

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,
Contestants

vs.

George Dougan; Ruth Dougan;
Claimants/Contestants.

**ORDER GRANTING MOTION
FOR RULING ON LEGAL ISSUES;
PROPOSED ORDER DENYING
CLAIM**

Case No. 228

Claims: 118

Contest: 1694, 3494¹, 3761, 4148

On November 17, 2004, the United States and the Klamath Tribes filed a Joint Motion for Ruling on Legal Issues, seeking determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served on Claimants, George Dougan and Ruth Dougan, should be deemed admitted because Claimants failed to provide responses despite the order requiring discovery; and (2) Claimants' deemed admissions establish that the elements of a Walton² water right are not met and, therefore, the claim should be denied. Claimants have not filed a response to the motion.

ISSUES

(1) Whether the requests for admissions served on Claimants by the United States and the Klamath Tribes and not responded to by Claimants despite the Order Requiring Discovery should be deemed admitted.

¹ Don Vincent voluntarily withdrew from Contest 3494 on November 28, 2000. Berlva Pritchard voluntarily withdrew from Contest 3494 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew, without prejudice, from Contest 3494 on January 16, 2004. The remaining Klamath Project Water Users withdrew Contest 3494 on April 8, 2004, thereby disposing of Contest 3494 in its entirety.

² 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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(2) Whether Claimants' deemed admissions establish that Claim 118 fails to meet the basic elements of a Walton claim and, therefore, should be denied.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Motions for Ruling 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:
 - (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) On November 29, 1990, George Dougan and Ruth Dougan filed Claim 118. Claimants have made a claim for water as non-Indian successors to a Klamath Indian Allottee. The claim is for an amount of water sufficient to irrigate the allotment's share of the Tribe's "practicably irrigable acreage" (PIA). This Walton claim is for 1.0 cubic feet per second (cfs) for irrigation of approximately 44.2 acres of land. The claimed period of use is February through October, and the claimed priority date is October 14, 1864. (OWRD Ex. 1 at 1-5.)

(2) On October 4, 1999, the Adjudicator for the Oregon Water Resources Department (OWRD), Richard D. Bailey, issued a Preliminary Evaluation, denying this claim for failure to prove the elements of a Walton claim. (OWRD Ex. 1 at 104.)

(3) On May 3, 2000, Claimants filed Contest 1694, stating that "Claim #118 *** was submitted in error ***." (OWRD Ex. 1 at 39.) On May 8, 2000, the United State filed Contest 3761 and the Klamath Tribes filed Contest 4148. (OWRD Ex. 1 at 87 and 91.)

(4) On November 18, 2003, Administrative Law Judge (ALJ) William D. Young held a prehearing conference, pursuant to written notice sent to participants. (See Order Requiring Prehearing Statements, Case 228, Claim 118, dated August 15, 2003.) Claimant George Dougan participated in the prehearing conference, but did not file a prehearing

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statement. (See Letter to Parties and Counsel, Case 228, Claim 118, dated November 19, 2003.)

(5) On November 19, 2003, ALJ William D. Young issued a Scheduling Order, based upon the discovery schedule that was agreed upon during the prehearing conference. (See Scheduling Order, Case 228, Claim 118.) A copy of the schedule was mailed to Claimants.

(6) On May 17, 2004, consistent with the Scheduling Order, counsel for the United States and the Klamath Tribes served discovery requests on Claimants, including requests for admissions. (Discovery Requests to Claimants.) Claimants did not respond to the discovery requests by the deadline of June 28, 2004, or at any time thereafter. (Joint Motion for an Order Requiring Discovery, Case 223, Claim 118.)

(7) On August 6, 2004, the United States and the Klamath Tribes filed a Joint Motion for an Order Requiring Discovery, based on Claimants' failure to respond to discovery requests. (Joint Motion for an Order Requiring Discovery, Case 228, Claim 118.)

(8) On October 8, 2004, ALJ Daina Upite issued an Order Requiring Discovery and an Order Modifying Scheduling Order, which required Claimants to respond to Contestants' discovery requests on or before October 18, 2004. (See Order Modifying Scheduling Order and Order Requiring Discovery, Case 228, Claim 118.) As of November 17, 2004, Claimants had not responded to the discovery requests or filed any objections. (Affidavit of David W. Harder.)

(9) The United States' and the Klamath Tribes' discovery request included the following warning: "Failure to serve a written answer or objection to any requests for admission within the time allowed will result in admission of the request." (Discovery Request to Claimants.)

(10) Based on its deemed admissions, Claimants have admitted that: (1) the claimed place of use has not been irrigated every year since the property left Indian ownership; (2) Claimants failed to provide sufficient chain of title documentation regarding ownership of the claimed place of use after it left Indian ownership; (3) Claimants failed to provide sufficient information to show the amount of land irrigated by the first non-Indian owner within five years after owning the allotments in issue; and (4) the claimed place of use has always been within a preexisting water right permit, number 39383. (United States' Discovery Request to Claimants, Request Nos. 1, 8-10.)

CONCLUSIONS OF LAW

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

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(2) Claimants' deemed admissions establish that Claim 118 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), Claimants' failure to respond to the United States' and the Klamath Tribes' requests for admissions despite an Order Requiring Discovery shall be deemed an admission of matters that were the subject of the request for admission, unless two narrow exceptions apply. The first exception does not apply because Claimants have not provided any reason for their 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.

Walton³ 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 Claimants are non-Indian successors to an Allottee. Therefore, the claim must be evaluated as a *Walton* water right claim.

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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; 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.)

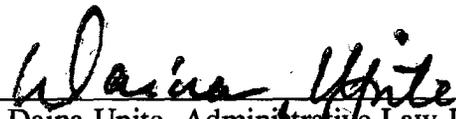
Claimants are deemed to have admitted, among other things, that the claimed place of use has not been irrigated every year since the property left Indian ownership; that Claimants failed to provide sufficient chain of title documentation regarding ownership of the claimed place of use after it left Indian ownership; and that Claimants failed to provide sufficient information to show the amount of land irrigated by the first non-Indian owner within five years after owning the allotments in issue. Therefore, Claimants cannot establish each element of a Walton water right. Consequently, Claimants in Claim 118 have failed to prove the basic elements of a Walton water right and Claim 118 should be denied.

ORDER

(1) The United States' and the Klamath Tribes' Joint Motion for Ruling on Legal Issues is granted. Claimants' failure to respond to the United States' and the Klamath Tribes' requests 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:

The elements of a water right cognizable under ORS Chapter 539 are not established for Claim 118, and the claim is denied.



Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: March 28, 2005

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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:

Richard D. Bailey
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 March 28, 2005, I mailed a true copy of the following: **ORDER GRANTING MOTION FOR RULING ON LEGAL ISSUES; 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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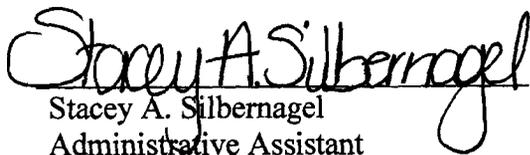
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