

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 Hill 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.; Reames Golf and
Country Club; Van Brimmer Ditch Company;
Plevna District Improvement Company; Collins
Products, LLC;

Contestants

PROPOSED ORDER ON DEFAULT

Case No. 57

Claim: 258

Contests: 1735 and 3540¹

vs.

Orin Kirk;

Claimant/Contestant.

HISTORY OF THE CASE

On January 31, 1991, Vina Kirk and Orin Kirk filed Claim No. 258, asserting a water right for 653.8 acre feet from one point of diversion located on Williamson River, for the irrigation of 210.9 acres of practicably irrigable acreage located in Township 32 South, Range 7 East, W.M., based on a priority date of October 14, 1864. Thereafter, on October 4, 1999, Oregon Water Resources Department (OWRD) entered a Preliminary Evaluation denying the claim as submitted. Claimants/contestants filed their contest on May 3, 2000. Contestants Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District;

¹ Don Vincent voluntarily withdrew from Contest 3540 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3540 on June 24, 2002

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Klamath Hill 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.; Reames Golf and Country Club; Van Brimmer Ditch Company; Plevna District Improvement Company; and Collins Products, LLC filed Contest 3540 on May 8, 2000.

The case was then referred to the Office of Administrative Hearings for hearing.

Pursuant to an Order of July 3, 2003, a Prehearing Statement was submitted by Claimants. On September 2, 2003, a Prehearing Conference was held, to define the issues presented by the case, and establish a schedule of further proceedings. Claimants appeared and participated.

This matter was set for hearing on June 21, 2005, at 9:00 a.m. PDT. On May 10, 2005, prior to the date of the hearing, counsel for Claimants withdrew from the case on the grounds that the property had been transferred to different ownership, and that the named Claimants in the case no longer had an interest in the property to which the claimed water right would be appurtenant.

At the time set for hearing, on June 21, 2005, Claimants did not appear. No other person appeared asserting an interest in the property appurtenant to the claimed water right.

The record closed on the date of the hearing. Claimants are in default.

EVIDENTIARY RULINGS

Exhibit 1, offered by OWRD was admitted into the record without objection. Claimant filed no evidence. The evidentiary record closed on June 21, 2005.

ISSUES

Whether the elements of a Klamath Indian Allottee claim are present in this case.

FINDINGS OF FACT

1. No further communication or evidence from Claimant has been received by OWRD or the Office of Administrative Hearings since the notice of hearing was issued. Claimants' counsel has withdrawn from the case on the grounds that the named claimants no longer hold an interest in the property to which the claimed water right would be appurtenant.
2. Notice of the Hearing in this case was sent to Richard A. Stayer, believed to be the present owner of the property, by certified mail, return receipt requested, on May 18, 2005.
3. No evidence of membership in the Klamath Tribes of the current owner of the property in question is contained in the record.

CONCLUSIONS OF LAW

The elements of a Klamath Indian Allottee claim are not present in this case.

OPINION

The burden of proof to establish a claim by a preponderance of the evidence is on the Claimants. ORS 539.110; OAR 690-028-0040. In order to meet that burden, Claimants must show following:

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 (9th Cir. 1984); *In re Rights to Use Water in Big Horn River*, 753 P2d 76 (Wyo. 1988).

In this case, Claimants have not met this burden. There is no evidence whatever respecting the membership of the current owner in the Klamath Tribes. In the absence of substantial evidence, the claim, as an Indian Allottee claim, cannot be sustained.

Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" water rights.²

Elements of a *Walton* water right that must be proven are:³

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 A "*Walton*" right refers to a term derived from the *Colville Confederated Tribes v. Walton* line of cases that address the issue of a claim for a water right of non-Indian successors to Indian allottees. *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*). An Indian "allotment" is a parcel of land on an Indian reservation awarded to an individual member of an Indian tribe, *i.e.*, an allottee, pursuant to the General Allotment Act of 1887, 24 Stat. 388. *See, e.g., Walton II*, 647 F2d at 45.

³ *See, Walton II*, 647 F2d at 51; *see also*, Decision by Administrative Law Judge William D. Young, Klamath Basin Adjudication, Case No. 272, dated August 4, 2003.

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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.
5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

If these elements are proven, the claim is assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.⁴

In this case, it is unknown whether the current owner of the property to which the claimed water right would be appurtenant is a member of the Klamath Tribe. If the current owner is not a member of the Klamath Tribe, a *Walton* right could still exist, if the necessary facts were shown. In this case, however, there is no evidence in the record to establish that the current owner is the first purchaser from an Indian owner, that there was any development of water use by the Indian owner or the first purchaser from an Indian owner, or that any water use so developed has been in continuous use by the first non-Indian successor and all subsequent successors. Thus, the evidence in this case fails to show the necessary elements of a *Walton* right.

ORDER

I recommend the Department order as follows:

Claim 258 in the name of Vina Kirk and Orin Kirk is **DISAPPROVED**.


Maurice L. Russell, II, Administrative Law Judge
Office of Administrative Hearings

Dated: March 17, 2006

APPEAL PROCEDURE

⁴ The Klamath Reservation was established on October 14, 1864. *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).

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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 Hearing Officer. 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:

Dwight French, Adjudicator
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2006 I mailed a true copy of the: **PROPOSED ORDER ON DEFAULT**, 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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