

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; 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

vs.

William C. Knudtsen;  
Claimant/Contestant.

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

Case No. 246

Claim: 268

Contests: 2780, 3549<sup>1</sup>, 3813, and  
4207

**RECEIVED**

**MAR 17 2005**

**WATER RESOURCES DEPT  
SALEM, OREGON**

On January 26, 2005, the United States and the Klamath Project Water Users each filed Motions for Ruling on Legal Issues, seeking determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served on Claimant should be deemed admitted because Claimant failed to respond despite the order requiring discovery; and (2) Claimant's deemed admissions establish that the elements of a Walton<sup>2</sup> water right are not met and, therefore, the claim should be denied. Claimant has not filed a response to the motions.

<sup>1</sup> Don Vincent voluntarily withdrew from Contest 3549 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3549 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3549 on January 16, 2004.

<sup>2</sup> 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 William C. Knudtsen* (246)

## ISSUES

(1) Whether the requests for admissions served on Claimant by the United States and the Klamath Project Water Users and not responded to by Claimant despite the Order Requiring Discovery should be deemed admitted?

(2) Whether Claimant's deemed admissions establish that Claim 268 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 \*\*\*.

**RECEIVED**

**MAR 17 2005**

**WATER RESOURCES DEPT  
SALEM, OREGON**

Considering the evidence in a manner most favorable to the non-moving party, I make the following:

## FINDINGS OF FACT

(1) On January 31, 1991, Jennie Sabin filed Claim 268. Sabin, an enrolled member of the Klamath Indian Tribe, made a claim for water as a Klamath Indian Allottee. The Allottee claim was for 142.2 acre-feet of water for 25 head of cattle and irrigation of 45.8 acres of "practicably irrigable acreage" (PIA). The claimed period of use is March 1 through October 16 for irrigation and year-round for livestock. The claimed priority date is October 14, 1864. (OWRD Ex. 1 at 16-21.)

(2) On September 10, 1996, William C. Knudtsen purchased Claimant's property. (OWRD Ex. 1 at 92). Knudtsen began making improvements to the irrigation system.

---

*Tribes v. Walton*, 647 F2d 42 (9<sup>th</sup> Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).  
*William C. Knudtsen* (246)

Order Granting Motion for Ruling on Legal Issues; Proposed Order Denying Claim  
Page 2 of 7

KBA\_ACFFOD\_03321

(OWRD Ex. 1 at 106-108.) Once transferred to non-Indians, the Walton Claimants may claim an amount of water sufficient to irrigate the allotment's share of the Tribe's PIA.

(3) On October 4, 1999, the Adjudicator for the Oregon Water Resources Department (OWRD), Richard D. Bailey, issued a Preliminary Evaluation, approving the claim for year-round livestock use of 300 gallons per day, but denying the claim for irrigation. The Adjudicator concluded that the elements for a PIA had not been established, because the Claimant did not prove that an irrigation system would be technically possible or economically feasible. (OWRD Ex. 1 at 178-80.)

(4) On May 8, 2000, the Klamath Project Water Users (KPWU) filed Contest 3549, the United States filed Contest 3813, and the Klamath Tribes filed Contest 4207. Contestants sought to completely deny the claim, or limit the claim to the Adjudicator's Preliminary Evaluation. (OWRD Ex. 1 at 112, 160, 165.)

(4) On May 9, 2000, Knudtsen filed Contest 2780. Knudtsen claimed a right to water for irrigation, as well as stock water. (OWRD Ex. 1 at 106-108.)

(5) On March 8, 2004, Administrative Law Judge (ALJ) William D. Young held a prehearing conference, pursuant to written notice sent to participants. (See Order Requiring Prehearing Statements, Case 246, Claim 268, dated January 23, 2004.) Claimant did not participate in the hearing and did not file a prehearing statement. (See Order Requiring Discovery and Modifying Scheduling Order, Case 246, Claim 268.)

(6) On April 2, 2004, ALJ William D. Young issued a Scheduling Order, based upon the discovery schedule that was agreed upon during the prehearing conference. (See Scheduling Order, Case 246, Claim 268.) A copy of the schedule was mailed to the Claimant.

(8) On July 23, 2004, consistent with the Amended Scheduling Order, counsel for the United States served discovery requests on the Claimant, including requests for admissions. (United States' Discovery Requests to Claimant, Case 246, Claim 268.) On July 27, 2004, counsel for the KPWU served discovery request on the Claimant. (Klamath Project Water Users' Interrogatories, Requests for Admission, and Requests for Production of Documents to Claimant, Case 246, Claim 268.) Claimant did not respond to the discovery requests by the deadline of September 21, 2004, or at any time thereafter. (Order Requiring Discovery and Modifying Scheduling Order, Case 246, Claim 268.)

(9) On November 12, 2004, the United States and the KPWU filed separate Motions for an Order Requiring Discovery Responses, based on failure of the Claimant to respond to discovery requests. (Order Requiring Discovery and Modifying Scheduling Order, Case 246, Claim 268.)

(10) On December 21, 2004, ALJ Dove Gutman issued an Order Requiring Discovery and Modifying Scheduling Order, which required the Claimant to respond to Contestants' discovery requests no later than December 31, 2004. (Order Requiring Discovery

*William C. Knudtsen (246)*

Order Granting Motion for Ruling on Legal Issues; Proposed Order Denying Claim

Page 3 of 7

RECEIVED

MAR 17 2005

WATER RESOURCES DEPT  
SALEM, OREGON

and Modifying Scheduling Order, Case 246, Claim 268.) As of January 26, 2004, the Claimant had not responded to the discovery requests or filed any objections. (See Motion of the United States for Ruling on Legal Issues, Case 246, Claim 268, p. 2; Klamath Project Water Users' Motion for Ruling on Legal Issues, Case 246, Claim 268, p. 5.)

(11) On January 26, 2004, the United States and the KPWU filed separate Motions for Ruling on Legal Issues seeking a summary judgment against the Claimant. (Motion of the United States for Ruling on Legal Issues, Case 246, Claim 268; Klamath Project Water Users' Motion for Ruling on Legal Issues, Case 246, Claim 268.)

(14) The United States' and KPWU discovery requests 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 137-003-570(12)." (United States' Discovery Requests to Claimant, Case 246, Claim 268, p. 3, ¶J; Klamath Project Water Users' Interrogatories, Requests for Admission, and Requests for Production of Documents to Claimant, Case 246, Claim 268, p. 2, ¶K.)

(15) Based on his deemed admissions, Claimant has admitted that (1) the required Walton elements have not been established for this claim, and (2) an irrigation system is not economically feasible. (United States' Discovery Requests to Claimant, Case 246, Claim 268, p. 5; Klamath Project Water Users' Interrogatories, Requests for Admission, and Requests for Production of Documents to Claimant, Case 246, Claim 268, pp. 6-7.)

### CONCLUSIONS OF LAW

(1) Pursuant to OAR 137-003-0570(12), the requests for admissions served on the Claimant by the United States and not responded to by the Claimant despite the Order Requiring Discovery are deemed admitted; and

(2) Claimant's deemed admissions establish that Claim 268 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

**RECEIVED**

**MAR 17 2005**

**WATER RESOURCES DEPT  
SALEM, OREGON**

KBA\_ACFOD\_03323

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), Claimant's failure to respond to the United States' and the KPWU's requests for admissions despite an Order Requiring Discovery shall be deemed an admission of matters that were the subject of the request for admission, unless two narrow exceptions apply. The first exception does not apply because the Claimant has not provided any reason for his failure to respond to the requests for admissions. Since this matter has not come to a hearing yet, the second exception also does not apply. Accordingly, each request for admission is deemed admitted.

Walton<sup>3</sup> Water Right Claim

**RECEIVED**

**MAR 17 2005**

**WATER RESOURCES DEPT  
SALEM, OREGON**

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.)

---

<sup>3</sup> The Claimant is a non-Indian successor to an Allottee. Therefore, the claim must be evaluated as a *Walton* water right claim.

*William C. Knudtsen* (246)

Order Granting Motion for Ruling on Legal Issues; Proposed Order Denying Claim

Page 5 of 7

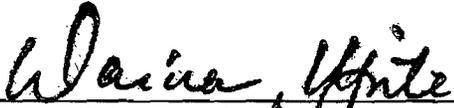
The Claimant is deemed to have admitted, among other things, that he cannot establish the elements of a Walton water right. Therefore, the Claimant in Claim 268 has failed to prove the basic elements of a Walton water right and, consequently, Claim 268 should be denied.

### ORDER

(1) The Motions of the United States and Klamath Project Water Users for Ruling on Legal Issues are granted. The Claimant's failure to respond to the United States' and KPWU's requests 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:

The elements of a water right cognizable under ORS Chapter 539 are not established for Claim 268, and the claim is denied.

  
\_\_\_\_\_  
Daina Upite, Administrative Law Judge  
Office of Administrative Hearings

Date: March 16, 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:

**RECEIVED**  
**MAR 17 2005**  
**WATER RESOURCES DEPT**  
**SALEM, OREGON**

Richard D. Bailey  
Klamath Basin Adjudication  
Oregon Water Resources Dept  
725 Summer Street N.E., Suite "A"  
Salem OR 97301

**RECEIVED**  
**MAR 17 2005**  
**WATER RESOURCES DEPT**  
**SALEM, OREGON**

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2005, I sent 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@wrp.state.or.us](mailto:richard.d.bailey@wrp.state.or.us)

Carl V. Ullman  
Water Adjudication Project  
The Klamath Tribes  
PO Box 957  
Chiloquin, OR 97624  
Phone: 541-783-3081  
Fax: 541-783-2698  
[bullman@cadsnet.net](mailto:bullman@cadsnet.net)

Walter Echo-Hawk/Lorna Babby  
Native American Rights Fund  
1506 Broadway  
Boulder, CO 80302  
Phone: 303-447-8760  
Fax: 303-443-7776  
[wechohwk@narf.org](mailto:wechohwk@narf.org)  
[babby@narf.org](mailto:babby@narf.org)

Paul S. Simmons/Andrew M. Hitchings  
Somach, Simmons & Dunn  
Hall of Justice Building  
813 Sixth Street, Third Floor  
Sacramento, CA 95814-2403  
Phone: 916-446-7979  
Fax: 916-446-8199  
[psimmons@lawssd.com](mailto:psimmons@lawssd.com)  
[ahitchings@lawssd.com](mailto:ahitchings@lawssd.com)

  
Stacey A. Silbernagel  
Administrative Assistant

William M. Ganong  
Attorney at Law  
514 Walnut Street  
Klamath Falls, OR 97601  
Phone: 541-882-7228  
Fax: 541-883-1923  
[wganong@aol.com](mailto:wganong@aol.com)

Barbara Scott-Brier  
US Dept of Interior  
500 NE Multnomah St., Suite 607  
Portland, OR 97232  
Phone: 503-231-2139  
Fax : 503-231-2166

Teri Hranac  
Oregon Water Resources Dept.  
725 Summer Street N.E., Suite "A"  
Salem, OR 97301  
Phone: 503-986-0826  
Fax: 503-986-0901  
[Teri.Hranac@wrp.state.or.us](mailto:Teri.Hranac@wrp.state.or.us)

William C. Knudtsen  
PO Box 307  
Beatty, OR 97621

Walter Perry/Justin Wirth  
Oregon Dept. of Justice  
1162 Court St NE  
Salem, OR 97310  
Phone: 503-378-4409  
Fax: 503-378-3802  
[walter.perry@doj.state.or.us](mailto:walter.perry@doj.state.or.us)  
[justin.wirth@doj.state.or.us](mailto:justin.wirth@doj.state.or.us)

**RECEIVED**

**MAR 17 2005**

**WATER RESOURCES DEPT  
SALEM, OREGON**