

173F00010003
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; Klamath Hills District Improvement Co.; 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,

PROPOSED ORDER

Case No. 173
Claim No. 28
Contests 32, 3441, 3726, and 4085

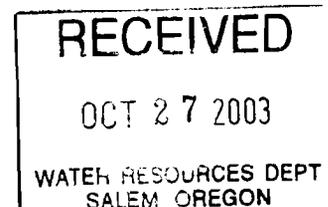
vs.

Clifford L. Ambers; Judy E. Ambers,
Claimants/Contestants.

HISTORY OF THE CASE

This proceeding under the provisions of ORS Ch. 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.

On January 31, 1991 Cliff Ambers submitted a Statement and Proof of Claim based upon use of water as a non-Indian successor to a Klamath Indian Allottee. The claim was filed for 5.78 cubic feet per second from one point of diversion located on Hog Creek, a tributary of the Williamson River, for irrigation of 212.3 acres. The claimed period of use is March through October, and the priority date claimed is 1864. On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Adjudication, issued a Summary Preliminary



Evaluation recommending denial of the claim and a finding that the required *Walton* elements had not been established.

On April 25, 2000, Mr. Ambers filed contest 32 to the Preliminary Evaluation, providing additional information regarding the chain of title. On May 8, 2000, the Klamath Project Water Users¹ (KPWU) filed Contest 3441 against the claim. On that same date, the United States of America (United States) filed Contest 3726 against the claim. Also on May 8, 2000, the Klamath Tribes filed Contest 4085 against the claim. The United States filed an Amendment to its Statement of Contest on August 14, 2003.

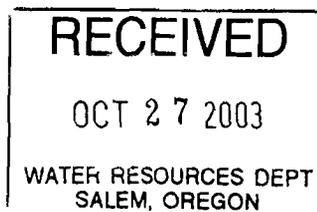
A prehearing conference was held on April 2, 2003. The Contestants and a representative from the Water Resources Department (OWRD) filed prehearing statements and appeared at the prehearing conference. Neither Mr. Ambers nor anyone on his behalf communicated with the Office of Administrative Hearings, filed a prehearing statement, or participated in the prehearing conference.

In accordance with the agreement of the participants at the prehearing conference, the Office of Administrative Hearings (OAH) issued a Scheduling Order on April 9, 2003, outlining a discovery process and indicating the hearing date.

Pursuant to a Notice of Hearing mailed to all participants by certified mail on August 6, 2003, a hearing was held on September 23, 2003, 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. William D. Young, Administrative Law Judge, presided. The United States was represented by its attorney, Bruce D. Bernard. The Klamath Tribes were represented by their attorney, Lorna Babby. The KPWU were represented by their attorney, Dan Kelly. The OWRD was represented by Walter E. Perry III, Assistant Attorney General. Neither Mr. Ambers nor anyone appearing on his behalf appeared at the hearing.

Before addressing the issues for which the hearing was convened, I asked the participants to address questions raised regarding the adequacy of service on Mr. Ambers, the factual and legal results of which are set out below. To permit adequate investigation of the issue, I held the hearing record open for additional information regarding the possibility of communication from Mr. Ambers' attorney regarding his withdrawal from representation of Mr. Ambers. By letter

¹ 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., Reames Golf and Country Club, Van Brimmer Ditch Co., Plevna District Improvement Company, and Collins Products, LLC. Contestants Don Vincent and Berlva Pritchard, originally among these contests, have sold their interests in property giving rise to their claims and this contest and have informed the Office of Administrative Hearings that they are no longer participants in this contested case.



dated October 22, 2003, Mr. Perry informed me that OWRD had reviewed its case file and that there was no record of a withdrawal in this case by Mr. Brandsness. I closed the hearing record on October 23, 2003.

EVIDENTIARY RULINGS

I admitted all offered documentary evidence and written testimony without objection, including OWRD exhibit 1 (Affidavit and Testimony of Teri Hranac) and United States' exhibits 1 (Affidavit and Testimony of H. Loring Gurney) and 2 (United States' Requests for Admission, Interrogatories and Requests for Production of Documents addressed to claimant). I also identified and admitted into the record without objection OAH exhibits 1 (August 19, 2003 letters from Justin Wirth to Mike Salak) and OAH exhibit 2 (August 27, 2003 letter from William P. Brandsness re: Klamath Adjudication, Case 900).

JURISDICTION

As noted above, neither Mr. Ambers nor any attorney representing his interests participated in the prehearing conference, the resulting discovery process, or appeared at the hearing. Regarding issues related to the authority of the OAH to proceed without Mr. Ambers' presence, I make the following:

FINDINGS

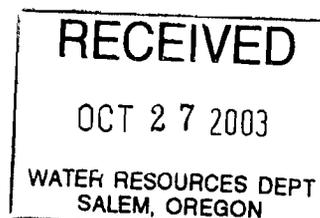
(1) Mr. Ambers filed a Statement and Proof of Claim (Claim 28) on January 31, 1991. He was not, apparently, represented by an attorney when he filed his claim. (OWRD exhibit 1, at 1-7.)

(2) On October 4, 1999, the Adjudicator of the Klamath Basin Adjudication published a Summary Preliminary Evaluation recommending that Claim 28 be denied. (OWRD exhibit 1, at 144-145.)

(3) On April 25, 2000, William P. Brandsness, filed a Statement of Contest of Preliminary Evaluation of Claim on behalf of Mr. Ambers. In that Statement of Contest Mr. Brandsness stated under oath that he was the attorney for the claimant (Mr. Ambers). He also indicated that "Service of notice of hearing, or answers or other papers" could be made upon him at the following mailing address:

William P. Brandsness
Brandsness, Brandsness & Rudd, P.C.
411 Pine Street
Klamath Falls, OR 97601

(OWRD exhibit 1, at 65-67.)



(4) On May 8, 2000, the KPWU filed a Statement of Contest of Claim. On June 9, 2000, Michael P. Rudd, an attorney in the office of Brandsness, Brandsness and Brandsness, notified

OWRD that he was the attorney for Enterprise Irrigation District and Pine Grove Irrigation District. (OWRD exhibit 1, pgs. 90-91.)

(5) On February 7, 2003, the OAH sent all participants in this contested case an Order Requiring Prehearing Statements and a letter giving a brief overview of the hearing process. That letter and order were sent by first class mail to Mr. Brandsness at the address provided when he filed Mr. Ambers' Statement of Contest. They were not returned to the OAH. (Hearing Case File.)

(6) On April 9, 2003, the OAH sent all participants in this contested case a Scheduling Order and a letter outlining the discovery process and stating the hearing date. That letter and order were sent by first class mail to Mr. Brandsness at the address he provided when he filed Mr. Ambers' Statement of Contest. They were not returned to the OAH. (Hearing Case File.)

(7) All participants in this contested case served all documents related to the case on counsel of record, Mr. Brandsness. On May 23, 2003, the United States propounded a discovery request to Mr. Ambers' attorney of record, Mr. Brandsness, mailing the discovery request to the address Mr. Brandsness provided when he filed Mr. Ambers' Statement of Contest. No reply to that discovery request was filed. (United States exhibit 2; Hearing Case File.)

(8) On August 6, 2003, the OAH sent a Hearing Notice regarding Claim 28 to William P. Brandsness at the mailing address he provided when he filed Mr. Ambers' Statement of Contest. That notice was sent by Certified Mail, return receipt requested, and was received by Mr. Brandsness on August 7, 2003. (Hearing Case File.)

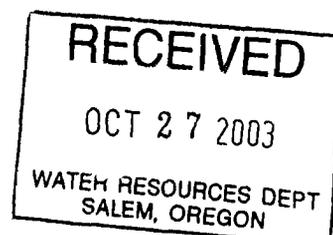
(9) On August 27, 2003, William P. Brandsness sent a letter to the Office of Administrative Hearings regarding Klamath Adjudication Case 900. That letter reads, in relevant part:

(10) Some time ago, William P. Brandsness of Brandsness, Brandsness & Rudd, P.C. and Michael P. Rudd of Brandsness, Brandsness & Rudd, P.C. had to withdraw from all representation of all parties involved in the Klamath Adjudication for the reason that we had mutual clients with conflicting interests. *We no longer represent any of the parties in the Klamath Adjudication.*

(OAH exhibit 2.) (Emphasis added.)

(11) Pursuant to the August 6, 2003 Hearing Notice, a contested case hearing was held in Salem, Oregon on September 23, 2003. Neither Mr. Brandsness, Mr. Ambers, nor anyone appearing on behalf of the Claimant appeared for the hearing.

DISCUSSION



ORS 539.110 describes the notice to which participants in these general stream adjudications are entitled. The statute states, in part:

The Water Resources Director shall fix the time and a convenient place for hearing the contest, and shall notify the contestant and the person whose rights are contested to appear before the director or the authorized assistant of the director at the designated time and place. The date of hearing shall not be less than 30 nor more than 60 days from the date the notice is served on the parties. The notice may be served personally or by registered or certified mail, return receipt requested, addressed to the parties at their post-office addresses as stated in the statement and proof of claimant. [sic]

The Statement and Proof of Claim stated that service of notice of the hearing notice and other documents could be made by mailing those documents to Mr. Brandsness at his Klamath Falls address. The file in this case contains no notice by Mr. Brandsness that he withdrew from representation of Mr. Ambers. The only information regarding his possible withdrawal involves another case. The August 6, 2003 Hearing Notice was sent to Mr. Ambers' attorney in accordance with the information in the Statement and Proof of Claim. The notice complied with the requirements of the statute. Due process requires no more. Mr. Ambers was provided timely and adequate notice of the contested case hearing and I have jurisdiction to proceed despite his failure to appear.

ISSUES

Does Clifford Ambers have a claim to water as a non-Indian successor to an Indian allottee under criteria set out in the *Colville Confederated Tribes v. Walton* line of cases?

Does a claim involving natural flooding/subirrigation/natural overflow claim an appropriative water right?

Does the acreage claimed in the place of use exceed the irrigated acreage supported by the evidence?

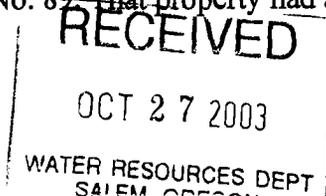
Is the diversion rate too large for the number of irrigated acres within the Place of Use?

FINDINGS OF FACT

On March 3, 1910, the United States issued Trust Patent No. 115181 to Sam Solomon Lalakes, Klamath Allottee No. 87, for lands described as the NE $\frac{1}{4}$, Section 28, Township 32 South, Range 8 East, Willamette Meridian, containing 160 acres, more or less. That property had been part of the Klamath Indian Reservation before transfer to Sam Solomon Lalakes. (OWRD exhibit 1, at 71-72.)

Sometime prior to 1952 the United States transferred property described as approximating 160 acres located SE $\frac{1}{4}$ of Section 28, Township 32 South of Range 8 East of the Willamette Meridian to David Lalakes, Klamath Allottee No. 89. That property had also been

Clifford L. Ambers et al (173)
Proposed Order - Page 5 of 9



part of the Klamath Indian Reservation before transfer to David Lalakes. (OWRD exhibit 1, at 72.)

On January 31, 1991, Cliff Ambers filed a Statement and Proof of Claim with the OWRD as a non-Indian successor to a Klamath Indian Allottee. His claim identified Hog Creek, tributary to the Williamson River, as the source of water for irrigation of 281.45 acres, at a rate of 5.78 cubic feet per second (cfs). The claimed period of use was March through October for irrigation, and the claimed priority date is 1864. (OWRD exhibit 1, at 1-7.)

On March 5, 1991, Mr. Ambers clarified that his claim was for irrigation of 230 acres. (OWRD exhibit 1, at 21).

Mr. Ambers later submitted proof that the property appurtenant to Claim 28, located in the E½ of Section 28, T32S, R8E Willamette Meridian, was "normally flooded by spring runoff" with "some old ditches assist[ing] in distributing the water over the property." He also provided proof that there are "several culverts under the Forest Service Road that allow for this spring runoff." The area irrigated totaled 212.3 acres. (OWRD exhibit 1, at 8 and 15.)

Mr. Ambers had not previously filed any information regarding the chain of title for his property. On April 9, 1999, OWRD sent Mr. Ambers a letter that informed him that it had reviewed his claim and considered it based on a claim that the land had previously been part of the Klamath Reservation. The letter provided a basic overview of possible bases of such a claim and informed him that "in order to fully demonstrate your claim, you will need to provide information showing when the land passed out of Indian hands, and the history of the development of the water use * * * if you have not provided the department with this information, you need to do so immediately." (OWRD exhibit 1 at 36.)

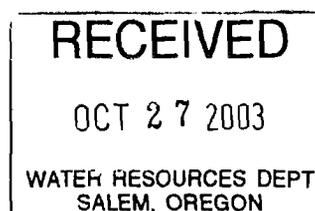
On October 4, 1999, the Adjudicator of the Klamath Basin Adjudication published a Summary Preliminary Evaluation recommending that Claim 28 be denied. (OWRD exhibit 1, at 144-145.)

On April 25, 2000, Mr. Ambers filed a Statement of Contest regarding the Adjudicator's Preliminary Evaluation. The Contest clarified that the claim was "for a total of 5.78 cubic feet per second from one point of diversion located on Hog Creek, a tributary to Williamson River, for irrigation of 212.3 acres situated upon a portion of the NE¼ and a portion of the SE¼ of Section 28, Township 32 South, Range 8 E.W.M. * * * The claim originates with the reservation of rights by the Klamath Indian Reservation, which was transferred by allotments to Sam Solomon Lalakes as to the NE¼ and to David Lalakes as to the SE¼." (OWRD exhibit 1, at 65.)

CONCLUSIONS OF LAW

Clifford Ambers does not have a claim to water as a non-Indian successor to an Indian allottee under criteria set out in the *Colville Confederated Tribes v. Walton* line of cases.

Clifford L. Ambers et al (173)
Proposed Order - Page 6 of 9



Because Mr. Ambers did not establish his right to water as a non-Indian successor to an Indian allottee, the remaining issues are moot.

OPINION

Claim 28 is a claim for water rights for lands purportedly within the boundaries of the former Klamath Indian Reservation. 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 (E.D. Wash. 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert den*, 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), *cert den*, 475 U.S. 1010 (1986) (*Walton III*).

Mr. Ambers has the burden of establishing the claim by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); *see Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). Claimant did not meet his burden.

Elements of a *Walton* claim that must be proven include:

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;

The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor;

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:

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.

After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

If these elements are proven, the claim is assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.²

²The Klamath Reservation was established on October 14, 1864. *Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians*, October 14, 1864, 16 stat. 707. "The priority date of Indian rights to water for irrigation and domestic purposes is 1864 [date of reservation creation] * * * For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians." *United States v. Adair*, 478 F. Supp. 336, 350 (D. Or. 1979) (*Adair I*).

RECEIVED
OCT 27 2003
WATER RESOURCES DEPT
SALEM, OREGON

The only evidence presented by Mr. Ambers was found in OWRD's exhibit 1. The evidence Mr. Ambers filed with his Statement of Contest established that the land appurtenant Claim 28 was part of the former Klamath Indian Reservation and was previously owned by Indians. The NE1/4 was allotted to Sam Solomon Lalakes, as Allotment 87, as evidenced by the Land Status Report. (OWRD exhibit 1 pages 71-72.) The SE1/4 was allotted to David Lalakes, as Allotment 89, as evidenced by the Deed to Restricted Indian Land Special Form (OWRD exhibit 1 at 73-74.)

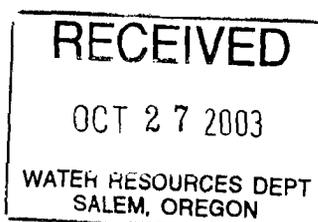
Mr. Ambers concedes that the property appurtenant to Claim 28 has passed from Indian ownership. The greater weight of the evidence does not establish when the land appurtenant to Claim 28 was transferred from Indian successors to the original allottee, to a non-Indian successor. Although the Statement of Contest identified subsequent owners as Indian, there is no evidence of their Indian status or tribal relationship, and no persuasive evidence sufficient to establish when the property left Indian ownership.

Still, it appears that Mr. Ambers has met the first of the requirements for establishing a *Walton* water right, and could have, with little additional evidence, established dates by which a reasonable finder of fact could have found the property to have left Indian ownership. The United States' witness, after reviewing the evidence, conceded that the property was probably out of Indian ownership not later than July 1, 1970. (United States exhibit 1, page 6.) Mr. Ambers' claim fails for lack of proof on the other elements.

Even though the claim appears to be based upon natural irrigation or overflow, the requirement of beneficial use of water is not eliminated. The greater weight of the evidence has to establish that natural irrigation or overflow was put to beneficial use by the Indian owner or by the first non-Indian successor. There is no evidence of when (or if) the natural overflow was put to beneficial use.

Even though a *Walton* right may include water use based on the Indian allottee's undeveloped irrigable land to the extent that the additional water use is developed with reasonable diligence by the *first* purchaser of land from an Indian owner, there is no evidence establishing that use of the waters claimed was occurring on the property at the time of transfer from Indian ownership, or that water use was developed by the first non-Indian owner. Mr. Ambers did not provide testimony or offer exhibits to support his claim and has not met his burden of proving that he has a valid *Walton* water right in Claim 28.

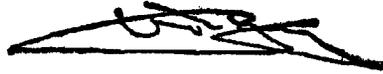
Because Mr. Ambers did not prove that he has a valid water right, resolution of other issues regarding his claim will have no effect on his rights. Cases in which a decision will have no practical effect on or concerning the rights of the parties must be considered moot. *State v. Macey*, 320 Or 408, 412 (1994); *Brumnette v. PSRB*, 315 Or 402, 406 (1993).



PROPOSED ORDER

I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final order as follows:

The required *Walton* elements are not established for claim 28. Therefore, the claim is denied.



William D. Young, Administrative Law Judge
Office of Administrative Hearings

Date: October 23, 2003

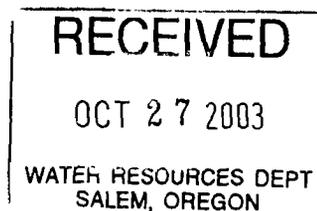
NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

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:

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



CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2003, I mailed a true copy of the following:
PROPOSED ORDER, 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@wrđ.state.or.us

Richard M. Glick/Nanci Klinger
Davis Wright Tremaine
1300 SW 5th Ave., Ste 2300
Portland, OR 97201
Phone: 503-778-5210
Fax: 503-778-5299
rickglick@dwt.com

Michael P. Rudd
Brandsness & Rudd, P.C.
411 Pine Street
Klamath Falls, OR 97601
Phone: 541-882-6616
Fax: 541-882-8819
mike@brandsnessrudd.com

Richard S. Fairclo
Attorney at Law
280 Main Street
Klamath Falls, OR 97601
Phone: 541-882-4436
Fax: 541-882-4437
rfair@cdsnet.net

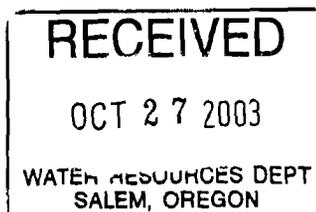
Michael Ratliff
Ratliff & Witney-Smith
905 Main Street, Suite 200
Klamath Falls, OR 97601
Phone: 503-241-2300
Fax: 503-778-5299
dmmratlif@aol.com

William P. Brandsness
Attorney at Law
411 Pine St
Klamath Falls, OR 97601
Phone 541-882-6616
Fax: 541-882-8819
bill@brandsnessrudd.com

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
ahitchings@lawssd.com

James R. Uerlings
Boivin, Uerlings & DiIaconi
803 Main St., Ste. 201
Klamath Falls, OR 97601
Phone: 541-884-8101
Fax: 541-884-8498
jruerlin@cdsnet.net

B.J. Matzen
435 Oak Street
Klamath Falls, OR 97601
Phone: 541-850-9284
Fax: 541-882-2029
bjmatzen@msn.com



Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624
Phone: 541-783-3081
Fax: 541-783-2609
bullman@internetcds.com

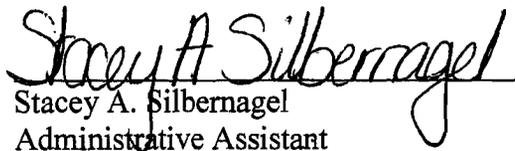
Walter Echo-Hawk/Lorna Babby
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Phone: 303-447-8760
Fax: 303-443-7776
wechohwk@narf.org
babby@narf.org

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@wrđ.state.or.us

William M. Ganong
Attorney at Law
514 Walnut Ave.
Klamath Falls, OR 97601
Phone: 541-882-7228
Fax: 541-883-1923
wganong@aol.com

Bruce D. Bernard
United States Dept. of Justice
999 18th St., Ste 945, North Tower
Denver, CO 80202
Phone: 303-312-7319
Fax: 303-312-7379
bruce.bernard@usdoj.gov

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
justin.wirth@doj.state.or.us


Stacey A. Silbernagel
Administrative Assistant

