

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. 195

Claim: 63

Contests: 2835<sup>1</sup>, 3276, 3461<sup>2</sup>, 3803, and  
4116<sup>3</sup>

vs.

Roger Nicholson;  
Claimant/Contestant.

**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 irrigable acreage" ("PIA").<sup>4</sup> As modified by stipulation, this *Walton* claim is for 5.925 cubic foot per second (cfs) of water (1/40<sup>th</sup> cfs per acre) and 1018.1 acre-feet of water per year (4.3 acre-

<sup>1</sup> WaterWatch of Oregon, Inc.'s Contest 2835 was dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

<sup>2</sup> Don Vincent voluntarily withdrew from Contest 3461 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3461 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3461 on January 15, 2004

<sup>3</sup> The Klamath Tribes voluntarily withdrew Contest 4116. See KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated January 19, 2005.

<sup>4</sup> Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9<sup>th</sup> Circuit, 1985).

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feet of water per acre) for irrigation of 237.0 acres of land and incidental livestock watering.<sup>5</sup> The claimed period of use is April 1 through November 1 for irrigation and year-round for livestock. The claimed priority date is October 14, 1864.<sup>6</sup>

On October 4, 1999, OWRD issued its Preliminary Evaluation of this claim preliminarily denying this claim. Claimants filed Contest 3276 on May 8, 2000.

WaterWatch of Oregon, Inc. filed contest 2835 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.,<sup>7</sup> 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,<sup>8</sup> Don Vincent<sup>9</sup>, 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 3461 on May 8, 2000.

The United States of America (hereafter "United States") filed Contest 3803 on May 8, 2000. The Klamath Tribes filed Contest 4116 on May 8, 2000.<sup>10</sup> 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 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

<sup>5</sup> 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.

<sup>6</sup> This is the priority date for all allowed *Walton* claims, as the date on which the Klamath Indian Reservation was created by treaty.

<sup>7</sup> Withdrew from Contest 3461 January 15, 2004.

<sup>8</sup> Withdrew from Contest 3461 June 24, 2002.

<sup>9</sup> Withdrew from Contest 3461 December 4, 2000.

<sup>10</sup> Contest 4116 was withdrawn on January 19, 2005.

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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.<sup>11</sup>

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 3803 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 Claimants 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 3803 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.

Claimant filed his Memorandum on October 10, 2006. KPWU filed its Response memorandum on October 20, 2006. Claimant Filed his 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.

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

Direct Testimony of Ronald S. Yockim with Claimant’s Exhibits C-1 through C-26, C-28 through C-31, C-33 through C-39 and C-43 through C-48. Claimant did not offer Exhibits C-27, C-32, and C-40 through C-42.

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<sup>11</sup> 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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Written Direct Testimony of Roger Nicholson, with exhibits attached thereto.

Written Direct Testimony of Jay Walters with exhibits attached thereto.

### ISSUES<sup>12</sup>

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.<sup>13</sup>**
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.**
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.**

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<sup>12</sup> 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.

<sup>13</sup> 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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11. Whether the Claimants assert a right to store water with 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 of rights of KPWU as provided in 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 63, the Rate is 1/40th cfs/acre. 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. Period of Use for Livestock is year-round. The Priority date is October 14, 1864. Stockwater is for 470 head.<sup>14</sup>

2) The land subject to this claim as limited under the Stipulation between claimant and the United States is composed of the following parcels:

SE ¼ SW ¼ Section 2 T34S R7.5E.W.M.	21.5 acres
NW ¼ SW ¼ Section 2 T34S R7.5E.W.M.	40.0 acres
SW ¼ SW ¼ Section 2 T34S R7.5E.W.M.	19.7 acres
NE ¼ SE ¼ Section 3 T34S R7.5E.W.M.	39.8 acres
NW ¼ SE ¼ Section 3 T34S R7.5E.W.M.	40.0 acres
SE ¼ SE ¼ Section 3 T34S R7.5E.W.M.	40.0 acres
SW ¼ SE ¼ Section 3 T34S R7.5E.W.M.	<u>36.0 acres</u>
Total	237.0 acres

(OWRD Ex. 1 at 85, 134.)

3) 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. (*Id.* at 136, 144, 150.)

4) On March 3, 1910, the United States allotted to Moffie Hill, a Klamath Indian, Allottee 148, property described as SE ¼ Section 3, T34S R7.5E.W.M, containing 160 acres, from the land of the Klamath Indian Reservation. (*Id.* at 106.) Most of this property (except for

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<sup>14</sup> 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 D.) 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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a 50-foot strip conveyed to Orville Elliott a non-Indian, in 1960<sup>15</sup>) was conveyed to Lloyd and Dorothy Nicholson, the first non-Indian owners, in 1963.

5) On March 3, 1910, the United States allotted to Nellie Morgan, a Klamath Indian, Allottee 238, property, among others, in the W ½ SE ¼ SW ¼ Section 2, T34S R7.5E.W.M., containing 20 acres, from the land of the Klamath Indian Reservation. (*Id.* at 117.) In 1974, this property was transferred to Alan Lee, the first non-Indian owner. (*Id.* at 110, 111.) Later in 1974, Lee transferred the property to William Erickson, former husband of the last non-Indian owner, Lavina Grace Erickson, who transferred the properties to Roger Nicholson the same day. (*Id.* at 108, 109.)

6) On March 7, 1910, the United States allotted to Emma Gray, a Klamath Indian, Allottee 506, property described as the W ½ SW ¼ Section 2, T34S R7.5E.W.M., containing 80 acres, from the land of the Klamath Indian Reservation. (*Id.* at 124.) In 1974, the claimed portion of this property was transferred to Alan Lee, the first non-Indian owner. Later in 1974, Lee transferred the property to William Erickson, former husband of the last non-Indian owner, Lavina Grace Erickson, who transferred the properties to Roger Nicholson the same day. (*Id.* at 108, 109.)

7) The claimed property that is part of Allotment 148 was irrigated while still in Indian ownership. Ditches had been constructed, and the property was under lease at the time of, or soon after conveyance out of Indian ownership. (Direct Testimony of Roger Nicholson at 2, 3.)

8) Prior to the transfer of the portions of Allotments 238 and 506 out of Indian ownership, the properties were leased to Lloyd Nicholson, who irrigated the properties. (Direct Testimony of Roger Nicholson at 4.)

9) 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 150.)

#### 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/or acreage claimed with some modification.**
3. **The right claimed has not been previously adjudicated.**
4. **As the claim for fish and wildlife use has been disclaimed, that portion of the claim is no longer at issue.**

<sup>15</sup> This strip was transferred to the Nicholsons in 1966 by Thomas W. Hawkins, Elizabeth Hawkins, Jack Owens, Elaine Owens, Craig Owens and Mazine Owens. (Direct Testimony of Roger Nicholson at 2.)

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5. As the claim for fish and wildlife use has been disclaimed, that portion of the claim is no longer at issue.
6. As the claim for fish and wildlife use has been disclaimed, that portion of the claim is no longer at issue.
7. As the claim for fish and wildlife use has been disclaimed, that portion of the claim is no longer at issue.
8. The current use was developed within a reasonable time after the claimed date of appropriation.
9. As the claim for fish and wildlife use has been disclaimed, that portion of the claim is no longer at issue.
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;

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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 Indians in 1910. With the exception of the property in Section 3, all of the property was irrigated by the Nicholson family while under lease prior to transfer from Indian ownership. The property in Section 3 had been irrigated previously, but the works were in disrepair when the property transferred out of Indian ownership, so that the land was not irrigated efficiently. The ditches were repaired in 1963, however, the year that most of the land was transferred out of Indian ownership, and all of the property in Section 3 was irrigated that year. The property is irrigated at the present day. The elements necessary for a *Walton* claim for 237 acres have been established.

As the property was subject to grazing leases while still in Indian ownership, the livestock watering claim has also 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.

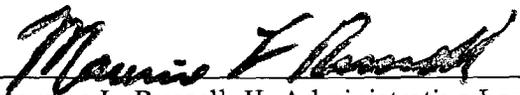
### ORDER

I propose that the Adjudicator issue the following order:

Claim 63 is allowed in part as follows:

- a. Point of Diversion: NW ¼ NW ¼ of 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 237.0 acres and livestock watering.

- d. Diversion Rate and Duty for Irrigation: 5.925 cubic feet per second (cfs) (237.0 acres x 1/40 cfs/acre), measured at the point of diversion and limited to a total volumetric amount of 1019.1 acre-feet per year (4.3 acre-feet/acre x 237.0 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 470 head of cattle.
- f. Place of Use: 21.5 acres in the SE ¼ SW ¼, 40.0 acres in the NW ¼ SW ¼, and 19.7 acres in the SW ¼ SW ¼ of Section 2, and 39.8 acres in the NE ¼ SE ¼, 40.0 acres in the NW ¼ SE ¼, 40.0 acres in the SE ¼ SE ¼, and 36.0 acres in the SW ¼ SE ¼ of Section 3, all in Township 34 South, Range 7.5 East, W.M. The location of the 19.7 acres in the SW ¼ SW ¼ of said Section 2 is shown on the map included in OWRD Exhibit 1 (Case 195, Claim 63) at 85. The location of the remaining lands included within the place of use is shown on the map included in OWRD Exhibit 1 at page 134.
- 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

**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.

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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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SALMON DIVISION

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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Misty Fragua  
Administrative Assistant

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