

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

~~Dwight Mebane; Ambrose W. McAuliffe; Elmore
Nicholson; Richard Nicholson; William Nicholson;~~
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.

Kenneth L. Tuttle; Karen L. Tuttle;
Claimants/Contestants.

PROPOSED ORDER

Case No. 184

Claim: 49

Contests: ~~2758~~¹, 2797, 3452², 3794³,
and ~~4104~~⁴

¹ Dwight Mebane voluntarily withdrew from Contest 2758 on June 25, 2004. On November 23, 2004, the remaining contestants voluntarily withdrew Contest 2758. See STIPULATED AGREEMENT BETWEEN CONTESTANTS AMBROSE W. MCAULIFFE, ELMORE NICHOLSON, RICHARD NICHOLSON, WILLIAM NICHOLSON AND CLAIMANTS KENNETH L. TUTTLE AND KAREN L. TUTTLE dated November 23, 2004.

² Don Vincent voluntarily withdrew from Contest 3452 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3452 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3452 on January 15, 2004.

³ A Stipulation between Claimants and the United States to resolve Contest 3794 was admitted into the record by ALJ Ken Betterton on July 28, 2006. See ORDER ON UNITED STATES' UNOPPOSED MOTION TO ADMIT STIPULATION dated July 28, 2006.

⁴ The Klamath Tribes voluntarily withdrew Contest 4104. See KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated January 10, 2005.

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HISTORY OF THE CASE

Kenneth L. Tuttle and Karen L. Tuttle, dba Double K Ranch (Claimants), filed this claim (Claim 49) on January 29, 1991. Claimants filed an Amendment to Klamath Basin Adjudication – Claim 49 on September 29, 1998 and also on December 14, 1998. Claimants have made a claim for water as non-Indian successors to a Klamath Indian Allottee, claiming an amount of water sufficient to irrigate the allotment's share of the Tribe's "practically irrigable acreage" ("PIA").⁵ This *Walton* claim was originally for a total of 14 cubic feet-per-second (cfs) of water for irrigation of 428.1 acres of land and stockwater for 759 head of stock. The claimed period of use is April 1 through October 1 for irrigation and incidental stockwater.

On October 4, 1999, Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation preliminarily denying this claim. The Claimants filed Contest 2797 on May 8, 2000. Ambrose W. McAuliffe, Dwight Mebane, Elmore Nicholson, Richard Nicholson, and William Nicholson (hereafter "McAuliffe, *et al.*") filed contest 2758 on May 8, 2000. Contest 2758 was withdrawn in its entirety by November 23, 2004.

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, Berlva Pritchard, Don Vincent, Randy Walthall, Inter-County Title Company, Winema Hunting Lodge, Inc., Van Brimmer Ditch Company, Plevna District Improvement Company, and Collins Products, LLC (hereafter "KPWU") filed Contest 3452 on May 8, 2000.

The United States of America (hereafter United States) filed Contest 3794 on May 8, 2000. The Klamath Tribes (hereafter Tribes) filed Contest 4104 on May 8, 2000. The Tribes withdrew their contest on January 10, 2005.

The case was consolidated with a number of other cases involving *Walton* claims into Case 900, for a determination of a common issue of law. After discovery to OWRD on this matter and extensive legal briefing, on March 1, 2004, Administrative Law Judge (ALJ) William D. Young issued his Rulings on Motions for Ruling on Legal Issues in Klamath Adjudication (KBA) Case 900. This Ruling was the subject of a Motion for Reconsideration and additional briefing. Ultimately ALJ Young withdrew his March 1, 2004 Ruling. Order Withdrawing Rulings on Motions for Ruling on Legal Issues and Allowing Reconsideration, April 15, 2004, KBA Case 900. On April 20, 2004, ALJ Young issued his Order Amending Rulings on Motions for Rulings on Legal Issues in KBA Case 900. On May 27, 2004, ALJ Young vacated the April 29, 2003 Order Granting Motion to Consolidate. Order Vacating Order to Consolidate, May 27, 2004, KBA Case No. 900. The Order Vacating Order to Consolidate provides that "the cases

⁵ Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 402 (9th Circuit, 1985).

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associated with this consolidated case shall proceed through the contested case process in the same manner as if they had not been consolidated, except that the law of the case in each case is set out in the April 20, 2004 Order Amending Rulings On Motions For Ruling On Legal Issues.” *Id.* at 2.⁶

Based upon ALJ Young’s April 20, 2004 order, the United States and Klamath Project Water Users filed a Motion for Ruling on Legal Issues contending that a portion of the claim was precluded because it was embraced within a prior adjudication. On May 23, 2005 ALJ Maurice L. Russell II issued an Order on Motions for Ruling on Legal Issues finding that the claim was precluded as to approximately 392.7 acres. ALJ Russell’s order also held that the claim was not precluded as to the remaining claimed lands, containing approximately 35.4 acres.

On July 3, 2006, the United States filed its Unopposed Motion to Admit Stipulation between Claimants and United States to Resolve United States’ Contest 3794 into the Record. On July 28, 2006, ALJ Ken Betterton issued an order granting the motion and admitting the Stipulation into the record.

Claimants submitted written direct testimony and exhibits on August 18, 2006. No rebuttal testimony was filed.

On October 26, 2006, ALJ Betterton convened a hearing on this matter. Cliff Bentz appeared on behalf of Claimant. Andy Hitchings appeared on behalf of Contestant KPWU. Jesse Ratcliffe appeared on behalf of OWRD. No party having asked to cross-examine any witness, ALJ Betterton admitted written testimony and evidence without objection and set a briefing schedule.

Claimants filed their Closing Memorandum on December 11, 2006. KPWU filed its Response memorandum on January 10, 2007. Claimants filed their Reply Memorandum on February 9, 2007. The record closed on February 9, 2007.

After the record closed, the case was reassigned to me to prepare this Proposed Order. I have reviewed the entire record, including the record of the October 26, 2006 hearing, prior to preparation of this order.

EVIDENTIARY RULINGS

The following exhibits, written testimony and affidavits were admitted into the record.

OWRD Exhibit 1 including the Affidavit and Testimony of Teri Hranac.

Claimants’ Exhibit 1-Direct Testimony of Witness Ambrose McAuliffe in Support of Claim No. 49

⁶ In his Amended Order, ALJ Young concluded that some of the claims filed in the Klamath Adjudication might be precluded because the property had already been subject to a prior adjudication. Because the answer to this question depended on evidence in the individual cases, ALJ Young held that the party seeking preclusion had the burden of going forward and presenting evidence in support of preclusion.

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Claimant's Exhibit 2-Direct Testimony of Kenneth L. Tuttle in Support of Claim 49.

Stipulation between Claimants and United States to Resolve the United States' Contest 3794.

ISSUE⁷

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) The portion of the original claim precluded by a prior adjudication is composed of approximately 392.7 acres, described as follows:

T 33 S., R. 7.5 E., Willamette Meridian

Section 22: W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$

Section 23: S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$

Section 26: NW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$

Section 27: NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, Lot 8 (as included in what is commonly known as the SW $\frac{1}{4}$ SE $\frac{1}{4}$), Lot 9 (as included in what is commonly known as the SE $\frac{1}{4}$ SW $\frac{1}{4}$)

(Order on Motion for Ruling on Legal Issues, May 23, 2005.)

2) The remaining portion of the claim subject to stipulation is for irrigation and incidental stockwatering. For all allowed water rights in Claim 49, the Rate is 1/50th cfs/acre.⁸ The Duty is 4.0 acre-feet of water per acre per year. The Period of Use for irrigation and incidental stock watering is April 1 through October 1. The Priority date is October 14, 1864.

3) The land subject to this claim as limited under the Stipulation between claimant and the United States is composed of a single parcel of 30.8 acres,⁹ located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22 (approximately 10 acres), the N $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ (approximately 8.3 acres), and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, and S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ (12.5 acres) of Section 23, all in T33S R7.5E.W.M. The property is irrigated

⁷ Only the issue raised by the remaining contestant, KPWU, is included. The issues raised in the other contests have not been listed, as they have been resolved by withdrawal or stipulation.

⁸ The rate and duty and stock water are based on the stipulation between claimant and the United States, supported by the Direct Testimony of Kenneth Tuttle. KPWU also sought that the rate, duty and number of head be limited to this amount in its argument. Season of use is as claimed. Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

⁹ Although the property remaining after preclusion, 35.4 acres, included a small parcel in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 23 that claimants attempted to add to the claim by amendment in 1998, that parcel does not appear to be included in the 30.8 acres remaining after the claim was limited by stipulation. (Claim 49 Stipulation Between Claimants and United States to Resolve United States' Contest 3794; OWRD Ex. 1 at 86.) Consequently, the purported amendments to the claim in 1998 will not be further addressed.

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from a diversion point at NE ¼ SW ¼ Section 23, T33S R7.5E.W.M. from Fort Creek, tributary to Wood River. (Direct Testimony of Kenneth Tuttle at 2, OWRD Ex. 1 at 86.)

4) The property in question is within the former Klamath Adjudication. (OWRD Ex. 1 at 199.) On December 12, 1929, the United States issued a patent for land within the Klamath Reservation to Francis Kirk, a Klamath Indian. (*Id.* at 152.) Francis Kirk had been allotted the property as early as 1917. (*Id.* at 199.)¹⁰ Francis Kirk transferred the property to H.M. Mallory, *et ux*, non-Indians, on January 27, 1930. (*Id.* at 153.)

5) In November 1917, ditches from the Klamath Reservation Agency Project were proposed that would extend to the allotment of Francis Kirk. (*Id.* at 199.) In May 1919 the State Water Board issued Permit 4158 to Walter Dixon for diversion and beneficial use of water on the property subject to this claim as limited by stipulation. A Water Right Certificate for this permit was issued in 1920. (*Id.* at 161.) The works described in the application for this permit correspond to the ditch proposed in 1917. (*Id.* at 162.) Water from Fort Creek Canal, part of the Agency Project, is diverted to the property by lateral ditches. (Direct Testimony of Kenneth Tuttle at 2.)

6) There is no evidence in the record of any forfeiture proceedings for non-use of the water subject to the water right certificate issued in 1920. The property in question has been irrigated continuously since at least 1957. (Direct Testimony of Ambrose McAuliffe at 2.)

CONCLUSION OF LAW

The record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, season of use and acreage claimed.

OPINION

The burden of proof to establish a claim is on the Claimants. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division*, 47 Or App 437 (1980); *Metcalf v. AFSD*, 65 Or App 761 (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

¹⁰ While the record contains statements from various persons that Francis Kirk was a Klamath Indian, the statements are hearsay well after the fact, and the source of that information is not in the record. I infer that more likely than not Francis Kirk was a Klamath Indian from the fact that Francis Kirk is identified as the holder of this land on a map of the Klamath Agency Project dated November 1917, but did not receive title to the property until 1929, and from the fact that his Patent for the property recites no consideration for the transfer. Under the General Allotment Act of 1887, 25 USC §§347-349, property was allotted to individual Indians, but held in Trust by the United States for 25 years before a patent would be issued, explaining the delay in transferring title to the property.

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In his Ruling on United States' Motion for Ruling on Legal Issues in Klamath Case 272, 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.

Ruling on United States' Motion for Ruling on Legal Issues, Klamath Adjudication Case 272, August 4, 2003, at 9.

Having reviewed the legal authorities applied by ALJ Young in his ruling, I adopt ALJ Young's formulation as the correct interpretation of the *Walton* line of cases.

The property in question was part of the Klamath Indian Reservation and allotted to an Indian, Francis Kirk, before 1917. By 1920, the property, though still allotted to Francis Kirk, was the subject of a Water Right Certificate in the name of Walter Dixon, based upon completion of the irrigation ditches that are still shown on the map of the property. This certificate included a description of the property remaining in this claim as part of the place of use. After Francis Kirk received his patent to the property, in 1929, he transferred it to the Mallories in 1930, who were non-Indians. Although there is no direct evidence that the property was continuously irrigated from 1930 and 1957, no forfeiture proceedings were brought against the certificated water right during this period, suggesting that water was put to beneficial use. From 1957 to the present, the percipient testimony of witnesses in these proceedings supports the conclusion that the property has been continuously irrigated, and is irrigated at the present day. The elements necessary for a *Walton* claim for the 30.8 acres have been established.

Based on the evidence presented, I recommend that the Adjudicator allow the claim on the terms specified in the stipulation between Claimant and the United States.

ORDER

I propose that the Adjudicator issue the following order:

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Claim 49 is allowed in part as follows:

- a. Point of Diversion: NE ¼ SW ¼ Section 26, Township 33 South, Range 7.5 East, W.M.
- b. Source: Fort Creek, tributary to Wood River.
- c. Use: Irrigation of 30.8 acres and incidental livestock watering.
- d. Diversion Rate and Duty for Irrigation: 0.60 cubic feet per second (cfs) (30.8 acres x 1/50 cfs/acre), measured at the point of diversion and limited to a total volumetric amount of 123.2 acre-feet per year (4.0 acre-feet/acre x 30.8 acres).
- e. Diversion Rate and Duty for Livestock Watering: Incidental livestock watering during the irrigation season (April 1 to October 1), with no additional amounts diverted for livestock.
- f. Place of Use: 30.8 acres described as follows:
T33S R7.5E.W.M.
Section 22:
Approx. 10 acres: SE ¼ NE ¼ SE ¼, SW ¼ NE ¼ NE ¼ SE ¼
Section 23:
Approx. 8.3 acres: N ½ N ½ SW ¼ SW ¼
Approx. 12.5 acres: SW ¼ NW ¼ SW ¼, S ½ SE ¼ NW ¼ SW ¼, and S ½ N ½ SE ¼ NW ¼ SW ¼
- g. Period of Use: April 1 to October 1 (irrigation); year-round
- h. Priority Date: October 14, 1864.



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

Dated: May 8, 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.

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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 May 8, 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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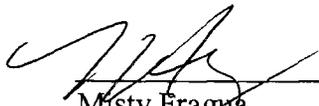
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