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MAR 30 2005

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON

WATER RESOURCES DEPT
SALEM 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

Klamath Irrigation District; Klamath Drainage
District; Tulalake 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

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

Case No. 259

Claims: 58

Contest: 3456¹

vs.

Lawrence Hall; Ann Hall,
Claimants.

On December 23, 2004, the Klamath Project Water Users² (KPWU) 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 KPWU on Claimants, Lawrence Hall and Ann Hall, 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*³ water

¹ Don Vincent voluntarily withdrew from Contests 3456 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contests 3456 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3456 on January 15, 2004.

² The above-named Contestants are collectively referred to as the Klamath Project Water Users.

³ 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*).

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right are not met and, therefore, the claim should be denied.⁴ Claimants have not filed a response to the motion. The Oregon Water Resources Department (OWRD) filed a reply brief January 25, 2005.

ISSUES

- (1) Whether the requests for admissions served on Claimants by KPWU and not responded to by Claimants despite the Order Requiring Discovery should be deemed admitted.
- (2) Whether Claimants' deemed admissions establish that Claim 58 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 19, 1990, Harry O. and Alma M. Elliott originally filed Claim 58. (OWRD Ex. 1 at 1.) Subsequently, by deed dated September 4, 1997, Lawrence Hall and Ann Hall became the successors in interest to the Elliots. (OWRD Ex. 1 at 41.) Claimants have made

⁴ Alternatively, KPWU seeks a ruling that Claimants' deemed admissions establish that Claim No. 58 was lawfully embraced within the Wood River Adjudication and, therefore, is barred by claim preclusion. OWRD argued in its reply brief that this matter may be resolved based on Claimants' non-participation, and that, therefore, it is unnecessary to address the claim preclusion issue. I agree, and I will not address KPWU's claim preclusion argument.

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a claim for water as non-Indian successors to a Klamath Indian Allottee. The claim is for an amount of water sufficient to irrigate the allotment's share of the Tribe's "practicably irrigable acreage" (PIA).⁵ This *Walton* claim is for 0.19 cubic feet per second (cfs) for irrigation of approximately 7.6 acres of land. The claimed period of use is April 1 through November 1, and the claimed priority date is October 14, 1864. (OWRD Ex. 1 at 1-5.)

(2) On October 4, 1999, the Adjudicator for the OWRD, Richard D. Bailey, issued a Preliminary Evaluation, denying this claim as a source which has been previously adjudicated. (OWRD Ex. 1 at 105.)

(3) On May 8, 2000, KPWU filed Contest 3456 to this claim. (OWRD Ex. 1 at 64.) Subsequently, Don Vincent, Berlva Pritchard, and the Klamath Hills District Improvement Company voluntarily withdrew from Contest 3456. (OWRD Ex. 1 at 79, 84.) Claimants did not file a contest.

(4) On January 21, 2003, Administrative Law Judge (ALJ) William D. Young held a pre-hearing conference, pursuant to written notice sent to participants. (See Order Requiring Prehearing Statements, Case 259, Claim 58, dated November 29, 2002.) Claimants did not participate in the pre-hearing conference.

(5) On August 9, 2004, ALJ Dove L. Gutman held a second pre-hearing conference. (See Scheduling Order, Case 259, Claim 58, dated August 10, 2004.) Again, Claimants did not participate.

(6) On August 16, 2004, ALJ Dove L. Gutman issued a Scheduling Order, based upon the discovery schedule that was agreed upon during the pre-hearing conference. (See Scheduling Order, Case 259, Claim 58, dated August 10, 2004.) A copy of the schedule was mailed to Claimants.

(7) On September 13, 2004, consistent with the Scheduling Order, counsel for KPWU served discovery requests on Claimants, including requests for admissions. (KPWU First Set of Request for Admissions, Interrogatories, and Requests for Production of Documents to Claimants, Case 259, Claim 58, dated September 13, 2004.) Claimants did not respond to the discovery requests by the deadline of October 13, 2004, or at any time thereafter.

(8) On October 26, 2004, KPWU filed a Motion for an Order Requiring Discovery, based on Claimants' failure to respond to discovery requests. (KPWU Motion for an Order Requiring Discovery, Case 259, Claim 58, dated October 26, 2004.)

(9) On December 6, 2004, Administrative Law Judge Dove L. Gutman issued an Order Requiring Discovery and an Order Modifying Scheduling Order, which required Claimants to respond to KPWU discovery requests on or before December 16, 2004. (Order Requiring Discovery and Modifying Scheduling Order, Case 259, Claim 58, dated December 6,

⁵ Such claims are known as "*Walton* claims," deriving their name from *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir 1981) ("*Walton I*").

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2004.) As of December 23, 2004, Claimants had not responded to the discovery requests, or filed any objections. (Affidavit of Andrew M. Hitchings.)

(10) KPWU's 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 137-003-0570(12).)" (KPWU's First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents to Claimants, p.3, ¶k, Case 259, Claim 58, dated September 13, 2004.)

(11) Based on its deemed admissions, Claimants have admitted that they cannot establish the elements of a *Walton* water right for Claim 58. (Affidavit of Andrew M. Hitchings, Ex. 1, First Set of Requests for Admissions, Interrogatories, and Request for Production of Documents to Claimants, Request No. 9, Case 259, Claim 58, dated September 13, 2004.)

CONCLUSIONS OF LAW

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

(2) Claimants' deemed admissions establish that Claim 58 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.

Pursuant to OAR 137-003-0570(12), Claimants' failure to respond to the KPWU's requests for admissions despite an Order Requiring Discovery shall be deemed 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 this matter has not come to a hearing yet,

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the second exception also does not apply. Accordingly, each request for admission is deemed admitted.

Walton⁶ 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 58 have failed to prove the basic elements of a *Walton* water right and, consequently, Claim 58 should be denied.

ORDER

(1) KPWU's Motion for Ruling on Legal Issues is granted. Claimants' failure to respond to KPWU's request 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:

⁶ The Claimants are non-Indian successors to an Allottee. Therefore, the claim must be evaluated as a *Walton* water right claim.

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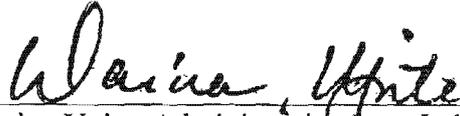
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The elements of a water right cognizable under ORS Chapter 539 are not established for Claim 58, and the claim is denied.



Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: March 29, 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 29, 2005, I sent by regular mail 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:

Richard D. Bailey
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
richard.d.bailey@wrđ.state.or.us

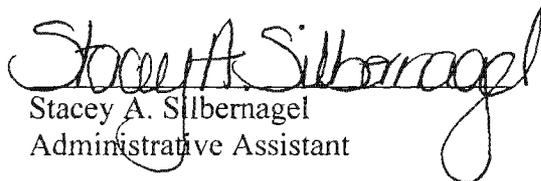
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