

**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

Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hill District Improvement Co.; 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.; Reames Golf and Country Club; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC;
Contestants

**PROPOSED ORDER BY
DEFAULT**

Case No. 64

Claim: 246

Contests: 1727¹ and 3530

vs.

Errol Hatcher;
Claimant/Contestant.

HISTORY OF THE CASE

On January 31, 1991, the Klamath Allottee Water User's Association (KAWUA), filed Claim No. 246 on behalf of Errol Hatcher, asserting a water right for 210.2 acre-feet of water from points of diversion on the Sprague River, for irrigation of 18.4 acres and 43.7 acres of practicably irrigable acreage located in NW ¼ SW ¼, Section 24, Township 34 South, Range 8 East, W.M. based on an initiation date of 1864. Claim No. 246 is for water based on "practicably irrigable acreage," as Indian successors to a Klamath Indian Allottee. On October

¹ On November 28, 2000, Contestant Don Vincent informed the Adjudicator that he had sold his interest in property giving rise to his claims and this contest and was no longer a participant in this contested case. On June 24, 2002, Contestant Berlva Pritchard informed the Office of Administrative Hearings that she had sold her interest in property giving rise to her claims and contests and was no longer a participant in this contested case.

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4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Adjudication for Oregon Water Resource Department (OWRD), issued a Preliminary Evaluation denying the claim finding the elements for a practicably irrigable acreage right had not been established. Claimant, through KAWUA filed Contest No. 3530 on May 1, 2000. On May 4, 2000, the Klamath Project Water Users (KPWU) filed Contest No. 1727.

The case was then referred to the Hearing Officer Panel (now the Office of Administrative Hearings)(OAH) for hearing.

Pursuant to a letter issued by the Office of Administrative Hearings on June 20, 2003, Prehearing Statements were submitted by OWRD on September 9, 2003 and KAWUA on September 2, 2003. KPWU did not file a Prehearing Statement. On September 2, 2003, a Prehearing Conference was held, to define the issues presented by the case, and establish a schedule of further proceedings.

No Direct or Rebuttal Testimony was filed by KAWUA or KPWU. The OWRD filed written testimony on January 6, 2004.

On May 10, 2005 KAWUA filed a Notice of Withdrawal of Counsel stating that the property had been alienated, the ownership of the land had changed, and the claimant was no longer the owner of the land. On August 1, 2005, the OAH issued a Notice of Hearing. This Notice was served on KAWUA, OWRD and David Rivard, who was believed to be claimant's successor in the land.

A hearing for cross-examination of witnesses was convened on September 12, 2005, Administrative Law Judge Donna Moursund Brann presiding. Present at the hearing were Jesse D. Ratcliffe on behalf of OWRD and Andrew M. Hitchings on behalf of KPWU. Neither KAWUA on behalf of the claimant, or the possible successor in interest, David Rivard, appeared at the hearing despite receiving notice of the hearing. At hearing, KPWU orally moved for a Motion for Default against the claimant based on the claimant's failure to present evidence to support the claim.

The record closed on September 12, 2005. Claimant has filed no evidence and failed to appear at hearing. Claimant is in default.

ISSUES

Whether claimant established a claim for an Allottee water right with a priority date of October 14, 1864.

EVIDENTIARY RULINGS

Claimant filed no evidence. OWRD moved to admit their document marked as Exhibit 1. KPWU objected to the admission of Exhibit 1 on the grounds that no rebuttal evidence can be submitted in the absence of direct testimony. The objection was sustained but OWRD Exhibit 1 was included in the record as Record A. The evidentiary record closed on September 12, 2005.

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FINDINGS OF FACT

(1) Claimant Errol Hatcher filed a Statement and Proof of Claim in the Klamath Basin Adjudication on January 31, 1991, claiming a right for 210.2 acre-feet of water from points of diversion located on Sprague River, for irrigation of 18.4 acres and 43.7 acres of practicably irrigable acreage (PIA) for irrigation, stock watering and domestic use. There are 18.4 acres of irrigated lands in use. There are 43.7 acres without current development with a projected future use for producing crops. The claimed period of use is March 1 through October 16. (OWRD Record A at 17.)

(2) The area of claimed use is 18.4 acres located in NW ¼ SW ¼, Section 24, Township 34 South, Range 8 East, W.M. with a priority date of 1864 (OWRD Record A at 156-158.)

(3) Claimant Errol Hatcher is an enrolled Klamath Indian. (OWRD Record A at 28.) On March 21, 1955, the United States issued a patent to Luetta Hicks Hatcher for property described as the SW ¼ of Section 24, Township 34 South, Range 8 East of the Willamette Meridian, Klamath County, Oregon, lying southwesterly of the Sprague River. (OWRD Record A at 29.) The property was deeded from Luetta Hicks Hatcher to Lee Hatcher, recorded April 20, 1955. By deed recorded April 13, 1981 the property was transferred from Luetta Hicks Hatcher and Lee Hatcher to Errol D. Hatcher and Lee A. Hatcher. By deed recorded March 14, 1990 Lee Hatcher deeded his interest to Errol D. Hatcher. (OWRD Record A at 28.) The property was deeded from Errol Hatcher to an unidentified individual believed to be David Rivard, after claimant filed his claim, but prior to the hearing on September 12, 2005. (Corrected Notice of Withdrawal of Counsel, May 10, 2005.) No evidence was presented to support that claimant's successor in interest, David Rivard, is an enrolled Klamath Indian.

(4) On October 4, 1999, Richard D. Bailey, Adjudicator for the Klamath Basin General Stream Adjudication, denied Claim 64 because "[t]he elements for a practicably irrigable acreage right are not established." (OWRD Record A at 158.) The Adjudicator found, among other things, that the land is part of the former Klamath Indian Reservation, that claimant was a Klamath Indian, that the property has been in continuous Indian ownership and that the land is arable. The Adjudicator also found that the record does not establish that "it is both technically possible and economically feasible to develop an irrigation system to serve this land." (OWRD Record A at 158.) The Adjudicator's findings occurred prior to the claimant's alienation of the land and did not take into consideration factors relating to the new property owner. (Corrected Notice of Withdrawal of Counsel, May 10, 2005.)

CONCLUSIONS OF LAW

Because claimant failed to prove all elements of an Allottee claim, the claim should be denied.

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OPINION

In the Klamath Basin General Stream Adjudication, a water right claimed by a tribal member who owns land in the former Klamath Indian Reservation is referred to as an “Allottee” claim. A Klamath Indian may make a claim for an amount of water sufficient to irrigate the allotment’s share of the Tribe’s practicably irrigable acreage (PIA). The following elements must be proved to establish a valid Allottee claim:

1. The claim must be for water use (current or future) on former Klamath Indian Reservation land;
2. The claimant must be a Klamath Indian;
3. The land must be arable;
4. Irrigation system development must be both technically possible and economically feasible; and
5. The right must not have been lost during intervening non-Indian ownership.

Arizona v. California, 373 US 546 (1963); *United States v. Anderson*, 736 F2d 1358 (9th Cir. 1984); *In re Rights to Use Water in Big Horn River*, 753 P2d 76 (Wyo. 1988).

Claimant has the burden of establishing the claim by a preponderance of the evidence. ORS 539.110; 183.450(2); *see Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

In this case, claimant has not met this burden. Claimant had ample opportunity to submit evidence and did not do so. In the absence of substantial evidence, the claim cannot be sustained.

The preponderance of evidence establishes that the land was in the former Klamath Indian Reservation, that claimant Errol Hatcher is a Klamath Indian, and that the land had been in continuous Indian ownership at the time the claim was filed. At an unknown date, after claimant filed his claim, claimant sold his interest in the property. The alleged purchaser, known as the successor in interest, is David Rivard. No evidence in the record exists as to whether the successor in interest is a Klamath Indian. Therefore, there is no evidence to support the claim that the land has been in continuous Indian ownership. There also is no evidence that development of an irrigation system for the acres claimed is both technically possible and economically feasible. There is simply no evidence that establishes whether and how much of the land claimed is technically possible and economically feasible to irrigate. Therefore, because claimant did not prove all elements of the claim, the claim should be denied.

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PROPOSED ORDER

It is proposed that Claim 246 be denied in its entirety.



Donna Moursund Brann, Administrative Law Judge
Office of Administrative Hearings

Dated: November 10, 2005

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
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 November 10, 2005, I mailed a true copy of the following:
PROPOSED ORDER BY DEFAULT, by depositing the same in the U.S. Post Office,
Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Dwight W. French
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Dwight.W.French@wrд.state.or.us
Teri.Hranac@wrд.state.or.us

William M. Ganong
Attorney at Law
514 Walnut Street
Klamath Falls, OR 97601
Phone: 541-882-7228
Fax: 541-883-1923
wganong@aol.com

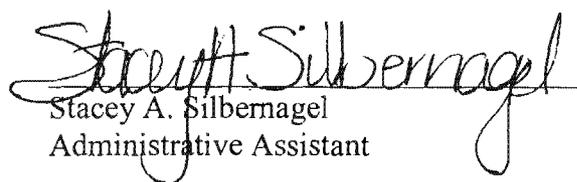
Christopher B. Leahy
Fredereick, Pelcyger & Hester, LLC
1075 East S. Boulder Road, Suite 305
Louisville, CO 80027
Phone: (303) 673-9600
Fax: (303) 673-9155
Cleahy@fphw.com

Jesse D. Ratcliffe / Stephen E.A. Sanders
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-378-4500
Fax: 503-378-3802
Jesse.d.ratcliffe@doj.state.or.us
Steve.sanders@doj.state.or.us

Paul S. Simmons/Andrew M. Hitchings
Somach, Simmons & Dunn
Hall of Justice Building
813 Sixth Street, Third Floor
Sacramento, CA 95814-2403
Phone: 916-446-7979
Fax: 916-446-8199
psimmons@lawssd.com
ahitchings@lawssd.com

Courtesy Copy:
David Rivard
PO Box 829
Chiloquin, OR 97624

Errol Hatcher
PO Box 564
Chiloquin, OR 97624


Stacey A. Silbernagel
Administrative Assistant

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