

**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;
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,

**ORDER GRANTING MOTION FOR
LEGAL RULING AND FOR
SUMMARY JUDGMENT, AND
PROPOSED ORDER DENYING
CLAIM**

Case No. 239

Claim No. 227

Contests 3518,¹ 3773, and 4200

v.

Joseph H. Laffargue; Tina Marie Leal,
Claimants.

On June 9, 2004, Contestants Klamath Project Water Users (KPWU)² filed a Motion for Ruling on Legal Issues for determinations that (1) pursuant to OAR 137-003-0570(12), the requests

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.

² The Klamath Project Water Users are comprised of Contestants 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.

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for admissions served by KPWU upon Joseph H. Laffargue and Tina Marie Leal (Claimants) are not responded to, be deemed admitted; and (2) that Claimants' deemed admissions establish that there is no basis for the claim, which should, therefore, be denied. Neither Claimants nor any other participants filed a response to KPWU's motion and supporting affidavit.

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 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, the following Findings of Fact are made:

FINDINGS OF FACT

(1) Norman Miller Anderson originally filed Claim No. 227 on January 31, 1991, possibly as a Klamath Indian Allottee, seeking a determination of a right to use an unspecified amount of water from the Sprague River for the practicably irrigable acreage on the claimed property. (Oregon Water Resources Department (OWRD) Ex. 1, at pp. 14-22.) The claimed priority date is October 14, 1864, the date of the Treaty between United States of America and the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians.³ (OWRD Ex. 1, at p. 14.) The property for which the water right is claimed was subsequently purchased by Joseph H. Laffargue and Tina Marie Leal (Claimants), who may not be Klamath Indians. (Order Requiring Discovery and Modifying Scheduling Order, Case No. 239, dated May 6, 2004, by William D. Young, Administrative Law Judge ("Discovery

Luscombe, Randy Walthall, Inter-County Title Company, Winema Hunting Lodge, Inc., Van Brimmer Ditch Company, Plevna District Improvement Company, and Collins Products, LLC.

³ *Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians*, October 14, 1864, 16 stat. 707. "The priority date of Indian rights to water for irrigation and domestic purposes is 1864 [date of reservation creation] * * *. For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians." *United States v. Adair*, 478 F Supp 336, 350, (D Or 1979) (*Adair I*).

Joseph H. Laffargue, et al (239)
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Order”).) On October 4, 1999, OWRD issued its Preliminary Evaluation for Claim No. 227, preliminarily denying the claim because Claimants could not meet the elements required to establish a “Walton claim.”⁴ (OWRD Prehearing Statement at p. 3.)

(2) On or about October 10, 2003, the Oregon Office of Administrative Hearings mailed to Claimants and other participants an Order Requiring Prehearing Statements for a prehearing conference scheduled for December 4, 2003. (Order Requiring Prehearing Statements in Case No. 239, dated October 10, 2003, by William D. Young, Administrative Law Judge.) Claimants did not file a prehearing statement as required by Order. Claimants did not participate in the December 4, 2003 prehearing conference. (Scheduling Order in Case No. 239, dated December 8, 2003, by Peter A. Rader, Administrative Law Judge (“Scheduling Order”).) The Scheduling Order established a deadline of February 27, 2004 for filing discovery requests, and a deadline of April 2, 2004, for responding to discovery requests.

(3) On February 27, 2004 KPWU served written discovery requests on Claimants for Interrogatories, Requests for Admission, and Requests for Production of Documents. (Affidavit of Andrew M. Hitchings in Support of KPWU’s Motion for Ruling on Legal Issues (“Hitchings Affidavit.”).) Claimants failed to respond to KPWU’s discovery requests by the April 2, 2004 deadline required by the Scheduling Order. (Discovery Order at p. 2, Finding 3.)

(4) On or about April 16, 2004, KPWU filed a Motion for an Order Requiring Discovery, seeking an order requiring Claimants to respond to KPWU’s written discovery requests, including requests for admissions. (Discovery Order at p. 1.) On or about May 6, 2004, the Administrative Law Judge granted KPWU’s Motion, and ordered Claimants to respond to KPWU’s requests for admissions served February 27, 2004 no later than May 17, 2004. (Discovery Order at p. 5.) KPWU did not received objections or responses from Claimants to KPWU’s Interrogatories, Requests for Admissions and Requests for Production of Documents by May 17, 2004, as required by the Discovery Order. (Hitchings Affidavit at p. 2, ¶ 4.)

(5) KPWU’s written discovery requests included a warning as to the consequences of any failure to respond to the discovery requests. The instructions set forth in the requests contained the following language: “FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION TO ANY REQUESTS FOR ADMISSIONS WITHIN THE TIME ALLOWED WILL RESULT IN ADMISSION OF THE REQUEST.” (OAR 137-003-0570(12).) (Hitchings Affidavit, Ex. A at p. 2, ¶ K.)

⁴ Claims for water rights of non-Indian successors to Indian water 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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(6) Through Claimants' deemed admissions, Claimants have admitted, among other things, that: (1) They cannot establish the elements of an Indian Allottee water right for Claim No. 227 (*see* Hitchings Affidavit, Ex. A at p. 5, Request for Admission ("RFA") No. 5); and (2) Claimants cannot establish that the irrigation system development for the claimed place of use is technically possible and/or economically feasible (*see* Hitchings Affidavit, Ex. A at p. 5 RFA Nos. 2 and 4).

CONCLUSIONS OF LAW

KPWU's Motion for Legal Ruling should be granted in its entirety.

(1) Pursuant to OAR 137-003-0570(12), the requests for admissions served by KPWU upon Claimants, and not responded to by them, are deemed admitted; and

(2) Claimants' deemed admissions establish that there is not factual basis for Claim No. 227.

OPINION

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 Contestants' requests for admissions are deemed admission of matters that were the subject of the request for admission.⁵ Accordingly, each request for admission is deemed admitted.

To effectuate the deemed admissions, KPWU asked that notice of the facts admitted be taken, as they are not in dispute. OAR 137-003-0615.⁶ While it may be appropriate to take notice of

⁵ 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, Claimants have not objected or responded to discovery requests served by KPWU. Claimants have not responded to KPWU's motion and have made no attempt to show a "satisfactory reason" for failing to respond to KPWU's discovery request.

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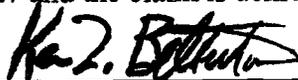
the judicially cognizable fact of the existence of the documents in the case file, it is usually inappropriate to take notice of the truth of information stated in the case file.⁷ In this case, however, it is permissible to take notice of the truth of information stated in the case file, as the deemed admissions remove all dispute as to any material fact.

Claimants are deemed to have admitted, among other things, that they cannot establish the elements of an Allottee right, that they cannot establish the elements of a *Walton* water right,⁸ and that there was “no factual basis to support a water right for the claimed place of use in Claim No. 227. KPWU, which seeks summary judgment and denial of Claimants’ claim in its entirety on the basis that they have admitted that they cannot establish the elements of the claimed water right, and that there is no factual support for the claim, are entitled to the ruling they seek.

ORDER

Based on the foregoing, a recommendation is made to the Adjudicator for the Klamath Basin General Stream Adjudication to 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 a water right cognizable under ORS chapter 539 are not established for Claim No. 227 and the claim is denied.



KEN L. BETTERTON, Administrative Law Judge
Office of Administrative Hearings

Date: July 27, 2004

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

⁶ ORS 183.450(4) states, in part that “The hearing officer and agency may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency.” Judicial or official notice is a short-cut to creating a record regarding particular adjudicative facts. “Judicially cognizable facts” are those facts of which a court can take judicial notice so, despite the general rule that the Oregon Rules of Evidence (ORE) do not apply in the contested case process, ORE determine what is a judicially cognizable fact.

⁷ See Laird C. Kirkpatrick, *Oregon Evidence* (2nd ed 1989).

⁸ The claim was initially filed as an Allottee claim. If the land transferred into non-Indian ownership, the claim would be for a water right as a non-Indian successor to an Allottee (*i.e.*, a *Walton* claim.) Because Claimants cannot establish the elements of a valid Allottee claim, no right would exist to succeed to as a *Walton* claim.

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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 July 27, 2004, I mailed a true copy of the following: **ORDER GRANTING MOTION FOR LEGAL RULING AND FOR SUMMARY JUDGMENT, AND PROPOSED ORDER DENYING CLAIM**, depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

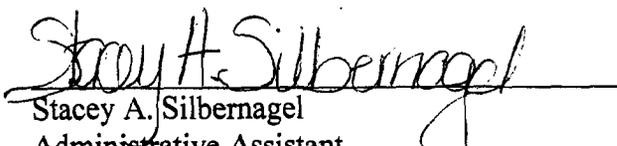
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Certificate of Service; Case 239, Claim 227
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