

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,
Contestants,

v.

Savannah Land Company and William E. Domes,
President,
Claimant/Contestant.

**STIPULATION TO RESOLVE
CONTESTS**

Case No. 167

Claim No. 20

Contests 2727, 3722, and 4078

Contestants, the United States of America (“United States”), the Klamath Tribes (“Tribes”) (the United States and the Tribes collectively referred to as “Contestants”), Claimants Savannah Land Company and William E. Domes, President, (“Claimants”), and the Oregon Water Resources Department (“OWRD”) hereby agree and stipulate, and request the Adjudicator to resolve the above-captioned claim and contests, as follows.

A. STIPULATED FACTS

1. On January 18, 1991, Claimants filed Claim No. 20 for a total of 2 acre feet per acre from natural overflow and flooding from the Williamson River and Big Spring Creek, tributary to Klamath River, for wildlife use. Claimants asserted a year-round period of use and a priority date of 1864.

2. On October 4, 1999, the Adjudicator, Richard D. Bailey, issued a Preliminary Evaluation for Claim No. 20, concluding that the required *Walton* elements had not been established and therefore recommending denial of Claim No. 20.

3. On May 8, 2000, the United States filed Contest No. 3722 to Claim No. 20.

4. On May 8, 2000, the Klamath Tribes filed Contest No. 4078 to Claim No. 20.

5. On May 5, 2000, Claimants filed Contest No. 2727 to the Preliminary Evaluation.

6. Contestants assert that wildlife is not a valid purpose for a *Walton* water right with an 1864 priority date.

7. Contestants further assert that use of water based on natural overflow, sub-irrigation, and/or flooding, without a showing of intent to apply water to the claimed beneficial use and without construction of an artificial means of diversion and/or control of the water, constitutes at most a privilege – not a right.

8. Contestants do not believe that Claimants can establish the necessary elements of a *Walton* water right.

9. Nonetheless, Contestants are willing to resolve their Contests to Claim No. 20 in accordance with the clarifications and limitations concerning the scope of the privilege to continued use of natural flooding, sub-irrigation, and/or natural overflow described below.

10. Claimants and are willing to clarify and limit the scope of the privilege to continued use of natural, flooding, sub-irrigation and/or natural overflow as described below in order to resolve the Contests filed by Contestants.

B. TERMS OF STIPULATION

1. Clarification Concerning the Claimed Beneficial Use. Claimants concede that wildlife is not a valid purpose of a *Walton* water right.

2. Clarification and Limitations Concerning Scope of Privilege to Continued Use of Natural Flooding, Sub-Irrigation, and/or Natural Overflow. Claimants concede that use of water based on natural overflow, sub-irrigation, and/or flooding, without a showing of intent to apply water to the claimed beneficial use and without construction of an artificial means of diversion

and/or control of the water, constitutes at most a privilege – not a right. Accordingly, Claimants agree to limit the use of water on the claimed lands by providing that such use constitutes a privilege to continue to accept natural overflow and flooding for the claimed beneficial use only, and that no priority date, rate or duty shall attach to such privilege. Claimants further agree that: (a) the privilege to so use water does not constitute a water right and may not be asserted to curtail water rights through the priority system; (b) the privilege to so use water may not be transferred to any other property; and (c) the privilege to so use water may not be altered by the use of any physical means to change the manner in which the natural flooding, sub-irrigation and/or natural overflow occurs, to contain or further distribute water or to increase in any other way the consumption that takes place from the natural flooding, sub-irrigation, and/or natural overflow, and that any such alteration shall require the filing of an application for permit to appropriate water from the Oregon Water Resources Department, the priority date of which shall be, in accordance with ORS 537.150(2), the date of the filing of the application.

3. Request that Adjudicator Limit Approval of the Claim. Claimants and Contestants request the Adjudicator to limit his approval of Claim No. 20 as described in Paragraph 2 above, and to include in the Adjudicator’s Order of Determination the following findings of fact and conclusion regarding Claim No. 20:

FINDINGS OF FACT:

1. Point of Diversion Location: None
2. Source: Williamson River and Big Spring Creek, tributary to Klamath River
3. Use: Wildlife
4. Amount Actually Beneficially Used: Unspecified – the privilege to continue to accept the natural flooding, sub-irrigation and/or natural overflow of the 311 acres

recognized herein does not constitute a right to a specific quantity of water

5. Period of Use: Year-round
6. Priority Date: None
7. Place of Use:

LOT 1 (NW 1/4 NE 1/4)	19.3 acres
LOT 4 (SW 1/4 NE 1/4)	30.3 acres
LOT 9 (SW 1/4 NE 1/4)	9.6 acres
LOT 9 (SE 1/4 NE 1/4)	40.0 acres
LOT 10 (NE 1/4 NE 1/4)	36.8 acres
LOT 11 (NW 1/4 NE 1/4)	17.2 acres
LOT 5 (NE 1/4 SE 1/4)	0.5 acres
LOT 5 (NW 1/4 SE 1/4)	34.5 acres
LOT 6 (SW 1/4 SE 1/4)	30.8 acres
LOT 6 (SE 1/4 SE 1/4)	0.4 acres
LOT 7 (SW 1/4 SE 1/4)	8.3 acres
LOT 7 (SE 1/4 SE 1/4)	39.2 acres
LOT 8 (NE 1/4 SE 1/4)	39.5 acres
LOT 8 (NW 1/4 SE 1/4)	4.6 acres

SECTION 1 TOWNSHIP 31 SOUTH, RANGE 8 EAST, W.M.

CONCLUSION:

The claim is approved only as a privilege to continue to accept the natural flooding, sub-irrigation, and/or natural overflow of the 311 acres identified above, and further provided that:

1. the privilege to so use water does not constitute a water right and may not be asserted to curtail water rights through the priority system;
2. the privilege to so use water may not be transferred to any other property; and
3. the privilege to so use water may not be altered by the use of any physical means to modify the manner in which the natural flooding, sub-irrigation, and/or natural overflow occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from the natural flooding,

sub-irrigation, and/or natural overflow, and that any such alteration shall require the filing of an application for permit to appropriate water from the Oregon Water Resources Department, the priority date of which shall be, in accordance with ORS 537.150(2), the date of the filing of the application.

3. Resolution of Claim and Contests Without Need for Hearing. Claimants, Contestants and OWRD agree that this Stipulation satisfactorily resolves all Contests to Claim No. 20 and eliminates the need for a hearing before the Administrative Law Judge.

4. Recommendation of OWRD Adjudication Staff that Adjudicator Withdraw Referral from the Office of Administrative Hearings. Based on the agreement of Claimants and Contestants that these contests can be resolved without the need for a hearing, OWRD adjudication staff hereby recommends to the Adjudicator that he withdraw the referral of Claim No. 20 from the Office of Administrative Hearings.

5. Recommendation of OWRD Adjudication Staff that the Adjudicator Enter an Order of Determination Approving and Limiting Claim in Accordance with Paragraph B.3. Based on its review of the record in this case and upon the agreement of the parties, OWRD adjudication staff hereby recommends to the Adjudicator that he enter an Order of Determination approving and limiting Claim No. 20 in accordance with Paragraph B.3. above.

6. Further Participation by Contestants. If the Order of Determination issued by the Adjudicator does not follow the request of Claimants and Contestants and the recommendation of OWRD adjudication staff that the Claim be approved and limited in accordance with Paragraph B.3. above, Claimants and Contestants reserve the right to file exceptions to the Order of Determination as to Claim No. 20 in the Circuit Court for Klamath County and reserve the right to participate in any other future proceedings authorized by law.

7. Stipulation Not to be Used Against Parties. This Stipulation has been entered into based upon good faith negotiations for the purpose of resolving legal disputes, including pending litigation, by compromise and settlement. Nothing in this Stipulation, including the agreement to resolve the Claim and Contests without the need for a hearing, or any offers or compromises made in the course of negotiating this Stipulation, shall be construed as admissions against interest or tendered or used as evidence or used in any other manner in any proceeding, including in this adjudication, other than for interpretation or enforcement of this Stipulation or for a purpose contemplated by Oregon Rule of Evidence 408.

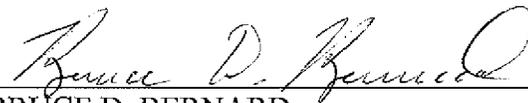
8. Post-1909 Water Rights. Nothing in this Stipulation shall affect any valid existing permit or certificate to appropriate water for use on the claimed lands.

9. Non-Severability. The terms of this Stipulation are non-severable.

10. Stipulation Binding on Successors, Heirs and Assigns. This Stipulation shall bind and inure to the benefit of successors, heirs and assigns of the parties.

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DATED: March 25, 2004



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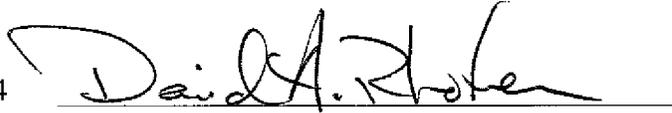

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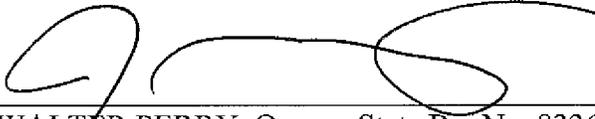
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