

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; <del>The Klamath Tribes;</del> <del>Elmore Nicholson; Richard Nicholson; William</del> <del>Nicholson; Roger Nicholson; LMJ Cattle</del> <del>Company; Lauren Peter Owens; Klamath</del> 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	<b>AMENDED PROPOSED ORDER</b>  Case No. 187  Claim: 53  Contests: 2067, 2752, <sup>1</sup> 2793, <sup>2</sup> 3453, <sup>3</sup> 3796, and 4108 <sup>4</sup>
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vs.

James Root; Valerie Root,  
Claimants/Contestants

This proceeding pursuant to ORS Chapter 539 is part of a general stream adjudication to determine the relative rights of the parties to the waters of the various streams and reaches within the Klamath River Basin.

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<sup>1</sup> On November 3, 2004, William Nicholson and Elmore Nicholson voluntarily withdrew from Contest 2752 and Roger Nicholson substituted for Richard Nicholson in Contest 2752.

<sup>2</sup> On December 2, 2005, Lauren Peter Owens filed a Notice of Withdrawal of Contest 2793 on behalf of himself and LMJ Cattle Company.

<sup>3</sup> Don Vincent voluntarily withdrew from Contest 3453 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3453 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3453 on January 15, 2004.

<sup>4</sup> The Klamath Tribes voluntarily withdrew Contest 4108 on January 21, 2005.

## HISTORY

Ambrose and Susan McAuliffe filed Claim 53 on February 1, 1991, for their property that was irrigated from Agency Creek, part of the Klamath Basin. In 1995, James and Valerie Root (Claimants) purchased the property. The original claim was for 45.0 cubic feet per second (cfs) of water diverted from Agency Creek for the following uses: 20 cfs for irrigation of 340.0 acres, 5 cfs for livestock, and 20 cfs for fish and wildlife purposes. On July 8, 2005, Claimants withdrew their fish and wildlife claim. The claimed priority date is October 14, 1864. The claimed period of use was April 1 through November 30 for irrigation, and year-round for livestock. Subsequently, the claim was amended to claim irrigation of 396.4 acres.

On October 4, 1999, OWRD issued its Preliminary Evaluation, preliminarily denying this claim as precluded as previously adjudicated in the Wood River, Crane Creek, Sevenmile Creek, and Fourmile Creek adjudication.

On May 5, 2000, Claimants filed Contest 2067. On May 8, 2000, the following also filed contests with respect to this claim: Elmore Nicholson, Richard Nicholson, and William Nicholson filed Contest 2752; LMJ Cattle Company and Lauren Peter Owens filed Contest 2793, which was withdrawn December 2, 2005; the United States filed Contest 3796; the Klamath Tribes filed Contest 4108, which was subsequently withdrawn; and the Klamath Project Water Users<sup>5</sup> (“KPWU”) filed Contest 3453. Subsequently, Elmore and William Nicholson withdrew from Contest 2752, and Roger Nicholson substituted for Richard Nicholson.

In May 2003, this claim was consolidated with several others in Consolidated Case 900 for the purpose of determining the effect of prior adjudications on the claims in this adjudication. An order by ALJ Young dated April 20, 2004, terminated the consolidated proceedings and referred the individual claims were for further proceedings.

On or about October 29, 2004, Roger Nicholson (through his attorney Carol DeHaven Skerjanec), KPWU, and the United States declined to file any motions for a determination that this claim is barred by the prior Wood River Adjudication. Therefore, any issues regarding the preclusive effect of the Wood River Adjudication are now moot.

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<sup>5</sup> 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 are collectively referred to as the Klamath Project Water Users.

On September 19, 2005, Administrative Law Judge Daina Upite issued an Order on United States's Motion for Ruling on Legal Issues regarding the legal standard for establishing a water right under the Klamath Termination Act. Claimants consented to the proposed legal standard, and the United States's motion was granted. The specific lands to which the ruling applies were not determined.

By March 1, 2006, Claimants, the United States, and KPWU had endorsed a Stipulation to Resolve Contests 3453 and 3796, contests retrospectively by KPWU and the United States. The remaining contests are Claimant's (2067) and Roger Nicholson's (2752).

On December 19, 2005, an Order Scheduling Pre-Hearing and Hearing and Order Imposing Deadlines for Evidence and Cross Examination was sent to the parties. Claimant submitted evidence by the deadline. Roger Nicholson provided no evidence. No party filed a request for cross-examination by the deadline of March 6, 2006. A pre-hearing was held that day. All the parties and OWRD were represented, except for Roger Nicholson. By letter mailed March 9, 2006, the ALJ denied Claimant's Motion to Cancel the hearing scheduled for March 13, 2006, in order to give contestant Roger Nicholson the opportunity to appear and argue in support of his contest.

A hearing was held on March 13, 2006. Participating by telephone were: Paul Logan, attorney for Claimants; Andrew Hitchings, attorney for KPWU; Thomas Snodgrass, attorney for the United States; and Jesse Ratcliffe, Assistant Attorney General for OWRD. Contestant Roger Nicholson did not appear. At the hearing, OWRD Exhibit 1 and Claimant's Exhibits 1, 2, and 3 were entered in the record and the record was closed.

A Proposed Order was issued on October 18, 2006. On October 20, 2006, Claimants requested amendment of the Proposed Order to correct description basis of the water rights. On November 1, 2006, OWRD re-referred this case to amend the Proposed Order. The Proposed Order is withdrawn and this Amended Order issued.

## ISSUES

In Contest 2752 and the Nicholsons' Pre-Hearing Statement, Contestant Roger Nicholson raised the following issues:

- Whether Claimants can establish a *Walton* right, including whether the lands in question were held by an Indian allottee.
- Are the rate and duty claimed by Claimants excessive?
- Is the stock water claimed by Claimants in excess of that required for beneficial use?

The Notice of Hearing in this case included issues raised by the United States and KPWU in their contests. Claimants, the United States, and KPWU have entered a stipulation that has settled all contests and claims among them. (Ex. C1.)

### **EVIDENTIARY RULINGS**

The following were admitted without objection:

- OWRD Exhibit 1
- Ex. C1, Stipulation of Claimants, the U.S., and KPWU
- Ex. C2, the direct testimony of Ambrose W. McAuliffe on behalf of claimant
- Ex. C3, the direct testimony of Claimant James M. Root

### **FINDINGS OF FACT**

(1) On January 28, 1991, Ambrose and Susan McAuliffe filed a Statement and Proof of Claim (Claim 53) for their property that was irrigated from Agency Creek, which is part of the Klamath Basin. (Ex. C2-B.) In 1995, James and Valerie Root (Claimants) purchased the property. The original claim was for 45.0 cubic feet per second (cfs) of water diverted from Agency Creek for the following uses: 20 cfs for irrigation of 340.0 acres, 5 cfs for livestock, and 20 cfs for fish and wildlife purposes. On July 8, 2005, Claimants withdrew their fish and wildlife claim. The claimed priority date is October 14, 1864 (the date the Klamath Indian reservation was established), as a non-Indian successor to a Klamath Indian Allottee. The claimed period of use was April 1 through November 30 for irrigation, and year-round for livestock. Subsequently, the claim was amended to claim irrigation of 396.4 acres. (Ex. C2.)

(2) On October 4, 1999, OWRD issued its Preliminary Evaluation, denying this claim as precluded because it was previously adjudicated in the Wood River, Crane Creek, Sevenmile Creek, and Fourmile Creek adjudication. In May 2003, this claim was consolidated with several others in Consolidated Case 900 for the purpose of determining the effect of prior adjudications on the claims in this adjudication. Administrative Law Judge William Young issued an order April 20, 2004, terminating the consolidated proceedings, and the individual claims were referred for further proceedings. On or about October 29, 2004, Roger Nicholson (through his attorney Carol DeHaven Skerjanec), KPWU, and the United States declined to file any motions for a determination that Claimants' claim is barred by the prior Wood River Adjudication. Therefore, any issues initially raised regarding the preclusive effect of the Wood River Adjudication are now moot.

(3) By March 1, 2006, Claimant and all of the remaining contestants except Roger Nicholson endorsed a Stipulation to Resolve Contests 3453 and 3796, resolving all the remaining contests except those of Nicholson and Claimants (in response to Nicholson's). (Ex. C1.) Nicholson was given an opportunity to join the Stipulation, but did not respond. Nicholson filed no information besides his contest. He provided no evidence

and did not request cross-examination of any witness. He did not appear at the hearing to provide evidence. (Ex. C1--Declaration of Paul Logan.) Claimants agreed to less than they originally claimed. They agreed to accept the following water rights (marked as B.2., B.3., and B.4. in the Stipulation) and the other remaining contestants, the United States and KPWU, did not object:

**B.2.**

SOURCE: Agency Spring, tributary to Agency Creek, tributary to Crooked Creek, tributary to Wood River

POINT OF DIVERSION: Lot 4 (SW ¼ SW ¼), Section 18, Township 34 South, Range 7 East, W.M., 815 feet east and 1,100 feet north of the SW ¼ corner, Section 18

USE: Irrigation and stock water use incidental to irrigation

RATE: April 1 – August 31, 1/80<sup>th</sup> cubic foot per second (cfs) (1/80<sup>th</sup> cfs x 262.0 acres = 3.275 cfs), measured at the point of diversion;

September 1 – October 15, 1/50<sup>th</sup> cfs x 262.0 acres = 5.24 cfs), measured at the point of diversion

DUTY: 4 acre feet (af) per acre per year, measured at the point of diversion

PERIOD OF USE: April 1 to October 15 each year.

PRIORITY DATE: October 14, 1864

PLACE OF USE:

PLACE	ACRES
T34S, R7E, Sec 19, Lot 4 (SW ¼ SW ¼)	9.3
T34S, R7E, Sec 30, Lot 1 (NW ¼ NW ¼)	36.2
T34S, R7E, Sec 30, Lot 5 (NE ¼ NW ¼)	3.0
T34S, R7E, Sec 30, Lot 2 (SW ¼ NW ¼)	39.4
T34S, R7E, Sec 30, (SE ¼ NW ¼)	13.0
T34S, R7E, Sec 30, Lot 3 (NW ¼ SW ¼)	32.2
T34S, R7E, Sec 30, Lot 4 (SW ¼ SW ¼)	37.0
T34S, R7.5E, Sec 25, Lot 13 (part of NE ¼ NE ¼)	11.5
T34S, R7.5E, Sec 25, Lot 12 (part of NE ¼ NE ¼)	20.7
T34S, R7.5E, Sec 25, (NW ¼ NE ¼)	3.4
T34S, R7.5E, Sec 25, Lot 15 (part of SE ¼ NE ¼)	18.7
T34S, R7.5E, Sec 25, Lot 14 (part of SE ¼ NE ¼)	13.5
T34S, R7.5E, Sec 25, Lot 17 (part of NE ¼ SE ¼)	16.0
T34S, R7.5E, Sec 25, Lot 16 (part of NE ¼ SE ¼)	4.0
T34S, R7.5E, Sec 25, (SE ¼ SE ¼)	4.1

**B.3.**

SOURCE: Agency Spring, tributary to Agency Creek, tributary to Crooked Creek, tributary to Wood River

POINT OF DIVERSION: Lot 4 (SW ¼ SW ¼), Section 18, Township 34 South, Range 7 East, W.M., 815 feet east and 1,100 feet north of the SW ¼ corner, Section 18

USE: Irrigation and stock water use incidental to irrigation

RATE: April 1 – August 31, 1/80<sup>th</sup> cubic foot per second (cfs) (1/80<sup>th</sup> cfs x 73.5 acres = .919 cfs), measured at the point of diversion;

September 1 – October 15, 1/50<sup>th</sup> cfs x 73.5 acres = 1.47 cfs), measured at the point of diversion

DUTY: 2.15 acre feet (af) per acre per year, measured at the point of diversion

PERIOD OF USE: April 1 to October 15 each year.

PRIORITY DATE: October 14, 1864

PLACE OF USE:

PLACE	ACRES
T34S, R7.5E, Sec 25, (NW ¼ NE ¼)	26.6
T34S, R7.5E, Sec 25, Lot 9 (SW ¼ NE ¼)	22.0
T34S, R7.5E, Sec 25, Lot 13 (part of NE ¼ NE ¼)	1.1
T34S, R7.5E, Sec 25, Lot 14 (part of SE ¼ NE ¼)	7.8
T34S, R7.5E, Sec 25, Lot 17 (part of NE ¼ SE ¼)	16.0

#### **B.4.**

SOURCE: Agency Spring, tributary to Agency Creek, tributary to Crooked Creek, tributary to Wood River

POINT OF DIVERSION: Lot 4 (SW ¼ SW ¼), Section 18, Township 34 South, Range 7 East, W.M., 815 feet east and 1,100 feet north of the SW ¼ corner, Section 18

USE: Stock water

RATE: 2,400 gallons per day, measured at the place of use

DUTY: 1.24 af per acre per year, measured at the place of use.

At no time shall more water be diverted than has been historically diverted for beneficial use and is reasonably necessary to transport the water and to prevent ditches and channels from being completely frozen up, up to a maximum of 3 cfs. Further, at no time shall more than 2,400 gallons per day (measured at the point of diversion) be diverted unless a minimum of 11 cfs shall flow into Agency Creek from Agency Spring after the diversion.

PERIOD OF USE: October 16 – March 31

PRIORITY DATE: October 14, 1864

PLACE OF USE:

The two lateral ditches flowing from Agency Canal across the following lands;

PLACE

T34S, R7E, Sec 30, Lot 3 (NW ¼ SW ¼)

T34S, R7E, Sec 30, Lot 4 (SW ¼ SW ¼)

T34S, R7.5E, Sec 25, Lot 17 (part of NE ¼ SE ¼)

T34S, R7.5E, Sec 25, (SE ¼ SE ¼)

(4) All the land included in this claim is within the former boundaries of the Klamath Indian Reservation. All the land included in Claim 53 was allotted by the United States to members of the Klamath Tribes. The irrigation system on the property was built during Indian ownership. (Ex. C2 at 2.) The location of the claim is detailed in Ex. C2-A. Ambrose and Susan McAuliffe were the first non-Indian purchasers of the

property. (Ex. C2.) They have continued the irrigation system that operated during Indian ownership. (*Id.*)

### CONCLUSIONS OF LAW

Claimant has provided sufficient evidence of the development and continuous use of water to establish Klamath Termination Act water rights.

The rate and duty claimed by Claimant are not excessive.

The stock water claimed Claimant is not in excess of that required for beneficial use.

### OPINION

The remaining contests are by Roger Nicholson and Claimants (in response to Nicholson's contest). Claimants have reached an agreement with two other contestants, KPWU and the United States, and agreed to lesser water rights than they first claimed. Roger Nicholson has provided no evidence and no argument after the filing of the contest on which he was later substituted. Contestants KPWU and the United States basically raised the same issues in their contests and agreed to the water rights described in the stipulation to settle their contests.

Claimants have the burden of establishing their claim, if it is contested. Their claim must be established by a preponderance of the evidence. ORS 539.110. *See* ORS 183.450 ("The burden of presenting evidence to support a particular fact or position in a contested case rests on the proponent of the fact or position.").

Contestant Nicholson raised the issue of whether Claimants have established a *Walton* water right, but Claimants are seeking to establish Klamath Termination Act water rights. A prior order in this case, Order on United States' Motion for Ruling on Legal Issues, Case No. 187, September 20, 2005, detailed the legal standards to establish Klamath Termination act water rights as follows:

1. The claim is for a consumptive water use on former unallotted Klamath Tribal lands that were formerly part of the Klamath Reservation.
2. The allotted Klamath Tribal lands were transferred from the Klamath Tribes to a non-Indian purchaser pursuant to the express language of the Klamath Termination Act, and the claimant is a successor in interest to the first non-Indian purchaser;
3. The amount of water claimed for consumptive use Klamath Termination Act water right is limited to the amount of water that was:

- a. Being used by the Klamath Tribes on the unallotted Klamath Tribal lands associated with the claim at the time title passed to the first non-Indian purchaser; or
  - b. That was put to use on the land with reasonable diligence by the first non-Indian purchaser;
4. After its initial development, the water claimed was continuously used by the first non-Indian purchaser and by all subsequent successors to the unallotted Klamath Tribal lands associated with the claim.

Based on the record in this case, Claimants have established Klamath Termination Act water rights, as described in Finding of Fact No. 3 above. The record supports the conclusions in the Stipulation. Contestant Nicholson did not appear or provide evidence to rebut these conclusions. The parties stipulated that the portion of the claim related to stock watering was restricted to incidental stock watering, and would not be allowed as a year-round use. (Ex. C1.) The record also supports the conclusions that the rate and duty are not excessive and that the amount of stock water is not in excess of that required for beneficial use.

### **ORDER**

It is proposed 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 specifically set out below.

The elements of Klamath Termination Act water rights are established for Claim 53 as follows:

#### **B.2.**

**SOURCE:** Agency Spring, tributary to Agency Creek, tributary to Crooked Creek, tributary to Wood River  
**POINT OF DIVERSION:** Lot 4 (SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ ), Section 18, Township 34 South, Range 7 East, W.M., 815 feet east and 1,100 feet north of the SW  $\frac{1}{4}$  corner, Section 18  
**USE:** Irrigation and stock water use incidental to irrigation  
**RATE:** April 1 – August 31  
1/80<sup>th</sup> cubic foot per second (cfs) (1/80<sup>th</sup> cfs x 262.0 acres = 3.275 cfs), measured at the point of diversion;  
September 1 – October 15  
1/50<sup>th</sup> cfs x 262.0 acres = 5.24 cfs), measured at the point of diversion  
**DUTY:** 4 acre feet (af) per acre per year, measured at the point of diversion  
**PERIOD OF USE:** April 1 to October 15 each year.  
**PRIORITY DATE:** October 14, 1864

PLACE OF USE PLACE	ACRES
T34S, R7E, Sec 19, Lot 4 (SW ¼ SW ¼)	9.3
T34S, R7E, Sec 30, Lot 1 (NW ¼ NW ¼)	36.2
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T34S, R7.5E, Sec 25, Lot 16 (part of NE ¼ SE ¼)	4.0
T34S, R7.5E, Sec 25, (SE ¼ SE ¼)	4.1

**B.3.**

SOURCE: Agency Spring, tributary to Agency Creek, tributary to Crooked Creek, tributary to Wood River

POINT OF DIVERSION: Lot 4 (SW ¼ SW ¼), Section 18, Township 34 South, Range 7 East, W.M., 815 feet east and 1,100 feet north of the SW ¼ corner, Section 18

USE: Irrigation and stock water use incidental to irrigation

RATE: April 1 – August 31, 1/80<sup>th</sup> cubic foot per second (cfs) (1/80<sup>th</sup> cfs x 73.5 acres = .919 cfs), measured at the point of diversion;

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DUTY: 2.15 acre feet (af) per acre per year, measured at the point of diversion

PERIOD OF USE: April 1 to October 15 each year.

PRIORITY DATE: October 14, 1864

PLACE OF USE:

PLACE	ACRES
T34S, R7.5E, Sec 25, (NW ¼ NE ¼)	26.6
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**B.4.**

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USE: Stock water

RATE: 2,400 gallons per day, measured at the place of use

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At no time shall more water be diverted than has been historically diverted for beneficial use and is reasonably necessary to transport the water and to prevent ditches and channels from being completely frozen up, up to a maximum of 3 cfs. Further, at no time shall more than 2,400 gallons per day (measured at the point of diversion) be diverted unless a minimum of 11 cfs shall flow into Agency Creek from Agency Spring after the diversion.

PERIOD OF USE: October 16 – March 31

PRIORITY DATE: October 14, 1864

PLACE OF USE:

The two lateral ditches flowing from Agency Canal across the following lands;

PLACE

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T34S, R7.5E, Sec 25, Lot 17 (part of NE ¼ SE ¼)

T34S, R7.5E, Sec 25, (SE ¼ SE ¼)

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Lawrence S. Smith  
Administrative Law Judge  
Office of Administrative Hearings

ISSUED AND MAILED ON: November 3, 2006

**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 Hearing Officer. 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:

Adjudicator  
Klamath Basin Adjudication  
Oregon Water Resources Dept  
725 Summer Street N.E., Suite "A"  
Salem OR 97301