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WATER RESOURCES DEPT
SALEM, OREGON

**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,
Contestant

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT; PROPOSED
ORDER DENYING CLAIM**

v.

Hugh D. Stevenson,
Claimant.

Case No. 226

Claim No. 116

Contests 3492,¹ 3759, 4146²

On August 16, 2004, the United States of America (United States) filed a Motion for Summary Judgment and Dismissal of the Claim, seeking determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served by the United States on Hugh D. Stevenson (Claimant) should be deemed admitted based on Claimant's failure to respond despite an order requiring discovery; and (2) that Claimant's deemed admissions establish that the elements of a *Walton*³ water right are not met and, therefore, the claim should be denied. Claimant did not file a response to the motion.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Motions for rulings on legal issues (Summary Judgment) are governed by OAR 137-003-0580, which establishes standards for evaluating the motion and states in material part:

(6) The administrative law judge shall grant the motion for a legal ruling if:

¹ Don Vincent voluntarily withdrew from Contest 3492 on November 28, 2000. Berlva Pritchard voluntarily withdrew from Contest 3492 on June 24, 2002. The Klamath Hills District Improvement Company voluntarily withdrew from Contest 3492 on January 16, 2004. On April 12, 2004, the remaining Klamath Project Water Users withdrew Contest 3492 in its entirety.

² The Klamath Tribes voluntarily withdrew Contest 4146, without prejudice, on July 26, 2004.

³ Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

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- (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
- (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
- (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party ***.

Considering the evidence in a manner most favorable to the non-moving party, I make the following:

FINDINGS OF FACT

- (1) Hugh D. Stevenson filed Claim 116 on November 27, 1990 as a non-Indian successor to a Klamath Indian Allottee, claiming an amount of water sufficient to irrigate the allotment's share of the Klamath Tribe's "practically irrigable acreage" (PIA). (See OWRD⁴ Ex. 1 at 1.)
- (2) The claim is for a total of 1.18 cubic feet per second (cfs) of water for irrigation of 47.1 acres of land. The claimed period of use is mid-February through July 1. (OWRD Ex. 1 at 1-5.) On October 4, 1999, the Adjudicator for the Oregon Water Resources Department (OWRD), Richard D. Bailey, issued a Preliminary Evaluation, preliminarily denying this claim. (OWRD Ex. 1 at 81-82.)
- (3) On May 8, 2000, the United States filed Contest 3759; the Klamath Tribes filed Contest 4146; and the Klamath Project Water Users filed Contest 3492. (OWRD Ex. 1 at 64, 68, and 28.) Claimant did not file a contest. On April 8, 2004, the Klamath Project Water Users withdrew Contest 3492 in its entirety. The Klamath Tribes voluntarily withdrew Contest 4146, without prejudice, on July 26, 2004.
- (4) Pursuant to written notice sent to all participants, including Claimant, a pre-hearing conference was held on November 24, 2003. Claimant did not participate in the pre-hearing conference. A discovery schedule was agreed upon in the pre-hearing conference and was memorialized by a Scheduling Order issued November 25, 2003.
- (5) On May 4, 2004, consistent with the Scheduling Order, the United States served discovery requests on Claimant, which included requests for admissions. Claimant failed to respond to the discovery requests by the deadline of June 25, 2004, or at any time thereafter.
- (6) On July 7, 2004, the United States filed a Motion for an Order Requiring Discovery, based on Claimant's failure to respond to the discovery requests. On July 16, 2004, an Order Requiring Discovery and an Order Modifying Scheduling Order were issued by Administrative Law Judge Daina Upite, requiring Claimant to respond to the United States' discovery requests on or before July 26, 2004. As of August 16, 2004, Claimant had not responded to any discovery requests. (Affidavit of David W. Harder, August 16, 2004.)

⁴ Oregon Water Resources Department.
Hugh D. Stevenson (226)

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(7) The United States' discovery request included a warning that "failure to serve a written answer or objection to any requests for admission within the time allowed will result in admission of the request." (United States' Discovery Requests to Claimant at 2, paragraph G.)

(8) Through his deemed admissions, Claimant has admitted, among other things, that: (1) Claimant has not provided sufficient information documenting who was the last Indian owner of the claimed place of use; (2) none of the claimed place of use was irrigated by the last Indian owner; (3) the claimed place of use was not developed for irrigation by the first non-Indian owner within a reasonable period of time; and (4) the claimed place of use has not been continually irrigated since it was first owned by a non-Indian. (United States' Motion for Summary Judgment, Exhibit 1 at 5-6, Requests for Admissions Nos. 2, 5, 6, and 7.)

CONCLUSIONS OF LAW

(1) Pursuant to OAR 137-003-0570(12), the requests for admissions served on Claimant by the United States and not responded to by Claimant despite the Order Requiring Discovery are deemed admitted; and

(2) Claimant's deemed admissions establish that Claim 116 fails to meet the basic elements of a *Walton* claim and, therefore, should be denied.

OPINION

Motion for Summary Judgment

OAR 137-003-0570(12) states:

Failure to respond to a request for admissions required by a discovery order shall be deemed an admission of matters that are the subject of the request for admissions, unless the party or agency failing to respond offers a satisfactory reason for having failed to do so, or unless excluding additional evidence on the subject of the request for admissions would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the administrative law judge does not treat failure to respond to the request for admissions as admissions, the administrative law judge may grant a continuance to enable the parties and the agency to develop the record as needed.

Pursuant to OAR 137-003-0570(12), Claimant's failure to respond to the United States' requests for admissions despite an Order Requiring Discovery shall be deemed admission of matters that were the subject of the request for admission, unless two narrow exceptions apply. The first exception does not apply because Claimant has not provided any reason for his failure to respond to the requests for admissions. Since this matter has not come to a hearing yet, the second exception also does not apply. Accordingly, each request for admission is deemed admitted.

Walton Water Right Claim

As outlined by Administrative Law Judge William D. Young in *Nicholson et al. v. United States*, OAH Case No. 272, in the context of the Klamath Basin Adjudication, the following elements must be proved to establish a *Walton* water right:

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; and
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 at 9 (August 4, 2003.)

Claimant is deemed to have admitted, among other things, that he has not provided sufficient title information regarding Indian ownership of the claimed place of use and/or transfer of the property to a non-Indian, that the claimed place of use was not irrigated by the last Indian owner, that the claimed place of use was not developed for irrigation by the first non-Indian owner within a reasonable period of time, and that the claimed place of use has not been continually irrigated since it was first owned by a non-Indian. Therefore, Claimant in Claim 116 has failed to prove the basic elements of a *Walton* water right. Consequently, Claim 116 should be denied.

ORDER

(1) The United States' Motion for Ruling on Legal Issues is granted. Claimant's failure to respond to United States' request for admissions is deemed an admission of the matters that are the subject of the request for admissions.

(2) Based on the foregoing, I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as more specifically set out below:

Hugh D. Stevenson (226)

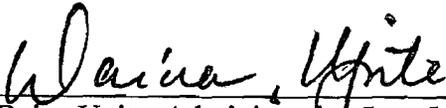
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The elements of a water right cognizable under ORS Chapter 539 are not established for Claim 116, and the claim is denied.

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Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: November 5, 2004

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:

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

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SALEM, OREGON**

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2004, I mailed a true copy of the following: **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT; PROPOSED ORDER DENYING CLAIM**, 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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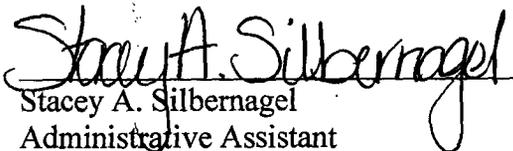
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