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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON

WATER RESOURCES DEPT
SALEM, 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;
Contestants,

AMENDED PROPOSED ORDER

Case No. 166

v.

Claim No. 19

Scott Runels; Margie Runels;
Claimants/Contestants.

Contests 2787, 2819,¹ 3437,² 3721, and
4077

HISTORY OF THE CASE

This proceeding under the provisions of ORS Chapter 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

Scott Runels and Margie Runels (Claimants) filed Claim 19 on December 3, 1990 for water as a non-Indian successor to a Klamath Indian Allottee. Claimants claimed an amount of water sufficient to irrigate the allotment's share of the Tribe's practicably irrigable acreage (PIA), commonly known as "*Walton claims*."

On October 4, 1999 Richard D. Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation recommending approval of the portion of the claim for irrigation, with an irrigation rate of 1/40th cfs/acre and a duty of 3.5 af/acre, for a period of use of March 1 – October 31, but not addressing the claim for livestock use. Claimants filed Contest 2787 on May 9, 2000. The United States filed Contest 3721

¹ On February 20, 2003, WaterWatch of Oregon, Inc. voluntarily withdrew Contest 2819, without prejudice.

² On March 11, 2003, Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Company, 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 Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Company, and Collins Products, LLC voluntarily withdrew Contest 3437.

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on May 8, 2000. The Klamath Tribes filed Contest 4077 on May 8, 2000. The United States filed an Amendment to its Statement of Contest on June 16, 2004.

On May 7, 2003 a Scheduling Order was issued that outlined a discovery process and scheduled a hearing for July 7, 2004. On February 3, 2004 an Order Modifying the May 7, 2003 Scheduling Order was issued, which required participants to file in writing their witnesses' direct testimony no later than April 23, 2004. Claimants did not file any written direct testimony for any witness by that deadline.

Pursuant to a Notice of Hearing mailed to all participants by certified mail on June 2, 2004, a hearing was held in Salem, Oregon on July 7, 2004, for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed and whose presence had been requested for cross-examination. Administrative Law Judge (ALJ) Ken L. Betterton presided at the hearing. Claimants appeared *pro se*. Assistant United States Attorney (AUSA) Bruce D. Bernard represented the United States of America. Attorney at Law Lorna Babby represented the Klamath Tribes. Assistant Attorney General (AAG) Justin Wirth represented Oregon Water Resources Department (OWRD). The record closed on September 27, 2004, with the filing of the last written closing argument by a participant.

A Proposed Order was issued on November 18, 2004. On November 30, 2004, OWRD filed a request to reopen the record to identify the point(s) of diversion and number of irrigated acres by quarter-quarter section. On or about January 13, 2005, the United States filed a written agreement by the parties as to the points of diversion and number of irrigated acres. On February 22, 2005, ALJ Betterton issued an Amended Proposed Order addressing the point(s) of diversion and number of irrigated acres. That order denied the claimed water rights on nine of the 11 claimed allotments. The parties stipulated that Claimants had established *Walton*³ rights for the remaining two allotments, numbers 208 and 1122 (stipulated acreage).

On June 20, 2007 OWRD filed a second request to reopen the record. The purposes of this reopening were limited to (1) allow Claimants an opportunity to offer evidence upon which the Special Master based his findings and conclusions in *John B. Mosby v. Scott Runels*, Case No. 88-241 CV, and (2) to permit contestants an opportunity to rebut any evidence offered by Claimants.⁴ On June 29, 2007 ALJ Maurice L. Russell, II issued Order Reopening Record. Pursuant to this order, a telephonic scheduling conference was held on August 10, 2007. ALJ Russell presided over the scheduling conference. Claimant Margie Runels appeared *pro se*. AUSA Bruce Bernard appeared on

³ The term *Walton* rights is defined in ALJ Betterton's Amended Proposed Order at footnote 4.

⁴ The relevant portion of OWRD Klamath Adjudication Exception Referral Form states, "The scope of further hearing shall be limited to reopening the record to (1) provide the Claimants an opportunity to offer evidence in OWRD's files upon which Special Master A. Reed Marbut based his Findings of Fact, Conclusions of Law and Order of Determination in *John B. Mosby v. Scott Runels* * * *, and (2) to allow the Contestants an opportunity to rebut any of the above described evidence that may be offered by the Claimants. * * *"

behalf of the United States. Attorney Carl Ullman appeared on behalf of the Klamath Tribes. Pursuant to ALJ Russell's instructions at the scheduling conference, Claimants submitted several documents. Claimants did not mark these documents as exhibits or otherwise identify them.

On January 9, 2008, ALJ Russell convened a telephonic status conference. Claimant Margie Runels again appeared *pro se*. AUSA Bruce Bernard appeared on behalf of the United States. Attorney at Law Carl Ullman appeared on behalf of the Klamath Tribes. AAG Jesse Ratcliffe appeared on behalf of OWRD. On January 29, 2008, ALJ Russell issued an Order on Status Conference that established a schedule for submission of further evidence as well as a briefing schedule. This order also assigned exhibit numbers S1 through S6 to Claimants' previously unmarked exhibits. Pursuant to Judge Russell's order, on March 7, 2008 Claimants submitted a letter identifying the purported significance of exhibits S1 through S6. On April 7, 2008, the United States of America filed a responsive brief.

Prior to issuance of a new Proposed Order in this matter, Judge Russell became unavailable.⁵ This case was reassigned to ALJ Joe L. Allen. On June 6, 2008, ALJ Allen convened an additional status conference by telephone to offer an opportunity for a further cross examination hearing. Claimant Margie Runels appeared *pro se*. AAG Jesse Ratcliffe appeared on behalf of OWRD. No other party appeared.⁶ The parties indicated that no further need for cross examination is necessary. The parties further agreed no further evidence or briefing was appropriate.

I have reviewed the entire record, including the digital recordings of the July 7, 2004 hearing and subsequent prehearing conferences before Judge Russell in preparation for issuing this order.

EVIDENTIARY RULINGS

The evidentiary rulings in the Amended Proposed Order dated February 22, 2005 is hereby adopted and incorporated by reference.

In addition, Exhibits S1 through S6 were offered by Claimants. The United States objected to these documents as irrelevant, immaterial, and not in conformance with the purposes stated in the reopen request. ALJ Russell overruled the objections and admitted Claimants' exhibits into the record.

ISSUES

(1) Whether there sufficient title information to establish a *Walton* water right for a portion of the claimed Place of Use.

⁵ Judge Russell passed away on April 28, 2008.

⁶ Prior to the conference, counsel for the Klamath Tribes, Carl Ullman, indicated by letter that he would not be in attendance.

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(2) Whether there sufficient information on the development or continuous use of water on this Place of Use to establish a *Walton* right.

(3) What is the appropriate Period of Use?

(4) Whether there was a clerical error in the Preliminary Evaluation in the description of the lands covered in that the claimed lands located in NW ¼ SE ¼ of Section 19, T 31, S, Range 8 and all of the claimed lands in Section 7, T 31 S, Range 8 are not listed.⁷

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful review of the record, including the additional evidence submitted in this proceeding, I find myself in agreement with the conclusions and reasoning expressed by ALJ Ken Betterton in his Amended Proposed Order dated February 22, 2005. As such, I find no reason to deviate from the prior order issued by ALJ Betterton. Accordingly, I hereby adopt the Amended Proposed Order of February 22, 2005 and incorporate same by reference into this Amended Proposed Order. For the reasons set forth below, I do not find Claimants' additional evidence to be persuasive on the issues before me.

1. *Exhibit S1, videotape of deposition of Slim Morrow, does not establish Walton rights on the claimed allotments.*

Claimants assert the deposition of Mr. Morrow establishes the claimed lands were irrigated by the first non-Indian owner and continuously thereafter. I do not agree. The deposition of Mr. Morrow is vague as to both the allotments being referenced and the time periods referred to. Nothing in Mr. Morrow's deposition establishes irrigation of the 11 separate allotments at issue at the time of transfer to the first non-Indian owner or continuously thereafter. Because of the vague nature of the questions and answers, it is impossible to ascertain which allotments Mr. Morrow refers to at any given time.

I do not find this testimony helpful in establishing *Walton* rights on any of the 11 allotments outside of the stipulated acreage.

2. *Exhibit S2, deposition of Scott Runels, does not establish Walton rights on the claimed allotments.*

The deposition of Claimant Scott Runels provides no specific information to establish irrigation by the first non-Indian owner. Nor does it provide any evidence of continuous irrigation thereafter. The deposition reveals that Claimant did not acquire the

⁷ OWRD concedes that the lands identified above were omitted from the Preliminary Evaluation as a result of a clerical error and should have been listed in the Preliminary Evaluation. The participants agree the lands identified above should have been listed.

allotments at issue until 1988 and had no personal knowledge of the irrigation of the claimed lands prior to that year.

Like the deposition of Mr. Morrow, I find the testimony in Claimant's deposition lacks sufficient information to establish the elements of a Walton right on any of the nine allotments outside of the stipulated acreage.

3. *Exhibit S3, memoranda, pleadings, affidavits, and exhibits from Mosby v. Runels, 88-241CV, do not establish Walton rights on the claimed allotments.*

Claimants submitted a significant number of documents filed in a civil court proceeding brought against them by a neighboring land owner. Ignoring for a moment that many of these documents constitute argument rather than evidence, I find that, even considering them in a light most favorable to Claimants, the proffered documents do not provide any information to establish *Walton* rights on the claimed lands. These court documents, many of which were in evidence at the time ALJ Betterton issued his Amended Proposed Order, do not establish irrigation of the claimed allotments by the first non-Indian owner or continuous irrigation thereafter.

4. *Exhibit S4, Findings and Conclusions of Special Master Reed Marbut, does not establish Walton rights on the claimed allotments.*

Claimants argue that these findings and conclusions, issued by the Special Master in *Mosby v. Runels*, establish "Indian" water rights on the claimed allotments. I cannot concur. It is important to note that this document was previously admitted into evidence and therefore available to ALJ Betterton at the time he issued his Amended Proposed Order. More important, however, is the fact that the Special Master in this matter found continuous irrigation from the mid 1970's. (Ex. 166 E 000 10001.) The only reference to early irrigation supports *Walton* rights on the stipulated acreage.

Nothing in this document supports irrigation of the other nine allotments at the time of the transfer to the first non-Indian owner. Further, because this information was before the ALJ at the time of the previous order, it is inferred that the ALJ gave it due consideration.

5. *Exhibit S5, Claimants' title documents for the claimed allotments, do not establish Walton rights on the claimed lands.*

The title documents submitted by Claimants clearly trace title to the 11 allotments of claim 19 back to Indian ownership. While this is an important element of the claimed water rights, it has not been disputed here. In fact, the United States' witness devoted a significant amount of testimony to this subject. In doing so, he considered these title documents and determined that each of the 11 allotments were previously under Indian ownership.

Claimants' title documents are not helpful beyond this point. Most notably, these documents do nothing to establish irrigation by the first non-Indian owner or continuous irrigation thereafter.

6. *Exhibit S6, Sand Creek documents and maps, do not establish Walton rights on claimed allotments outside the stipulated acreage.*

Claimants submit these documents to show the claimed lands were once part of the Sand Creek irrigation project. As ALJ Betterton found in his previous order, this was true for four of the 11 allotments in claim 19; allotment numbers 120, 121, 208, and 1122. ALJ Betterton found that allotments 120 and 121 were removed from the Sand Creek irrigation project in 1939. (Amended Proposed Order at 4.) ALJ Betterton also found that, after removal from the project, there was no evidence of continuous irrigation of allotments 120 and 121. (*Id.* at 5.) Nothing in Claimants' exhibit contradicts ALJ Betterton's findings.

Exhibit S6 is helpful only in establishing *Walton* rights on allotments 208 and 1122, land already stipulated to by the contestants in this matter. Outside the stipulated acreage, these documents are unhelpful in establishing the claimed water rights.

In conclusion, I find the newly submitted documents do not provide sufficient evidence to establish the claimed water rights on the claim 19 lands outside the stipulated acreage. Accordingly, I find no basis upon which to set aside or modify ALJ Betterton's Amended Proposed Order issued February 22, 2005.

Based upon the foregoing, I propose OWRD issue the following:

AMENDED PROPOSED ORDER

Claim 19 is DENIED in part and APPROVED in part in accordance with the Amended Proposed Order dated February 22, 2005:

(1) Claimants have established the elements of a *Walton* water right for 138 acres of Allotment No. 208 and for 160 acres of Allotment No. 1122 of Claim 19 as detailed in the Amended Proposed Order issued February 22, 2005;

(2) Claimants failed to establish the elements of a *Walton* right for the remaining allotments of Claim 19 (*i.e.*, Allotment Nos. 11, 12, 13, 120, 121, 530, 533, 534 and 1442). The claim for water rights on those allotments should be denied in accordance with the Amended Proposed Order issued February 22, 2005.



Joe L. Allen, Administrative Law Judge
Office of Administrative Hearings

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Date: August 14, 2008

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:

Dwight W. French
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 August 14, 2008, I mailed the following: **AMENDED PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

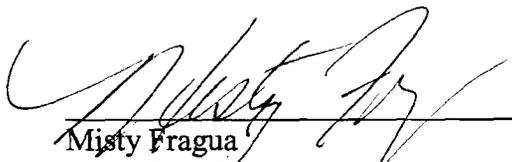
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