

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; Klamath Hills District Improvement
Co.; Malin Irrigation District; Midland District
Improvement Company; 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
Co.; Winema Hunting Lodge, Inc.; Reames Golf
and Country Club; Van Brimmer Ditch Co.;
Plevna District Improvement Company; and
Collins Products, LLC;~~
Contestant(s)

AMENDED PROPOSED ORDER

Case No. 133

Claim(s): 200

Contest(s): 31, 3411¹, 3842, and 4184²

vs.

Kathleen D. Walt; Jennifer J. Walt;
Claimants/Contestants.

This AMENDED PROPOSED ORDER is issued pursuant to OAR 137-003-0655, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130.

¹ Don Vincent voluntarily withdrew from Contest 3411. See NOTICE OF WITHDRAWAL OF CLAIMANTS dated November 28, 2000. Berlva Pritchard voluntarily withdrew from Contest 3411. See NOTICE OF WITHDRAWAL OF CLAIMANTS dated June 24, 2002. The remaining entities comprising Klamath Project Water Users voluntarily withdrew Contest 3411. See NOTICE OF WITHDRAWAL OF CONTEST 3411 dated April 1, 2004.

² The Klamath Tribes voluntarily withdrew Contest 4184 on February 13, 2003. See KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST.

I. INCORPORATION OF PROPOSED ORDER

The PROPOSED ORDER issued by Administrative Law Judge Michael A. Francis, dated April 5, 2005, is incorporated as if set forth fully herein, except as modified below.

II. MODIFICATIONS TO "HISTORY OF THE CASE"

Paragraph 2 of the "HISTORY OF THE CASE" section, at page 1, is modified as follows (additions are shown in underline, deletions are shown in strikethrough):

On January 30, 1991, Harold R. Walt (predecessor-in-interest to claimant Jennifer J. Walt) and Kathleen D. Walt filed claim 200 based upon a right to use of water commenced prior to February 24, 1909. The Claim is for a total of 1.3 cubic feet per second (cfs) from two points of diversion located on Keene Creek, Jenny Creek, and unnamed tributaries, which are tributary to Jenny Creek, for irrigation of 104 acres and stock and domestic use. Subsequently, on July 12, 1999, Claimants submitted a report and water rights map prepared by Certified Water Rights Examiner (CWRE) Mark E. Boyden (OWRD Exhibit 1 at 66-67). The report and map indicate the only source of water for this right is Keene Creek. (Id.) In addition, the acreage shown on the map totals 56.3 acres which includes .5 acre for domestic irrigation (OWRD Exhibit 1 at 67). The map and report represent Claimants' most detailed understanding of the claim area, source, and point of diversion. As a result, Claimants' claim will be limited to 56.3 acres, including .5 acres for domestic irrigation, with the source and points of diversion as described in the report and the map. The claimed period of use for all claimed uses is April 1 through October 31 for irrigation, with a claimed priority date of 1902.

These changes to the "History of the Case" are made to reflect the record in the case. With respect to the season of use, the Department relies on the statement made by Claimants in their Statement and Proof of Claim. In response to Question 10, "When does the irrigation season begin and end, and if water is used for other purposes, during what months is it used?" Claimants stated: "April 1 – October 31." Because Claimants did not specify a separate season for domestic or stock use, the season for each is limited to April 1 – October 31.

III. MODIFICATIONS TO SUBSECTION III OF THE "On the Merits" SECTION

A sentence is added after the final sentence of Paragraph 10 of Subsection 3, at page 11, as follows:

In addition, Claimants' claim is limited to 56.3 acres, including .5 acres for domestic irrigation based on the map and report at OWRD Ex. 1, pages 66-67.

This modification is made to be consistent with the modification to the "HISTORY OF THE CASE" section described above.

IV. MODIFICATIONS TO THE "Elements of the Claim" SUBSECTION OF THE "OPINION" SECTION

The final sentence of Paragraph 3 of the "Elements of the Claim" section, at page 15, is modified as follows:

As shown below, however, the evidence also establishes that it is more likely than not that the priority date is in fact 1902 and that the total acreage developed within a reasonable time pursuant to a comprehensive plan of development is 58 acres, the upper bound stipulated to by the parties 56.3 acres, as limited by Claimants' claim, as shown in the map and report at OWRD Ex. 1, pages 66-67.

This modification is made to be consistent with the modification to the "HISTORY OF THE CASE" section described above. In addition, a new paragraph is added at the end of Paragraph 3, as follows:

The Claimant claimed the season of use as April 1 to October 31 (OWRD Exhibit 1 at 22). The July 12, 1999 Report submitted the CWRE Boyden indicated a year 'round use for livestock (OWRD Exhibit 1 at 66). The Claimant is limited to the season of use as originally claimed. To allow otherwise would constitute an enlargement of the original claim amounting to a new claim, in contravention of ORS 539.210. The season of use for all the claimed uses is April 1 to October 31.

This modification is made to reflect the prohibition in ORS 539.210 of "new claims" after the deadline for filing claims in the Adjudication. The Department has interpreted ORS 539.210 to mean that, in some circumstances, an amendment of a claim after the claim filing deadline is significant enough that it in effect constitutes a new claim. The Department may, in its discretion, determine that amendments that increase the material terms of a claim, including the place of use, season, rate, duty, and priority date, constitute new claims under the circumstances. Here, the amendment to livestock season constitutes a substantial increase in the length of season. In addition, Claimants have provided no evidence demonstrating why the year-round season of use for livestock was not reasonably ascertainable at the time of the January 31, 1991,

claim filing deadline. As a result, the season of use for livestock is limited to April 1 – October 31.

V. MODIFICATIONS TO THE “ORDER” SECTION

This following replaces the Order section listed on page 17 of the PROPOSED ORDER. The changes made below reflect the modifications described above, as well as changes in formatting consistent with the Department’s practices. For example, the “ORDER” did not break out separate rates for irrigation, domestic, and livestock use. The rates identified below are consistent with the Department’s standard, as set forth in Appendix A of the Preliminary Evaluation. In addition, no duty for irrigation was specified in the “ORDER.” The 3.5 acre-feet/acre/year specified below is based on the Department’s standard, as set forth in Appendix A of the Preliminary Evaluation. The points of diversion and place of use are specified in greater detail, based on the map and report at OWRD Ex. 1, pages 66-67. The Adjudicator should confirm a water right for Claim 133 as follows:

CLAIMANT: KATHLEEN D. WALT
JENNIFER J. WALT
650 CALIFORNIA ST., 20TH FLOOR
SAN FRANCISCO, CA 94108-2693

SOURCE OF WATER: KEENE CREEK, tributary to JENNY CREEK

PURPOSE or USE:
DOMESTIC INCLUDING IRRIGATION OF 0.5 ACRES (DOMESTIC EXPANDED);
IRRIGATION OF 55.8 ACRES; AND LIVESTOCK

RATE OF USE:
1.300 CUBIC FEET PER SECOND (CFS), BEING 1.28 CFS FOR IRRIGATION, 0.01 FOR
DOMESTIC EXPANDED, AND 0.01 FOR LIVESTOCK

DUTY: 3.5 ACRE FEET PER YEAR FOR IRRIGATION

PERIOD OF ALLOWED USE:

Use	Period
Domestic Expanded	April 1 - October 31
Irrigation	April 1 - October 31
Livestock	April 1 - October 31

DATE OF PRIORITY: DECEMBER 31, 1902

THE POINTS OF DIVERSIONS AND MAXIMUM RATES:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates	Authorized Use	Maximum Rate (cfs)
Northerly Pipeline	40 S	4 E	WM	17	NW NW	1640 FEET NORTH AND 4490 FEET WEST FROM E1/4 CORNER, SECTION 17	Irrigation	0.81
							Domestic Expanded	0.01
							Livestock	0.008
Southerly Pipeline	40 S	4 E	WM	17	SE NW	445 FEET NORTH AND 2645 FEET WEST FROM E1/4 CORNER, SECTION 17	Irrigation	0.34
							Livestock	0.002
Water Cannon	40 S	4 E	WM	17	SW NE	NONE GIVEN	Irrigation	0.13
Water Cannon	40 S	4 E	WM	17	SE NW	NONE GIVEN		

THE PLACE OF USE:

DOMESTIC EXPANDED						
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD
40 S	4 E	WM	17	SE NE	0.50	Northerly Pipeline

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	Authorized POD
70 S	4 E	WM	17	SW NE	14.30	Northerly Pipeline
70 S	4 E	WM	17	SW NE	5.20	Southerly Pipeline
70 S	4 E	WM	17	SW NE	3.80	Water Cannon
70 S	4 E	WM	17	SE NE	10.00	Northerly Pipeline
70 S	4 E	WM	17	SE NE	9.70	Southerly Pipeline
70 S	4 E	WM	17	SE NW	10.80	Northerly Pipeline
70 S	4 E	WM	17	SE NW	2.00	Water Cannon

LIVESTOCK						
Twp	Rng	Mer	Sec	Q-Q	Authorized POD	
40 S	4 E	WM	17	SW NE	Northerly Pipeline and Southerly Pipeline	
40 S	4 E	WM	17	SE NE	Northerly Pipeline and Southerly Pipeline	
40 S	4 E	WM	17	NW NW	Northerly Pipeline	

DATED this 15th day of May, 2007.



 Dwight French, Adjudicator
 Klamath Basin General Stream Adjudication

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Amended Proposed 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 contained within this AMENDED PROPOSED ORDER. 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 Amended Proposed 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 Amended Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

**Dwight French, Adjudicator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Amended Proposed Order was served on May 15th, 2007, by first-class mail, postage prepaid to the following:

Stephen R. Palmer
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Via State of Oregon Shuttle Mail

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Teri Hranac
Adjudication Specialist