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WATER RESOURCES DEPT
SALEM, OREGON

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; 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

**ORDER GRANTING KLAMATH
PROJECT WATER USERS' MOTION
FOR RULING ON LEGAL ISSUES;
PROPOSED ORDER DENYING CLAIM**

Case No. 79

Claim: 280

Contests: 3559¹

vs.

Mazama Properties LLC,
Claimants.

On September 13, 2004, the Klamath Project Water Users (KPWU) filed a Motion for Ruling on Legal Issues, seeking determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served by KPWU on Claimant, Mazama Properties, LLC, should be deemed admitted because Claimant failed to provide responses despite the order requiring discovery; and (2) Claimant's deemed admissions establish that the elements of a Walton²

¹ Don Vincent voluntarily withdrew from Contest 3559 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3559 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3559 on January 15, 2004.

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 (ED Wash 1978) (*Walton I*); *Colville Confederated Mazama Properties L.L.C (079)*.

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water right are not met and, therefore, the claim should be denied. Claimant has not filed a response to KPWU's motion.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Motions for rulings 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 ***.

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

FINDINGS OF FACT

(1) Harold B. Wright, an enrolled member of the Klamath Tribe, originally filed Claim 280 on or about January 31, 1991, seeking a right to use 46.0 acre-feet of water per year from the Williamson River for 14.8 acres of practicably irrigable acreage and for stock water and domestic use. 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. On October 4, 1999, Adjudicator Richard D. Bailey issued a Preliminary Evaluation approving a water right for livestock, but denying the practicably irrigable acreage portion of the claim. (OWRD³ Ex.1 at 27, 153-55.)

(2) On or about August 14, 1992, the claimed place of use was sold to Gienger Investments. (Id. at 83.) In February 2000, Harry B. and Melinda Childers, and Randy S. and Cynthia L. Sparacino owned the claimed place of use. (Id. at 64-68.) On or about April 4, 2000, Randy S. and Cynthia L. Sparacino conveyed their interest in the claimed place of use to Mazama Properties, LLC (Mazama). On or about July 9, 2003, Mazama filed a "Change of Ownership Form for Property Claimed in the Klamath River Basin Adjudication." (Id. at 84-85.)

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*).

³ Oregon Water Resources Department.

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(3) On May 8, 2000, the Klamath Project Water Users filed Contest 3559 to this claim. (OWRD Ex. 1 at 101.) Subsequently, Don Vincent, Berlva Pritchard, and the Klamath Hills District Improvement Company voluntarily withdrew from Contest 3559. (Id. at 127, 132.) Claimant did not file a contest.

(4) Pursuant to written notice sent to participants, a pre-hearing conference was held July 7, 2003. Claimant did not participate in the pre-hearing conference, although OWRD informed Claimant of the proceeding. A discovery schedule was agreed upon in the pre-hearing conference and memorialized by a Scheduling Order issued July 10, 2003, a copy of which was mailed to Claimant.

(5) Consistent with the Scheduling Order, KPWU on September 5, 2003 served discovery requests on Claimant, including requests for admissions. (Affidavit of Andrew M. Hitchings, September 13, 2004.) Claimant did not respond to the discovery requests by the deadline of September 26, 2003, or at any time thereafter.

(6) On June 30, 2004, KPWU filed a Motion for an Order Requiring Discovery, based on Claimant's failure to respond to discovery requests. On August 13, 2004, Administrative Law Judge Daina Upite issued an Order Requiring Discovery and an Order Modifying Scheduling Order, which required Claimant to respond to KPWU's discovery requests on or before August 23, 2004. As of September 13, 2004, Claimant had not responded to the discovery requests, or filed any objections. (Affidavit of Andrew M. Hitchings, September 13, 2004.)

(7) KPWU's discovery request 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 137-003-0570(12).)" (Klamath Project Water Users' Interrogatories, Requests for Admissions and Requests for Production of Documents to Claimant Mazama Properties, LLC at 2, paragraph K.)

(8) Based on its deemed admissions, Claimant has admitted that (1) Claimant cannot establish the elements of an Allottee right for Claim 280; (2) Claimant cannot establish the elements of a Walton water right for Claim 280; and (3) there is no factual basis to support a water right for the claimed place of use in Claim 280. (Affidavit of Andrew M. Hitchings, Exhibit A at 5 and 8, Request for Admissions Nos. 2, 17, and 20.)

CONCLUSIONS OF LAW

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

(2) Claimant's deemed admissions establish that Claim 280 fails to meet the basic elements of a Walton claim and, therefore, should be denied.

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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 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 KPWU's requests for admissions despite an Order Requiring Discovery shall be deemed admission of matters that were the subject of the request for admission, unless two narrow exceptions apply. The first exception does not apply because Claimant has not provided any reason for its 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.

Walton⁴ Water Right Claim

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;

⁴ Originally, this claim was filed as a Klamath Indian Allottee claim, because Mr. Wright is a Klamath Indian. Mr. Wright sold the property, however, and the current owner, Mazama Properties, LLC, is not a member of the Klamath Tribe. Therefore, because the current owner is a non-Indian successor to an Allottee, the claim must be evaluated as a *Walton* water right claim.

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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.

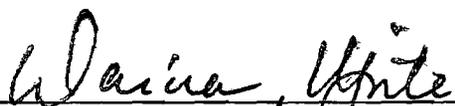
Ruling on United States' Motion for Ruling on Legal Issues at 9 (August 4, 2003.)

Claimant is deemed to have admitted, among other things, that it cannot establish the elements of a Walton water right, and there is no factual basis to support a water right for the claimed place of use. Therefore, Claimant in Claim 280 has failed to prove the basic elements of a Walton water right and, consequently, Claim 280 should be denied.

ORDER

- (1) The Klamath Project Water Users' Motion for Ruling on Legal Issues is granted. Claimant's failure to respond to the KPWU's request 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 280, and the claim is denied.



Daina Upite, Administrative/Law Judge
Office of Administrative Hearings

Date: November 8, 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.

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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 November 8, 2004, I mailed a true copy of the following: **ORDER GRANTING KLAMATH PROJECT WATER USERS' 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:

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Salem, OR 97301
richard.d.bailey@wrд.state.or.us

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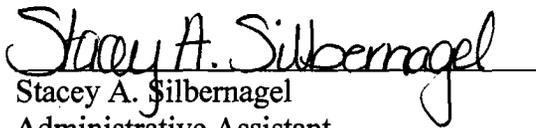
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