

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

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

**CORRECTED PROPOSED  
ORDER**

Case No. 265

Claim: 96

Contest: 3515<sup>1</sup>

vs.

Stern Skeen; Betty Skeen;  
Claimants.

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The Proposed Order dated August 29, 2005, is hereby withdrawn for correction, pursuant to OAR 137-003-0655, to delete references to *Walton* water rights because this claim is for an Allottee water right. The correction is in the third paragraph of the "History" section: previous footnote 3 has been deleted, and new language is in **bold** print.

**HISTORY OF THE CASE**

This matter came to hearing on June 16, 2004 at 9:00 a.m. PDT in Salem, Oregon, pursuant to a notice served upon the participants by certified mail on May 5, 2004. Administrative Law Judge Daina Upite of the Office of Administrative Hearings presided. This hearing was to determine the relative water rights regarding Claim 96 in the Klamath Basin General Stream Adjudication.

Claimants Stern Skeen and Betty Skeen appeared and were represented by their attorney, Peter Richard. The Klamath Project Water Users<sup>2</sup> (KPWU) appeared by telephone and were

<sup>1</sup> On January 15, 2004, Klamath Hills District Improvement Company voluntarily withdrew from Contest 3515.  
*Stern Skeen and Betty Skeen (265)*,  
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represented by their attorney, Andrew Hitchings. The Oregon Water Resources Department (OWRD) participated and was represented by Assistant Attorney General Justin Wirth. Robert Coffin, a hydrologist, was present on behalf of the claimants.

On December 7, 1990, Stern and Betty Skeen filed Claim 96 for water based on “practicably irrigable acreage” as Indian successors to a Klamath Indian Allottee, claiming an unspecified quantity of water for irrigation of approximately 110 acres of land. On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Adjudication for OWRD, issued a Preliminary Evaluation denying the claim. Claimants did not file a contest to the Preliminary Evaluation. On May 8, 2000, KPWU filed Contest 3515, raising the following issues:

1. Whether the required elements are established for an Allottee \*\*\* water right with a priority date of October 14, 1864.
2. Whether the record indicates the practicably irrigable acreage claimed or that it would be technically possible or economically feasible to develop an irrigation system to serve such acreage.
3. Whether there has been a use of inchoate rights.

Following the hearing on June 16, 2004, participants had an opportunity to submit written closing arguments. On June 29, 2004, Mr. Richard filed closing argument on behalf of claimants. On July 16, 2004, Mr. Hitchings filed a response brief on behalf of KPWU. Claimants did not file a rebuttal argument. The record closed July 30, 2004, the deadline for filing rebuttal argument.

## ISSUES

Whether claimants established their claim for an Allottee water right with a priority date of October 14, 1864.

## EVIDENTIARY RULINGS

OWRD’s Exhibits 1 and 2<sup>3</sup> (265E00020001, 265E00020002) were admitted into evidence without objection. Exhibits 1-4 and 6, attached to claimants’ Amended Pre-Hearing Statement filed September 26, 2003, were admitted into evidence without objection.

Mr. Richard offered the hydrologist’s report and proposed to present direct testimony on the day of the hearing. Mr. Hitchings and Mr. Wirth objected. The objection was sustained and

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<sup>2</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; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC, are collectively referred to as the Klamath Project Water Users.

<sup>3</sup> OWRD Exhibit 1 is the Department’s file for Claim 96. OWRD Exhibit 2 is the Affidavit and Testimony of Teri Hranac, OWRD Adjudication Specialist.

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no direct evidence was allowed to be presented at the hearing. Pursuant to a Scheduling Order issued October 3, 2003, the deadline for submitting written direct testimony and documentary evidence was January 12, 2004, and the deadline for submitting rebuttal evidence was February 9, 2004. The Scheduling Order was accompanied by a "Guide to Written Testimony" that explains that all direct and rebuttal testimony must be submitted in writing before the hearing, and it explains the procedure for doing so. Claimants did not submit any written testimony before the hearing, nor did they request an extension of time for filing written testimony. Mr. Richard did not indicate that there were any circumstances beyond his or his clients' control that prevented adherence to the Scheduling Order deadlines. Therefore, claimants' request to submit evidence that was not submitted prior to the hearing was denied.

### FINDINGS OF FACT

(1) Claimants Stern and Betty Skeen filed a Statement and Proof of Claim in the Klamath Basin Adjudication on December 7, 1990, claiming a right to water from the Sprague River and Trout Creek for irrigation and livestock use, with a priority date of October 14, 1864. No quantity of water was claimed. The claim was made for "practicably irrigable acreage" (PIA). Claimants stated there was no current development: "The land is not being used at this time but will be using [sic] in the future." (OWRD Ex. 1 at 1-5, 10, 13.)

(2) The area of claimed use is 110 acres located in the SE  $\frac{1}{4}$  SE  $\frac{1}{4}$  of Section 26, E  $\frac{1}{2}$  E  $\frac{1}{2}$  of Section 35, and NW  $\frac{1}{4}$  of Section 36, Township 35 South, Range 9 East, W.M. (OWRD Ex. 1 at 9-10, 70.)

(3) Claimant Stern Skeen is an enrolled Klamath Indian and the son of David Skeen, a Klamath Indian. (OWRD Ex. 1 at 5.) On December 1, 1914, the United States issued a fee simple patent to David Skeen, purchaser of land included in the allotment of Daniel Robertson, for 160 acres described as the NW  $\frac{1}{4}$  of Section 36, Township 35 South, Range 9 East, W.M. (Claimant's Ex. 2.) On March 25, 1918, the United States issued a fee simple patent to David Skeen, a Klamath Indian, for the S  $\frac{1}{2}$  of the NE  $\frac{1}{4}$  of Section 36, the N  $\frac{1}{2}$  of the NE  $\frac{1}{4}$  of Section 35, and the S  $\frac{1}{2}$  of the SE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 26, all in Township 35 South, Range 9 East, W.M., containing 160 acres. (Claimant's Ex. 3.) The property has been in continuous Indian ownership. (OWRD Ex. 1 at 9, 71.)

(4) On October 4, 1999, Richard D. Bailey, Adjudicator for the Klamath Basin General Stream Adjudicator, denied Claim 96 because "[t]he elements for a practicably irrigable acreage right are not established." (OWRD Ex. 1 at 72.) The Adjudicator found, among other things, that the land is part of the former Klamath Indian Reservation, that claimants are Klamath Indians, and that the property has been in continuous Indian ownership. The Adjudicator also found that the record does not establish that the land is arable, and that the record does not establish that "it is both technically possible and economically feasible to develop an irrigation system to serve this land." (OWRD Ex. 1 at 71.)

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## CONCLUSIONS OF LAW

Because claimants failed to prove all elements of an Allottee claim, the claim should be denied.

## OPINION

In the Klamath Basin General Stream Adjudication, a water right claimed by a tribal member who owns land in the former Klamath Indian Reservation is referred to as an "Allottee" claim. A Klamath Indian may make a claim for an amount of water sufficient to irrigate the allotment's share of the Tribe's practicably irrigable acreage (PIA). The following elements must be proved to establish a valid Allottee claim:

1. The claim must be for water use (current or future) on former Klamath Indian Reservation land;
2. The claimant must be a Klamath Indian;
3. The land must be arable;
4. Irrigation system development must be both technically possible and economically feasible; and
5. The right must not have been lost during intervening non-Indian ownership.

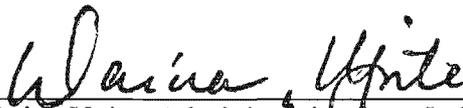
*Arizona v. California*, 373 US 546 (1963); *United States v. Anderson*, 736 F2d 1358 (9<sup>th</sup> Cir 1984); *In re Rights to Use Water in Big Horn River*, 753 P2d 76 (Wyo 1988).

Claimants have the burden of establishing the claim by a preponderance of the evidence. ORS 539.110; 183.450(2); *see Cook v. Employment Div.*, 47 Or App 437 (1980) in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

The preponderance of evidence establishes that the land was in the former Klamath Indian Reservation, that claimant Stern Skeen is a Klamath Indian, and that the land has been in continuous Indian ownership. There is no evidence, however, that development of an irrigation system for the 110 acres claimed is both technically possible and economically feasible. Evidence suggests that portions of the land were irrigated and cultivated in the past (OWRD Ex. 1 at 9-10), but the land was not in use in 1990 when the claim was filed (OWRD Ex. 1 at 5). There is simply no evidence that establishes whether and how much of the land claimed is technically possible and economically feasible to irrigate. Therefore, because claimants did not prove all elements of their claim, the claim should be denied.

**PROPOSED ORDER**

It is proposed that Claim 96 be denied in its entirety.



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Daina Upite, Administrative Law Judge  
Office of Administrative Hearings

Date: August 31, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2005, I mailed a true copy of the following:  
**CORRECTED 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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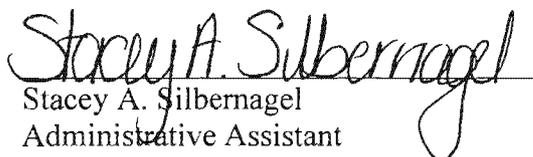
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