

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;  
Contestants

vs.

Yeugeny Kaplun; Luba Kaplun; William G. Shaffer; Maureen Shaffer; Dennis E. Odell; Phyllis Odell; Harry E Fuqua II; Thomas E. McKelvey; Sallie McKelvey; MaManus Family Trust; Daniel Warren; Mary Lezotte; George R. Pedranti, Jr.; Sharon Pedranti; Yoshitaka K. Taniguchi; Keiko Taniguchi; James E. Ellis; Karen L. Ellis; Ellis Family Trust; Gilbert L. Tompson; Jean Thompson; H. Deborah Moruss; David Barta; Lydia Barta; David T. Garrett; Ann M. Garrett; Thomas A. Henderson; Yvonne Henderson; Scherl Family Trust; Richard J. Swiatkowski; Joan Swiatkowski; David J. Schrodi; John B. Schrodi; Charles E. Coker; Bongorz Family Trust;  
Claimants.

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

Case No. 188

Claims: 54

Contest: 3797 and 4109

On December 3, 2004, the United States and the Klamath Tribes filed a Joint Motion for Ruling on Legal Issues, seeking determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served on Claimants should be deemed admitted because Claimants failed to provide responses despite the order requiring discovery; and (2) Claimants' deemed admissions establish that the elements of a *Walton*<sup>1</sup> water right are not met and, therefore, the claim should be denied. Claimants have not filed a response to the motion.

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MAR 14 2005

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<sup>1</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*). *Yeugeny Kaplun, et al.* (188)

## ISSUES

(1) Whether the requests for admissions served on Claimants by the United States and the Klamath Tribes and not responded to by Claimants despite the Order Requiring Discovery should be deemed admitted?

(2) Whether Claimants' deemed admissions establish that Claim 54 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

(1) On November 27, 1990, Richard E. Siemens and Theodore E. Siemens dba Siemens Farms filed Claim 54. The original Claimants made a claim for water as Indian successors to a Klamath Indian Allottee. The Allottee claim was for 600 gallons per minute for irrigation of 97.2 acres of land. The claimed period of use is May through October, and the claimed priority date is October 14, 1864. (OWRD Ex. 1 at 1-5.)

(2) Shortly after filing their claim, the Claimants transferred their property interests to Eli Property Company for development into a subdivision (Agency Lake Ranches). Once transferred to non-Indians, the *Walton* Claimants may claim an amount of water sufficient to irrigate the allotment's share of the Tribe's "practicably irrigable acreage" ("PIA"). An agent for the developer, Cory Engel, stated that the agricultural land has been taken out of use and developed into residential property. (OWRD Ex. 1 at 81.) Eli Property Company transferred property interests to:

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MAR 14 2005

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- Yeugeny Kaplun; Luba Kaplun. (OWRD Ex. 1 at 16.)
- William G. Shaffer; Maureen Shaffer. (OWRD Ex. 1 at 16.)
- Dennis E. Odell & Phyllis Odell: In a phone conversation with OWRD, Phyllis Odell said that she plans to pursue the water right claim, but does not currently irrigate. (OWRD Ex. 1 at 16, 83.)
- Harry E Fuqua II. (OWRD Ex. 1 at 16, )
- Thomas E. McKelvey; Sallie McKelvey. (OWRD Ex. 1 at 16.)
- MaManus Family Trust. (OWRD Ex. 1 at 16.)
- Daniel Warren; Mary Lezotte: Mary Lezotte contacted the Office of Administrative Hearings and said that she and her husband sold the property to Eli Property Company. (OWRD Ex. 1 at 16; Note to file dated 11/24/04.)
- George R. Pedranti, Jr.; Sharon Pedranti. (OWRD Ex. 1 at 16.)
- Yoshitaka K. Taniguchi; Keiko Taniguchi: On November 29, 2004, Yoshitaka and Keiko Taniguchi filed a Notice of Withdrawal of Claim. (OWRD Ex. 1 at 16; Notice of Withdrawal of Portion of Claim, Case 188, Claim 54.)
- James E. Ellis; Karen L. Ellis; Ellis Family Trust. (OWRD Ex. 1 at 16.)
- Gilbert L. Thompson and Jean Thompson: In a telephone conversation and subsequent letter to OWRD, Gil Thompson said that he did not intend to use water from Agency Lake. (OWRD Ex. 1 at 16, 77, 84.)
- H. Deborah Moruss. In a telephone conversation, Deborah Moruss said that she is considering whether she wished to pursue the claim. (OWRD Ex. 1 at 16, 78.)
- David Barta; Lydia Barta. (OWRD Ex. 1 at 16.)
- David T. Garrett; Ann M. Garrett. (OWRD Ex. 1 at 16.)
- Thomas A. Henderson & Yvonne Henderson: Initially, Thomas and Yvonne Henderson wrote a letter expressing an interest in protecting the claim. However, the Hendersons subsequently sold the property to Kerry Penn. (OWRD Ex. 1 at 16, 88; Note to Stacey Silbernagel.)
- Scherl Family Trust. (OWRD Ex. 1 at 16.)
- Richard J. Swiatkowski and Joan Swiatkowski: In a telephone conversation with OWRD, Dick Swiatkowski said that he did not use water from Agency Lake to irrigate his parcel. (OWRD Ex. 1 at 16, 82.)
- David J. Schrodi & John B. Schrodi: In a telephone conversation and letter, David Schrodi said that he wished to pursue the claim. In a subsequent letter dated 11/23/04, David Schrodi wrote that he sold the property to Eli Property Co. (OWRD Ex. 1 at 16, 91; Letter to Judge Thomas Ewing, Case 188, Claim 54.)
- Charles E. Coker. (OWRD Ex. 1 at 16.)
- Bongerz Family Trust. (OWRD Ex. 1 at 16.)

(3) On October 4, 1999, the Adjudicator for the Oregon Water Resources Department (OWRD), Richard D. Bailey, issued a Preliminary Evaluation, approving this claim for 1.34 cubic feet per second (cfs) for irrigation of 97.2 acres of land. The approved period of use is March 1 through October 31, and the approved priority date is October 14, 1864. (OWRD Ex. 1 at 150.)

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(4) On May 8, 2000, the United States filed Contest 3797, and the Klamath Tribes filed Contest 4109. (OWRD Ex. 1 at 131, 136.)

(5) On January 26, 2004, Administrative Law Judge (ALJ) William D. Young held a prehearing conference, pursuant to written notice sent to participants. (See Order Requiring Prehearing Statements, Case 188, Claim 54, dated November 14, 2003.) Claimants did not participate in the hearing and did not file prehearing statements. (See Letter to Counsel, Case 188, Claim 54, dated January 27, 2004.)

(6) On January 27, 2004, ALJ William D. Young issued a Scheduling Order, based upon the discovery schedule that was agreed upon during the prehearing conference. (See Scheduling Order, Case 188, Claim 54.) A copy of the schedule was mailed to Claimants.

(7) On June 23, 2004, ALJ Maurice L. Russell, II, issued an amended scheduling order (See [Proposed] Amended Scheduling Order, Case 188, Claim 54.)

(8) On June 29, 2004, consistent with the Amended Scheduling Order, counsel for the United States served discovery requests on Claimants, including requests for admissions. (Discovery Requests to Claimants, Case 188, Claim 54.) Claimants did not respond to the discovery requests by the deadline of September 1, 2004, or at any time thereafter. (Motion for an Order Requiring Discovery Responses, Case 188, Claim 54.)

(9) On October 1, 2004, the United States filed a Motion for an Order Requiring Discovery Responses, based on failure of named Claimants to respond to discovery requests. (Motion for an Order Requiring Discovery Responses from Claimants, Case 188, Claim 54.)

(10) On November 19, 2004, ALJ Daina Upite issued an Order Requiring Discovery, which required Claimants to respond to Contestants' discovery requests on or before November 30, 2004. (See Order Requiring Discovery, Case 188, Claim 54.) As of December 3, 2004, Claimants had not responded to the discovery requests or filed any objections. (See Joint Motion of the United States and Klamath Tribes for Motion for Ruling on Legal Issues, Case 188, Claim 54.)

(11) On December 3, 2004, the United States and the Klamath Tribes filed a Joint Motion for Ruling on Legal Issues seeking a summary judgment against the claimants. (Joint Motion of the United States and Klamath Tribes for Motion for Ruling on Legal Issues, Case 188, Claim 54.)

(12) On December 15, 2004, ALJ Daina Upite issued an Order Extending the Deadline to respond to the Order Requiring Discovery because some Claimants had either moved or sold their property and had not yet received the Order Requiring Discovery. The extension required Claimants to respond to Contestants' discovery requests on or before December 27, 2004. The order also addressed the Motion for Ruling on Legal Issues, previously filed, and allowed participants to file response and reply briefs regarding that motion. (See Order Extending the Deadline to Respond to the Order Requiring Discovery, Case 188, Claim 54.)

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(13) In a letter dated December 21, 2004, ALJ Michael A. Francis scheduled a prehearing conference for January 5, 2004. Subsequently, the prehearing conference was rescheduled for January 7, 2005. (See Letter dated December 21, 2004; Letter dated December 29, 2004.)

(14) 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 WILL RESULT IN ADMISSION OF THE REQUEST. OAR 137-003-570(12)." (United States' Discovery Request to Claimants, Case 188, Claim 54.)

(15) No response or reply to the Joint Motion for Ruling on Legal Issues has been filed by any participant, nor has any claimant responded in any fashion to the United States' Discovery Requests.

(16) By virtue of their failure to respond to the Discovery Requests to Claimants, Claimants have admitted that the required *Walton* elements have not been established for this claim. (United States' Discovery Request to Claimants, Request No. 2.)

### CONCLUSIONS OF LAW

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

(2) Claimants' deemed admissions establish that Claim 54 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.

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Pursuant to OAR 137-003-0570(12), Claimants' 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 Claimants have not provided any reason for their failure to respond to the requests for admissions. Since claimants have the burden of proof, and have submitted no evidence to meet that burden, the second exception does not apply. Accordingly, each request for admission is deemed admitted.

### **Walton<sup>2</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.)

Claimants are deemed to have admitted, among other things, that they cannot establish the elements of a *Walton* water right. Therefore, Claimants in Claim 54 have failed to prove the basic elements of a *Walton* water right and, consequently, Claim 54 should be denied.

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<sup>2</sup> The Claimants are non-Indian successors to an Allottee. Therefore, the claim must be evaluated as a *Walton* water right claim.

*Yeugeny Kaplun, et al. (188)*

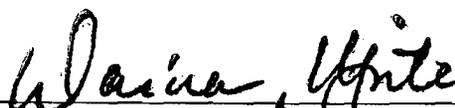
Order Granting Motion for Ruling on Legal Issues; Proposed Order Denying Claim

Page 6 of 7

**ORDER**

- (1) The Joint Motion of the United States and Klamath Tribes for Ruling on Legal Issues is granted. Claimants' 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 54, and the claim is denied.

  
\_\_\_\_\_  
Daina Upite, Administrative Law Judge  
Office of Administrative Hearings

Date: March 11, 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  
725 Summer Street N.E., Suite "A"  
Salem OR 97301

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2005, I mailed a true copy of the following: **ORDER GRANTING MOTION FOR RULING ON LEGAL ISSUES; PROPOSED ORDER DENYING CLAIM**, 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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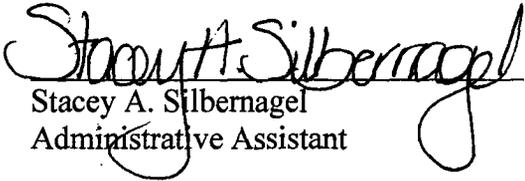
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