

**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,

v.

Richard M. Brown,
Claimant.

**ORDER GRANTING MOTION
FOR LEGAL RULING AND FOR
PROPOSED ORDER DENYING
CLAIM**

Case No. 222

Claim No. 110

Contests 3488,¹ 3755, and 4142

On June 7, 2004, the United States of America (United States) and the Klamath Tribes filed a Joint Motion for Ruling on Legal Issues for determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served by the United States and the Klamath Tribes upon Richard M. Brown (Brown) should be deemed admitted based on Mr. Brown's failure to provide responses despite the order requiring discovery; and (2) that Mr. Brown's deemed admissions establish that the elements of a Walton Right are not met and there is no basis for the claim, which should, therefore, be denied. Neither Mr. Brown nor the Water Resources Department (OWRD) filed a response to the joint motion and supporting documents.

LEGAL STANDARD: Motions and requests for legal rulings are governed by Oregon Administrative Rule (OAR) 137-003-0580, which establishes standards for evaluating the motion, and which states in part:

(6) The hearing officer 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

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¹ On November 28, 2000, Contestant Don Vincent informed the Adjudicator that he had sold his interest in property giving rise to his claims and this contest and was no longer a participant in this contested case. On June 24, 2002, Contestant Berlva Pritchard informed the Office of Administrative Hearings that she had sold her interest in property giving rise to her claims and contests and was no longer a participant in this contested case. On April 1, 2004, the remaining Contestants withdrew Contest 3488 in its entirety.

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- (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
- (7) The hearing officer 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) Claim 110 is for water rights of non-Indian successors to Indian allottees.² The claim seeks water for irrigation with a diversion rate of 3.33 cfs for the irrigation of an estimated 60 acres. The claimed season of use is April 1 through October 1.

(2) On October 4, 1999, the Adjudicator for the Klamath Basin general stream adjudication, Richard D. Bailey, issued a Preliminary Evaluation recommending denial of the claim because "[t]he record does not establish that water for the claimed use was used by the last Indian owner of the property. The record does not establish that the water use was diligently developed by non-Indian owners of the property after transfer from the last Indian owner."

(3) On January 2, 2000, the original claimant, Gloria E. Campbell, sent a letter to the Water Resources Department (OWRD) informing OWRD that she had sold the property to Richard M. Brown on September 30, 1999. She later informed OWRD that all future correspondence should be sent to Mr. Brown. Since that time all information regarding adjudication of the claim has been sent to Mr. Brown.

(4) Pursuant to written notice sent to all participants, including Mr. Brown, a prehearing conference was held on October 27, 2003. Mr. Brown did not file a prehearing statement and did not appear at the prehearing conference, both of which were required by the Prehearing Order. A discovery schedule, which was memorialized by a Scheduling Order, was arrived at and agreed to by the participants in the prehearing conference.

(5) On February 4, 2004, pursuant to the October 30, 2003 Scheduling Order, the United States and the Klamath Tribes served discovery requests on Mr. Brown. The instructions in the United States' Discovery Requests to Claimant included an admonition

² 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 (E.D. Wash. 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986) (*Walton III*).

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that "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION TO ANY REQUESTS FOR ADMISSION WITHIN THE TIME ALLOWED WILL RESULT IN ADMISSION OF THE REQUEST. (See Ex. A, p.2, ¶G.) The instructions in the Klamath Tribes' Discovery Requests to Claimant included a nearly identical admonition to that included by the United States. (See Ex. B, p.2, ¶F.)

(6) Mr. Brown did not respond to the requests for discovery by the deadline of March 5, 2004, or at any time thereafter.

(7) Mr. Brown has informed counsel for the United States by letter dated February 12, 2004, that he no longer owns the property appurtenant to Claim 110.

(8) On April 2, 2004, the United States and the Klamath Tribes filed a Joint Motion for an Order Requiring Discovery based upon the failure of Mr. Brown to respond to discovery requests propounded by each of the Contestants. On that same date the United States and the Klamath Tribes filed a Joint Motion to Modify the Scheduling Order.

(9) On May 5, 2004 an Order Requiring Discovery and Modifying Scheduling Order was issued by Administrative Law Judge William Young which instructed Mr. Brown to respond to the discovery requests previously served by the United States and the Klamath Tribes within ten days of the date of the Order.

(10) To date, Mr. Brown has not provided any responses to the United States' and Klamath Tribes' discovery requests.

(11) Through Mr. Brown's deemed admissions, he has admitted, among other things, that: (1) he has not provided sufficient title information regarding Indian ownership of the claimed place of use and/or transfer of the property to non-Indian ownership (See Ex. A, p. 5-6, RFA Nos. 2-4; Ex. B, p. 4-5, RFA Nos. 1-2.); (2) the claimed place of use was not irrigated by the last Indian owner (See Ex. A, p. 6, RFA No. 5; Ex. B, p. 5, RFA Nos. 3 & 5.); (3) the claimed place of use was not developed for irrigation by the first non-Indian owner within a reasonable period of time (See Ex. A, p. 6, RFA No. 6; Ex. B, p. 5, RFA No. 4.); (4) the claimed place of use has not been continually irrigated since it was first owned by a non-Indian (See Ex. A, p. 6, RFA No. 7.); and (5) Claim 110 fails to meet the basic elements of a Walton claim, elements three through five.³

³ The five basic elements of a Walton right within the context of the Klamath Adjudication were outlined by Administrative Law Judge William Young in *Nicholson et al. v. United States*, Case 272, Ruling on United States' Motion for Ruling on Legal Issues, p. 9, August 4, 2003. The five elements are: 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; 4) the claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water

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CONCLUSIONS OF LAW

The United States' and the Klamath Tribes' Joint Motion for Ruling on Legal Issues must be GRANTED in its entirety.

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

(2) Richard M. Brown's deemed admissions establish that Claim 110 fails to meet the basic elements of a Walton claim, elements three through five.

OPINION

OAR 137-003-0570(12) states:

(12) 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 hearing officer does not treat failure to respond to the request for admissions as admissions, the hearing officer may grant a continuance to enable the parties and the agency to develop the record as needed.

Pursuant to OAR 137-003-0570(12), Mr. Brown's failure to respond to the United States' and the Klamath Tribes' requests for admissions despite an Order Requiring Discovery are deemed admission of matters that were the subject of the request for admission.⁴ Accordingly, each request for admission is deemed admitted.

Mr. Brown is deemed to have admitted, among other things, that he has not provided sufficient title information regarding Indian ownership of the claimed place of use and/or transfer of the property to non-Indian, that the claimed place of use was not

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.

⁴ This provision contains two narrow exceptions that could operate to avoid a deemed admission. A party can avoid the mandatory deemed admission if (1) the party can demonstrate a "satisfactory reason" for failing to respond, or (2) excluding additional evidence would violate the duty to conduct a full and fair hearing. In this regard, Mr. Brown has not objected or responded to discovery requests served by the United States and the Klamath Tribes despite an Order Requiring Discovery. Mr. Brown has not responded to the United States' and the Klamath Tribes' Motion and has made no attempt at showing a "satisfactory reason" for failing to respond to the discovery requests.

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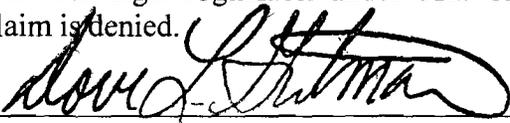
irrigated by the last Indian owner, that the claimed place of use was not developed for irrigation by the first non-Indian owner within a reasonable period of time, that the claimed place of use has not been continually irrigated since it was first owned by a non-Indian, and that Claim 110 fails to meet the basic elements of a Walton claim, elements three through five.

The United States and the Klamath Tribes, who seek denial of Mr. Brown's claim in its entirety on the basis that he has admitted that he cannot establish the basic elements of a Walton claim, elements three through five, are entitled to the ruling they seek.

ORDER

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 specifically set out below:

The elements of a water right cognizable under ORS Ch. 539 are not established for Claim 110 and the claim is denied.


Dove L. Gutman, Administrative Law Judge
Office of Administrative Hearings

Date: September 7, 2004

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:

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Richard D. Bailey
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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2004, I mailed a true copy of the following: **ORDER GRANTING MOTION FOR LEGAL RULING AND FOR 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:

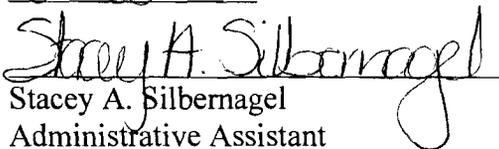
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