

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; 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. 190

Claim: 57

Contests: ~~2832~~², 3273, 3455³, ~~3798~~⁴ and
4111⁵

vs.

NBCC, LLC¹;
Claimant/Contestant.

HISTORY OF THE CASE

Claimant seeks a water right as a non-Indian successor to a Klamath Indian Allottee, claiming an amount of water sufficient to irrigate the allotment's share of the Tribe's "practically

¹ Change of Ownership filed April 7, 2006 – Dorothy Nicholson Trust to Roger Nicholson and Richard Nicholson; and Roger Nicholson and Richard Nicholson to NBCC, LLC.

² WaterWatch of Oregon, Inc.'s Contest 2832 was dismissed. *See* ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

³ Don Vincent voluntarily withdrew from Contest 3455 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3455 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3455 on January 15, 2004.

⁴ Contest 3798 was resolved by Stipulation. *See* STIPULATION BETWEEN CLAIMANT AND THE UNITED STATES TO RESOLVE THE UNITED STATES' CONTEST 3798, dated June 30, 2006.

⁵ The Klamath Tribes voluntarily withdrew Contest 4111 on July 16, 2004. *See*, KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST.

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irrigable acreage” (“PIA”).⁶ As modified by stipulation, this *Walton* claim is for 1/40th cubic foot per second (cfs) of water per acre and 4.3 acre-feet of water per acre for irrigation of 41.2 acres of land. The claimed period of use is April 1 through November 1. The claimed priority date is October 14, 1864.⁷

The Dorothy Nicholson Trust filed this claim (Claim 57) on February 1, 1991. On October 4, 1999, Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation preliminarily denying this claim. Claimant Dorothy Nicholson Trust filed Contest 3273 on May 8, 2000.

WaterWatch of Oregon, Inc. filed Contest 2832 on May 8, 2000, which was subsequently dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.’S CONTESTS dated May 20, 2003.

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, Berlva Pritchard, Don Vincent, Randy Walthall, Inter-County Title Company, Winema Hunting Lodge, Inc., Van Brimmer Ditch Company, Plevna District Improvement Company, and Collins Products, LLC (hereafter “Klamath Project Water Users” or “KPWU”) filed Contest 3455 on May 8, 2000.

The United States of America (hereafter “United States”) filed Contest 3798 on May 8, 2000. The Klamath Tribes filed Contest 4111 on May 8, 2000, and withdrew the contest on July 16, 2004. See Klamath Tribes’ Voluntary Withdrawal of Contest.

The matter was then referred to the Office of Administrative Hearings (OAH). The case was consolidated with a number of other cases involving *Walton* claims into Case 900, for a determination of a common issue of law. After discovery to OWRD on this matter and extensive legal briefing, on March 1, 2004, Administrative Law Judge (ALJ) William D. Young issued his Rulings on Motions for Ruling on Legal Issues in Klamath Adjudication (KBA) Case 900. This Ruling was the subject of a Motion for Reconsideration and additional briefing. Ultimately ALJ Young withdrew his March 1, 2004 Ruling. Order Withdrawing Rulings on Motions for Ruling on Legal Issues and Allowing Reconsideration, April 15, 2004, KBA Case 900. On April 20, 2004, ALJ Young issued his Order Amending Rulings on Motions for Rulings on Legal Issues in

⁶ Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985).

⁷ The Klamath Reservation was established on October 14, 1864. *Treaty Between the United States of America and the Klamath and Modoc 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).

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KBA Case 900.⁸ On May 27, 2004, ALJ Young vacated the April 29, 2003 Order Granting Motion to Consolidate. Order Vacating Order to Consolidate, May 27, 2004, KBA Case No. 900. The Order Vacating Order to Consolidate provides that “the cases associated with this consolidated case shall proceed through the contested case process in the same manner as if they had not been consolidated, except that the law of the case in each case is set out in the April 20, 2004 Order Amending Rulings On Motions For Ruling On Legal Issues.” *Id.* at 2.

On May 31, 2006, ALJ Rick Barber issued an Order on Motion for Ruling on Legal Issues. ALJ Barber concluded in that Order that a *Walton* right could not include any right to water for fish and wildlife purposes.

On July 3, 2006, the United States filed an Unopposed Motion to Admit Stipulation Between Claimant and the United States to Resolve the United States’ Contest 3798 into the Record, with accompanying Stipulation. That motion was granted by order of ALJ Barber issued September 19, 2006.

A hearing was convened by ALJ Barber by telephone on September 28, 2006. Ron Yockim appeared on behalf of Claimant NBCC, LLC, successor in interest to the original Claimant Dorothy Nicholson Trust. Andy Hitchings appeared on behalf of KPWU. Jesse Ratcliffe appeared for OWRD. No witness testified at the hearing, but evidence was admitted and evidentiary issues discussed. The record was held open for submission of an additional exhibit, which was received, and admitted over objection.

Claimant filed its Closing Brief on November 17, 2006. KPWU filed its Response memorandum on December 20, 2006. Claimant filed its Reply Brief on January 24, 2007. The record closed on January 24, 2007.

After the record closed, the case was reassigned to me to prepare this Proposed Order. I have reviewed the entire record, including the record of the September 28, 2006 hearing, prior to preparation of this order.

EVIDENTIARY RULINGS

The following were admitted into the record.

OWRD Exhibit 1 including the Affidavit and Testimony of Teri Hranac.

Affidavit of Roger Nicholson.

Affidavit of Counsel Identifying Exhibits Submitted by Claimant.

⁸ In his Amended Order, ALJ Young concluded that some of the claims filed in the Klamath Adjudication might be precluded because the property had already been subject to a prior adjudication. Because the answer to this question depended on evidence in the individual cases, ALJ Young held that the party seeking preclusion had the burden of going forward and presenting evidence in support of preclusion. No such evidence was presented in this case.

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Exhibits C1-C26, C28-C30, C32-C44, C48, C50-C53, which were admitted without objection.

Stipulation Between Claimant and the United States to Resolve the United States' Contest 3798.

KPWU objected to Attachment A, an attachment inadvertently omitted from the Affidavit of Roger Nicholson, as illegible and irrelevant. After an exchange of written argument on the objection, and submission of a more legible copy, ALJ Barber overruled KPWU's objection to the Attachment and admitted it into evidence by letter dated October 16, 2006.

ISSUES⁹

1. **Whether the record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use, and/or acreage claimed.**
2. **Whether the right claimed has been previously adjudicated and no issues can be legally redetermined, as the principles of res judicata and/or collateral estoppel apply.**
3. **Whether the claimants have changed the use of the claimed water from irrigation to fish and wildlife habitat and/or wetlands, but have not complied with Oregon statutory procedures for securing a change of use.**
4. **Whether the claimants' changed use and application of water is detrimental to KPWU's prior water rights.**
5. **Whether claimants' use of the claimed water is wasteful for fish and wildlife habitat and/or wetlands.**
6. **Whether the Klamath River and its tributaries were over-appropriated at the time claimants began their use of the claimed water for fish and wildlife habitat and/or wetlands.**
7. **Whether there is proof to support the water use season claimed.**
8. **Whether to the extent water is used for fish, wildlife and/or wetlands, claimants have abandoned permitted uses.**
9. **Whether the current use was developed within a reasonable time after the claimed date of appropriation.**

⁹ Only the issues raised by the remaining contestant, KPWU, are included. The issues raised in the other contests have not been listed. The Contests of the United States and the Klamath Tribes have been resolved by withdrawal or stipulation. The Contest issues presented by Claimant related only to issue preclusion, which is no longer an live issue in this case, as no party asserted preclusion within the time allowed under ALJ Young's order.

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10. Whether claimants abandoned any rights acquired with the lands included in the claim when it was purchased.

11. Whether the claimants assert a right to store water which interferes with the direct diversion and storage of waters for domestic and irrigation uses.

12. Whether any rights to use or store water for the purposes claimed is subordinate to domestic and irrigation rights as provided in the Klamath River Basin Compact, Article II and XIII.

FINDINGS OF FACT

1) For all allowed water rights in Claim 57, the Rate is 1/40th cfs/acre.¹⁰ The Duty is 4.3 acre-feet of water per acre per year for irrigation. Livestock watering is 12 gallons per day for 82 head of cattle, outside the irrigation season. The Period of Use for irrigation and incidental livestock use is April 1 through November 1. The Priority date is October 14, 1864.

2) The land subject to this claim is composed of two parcels. One parcel, of 13.5 acres, is located in NE ¼ NE ¼ Section 3 T34S R7.5 E.W.M. The second parcel, of 27.7 acres, is located in SE ¼ NE ¼ Section 3 T34S, R7.5E.W.M. Both parcels are irrigated from the Fort Creek Canal, with a diversion point at NW ¼ NW ¼ Section 26, T33S R7.5E.W.M. from Fort Creek, tributary to Wood River. (OWRD Ex. 1 at 119.)

3) On May 28, 1920, the United States allotted to Eddie Lobert, Klamath Indian Allottee 1403, property described as S ½ N ½ NE ¼ and S ½ NE ¼ Section 3, T34S R7.5 E.W.M., among others, from the land of the Klamath Indian Reservation. (Exs. C1 at 2, C4.) On October 3, 1957, the United States issued a fee simple patent to the property, among others, to Billett Lobert, administrator of the Estate of Eddie Lobert. (OWRD Ex. 1 at 94.) Thereafter, on April 14, 1958, Billett Lobert conveyed the property to J. L. Helms and Robert D. Helms, non-Indians. (*Id.* at 91.) Lloyd and Dorothy Nicholson were undisclosed partners or beneficiaries in this transaction, having agreed with the Helms in 1957 to purchase the property subject to this claim from the Helms as soon as a necessary survey to sever the two parcels had been completed. (Affidavit of Roger Nicholson at 3.) On June 30, 1958, J. L. Helms and Robert Helms conveyed the property subject to this claim to Lloyd Nicholson and Dorothy Nicholson. (OWRD Ex. 1 at 89.)

4) The Fort Creek Canal, part of the Agency Unit (*Id.* at 60), had been in existence long enough in 1919 to require repair and replacement of rotted wooden parts of the works. (*Id.* at 35-37.) A lateral from the Fort Creek Canal passes through the property in question. (*Id.* at 110.)

¹⁰ The rate is approximately the amount claimed, as limited by the Stipulation between Claimant and the United States. Although a certificate of water right obtained by Lloyd G. and Dorothy M. Nicholson with a priority date of March 25, 1960 allowed a duty of five acre-feet per acre (OWRD Ex. 1 at 119), Claimant agreed to limit the duty to 4.3 acre-feet of water per acre in the Stipulation. KPWU also argued that the rate and duty be limited to this amount. Season of use is as claimed. Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

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4) On October 17, 1957, William Wales, a Civil Engineer in Klamath Falls, Oregon, conducted a survey of the property subject to this claim on behalf of Lloyd G. Nicholson, preparatory to applying for a water right permit. (Ex. C42 at 3.) A map based upon that permit was prepared and submitted in support of Application 33780 for that permit, which was filed March 25, 1960. The application, in the name of Lloyd Nicholson, shows the irrigation works described in the survey as already in place, and the land as having already been subject to irrigation under the United States Indian Service Agency Project. (Ex. C43 at 3.) Prior to June 30, 1958, when the property passed to the Nicholsons, the second non-Indian owners, the entire parcel was under irrigation, and has been continuously irrigated since that time. (Affidavit of Roger Nicholson at 4; OWRD Ex. 1 at 83.)

5) In 1957, prior to transfer out of Indian ownership, the Helms leased the property under a tribal grazing lease. (Ex. C36.) The property had been subject to grazing leases since 1905 when the Allottee, Eddie Lobert, was a minor. (Ex. C34.) By 1927, however, Eddie Lobert was running cattle and horses on the property, himself. (Ex. C41.)

CONCLUSIONS OF LAW

1. **The record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use, and/or acreage claimed, as limited by stipulation.**
2. **The right claimed has not been shown to have been previously adjudicated.**
3. **Claimants have disclaimed the fish and wildlife portion of this claim under the stipulation. There is, therefore, no longer an issue as to this portion of the claim.**
4. **The claimants have not changed the use and application of water.**
5. **The portion of the claim related to fish and wildlife use is no longer an issue in this case.**
6. **The portion of the claim for fish and wildlife use is no longer an issue in this case.**
7. **There is proof to support the water use season claimed, subject to stipulation.**
8. **The portion of the claim related to fish and wildlife use is no longer an issue in this case.**
9. **The current use was developed prior to or soon after transfer from Indian ownership.**
10. **Claimants have not abandoned any rights acquired with the lands included in the claim when it was purchased.**
11. **Claimants do not assert a right to store water.**

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12. Claimants do not assert the right to store water.

OPINION

The burden of proof to establish a claim in the Klamath Basin Adjudication is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division*, 47 Or App 437 (1980); *Metcalf v. AFSD*, 65 Or App 761 (1983) *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

In his Ruling on United States' Motion for Ruling on Legal Issues in Klamath Case 272, Administrative Law Judge William Young stated the elements of a *Walton* claim as follows:

1. 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;
2. The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor;
3. 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:
4. 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.
5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

Ruling on United States' Motion for Ruling on Legal Issues, Klamath Adjudication Case 272, August 4, 2003, at 9.

Having reviewed the legal authorities applied by ALJ Young in his ruling, I adopt ALJ Young's formulation as the correct interpretation of the *Walton* line of cases.

Originally, this claim included an appropriation for fish and wildlife use. However, in an Order on Motion for Ruling on Legal Issues on May 31, 2006, it was held that fish and wildlife use was not allowable in a *Walton* claim, as that portion of the water right provided in the Klamath treaty was reserved to the Klamath Tribes as a whole. Further, in the Stipulation between Claimant and the United States to resolve the United States' Contest 3798, Claimant disclaimed any fish and wildlife use under this claim. Consequently, those issues raised by KPWU related to fish and wildlife use of water are no longer subject to consideration, and will not be further discussed. Likewise, as this claim does not include a claim for storage of water, the issues related to a storage right raised by KPWU are not under consideration, and will not be

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further discussed. The issues remaining relate to the allowability of the claim as a *Walton* right, and its quantification.

The property in question was part of the Klamath Indian Reservation, and allotted to an Indian in 1920. The testimony of Roger Nicholson, the only percipient witness, shows that the property was already subject to irrigation no later than June 30, 1958, when it was transferred to the second non-Indian owner.¹¹ Since the property passed to the Nicholsons, it has been continuously irrigated. The only issue, then, is the quantity to be allowed.

Although the Water Right Permit applied for by the Nicholsons in 1960 called for a diversion rate of 1/50 cfs of water per acre, the stipulation provides for a rate of 1/40 cfs of water per acre. The permit does not, of course, limit the rate allowable in these proceedings, although it is evidence of prior use. The Statement of Claim, however, was submitted under penalty of perjury, and specifies a diversion rate of approximately 1/20 cfs per acre. The rate agreed upon, 1/40 cfs, is reasonable. Additionally, claimant also agreed to a reduction in the duty for this right from 5 acre-feet of water per acre to 4.3 acre-feet of water per acre. KPWU did not raise any argument respecting either the rate of diversion or the duty, instead advocating that the claim be limited to the amounts agreed upon.

Based on the evidence presented, I recommend that the Adjudicator allow the claim on the terms specified in the stipulation between Claimant and the United States.

ORDER

I propose that the Adjudicator issue the following order:

Claim 57 is allowed in part as follows:

Season of Use: April 1 through November 1 for Irrigation; year-round for livestock

Purpose of Use: Irrigation and incidental livestock watering

Priority Date: October 14, 1864

Diversion Point: NW ¼ NW ¼ Section 26, T33S R7.5E.W.M.

Rate: 1.03 cfs of water for irrigation and incidental livestock watering during the irrigation season, 12 gallons per day per head of cattle for 82 head of cattle between November 1 and March 31.

Duty: 177.16 acre-feet of water per year

Acres: 41.2 acres

Source: Fort Creek, tributary to Wood River.

Place of Use: NE ¼ NE ¼ Section 3 T34S R7.5 E.W.M. (13.5 acres)

¹¹ It is arguable that Lloyd and Dorothy Nicholson were actually part of a partnership with the Helms for the purchase of the property or at least had a beneficial ownership in the land subject to this claim when it passed out of Indian ownership. However, the evidence also shows that the property was irrigated while still in title to the Helms, who were the first non-Indian purchasers of record. It is therefore unnecessary to explore this argument further, as the use satisfies the requirements for a *Walton* right.

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SE ¼ NE ¼ Section 3 T34S, R7.5E.W.M. (27.7 acres)

All portions of the claim not specifically allowed should be denied.



Maurice L. Russell, II, Administrative Law Judge
Office of Administrative Hearings

Dated: May 9, 2007

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, Adjudicator
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 May 9, 2007, 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:

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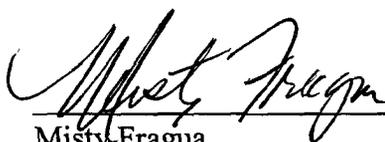
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