

**BEFORE THE HEARING OFFICER PANEL  
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 Bureau of Reclamation; 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 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; Berlva Prichard;<sup>1</sup> Don Vincent;<sup>2</sup> 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

**PROPOSED ORDER**

Case No. 111

Claim: 52

Contests: 3391, 3731, 4107

Vs.

Donald R. Holm and Patricia A. Holm,  
Claimants.

**HISTORY OF THE CASE**

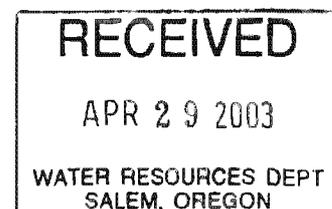
**THIS PROCEEDING** under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

---

<sup>1</sup> On June 24, 2002 Contestant Berlva Pritchard informed the Hearing Officer Panel that she had sold her interest in the property giving rise to her claims and this contest, and was no longer a participant in this contested case.

<sup>2</sup> On November 28, 2000, Contestant Don Vincent informed the Hearing Officer Panel that he had sold his interest in the property giving rise to his claims and this contest and, was no longer a participant in this contested case.

*In re Holm* (111)  
Proposed Order - Page 1 of 7



On November 21, 1990, Donald R. Holm and Patricia A. Holm filed Claim 52 for a total of 2.0 cubic feet per second (cfs) from one point of diversion located on Spring Creek, tributary to the Williamson River, for irrigation of approximately 80 acres. They claimed a period of use from April 1 through November 1 of each year, with a claimed priority date "prior to 1890."

On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Stream Adjudication, issued a Preliminary Evaluation allowing the claim for 0.07 cfs and for 7.8 acres, but with a greater period of use, from March 1 to October 31 of each year. Claimants did not contest the Preliminary Evaluation.

On May 4, 2000, the entities and individuals identified in this proceeding as the Klamath Project Water Users<sup>3</sup> (KPWU) filed contest 3391. On May 4, 2000, the United States of America filed contest 3731, and on May 4, 2000, the Klamath Tribes filed contest 4107.

On March 15, 2002, the Hearing Officer Panel served a letter and an Order Requiring Pre-Hearing Statements on the individuals and entities on the service list for this case, including the Claimants. The letter and the Order Requiring Pre-hearing Statements, which informed the participants of the general requirements of the prehearing statement and of the date of the prehearing conference, were sent to the address the Claimants provided when they filed their Statement and Proof of Claim in 1991, their mailing address according to OWRD records. The March 15, 2002 letter and Order were not returned by the U.S. Postal Service as undeliverable.

Pursuant to that Order, a prehearing conference was held by telephone on April 23, 2002. All contestants and a representative from the Oregon Resources Department (OWRD) filed prehearing summaries and appeared at the prehearing conference. The Claimants did not provide information that could have allowed the administrative law judge (ALJ) to contact them for the prehearing conference, did not file a prehearing statement as required by the March 15, 2002, order, and did not appear at or otherwise participate in the prehearing conference.

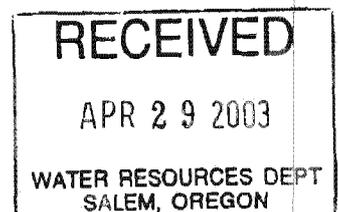
The effect of Claimants' nonparticipation was discussed during the prehearing conference, but the ALJ declined to make a ruling based on the discussions that took place during that conference. On April 26, 2002 the ALJ served on all participants, including Claimants, a letter summarizing the prehearing conference and a Prehearing Order establishing the discovery schedule and dates for the hearing.

On May 29, 2002, the KPWU wrote a letter, served on all participants, asking that the ALJ transmit questions to OWRD regarding the authority to dismiss a claim or enter a default order when claimants fail to comply with the terms and conditions of prehearing conference orders, and when they fail to cooperate with the discovery process outlined in a prehearing

---

<sup>3</sup> 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 Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Pine Grove Improvement District; Shasta View Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Berlva Prichard; Don Vincent; 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

*In re Holm* (111)



scheduling order. In a letter dated June 12, 2002, the ALJ declined to transmit the questions to OWRD. That letter was also served on all participants.

On July 31, 2002, Contestant United States of America (USA) served a Request for Admission, Interrogatories and Request for Production on Claimants Donald R. Holm and Patricia A. Holm, directing the Claimants to respond not later than August 30, 2002. Claimants did not respond to the discovery request, which was made in conformance with the prehearing scheduling order.

October 10, 2002, Contestants USA and the Klamath Tribes jointly filed a Motion for Dismissal of Claim No. 52, or, in the Alternative, For Entry of Show Cause Order. Those Motions were based upon the Claimant's ongoing failure to cooperate with the hearing process. On November 1, 2002, the ALJ denied the motion. The motion and resulting order were served on all participants.

On February 25, 2002 the Hearing Officer Panel served a Notice of Hearing on all participants, including Claimants. The notice, sent by Certified Mail, Return Receipt Requested, informed claimants and the other participants that the hearing would be held April 8-10, 2003, in Salem, Oregon. The Claimants did not appear at the hearing on April 8, 2003. The Contestants appeared for the hearing: Bruce D. Bernard representing Contestant USA; Lorna K. Babby representing Contestants Klamath Tribes; and Dan Kelly representing Contestants KPWU. Renee Moulun and Justin Wirth represented the Oregon Water Resources Department (OWRD). Spring Creek Properties, Inc., successor-in-interest to Claimant's property appurtenant to Claim 52, appeared at the hearing by Quentin Breen, an authorized representative.<sup>4</sup>

### EVIDENTIARY RULINGS

I admitted OWRD's Exhibit 1 (Ref. No. 111E00020002), overruling objections and motions to strike voiced by all the Contestants regarding portions of that document. Specifically, Contestant USA, Klamath Tribes, and KPWU moved to strike all or portions of pages 10, 12, 61 and 62 of the exhibit, contending that the items specified in their motions were hearsay and insufficiently reliable to be the kind of evidence that would commonly be relied upon by reasonably prudent persons in conduct of their serious affairs. *See* ORS 183.415(1). I allowed the motion to strike regarding page 8 of OWRD's Exhibit 1, finding that item merely duplicative of page 12 of that exhibit.

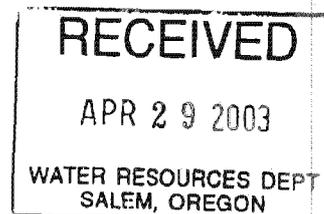
I admitted OWRD's Exhibit 2 and 3 and Contestant USA's Exhibit 1 for the limited purpose of determining whether Spring Creek Properties, Inc. would have an opportunity to present testimony or other evidence regarding Claim 52. After taking testimony from Quentin Breen and Teri Hranac, I denied Spring Creek Properties, Inc.'s request to present testimony or other evidence regarding the Claim based upon the following findings of fact, which supplement and do not replace findings made on the record:

---

<sup>4</sup> Corporations appearing in contested case hearings before the OWRD may be represented by non-attorney authorized representatives, including authorized officers or regular employees of a corporation. ORS 183.457; OAR 137-003-0555(1)(b).

*In re Holm* (111)

Proposed Order - Page 3 of 7



(1) Spring Creek Property, Inc., an Oregon Corporation, obtained ownership of the property appurtenant to Claim 52 on December 6, 1999. Not later than the date of purchase Quentin Breen, the shareholder, officer and director of the corporation, knew that water rights of the property were subject to the Klamath Basin Adjudication and that the Adjudicator had published a Summary Preliminary Evaluation allowing the Claim. (Breen testimony; USA Exhibit 1).

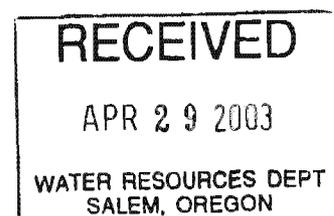
(2) The service list for this contested case included the Claimants and all attorneys for all Contestants. On March 15, 2002, the Hearing Officer Panel served a letter and an Order Requiring Pre-Hearing Statements on the individuals and entities on the service list for this case, including the Claimants. The letter and the Order Requiring Pre-hearing Statements, which informed the participants of the general requirements of the prehearing statement and of the date of the prehearing conference, were sent to the address the Claimants provided when they filed their Statement and Proof of Claim in 1991, their mailing address according to OWRD records. The March 15, 2002 letter and Order were not returned by the U.S. Postal Service as undeliverable. (OWRD Exhibit 1; case file).

(3) At about this time, Claimants contacted OWRD and informed the Department that they had transferred the property appurtenant to Claim 52 to Spring Creek Properties. Neither Claimants nor the new property owners filed change of ownership form indicating that the new owner would be participating in the adjudication. (Hranac testimony).

(4) On May 1, 2002, OWRD sent a letter to Spring Creek Properties, Inc., to the address it had obtained, 39641 S. Chiloquin Rd., Chiloquin, OR 97264. That letter informed the corporation that the Department had received information from Claimants that Spring Creek Properties had purchased the property from them; informed the corporation that Claimants had filed a water right claim for the property; and identified the properties appurtenant to the claim by street address. The letter also informed the corporation that a prehearing conference had been held on April 23, 2002, after which a Prehearing Order had been published, and enclosed a copy of the order, which set out all the dates for this contested case, including dates scheduled for discovery and the dates scheduled for hearing. OWRD also included a change of ownership form and asked that the form be completed and sent with a copy of the deed to the addresses on the certificate of mailing, which included all Contestants, OWRD, and the Hearing Officer Panel. (Hranac testimony; OWRD Exhibit 2).

(5) When OWRD prepared its claim file for the hearing (OWRD Exhibit 1), the Department sent a "courtesy" copy of the document to Spring Creek Properties on May 8, 2002, when the document was served on the participants, including Claimants, and the Hearing Officer Panel. OWRD also sent Spring Creek Properties "courtesy" copies of other documents it prepared in connection with this Claim. (Hranac testimony; OWRD Exhibit 1).

(6) In September or October 2002, Quentin Breen had dinner with Claimants. They informed him that they had received several documents related to the water rights case affecting the property. Some time in April 2003, they sent him copies of the documents they had received. (Breen testimony).



(7) On November 7, 2002, Ms. Hranac spoke with Mr. Breen by telephone. He informed her that he didn't want to file a change of ownership form until he spoke with counsel. Until a change of ownership form is filed with the Department, OWRD's service list for the contested case does not change. (Hranac testimony).

(8) On February 25, 2002 the Hearing Officer Panel served a Notice of Hearing on all participants, including Claimants. The notice, sent by Certified Mail, Return Receipt Requested, informed Claimants and the other participants that the hearing would be held April 8-10, 2003, in Salem, Oregon. The Claimants received that notice on March 7, 2003. (Case file).

(9) The Hearing Officer Panel did not send a copy of the notice to Spring Creek Properties, Inc. OWRD sent claimant a "courtesy" a copy of the Hearing Notice shortly after the Department received it. Spring Creek Properties has had actual notice of the hearing date and hearing rights since late February or very early March 2003. (Hranac testimony; case file).

(10) Mr. Breen's mailing address, and the mailing address of Spring Creek Properties, Inc., is 39641 S. Chiloquin Rd., Chiloquin, OR 97264. None of the documents OWRD sent to Spring Creek Properties were returned to the Department by the U.S. Postal Service. (Breen and Hranac testimony).

(11) As of April 8, 2003, Spring Creek Properties, Inc. had not filed any document with OWRD or the Hearing Officer Panel indicating that it owned the property appurtenant to Claim 52 or that it intended to participate in the contested case proceeding affecting Claim 52. Mr. Breen telephoned the OWRD on April 7, 2003, and informed the Department that he intended to appear at the hearing. Mr. Breen appeared at the hearing on April 8, 2003, as the authorized representative for Spring Creek Properties, Inc. (Breen and Hranac testimony; case file).

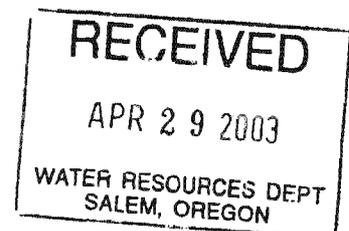
Analysis: Relying on the credible and highly persuasive testimony of Ms. Hranac, a presumption that items mailed and not returned by the Postal Service are received by the addressee, and on the facts set out above, I concluded that Mr. Breen, the shareholder, officer and director of Spring Creek Properties, Inc., received the documents that were mailed to Spring Creek Properties, Inc. and that he made a conscious choice not to participate in the hearing process despite actual notice of the hearing schedule, which set the date by which written testimony and other documentary evidence had to be filed and served upon other participants. I denied Spring Creek Properties the opportunity to present evidence in the hearing regarding Claim 52 because of the failure to abide by that order. As a party, he was allowed to participate, except for the opportunity to present evidence that had not been provided in conformance with the April 26, 2002 Prehearing Order<sup>5</sup>

---

<sup>5</sup> ORS 183.415(1) states, " In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice, served personally or by registered or certified mail." Although Spring Creek Properties, Inc. was not served by certified mail, the principal of the corporation had actual knowledge of the hearing date and was provided a copy of the only exhibit admitted into evidence not later than May 2002. Also, Spring Creek Properties was provided a copy of the February 25, 2003, Hearing Notice, which informed the corporation of its rights in the contested case. (OWRD Exhibit 2). Spring Creek Properties, Inc. has not shown that it was prejudiced by the failure to serve the corporation personally or by certified mail.

*In re Holm* (111)

Proposed Order - Page 5 of 7



## ISSUES

Claimants filed the above entitled claim based upon use of water commenced before February 24, 1909. Contestants raise the following issues, more specifically stated in the Statements of Contest filed in these matters:

- (1) Have the required pre-1909 elements been established and, if so, what is the priority date for claim 52?
- (2) Does the record support the rate, duty, actual use, points of diversion, seasonal limitations and/or acreage claimed?

## FINDINGS OF FACT

(1) On November 21, 1990, Claimants Donald R. and Patricia A. Holm filed claim 52 based upon use of water commenced prior to February 24, 1909. Claim 52 is for a total of 2 cubic feet per second (cfs) from one point of diversion located on Spring Creek, tributary to the Williamson River, for irrigation of approximately 80 acres. The claimed period of use is April 1 through November 1 of each year. The claimed priority date is "prior to 1890."

- (2) The evidence is insufficient for additional findings material to the claim.

## CONCLUSIONS OF LAW

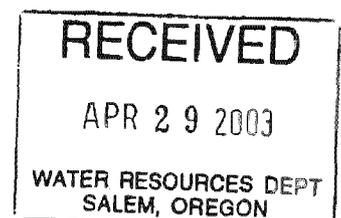
The required pre-1909 elements have not been established for claim 52.

## OPINION

To establish a claim for a pre-1909 water right in the Klamath Basin General Stream Adjudication, a claimant must prove by a preponderance of the evidence the following elements: (1) a *bona fide* intent prior to February 24, 1909 to apply the water to a currently existing or currently contemplated future beneficial use; (2) a diversion; and (3) an application to a beneficial use within a reasonable time. ORS 183.450(5); 539.010(4); *see also In re Water Rights of Silvies River*, 115 Or 27 (1925).

The greater weight of the persuasive evidence did not establish any of the required elements. The only evidence suggesting the possibility of intention to apply water to beneficial use prior to February 24, 1909, or actual diversion or use within a reasonable time thereafter, were the Statement and Proof of Claim (Ref. No.111E00020002; OWRD Exhibit 1, pgs. 1-5) signed by both Claimants, and the statement by Richard Bauman, the manager of a nearby park. (Ref. No.111E00020002; OWRD Exhibit 1, pg. 12).

The Statement and Proof of Claim, although under oath, merely recites that the statements supporting the claim "are true to the best of my knowledge and belief." The factual



documentary evidence Claimants provided in support of their claim was insufficient to establish the existence of the underlying facts.

The only documentary evidence provided was a short statement written by Mr. Bauman. His statement is entirely hearsay (or rumor) and is unsupported by indicia of reliability that would have made his statement more persuasive. Whether a waterwheel and flume were in existence and in use in the 1950s is of little assistance in determining whether they were in existence in the late 1800s as stated, or during any period before February 24, 1909, or reasonably thereafter. Even his statement regarding the more recent use is preceded by "I understand," emphasizing the lack of confidence Mr. Bauman had in the truth of the facts asserted.

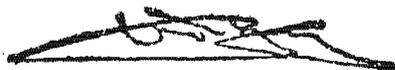
The passage of time can sometimes make it difficult to establish the elements of a pre-1909 water right, but it is by no means impossible. Deeds often reference improvements such as water wheels and flumes. Private notes, records and letters are sometimes available. Local newspapers of the era are often available. Even hearsay (and double hearsay) attributed to identified individuals along with information indicating the basis of the individual's knowledge can be helpful. None of this kind of evidence was present in the record.

Although obviously made in good faith, I cannot find that claimants' statement or Mr. Bauman's statement prove by a preponderance the truth of the facts asserted in the claim or in Mr. Bauman's written statement. The evidence submitted in support of the claim was sufficiently reliable to be admitted as evidence in this contested case. If other, more reliable evidence had been presented, the claimants might have established their claim. In the absence of other persuasive evidence the evidence in this hearing was insufficient to establish a preponderance regarding any element necessary to establish a pre-1909 water right. Since Claimants have not met their burden of proving the existence of a pre-1909 water right, it is not necessary to determine the rate, duty, use, points of diversion, seasonal limitations or acreage of that right.

### PROPOSED ORDER

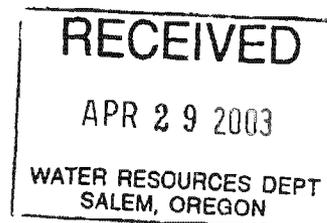
I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final order as follows:

The required pre-1909 elements are not established for claim 52. Therefore, the claim is denied.



William D. Young, Administrative Law Judge  
Hearing Officer Panel

Dated: April 25, 2003



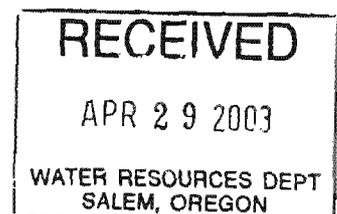
**NOTICE TO THE PARTIES:** If you are not satisfied with this Order you may:

**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 Hearing Officer. 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  
158 12th Street NE  
Salem OR 97301



CERTIFICATE OF SERVICE

I hereby certify that on April 25, 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:

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

Walter Perry/Justin Wirth  
Oregon Dept. of Justice  
1162 Court St NE  
Salem, OR 97310  
Phone: 503-378-4009  
Fax: 503-378-3802  
[walter.perry@doj.state.or.us](mailto:walter.perry@doj.state.or.us)  
[justin.wirth@doj.state.or.us](mailto:justin.wirth@doj.state.or.us)

Richard D. Bailey  
Oregon Water Resources Department  
158 12<sup>th</sup> St NE  
Salem, OR 97301  
Phone: 503-378-8455  
Fax: 503-378-6203  
[richard.d.bailey@wrds.state.or.us](mailto:richard.d.bailey@wrds.state.or.us)

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](mailto:wechohwk@narf.org)  
[babby@narf.org](mailto:babby@narf.org)

Donald Holm and Patricia Holm  
379 Avocado Crest  
La Habra HTS, CA 90631

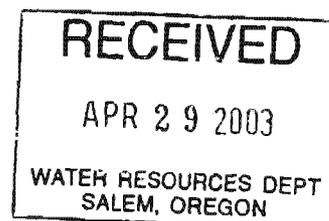
Renee Moulun  
Klamath Basin Adjudication  
Oregon Water Resources Dept.  
158 12<sup>th</sup> Street NE  
Salem, OR 97301  
Phone: 503-378-8455  
Fax: 503-378-6203  
[renee.m.moulun@wrds.state.or.us](mailto:renee.m.moulun@wrds.state.or.us)

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](mailto:bullman@internetcds.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](mailto:rfair@cdsnet.net)

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](mailto:psimmons@lawssd.com)  
[ahitchings@lawssd.com](mailto:ahitchings@lawssd.com)

Certificate of Service, Case 111, Claim 52



KBA\_ACFOD\_00866

Quintin Breen  
Spring Creek Properties  
39641 S. Chiloquin Rd.  
Chiloquin, OR 97624

Quintin Breen  
P.O. Box 606  
Chiloquin, OR 97624

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

B.J. Matzen  
Attorney at Law  
435 Oak Street  
Klamath Falls, OR 97601  
Phone: 541-850-9284  
Fax: 541-882-2029  
[bjmatzen@msn.com](mailto:bjmatzen@msn.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@cadsnet.net](mailto:jruerlin@cadsnet.net)

Mary Cheyne  
Klamath Drainage District  
280 Main Street  
Klamath Falls, OR 97601  
[kdd280@cvc.net](mailto:kdd280@cvc.net)

Michael P. Rudd  
Brandsness & Rudd, P.C.  
411 Pine Street  
Klamath Falls, OR 97601  
Phone: 541-882-6616  
Fax: 541-882-8819  
[mike@brandnessrudd.com](mailto:mike@brandnessrudd.com)

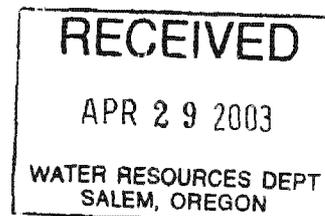
William M. Ganong  
Attorney at Law  
514 Walnut Street  
Klamath Falls, OR 97601  
Phone: 541-882-7228  
Fax: 541-883-1923  
[wganong@aol.com](mailto:wganong@aol.com)

David Solem, Manager  
Klamath Irrigation District  
6640 Klamath Irrigation District Lane  
Klamath Falls, OR 97603  
[Kidhq@cadsnet.net](mailto:Kidhq@cadsnet.net)

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](mailto:rickglick@dwt.com)

  
Stacey A. Silbernagel  
Administrative Assistant

Certificate of Service, Case 111, Claim 52



KBA\_ACFOD\_00867