

OREGON WATER RESOURCES DEPARTMENT

Klamath Basin Alternative Dispute Resolution

6/13/00 DRAFT

**CONTEST QUESTIONS**

1. May contests be submitted prior to the contest date?

Answer: *No. Contests may only be filed during the contest period established by the Adjudicator.*

2. May a person submit additional information supporting their claim during the contest hearing phase?

Answer: *Additional information may be included at the discretion of the Hearings Officer.*

3. May a person submit additional information supporting their claim during the contest negotiation phase?

Answer: *Additional information in support of the claim may be made part of the record at the discretion of the Hearings Officer.*

4. Is there anything to preclude a claimant from submitting information during the hearing if they fail to submit the information during open inspection?

Answer: *Additional information may be made part of the record at the discretion of the Hearings Officer.*

5. Question about clarification of #10 in handout (What can I do if I don't agree with a preliminary evaluation): Will the Adjudicator set up a process for resolving disagreements with the preliminary evaluations?

Answer: *If a claimant does not agree with the preliminary evaluation of his/her claim, he/she should file a contest.*

6. How will adjudication negotiations be coordinated with the ADR process?

Answer: *The Adjudicator and/or the hearing officer will allow time (continuance) for settlement of contests through negotiations. The ADR will be available as a forum for contestants and claimants to negotiate settlements. Settlements achieved within the ADR can become "ADR Agreements" if approved through the ADR process. (See ¶ 7.4 of the ADR Operating Principles.)*

7. Will there be revised preliminary evaluations based on amended claims?

- Answer: *No.*
8. Will the Adjudicator publish error corrections (corrections of errors in claim files)?
- Answer: *No. Where the error is in the information provided by the claimant, the Adjudicator does not have the authority to unilaterally change the claim or the claim's supporting information.*
9. Will it be possible to discuss the impact of claim amendments with the Adjudicator?
- Answer: *Yes. The Adjudicator and his staff are available to discuss the contents of claim files. After a contest is filed the Adjudicator will not meet with contestants regarding contests.*
10. Will a list of amended claims be available?
- Answer: *Yes. The Adjudicator will have available, on request, a list of all claims files that were amended. The list will be available on the Department's web site at:*
- <http://www.wrd.state.or.us/programs/klamath/index.shtml>*
11. Must a contest be filed on both the original claim and the amended claim?
- Answer: *No. Because the claim may have been amended between the preliminary evaluation of the claim and the beginning of Open Inspection, a contest to the original claim will be treated as a contest to the amended claim.*
12. If so, how will the list be distributed?
- Answer: *See answer to question number 10, above.*
13. Must a person file a contest in order to have standing in the Circuit Court proceeding?
- Answer: *No.*
14. Will the Department develop a contest form for use by individuals contesting either another claim or a preliminary evaluation?
- Answer: *Yes. The form is available upon request from the Water Resources Department in Salem, the watermaster's office in Klamath Falls and on the Department's web site at:*
- <http://www.wrd.state.or.us/programs/klamath/index.shtml>*
15. Will the Department provide contest filing instructions and/or guidelines?

- Answer: *Yes. Instructions will be attached to the contest form and available on the Department's web site.*
16. If a person questions a particular claim and its evaluation, should the contestant contest the claim, the preliminary evaluation or both?
- Answer: *A contestant who questions both a claim and its preliminary evaluation should contest both the claim and the preliminary evaluation. Where a contestant questions a claim - but agrees with the preliminary evaluation of the Adjudicator - the contestant should file a contest on the claim.*
17. If the contestant elects to contest both the claim and the preliminary evaluation, must the contestant file two contests on two contest forms?
- Answer: *No. One form can be used to contest both the claim and the preliminary evaluation.*
18. Who will actually hear the contests?
- Answer: *Hearings will be conducted by Hearings Officers from the state hearing officer panel established by HB 2525.*
19. How does this process relate to the new law creating a central hearing panel (HB 2525)?
- Answer: *See answer to question number 18. The Oregon Attorney General's office is currently reviewing the relationship between the adjudication process under ORS 539 and the central hearing panel procedure under HB 2525 and the new Uniform Rules of Procedure.*
20. How should change of land ownership be handled (documented in the file)?
- Answer: *Change of land ownership should be documented for the record as soon as possible after the land transaction is final. The new owner should provide such information with proof of ownership.*
21. What weight will the hearing officer give to the preliminary evaluation?
- Answer: *The hearing officer will not presume that the Preliminary Evaluation is correct. To the extent the Preliminary Evaluation contains relevant evidence, it will be considered by the hearing officer.*
22. Is the supplemental information being placed in the claim files on a regular basis?
- Answer: *As of this writing, all supplemental information provided to the Adjudicator*

*has been placed in its respective claim file. Additionally, all amendment filings have been placed in the appropriate files.*

23. How will interested persons know if new information has been added to a file?

Answer: *It is impossible to list in some comprehensive way all information that has been added to the record after a claim was originally filed. A great deal of information has been received by the Adjudicator and made part of the record. Therefore, it is the responsibility of the contestant to determine what is contained in the file and its relevance.*

24. What is the lag time for supplemental information to be included in the claim file?

Answer: *See answer to question number 22.*

25. Will the Adjudicator create a data-base of supplemental information placed in claim files?

Answer: *No. Many claimants have provided supplemental information to the Adjudicator. The Adjudicator will not publish a list of all claims that have been supplemented. However, all supplemental information has been placed in the corresponding claim file. It is the responsibility of the contestant to determine what is in the file and its relevance.*

26. Who will be the parties in a contested hearing?

Answer: *The contestant and the contestee (claimant whose claim is contested). The Hearings Officer, however, has the authority and may elect to combine contests with the same issues.*

27. Who besides the parties will participate in a contested hearing?

Answer: *Only the claimant and the contestant will participate in the hearing unless the Hearings Officer elects to join similarly situated contestants and contestees (claimants).*

28. Will the Department participate in a contest hearing?

Answer: *The Adjudicator and his staff may participate.*

29. Is the contested case hearing officer the decision maker, or is the hearing officer order simply a recommendation to the Adjudicator?

Answer: *After the hearing, the hearing officer will issue a proposed order including*

*recommended findings of fact and conclusion of law. The parties will have an opportunity to file exceptions to the proposed order and present argument to the Adjudicator. The Adjudicator is not bound by the proposed order issued by the hearing officer. The Adjudicator may modify the proposed order when he issues his Findings of Fact and Order of Determination. If the Adjudicator modifies the form of the order issued by the hearing officer in any substantial manner, he must identify the modifications and provide an explanation to the parties to the hearing as to why he made the modifications.*

30. How is a hearing officer's order from a contest of a claim incorporated into the findings?

Answer: *See answer to Question 29.*

31. What latitude does the Adjudicator have in adopting or rejecting the hearing officer's order?

Answer: *See answers to questions number 29 and 30.*

32. Is there a process to contest basin-wide issues (e.g., multiple claims affected by rate and duty)?

Answer: *No, not in isolation or in the abstract. However, a determination in a preliminary evaluation, such as a determination of the amount of water allowed for a particular claim (duty), could be contested. An order issued as a part of contest hearing could be applicable to other similarly situated claims depending on the circumstances of the water use in these other claims.*

33. If a party does not agree with the Adjudicator's preliminary evaluation of basin-wide duty, how does the party contest the evaluation?

Answer: *See answer to question number 32.*

34. What documentation can be submitted in contesting a rate and duty in a claim or a preliminary evaluation?

Answer:

35. Regarding the Fort Klamath area, where a group of claims were denied based on the 1932 Wood River adjudication:

35.1 Did the Oregon A.G. provide written advice on these claims?

Answer: *No. No final written advice has been provided to the Adjudicator. The A.G. is reviewing this issue and we hope to be able to provide an answer to this question in the near future.*

35.2 How does a claimant establish a Walton priority date?

Answer: *There is a three-fold test for establishing a "Walton" priority date: 1) The claimant must show that the Reservation land was in Indian ownership, 2) The claimant must document the transfer of ownership to a non-Indian successor, and 3) The claimant must document diligent development of the right after transfer to the first non-Indian owner.*

35.3 Should a claimant who is attempting to establish a Walton claim file a contest on their own preliminary evaluation?

Answer: *If the claimant disagrees with the preliminary evaluation of his/her claim by the Adjudicator, he/she should file a contest.*

35.4 Who should the Walton claimant, who is contesting his/her own preliminary evaluation, serve?

Answer: *A claimant contesting his/her own preliminary evaluation must file the contest with the Department during the contest period, but does not need to serve any other party.*

36. Did the Oregon A.G. review all the claims?

Answer: *No.*

37. What does the hearing officer do regarding arguments about legal advice?

Answer: *The Hearings Officer will listen to all relevant arguments and receive any relevant materials. This includes arguments and briefs regarding the law of the issues to be determined. The Hearings Officer will prepare an Order reflecting his/her judgement on the facts and law of the contest.*

38. What is the Oregon Justice Department role in the contest proceeding?

Answer: *The Oregon Department of Justice provides legal advice to the Adjudicator and may assist in presenting information to the hearings officer to ensure development of a complete record of the case.*

39. If a claimant withdraws the claim before completion of the adjudication, is the claim of no further force or effect?

Answer: *Yes.*

40. Does an allottee who withdraws a claim have a right to re-file a claim?

Answer: *No.*

41. Some former Reservation land was sold by the United States (BIA) directly to non-Indian purchasers:

41.1 What type of claim should have been filed (Walton or other)?

Answer:

41.2 Is there information about water claims from those successor purchasers?

Answer:

42. Is the Circuit Court proceeding a trial de novo?

Answer:

43. In addition to the notice to holders of permitted and certificated surface water rights, will the contest period notices be sent to holders of groundwater rights?

Answer: *No. The Adjudicator intends to send notice to all individuals who are parties to the Klamath Basin Adjudication. The adjudication statutes and rules define "party" to include all claimants and holders of permitted, certificated or decreed water rights on a stream subject to the adjudication. Only surface water is subject to this adjudication. Therefore, the Adjudicator does not intend to send notice of the contest period to individuals who hold only groundwater rights, but do not hold surface water rights.*

44. Who has the right to receive the notice?

Answer: *See Answer to #43 above.*

45. If you have questions regarding small claims, that is claims with relatively small files, can you have it photocopied and mailed instead of coming to Salem?

Answer: *Yes. All documents in a claim file can be copied and delivered on request. Naturally, there will be a charge for the copying and postage. Large files will take longer to copy and deliver than small files. In addition, copies of maps will take longer and will cost more.*

46. Will the notice of contest include some description of what is at stake? That is, what effect will an adjudicated right decreed in the current Klamath Basin Adjudication have on an existing permitted or certificated right, including rights that were adjudicated in one of the previous sub-basin adjudications (e.g., Upper Sprague, Wood River, etc.)?

Answer: Yes.

47. Please provide clarification as to the discretion of Hearings Officer.

Answer: Question #29 on the 1/11/00 draft was:

Is the contested case hearing officer the decision maker, or is the hearing officer order simply a recommendation to the Adjudicator?

The answer was:

*After the hearing, the hearing officer will issue a proposed order including recommended findings of fact and conclusion of law. The parties will have an opportunity to file exceptions to the proposed order and present argument to the Adjudicator. The Adjudicator is not bound by the proposed order issued by the hearing officer. The Adjudicator may modify the proposed order when he issues his Findings of Fact and Order of Determination. If the Adjudicator modifies the form of the order issued by the hearing officer in any substantial manner, he must identify the modifications and provide an explanation to the parties to the hearing as to why he made the modifications.*

*This answer would seem to answer the current question.*

48. Under what circumstances and in what way will the Department, meaning the Adjudicator and his staff, participate in contested cases?

Answer: In answer to Question #28 (Will the Department participate in a contest hearing?) we answered: *The Adjudicator and his staff may participate.*

*The Adjudicator and his staff will participate in contest hearings as he feels necessary to clarify the record of the contest and to explain his evaluations of claims.*

49. When filling out the contest claim form, will a certificate or claim number be sufficient to identify the contestants standing to file a contest?

Answer: *Yes. However, the contestant should to be sure the name and address of the current holder of the right is included on the contest form. In addition, it would be helpful for the contestant to attach a copy of the permit or certificate to the contest form. Attaching a copy of the right is a simple way to describe the nature and scope of the right claimed as required by the rules.*

50. Expand on items #2 and #4 of the “Your Claim” contest form.

2. That the Adjudicator made a Preliminary Evaluation of the right claimed, as follows:

Answer: *The contestant should summarize the Preliminary Evaluation by setting out the difference between the right claimed and the right allowed under the Preliminary Evaluation.*

4. That claimant/contestant contests the Adjudicator’s Preliminary Evaluation of the right claimed for the following reasons:

Answer: *There is no standard language or form that will apply here. The contestant should try to set out in detail why the Preliminary Evaluation is incorrect. Specific facts and/or legal reasons why the Preliminary Evaluation is incorrect should be stated. Where the contestant proposes a change in the preliminary evaluation, specific facts and law should be described supporting the contestants position.*

#### **Questions asked at the February 8, 2000, Meeting**

51. There was a request for a precise description of what paperwork is needed in a situation where a contestant is contesting another person’s claim.

Answer: *Each statement of contest must be filed with the Department between April 3, 2000 and May 8, 2000. The contest statement must be verified by an affidavit of the contestant. The contestant must serve the contestee (claimant) with a copy of the contest by registered or certified mail, return receipt requested. Proof of this service must be filed with the Department as soon as possible after serving the copy of the statement of contest on the contestee.*

52. Follow-up on question #19 distributed 1/11.

Question #19 is: How does this process relate to the new law creating a central hearing panel (HB 2525)?

Answer: *See answer to question number 18. The Oregon Attorney General’s office is currently reviewing the relationship between the adjudication process under ORS 539 and the central hearing panel procedure under HB 2525 and the new Uniform Rules of Procedure.*

Question #18 is: Who will actually hear the contests?

Answer: *Hearings will be conducted by Hearings Officers from the state hearing officer panel established by HB 2525.*

53. Should everyone file a contest to verify the preliminary evaluation and have standing to challenge any change?

Answer: *The decision as to whether to file a contest must be made by each party (claimant or water right holder). However, you do not need to file a contest to have standing to file an exception to the Adjudicator's Findings of Fact and Order of Determination (Findings) with the Circuit Court. If the Adjudicator elected to change his position with regard to a claim (that was not contested and for which no hearing was held) the claimant (or any party) could file an exception to the Findings when it is presented to the Court.*

54. Is there a cutoff time for adding information to a file?

Answer: *The Adjudicator may not accept information after the beginning of the contest period. However, for claims or preliminary evaluations that have been contested, additional information may be accepted into the record at the discretion of the Adjudicator or hearing officer as appropriate.*

55. Will the new WRD director assume control of the adjudication?

Answer: *We do not know.*

56. Can a claimant safeguard their claim by contesting any adversarial claim (that is, should a claimant contest a claim that, if decreed, would deprive the claimant of water in times of shortage)?

Answer: *Again, the decision as to whether to file a contest must be made by each party (claimant or water right holder). However, the only way to challenge a competitive claim at this time is to file a contest. In addition, we repeat that "you do not need to file a contest to have standing to file an exception to the Adjudicator's Findings of Fact and Order of Determination with the Circuit Court. (See answer to Question # 53 above.)"*

57. If a claimant has new information that will be helpful in settling a claim and wants it to be considered in the settlement, should the claimant provide copies of such information to the file to support the position?

Answer: *Yes. But, see answer to Question #54 above.*

58. Does WRD intend to develop lists of contests by stream basin for convenience of the claimants?

Answer: *No. The contest database will only have fields related to the information contained in the contest. Since stream basin information does not generally appear in a contest itself, the database cannot contain a source field.*

59. Can such lists be developed?

Answer: *See answer to Question # 58 above.*

3. Is there going to be an interlocutory appeal process whereby legal issues can be contested up to the circuit court, short of the court's hearing of the findings?

Answer: *No. The Adjudicator has taken the position that all matters will go to the court as a part of the findings and order of determination.*

4. Expansion on question #38 – Is a legal advice of the Oregon DOJ binding on the hearings officer, or will it be more like a litigant and participate on briefing in legal issues before the hearings officer?

Answer: *The hearing officer is independent of the Department. The hearing officer is charged with producing a proposed order for the Adjudicator. Like attorneys for claimants and contestants, the Oregon DOJ is only able to present legal opinions and/or arguments to the hearing officer. The procedure for offering such advice and form in which the advice is offered will be established by each hearing officer in accordance with the Oregon APA.*

5. Will there be communication between Oregon DOJ and the hearings officer in the absence of other parties (i.e., claimants and/or contestants)?

Answer: *No. However, the hearing officers may ask the ODOJ for legal advice.*

### **Questions asked at the March 14, 2000, Meeting**

51. If a preliminary evaluation accepts a claim as filed and there are no contests, does the claim go to the findings unchanged, or can the adjudicator himself reconsider his preliminary evaluation before development of the findings?

Answer: *The Adjudicator can change his position on a claim in the Findings of Fact and Order of Determination.*

52. In case of an obvious "typo" by the adjudication staff on acreage, does a contest need to be filed?

Answer: *Again, the decision as to whether to file a contest must be made by each party (claimant or water right holder). However, if the claimant can easily describe the typo in a contest, this would be a simple way to insure that the typo in the preliminary evaluation is corrected in the record. It is extremely unlikely that such a contest would need to go to hearing. The Adjudicator has indicated that such contests could be settled quickly and easily without a hearing.*

53. With data base problems, how can the contest period be opened in one month?

Answer: *The claim database is not a legal requirement; therefore, whether there is a database or not does not effect the adjudication schedule. It should be noted that the preliminary evaluations, along with a complete index to the evaluations are posted on the Department's web page. This posting with its search capability is also not required under the adjudication law, it is available only as a convenience.*

54. Is there a minimum time period between the date notices are sent out and the end of the contest period?

Answer: *Yes. The notice of the open inspection must be mailed at least 10 days before the beginning of the open inspection period. The open inspection period must run for at least 80 hours (between the hours of 8:00 a.m. and 5:00 p.m. except Sunday), and the contest period must run for a minimum of 15 days. (See ORS 539.090 and 539.100.) Therefore, the adjudication statute states that the notice must be mailed 40 days before the end of the contest period.*

55. Is there a due process minimum notice for the contest period?

Answer: *See answer to Question #16 above.*

### **Questions asked at the May 9, 2000, Meeting**

6. In cases where a claim was filed describing a water right on property that has changed hands since the original claim was filed, has the Oregon Water Resources Department given any thought as to how to advise the new owners that their property has a claim?

Answer: *No. The Department does not receive notice that land has changed hands unless the purchaser (new owner) notifies the Department of the transaction. If the purchaser provides notice of the transaction and proof of ownership the Department will change the name of the claim file and will direct all correspondence to the new owner.*

7. What is the responsibility of the contestant to notify a new owner of the filing of a contest?

Answer: *We do not know. At the minimum, the Oregon adjudication statute states that the contestant shall mail "... to the contestee ... at the post-office address of the contestee as stated in the statement and proof of claim of the contestee." We recommend that contestants may wish to consult with an attorney to be sure they have taken appropriate steps to notify the claimant/contestee. It is important to the ADR process to be sure that all parties receive notice of pending contests.*

8. Put another way: Does a contestant discharge his/her duty to notify the contestee (claimant) if the contestant mails a copy of the contest to the name and address of the claimant that appears in the statement and proof of claim, even if this name and address is no longer current?

Answer: *See answer to # 2 above.*

9. If the only contest filed on a claim is filed by the claimant challenging the Adjudicator's Preliminary Evaluation, can the contestant/claimant and the Adjudicator settle the contest without a hearing?

Answer: *Yes. The Adjudicator will attempt to reach a settlement with the contestant/claimant on the issues raised in the contest.*

10. If so, how will the settlement be memorialized to ensure that the settlement is reflected in the Adjudicator's findings of fact and order of determination?

Answer: *A settlement between a contestant/claimant and the Adjudicator could be documented in a memorandum submitted to the claimant's file to lay out the details of the settlement. The settlement as delineated in the memorandum will be incorporated in the Adjudicator's findings of fact and order of determination to be submitted to the Circuit Court.*

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