for domestic aquaculture. (OWRD Ex. 1 at 4.)

(3) On October 4, 1999, OWRD issued its Preliminary Evaluation denying this claim. (OWRD Ex. 1 at 268.)

(4) On May 8, 2000, several contests were filed. Claimant filed Contest 2782. (OWRD Ex. 1 at 91.) The Mathis Family Trust filed Contest 2737. (*Id.* at 77.) Ambrose W. McAuliffe, Dwight Mebane, Elmore Nicholson, Richard Nicholson, and William Nicholson filed Contest 2751. (*Id.* at 85.) The Klamath Project Water Users⁷ (KPWU) filed Contest 3451. (*Id.* at 191.) The United States filed Contest 3793. (*Id.* at 251.) The Klamath Tribes filed Contest 4103. (*Id.* at 255.) Subsequently, Dwight Mebane, Ambrose McAuliffe, William Nicholson, and Elmore Nicholson voluntarily withdrew from Contest 2751, and Roger Nicholson was substituted for Richard Nicholson. Don Vincent, Berlva Pritchard, and Klamath Hills District Improvement Company voluntarily withdrew from Contest 3451. The Klamath Tribes voluntarily withdrew Contest 4103.

⁷ The Klamath Project Water Users currently include the following entities: 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; and Collins Products, LLC.

(5) Claimant admits that (1) he has not established the elements of a *Walton* water right for claim 48; (2) he cannot establish that the claimed water rights have been continuously used for domestic, livestock watering, and aquaculture purposes since 1979 (*i.e.*, five years after the Claim Lands were first conveyed out of Indian ownership); (3) there are currently no domestic or livestock watering uses occurring on the Claim Lands; (4) the two ponds relevant to the Claim are not currently being used for any aquaculture or other beneficial uses; (5) Claimant cannot establish the number of acres within the claimed place of use, if any, which were irrigated by the last Indian owner(s) of the Claim Lands; (6) he cannot establish the number of acres within the claimed place of use if any, which were irrigated by the first non-Indian owner(s) of the Claim Lands; (7) he cannot establish that the claimed water rights were utilized for irrigation, domestic, livestock watering, and aquaculture uses by the last Indian owner(s) of the Claim Lands; and (8) he cannot establish that the claimed water rights were utilized for irrigation, domestic, livestock watering, and aquaculture uses by the first non-Indian owner(s) of the Claim Land. (Claimant's Response to United States' Second Request for Admissions (Exhibit A), Nos. 9, 12, 13, 15, 16, 17, 18, and 19.)

CONCLUSIONS OF LAW

Claimant's admissions establish that Claim 48 fails to meet the basic elements of a *Walton* claim; therefore, Claim 48 should be denied.

OPINION

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.)

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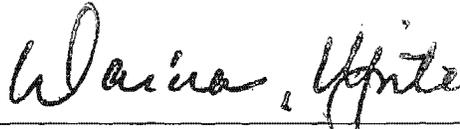
Claimant admits, among other things, that he has not established the elements of a *Walton* water right. Furthermore, claimant admits that he cannot establish all the elements of a *Walton* water right. Therefore, because Claimant has failed to prove the basic elements of a *Walton* water right, Claim 48 should be denied.

ORDER

(1) The United States' Motion for Ruling on Legal Issues is granted. Claimant admits that he has not and cannot establish the basic elements of a *Walton* water right for Claim 48.

(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 48, and the claim is denied.



Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: September 7, 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:

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Salem OR 97301

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Daryl Kollman (183)

Order Granting USA's Motion for Ruling on Legal Issues; Proposed Order Denying Claim – Page 5 of 5

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2005, I sent a true copy of this **ORDER GRANTING MOTION FOR RULING ON LEGAL ISSUES; PROPOSED ORDER DENYING CLAIM** via regular First Class mail and via email, where an email address is indicated.

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