

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~~; **PROPOSED ORDER**
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

Case No. 194

Claim: 62

Contests: 2834², 3275, 3460³, 3802, and
4115⁴

vs.

NBCC, LLC¹;
Claimants/Contestants.

HISTORY OF THE CASE

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

¹ Change of Ownership Filed 4/7/2006 – Roger Nicholson and Richard Nicholson to NBCC, LLC.

² WaterWatch of Oregon, Inc.'s Contest 2834 was dismissed. *See* ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

³ Don Vincent voluntarily withdrew from Contest 3460 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3460 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3460 on January 15, 2004

⁴ The Klamath Tribes voluntarily withdrew Contest 4115. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated January 19, 2005.

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irrigable acreage” (“PIA”).⁵ As modified by stipulation, this *Walton* claim is for 4.0 cubic foot per second (cfs) of water (1/40th cfs per acre) and 688 acre-feet of water per year (4.3 acre-feet of water per acre) for irrigation of 160 acres of land and incidental livestock watering.⁶ The claimed period of use is April 1 through November 1. The claimed priority date is October 14, 1864.⁷

On October 4, 1999, OWRD issued its Preliminary Evaluation of this claim preliminarily denying this claim. Claimants filed Contest 3275 on May 8, 2000.

WaterWatch of Oregon, Inc. filed Contest 2834 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.,⁸ 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,⁹ Don Vincent¹⁰, 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 3460 on May 8, 2000.

The United States of America (hereafter “United States”) filed Contest 3802 on May 8, 2000. The Klamath Tribes filed Contest 4115 on May 8, 2000. The Tribes withdrew their contest on January 19, 2005. 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 KBA Case 900. On May 27, 2004, ALJ Young vacated the April

⁵ 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).

⁶ The claim originally also included a claim for water for fish and wildlife. On June 27, 2006, I issued an Amended Order Granting Motions for Ruling on Legal Issues, ruling that the claim for water for fish and wildlife could not be allowed as a *Walton* claim. The stipulation between claimant and the United States expressly agrees that a fish and wildlife claim should not be allowed. Therefore, the fish and wildlife portion of this claim will not be addressed further.

⁷ This is the priority date for all allowed *Walton* claims, as the date on which the Klamath Indian Reservation was created by treaty.

⁸ Withdrew from Contest 3460 January 15, 2004.

⁹ Withdrew from Contest 3460 June 24, 2002.

¹⁰ Withdrew from Contest 3460 December 4, 2000.

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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 2.¹¹

The United States amended its Contest on May 24, 2006. On July 3, 2006, the United States filed its Unopposed Motion to Admit Stipulation between Claimant and United States to Resolve United States’ Contest 3802 into the Record.

Pursuant to a letter dated July 18, 2006, Administrative Law Judge (ALJ) Donna Moursund Brann of the Office of Administrative Hearings convened a pre-hearing conference by telephone on July 25, 2006, beginning at 3:30 p.m. on both cases 194 and 195. The following individuals participated in the conference: Ronald S. Yockim representing Claimant/Contestant Roger Nicholson (195) and Claimant NBCC, LLC (194); Barbara Scott-Brier representing the United States of America (United States); Andrew Hitchings representing the Klamath Project Water Users (KPWU); and Jesse Ratcliffe representing the Oregon Water Resources Department (OWRD).

In the course of that prehearing conference, ALJ Brann, without objection by any party, admitted the Stipulation between Claimant and United States to Resolve the United States’ Contest 3802 into the record. ALJ Brann also, with the concurrence of the parties, concluded that no hearing would be necessary in this case, as no party had requested cross-examination. Consequently, ALJ Brann scheduled written argument on the case. The parties then submitted the case on the record, subject to notification by the parties of objections to an amendment to the Direct Testimony of Roger Nicholson to include Exhibit A, which had been unintentionally omitted. No objection was received within the time allotted, and the evidentiary record closed on August 7, 2006.

Claimant filed its Memorandum on October 10, 2006. KPWU filed its Response memorandum on October 20, 2006. Claimant Filed its Reply Memorandum on December 13, 2006. No other participant filed argument, and the record closed on December 13, 2006.

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 July 25, 2006 prehearing conference, prior to preparation of this order.

EVIDENTIARY RULINGS

The following exhibits, written testimony and affidavits were admitted into the record.

¹¹ 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 presented evidence in support of preclusion.

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

Direct Testimony of Ronald S. Yockim with Claimant's Exhibits C1 through C26, C28 through C31, C42 and C44-C56. Claimant did not offer Exhibits C27, C32 through C41, and C43.

Written Direct Testimony of Roger Nicholson, with exhibits attached thereto as amended.

Written Direct Testimony of Jay Walters with exhibits attached thereto.

Stipulation between Claimant and United States to Resolve the United States' Contest 3802

ISSUES¹²

1. **Whether there is sufficient documentation to support the elements of a *Walton* claim.**
2. **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.**
3. **Whether the right claimed has been previously adjudicated and no issues can be legally re-determined, as the principles of *res judicata* and/or collateral estoppel apply.¹³**
4. **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.**
5. **Whether the Claimants' changed use and application of the water is detrimental to KPWU's prior water rights.**
6. **Whether the Claimants' use of the claimed water is wasteful for fish and wildlife habitat and/or wetlands.**
7. **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.**

¹² Only the issues raised by the remaining contestant, KPWU, are included. The issues raised in the other contests have not been listed, as they have been resolved by withdrawal or stipulation.

¹³ This issue was stated in KPWU's contest. Under ALJ Young's ruling, KPWU, the proponent of preclusion, had the burden of going forward and presenting evidence. KPWU did not present any evidence suggesting that this particular claim was precluded by a prior adjudication. Consequently, this contention is not supported in the record and will not be addressed further.

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8. Whether the current use was developed within a reasonable time after the claimed date of appropriation.
9. Whether to the extent water is used for fish, wildlife and/or wetlands, Claimants have abandoned permitted uses.
10. Whether Claimants have abandoned any rights acquired with the lands included in the claim when Claimants purchased it.
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 in violation of Article III.C of the Klamath River Basin Compact.
12. Whether any rights to use or store water for the purpose claimed is subordinate to domestic and irrigation rights of KPWU as provided in the Klamath River Basin Compact, Articles II and XIII.
13. Whether there is proof to support the water use season claimed.

FINDINGS OF FACT

1) For all allowed water rights in Claim 62, the Rate is 1/40th cfs/acre.¹⁴ The Duty is 4.3 acre-feet of water per acre per year. The Period of Use for irrigation is April 1 through November 1 and for livestock is year-round. The Priority date is October 14, 1864. Stockwater is for 320 head.

2) The land subject to this claim as limited under the Stipulation between claimant and the United States is composed of a single parcel of 160 acres, located in the NW ¼ Section 2 T34S R7.5 E.W.M. The property is 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. (Direct Testimony of Roger Nicholson at 2, Attachment A at 4; OWRD Ex. 1 at 2, 96.)

3) On March 3, 1910, the United States allotted to Kate Lobert, Klamath Allottee 222, property described as NW ¼ Section 2, T34S R7.5 E.W.M. from the land of the Klamath Indian Reservation. (Ex. C-4.) As early as 1932, the property was subject to grazing leases for cattle and horses. (Ex. C-49, C-50, C-51.) On February 28, 1943, the United States of America, acting through the Bureau of Indian Affairs, leased the property in question on behalf of Kate Lobert David to Lloyd Nicholson. (Direct Testimony of Roger Nicholson at 2, Attachment A as amended.) At the time of this lease, the property was subject to irrigation. (*Id.* at 2, 3.) On June 9, 1955, the property was appraised by Mathew Spencer, Agency Land Operations Officer for

¹⁴ The rate and duty and stock water are based on the stipulation between claimant and the United States, supported by the Direct Testimony of Roger Nicholson. Additionally, these terms were accepted by OWRD and the United States in stipulations on nearby properties subject to substantially the same conditions. It is therefore reasonable to apply them in this case. (Direct Testimony of Roger Nicholson at Attachment B.) KPWU also sought that the rate, duty and number of head be limited to this amount in its argument. 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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the United States Bureau of Indian Affairs. The appraisal recites that the property had 130 irrigated acres, and 30 acres grazing. (Ex. C-42.)

4) On July 7, 1955, the United States of America issued a patent in fee to Irma Wilson, a Klamath Indian, heir to Kate Lobert David. (OWRD Ex. 1 at 44; Ex. C-3 at 1.) On July 20, 1955, Irma Wilson conveyed the property to Lloyd Nicholson, a non-Indian. (OWRD Ex. 1 at 47.) In 1957, William Wales, a professional engineer, mapped and prepared a water right application for the property subject to this claim, among others, on behalf of Lloyd Nicholson. (Direct Testimony of Roger Nicholson at 3, Attachment A at 4.) That map disclosed irrigation of the entire 160 acres. (*Id.*) On August 31, 1966 OWRD issued to Lloyd Nicholson a Certificate of Water Right, with priority of March 25, 1960, for 160 acres irrigation on the land subject to this claim. (OWRD Ex. 1 at 97.)

5) The Agency Unit, drawing water from Fort Creek and Crooked Creek, was begun in 1899, by the Indian Agency. By October 1932, the system was largely complete, and was the source of water for irrigation of 2,000 acres on the Klamath Indian Reservation. (Ex. C-31 at 5.) Water from Fort Creek Canal, part of the Agency Unit, is diverted to the property by lateral ditches. (OWRD Ex. 1 at 87, 91.)

6) On June 26, 1985, Charles Roger Nicholson, as Trustee for Lloyd Nicholson, conveyed the property to Charles Roger Nicholson and Richard Nicholson. (*Id.* at 75.) The property was subsequently conveyed to NBCC, LLC. (Direct Testimony of Roger Nicholson, at 3.) The property has been continuously irrigated since 1956. (*Id.*)

CONCLUSIONS OF LAW

1. **There is sufficient documentation to support the elements of a *Walton* claim.**
2. **The record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use and acreage claimed, with some modification.**
3. **The right claimed has not been previously adjudicated.**
4. **Any changed use to fish and wildlife habitat is no longer an issue in this case.**
5. **Any changed use to fish and wildlife habitat is no longer an issue in this case.**
6. **Any changed use to fish and wildlife habitat is no longer an issue in this case.**
7. **Any changed use to fish and wildlife habitat is no longer an issue in this case.**
8. **The current use was developed within a reasonable time after the claimed date of appropriation.**
9. **Any changed use to fish and wildlife habitat is no longer an issue in this case.**

10. **Claimants have not abandoned any rights acquired with the lands included in the claim when Claimants purchased it.**
11. **Claimants do not assert a right to store water.**
12. **Claimants do not assert a right to store water.**
13. **There is proof to support the water use season claimed.**

OPINION

The burden of proof to establish a claim 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.

Claimant disclaimed any water right for fish and wildlife uses in its Stipulation with the United States. It is therefore unnecessary to address those issues. The remaining issues, having to do with establishment of a *Walton* claim, are addressed below.

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.

The property in question was part of the Klamath Indian Reservation, and allotted to an Indian in 1910. The appraisal of 1955 shows that at least 130 acres of the property was under irrigation while in Indian ownership. After it was sold to Lloyd Nicholson, the first non-Indian owner, in 1955, it continued under irrigation, which was expanded to 160 acres within a few years. The property is irrigated at the present day. The elements necessary for a *Walton* claim for the 160 acres have been established.

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 62 is allowed in part as follows:

- a. Point of Diversion: NW ¼ NW ¼ Section 26, Township 33 South, Range 7.5 East, W.M., at a point 940 feet south and 960 feet east from the NW ¼ corner of said Section 26.
- b. Source: Fort Creek, tributary to Wood River.
- c. Use: Irrigation of 160 acres and livestock watering.
- d. Diversion Rate and Duty for Irrigation: 4.0 cubic feet per second (cfs) (160 acres x 1/40 cfs/acre), measured at the point of diversion and limited to a total volumetric amount of 688 acre-feet per year (4.3 acre-feet/acre x 160 acres).
- e. Diversion Rate and Duty for Livestock Watering: Incidental livestock watering during the irrigation season (April 1 to November 1), with no additional amounts diverted for livestock; 12 gallons per day/head outside the irrigation season (November 2 to March 31), measured at the place of use, provided that at no time shall more water be diverted than reasonably necessary and to prevent the ditches and channels from being completely frozen and provided further that livestock watering shall be limited to a maximum of 320 head of cattle.
- f. Place of Use: 160 acres in the NW ¼ of Section 2, Township 34 South, Range 7.5 East, W.M., the location of which is shown on the map included in OWRD Exhibit 1 (Case 194, Claim 62) at page 103.
- g. Period of Use: April 1 to November 1 (irrigation); year-round (livestock watering).
- h. Priority Date: October 14, 1864.


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

Dated: April 17, 2007

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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

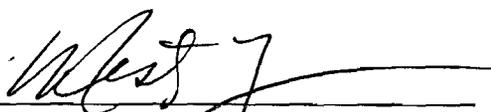
I hereby certify that on April 17, 2007, I mailed a true copy of the following:
PROPOSED ORDER, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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