

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; 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

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

Case No. 245

Claim: 263

Contests: 3508<sup>1</sup>, 3812, and 4206<sup>2</sup>

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WATER RESOURCES DEPT  
SALEM, OREGON

vs.

Mark Allen Tunno,  
Claimant.

On March 18, 2005, the United States filed a Motion for Ruling on Legal Issues, seeking determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served by the United States on Claimant, Mark Allen Tunno, should be deemed admitted because Claimant failed to provide responses despite the order requiring discovery; and (2) Claimant's deemed admissions establish that the elements of a *Walton*<sup>3</sup> water right are not met and,

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<sup>1</sup> Don Vincent voluntarily withdrew from Contest 3508 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contest 3508 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3508 on January 15, 2004.

<sup>2</sup> The Klamath Tribes voluntarily withdrew their Contest 4206, without prejudice, on August 3, 2004.

<sup>3</sup> 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 (9<sup>th</sup> Cir

therefore, the claim should be denied.<sup>4</sup> No briefs have been filed in response to the United States' motion.

### ISSUES

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

(2) Whether Claimant's deemed admissions establish that Claim 263 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 March 18, 1991, Claim 263 was filed on behalf of Allen K. Nelson, a Klamath Indian. (OWRD Ex. 1 at 59, 177.) On October 30, 1997, Claimant Nelson conveyed the property appurtenant to Claim 263 to Mark Allen Tunno, a non-Indian successor. (*Id.* at 72.)

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1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

<sup>4</sup> Alternatively, the U.S. seeks a ruling that Claim 263 should be denied because Claimant filed the claim after the February 1, 1991 filing deadline. Because this case can be decided upon the failure to establish the *Walton* elements, I will not address the timeliness argument.

*Mark Allen Tunno* (245)  
Order Granting Motion for Ruling on Legal Issues; Proposed Order Denying Claim  
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Claimant Tunno continued to pursue Claim 263 as a *Walton* claimant. The claim is for an amount of water sufficient to irrigate the allotment's share of the Tribe's "practicably irrigable acreage" (PIA). The claim is for 164 acre-feet (af) of water, diverted from Fort Creek, a tributary to the Wood River. (*Id.* at 177.) The claim is for irrigation of approximately 52.9 acres of land. (*Id.*) The claimed period of use is March 1 through October 16, and the claimed priority date is October 14, 1864. (*Id.*)

(2) On October 4, 1999, the Adjudicator for the OWRD, Richard D. Bailey, issued a Preliminary Evaluation (P.E.), denying this claim because it was received after the deadline and because it is for a source which was previously adjudicated. (OWRD Ex. 1 at 178.)

(3) On May 8, 2000, the Klamath Irrigation District, et al. filed Contest 3508 to this claim. (OWRD Ex. 1 at 118.) The United States filed Contest 3812 to the claim (*Id.* at 159.) The Klamath Tribes filed Contest 4206 to the claim. (*Id.* at 163.) The Klamath Tribes subsequently withdrew their Contest. Claimant did not file a contest to the P.E.

(4) On November 15, 2004, Administrative Law Judge (ALJ) Daina Upite held a pre-hearing conference, pursuant to written notice sent to participants. (Order Requiring Prehearing Statements, Case 245, Claim 263, dated July 30, 2004.) Claimant did not participate in the pre-hearing conference. (*See* Prehearing Order, Case 245, Claim 263, dated November 15, 2004.)

(5) On November 15, 2004, ALJ Upite issued a Scheduling Order, based upon the discovery schedule that was agreed upon during the pre-hearing conference. (*Id.*) A copy of the schedule was mailed to Claimant.

(6) On December 3, 2004, consistent with the Scheduling Order, counsel for KPWU served discovery requests on Claimant, including requests for admissions. (KPWU First Set of Interrogatories, Requests for Admission, and Requests for Production of Documents to Claimant Mark Allen Tunno, Case 245, Claim 263, dated December 3, 2004.) On December 3, 2004, counsel for the United States also served discovery requests on Claimant. (United States' Request for Admission, Interrogatories, Requests for Production of Documents, and Request for Entry Upon Land, Case 245, Claim 263, dated December 3, 2004.) Claimant did not respond to the discovery requests by the deadline of January 5, 2005, or at any time thereafter. (*See* United States' Motion for an Order Requiring Discovery Responses from Claimant Mark Allen Tunno, Case 245, Claim 263, dated January 27, 2005.)

(7) On January 26, 2005, KPWU filed a Motion for an Order Requiring Discovery, based on Claimant's failure to respond to discovery requests. (KPWU Motion for an Order Requiring Discovery, Case 245, Claim 263, dated January 26, 2005.) On January 27, 2005, the United States filed a similar motion. (United States' Motion for an Order Requiring Discovery Responses from Claimant Mark Allen Tunno, Case 245, Claim 263, dated January 27, 2005.) Claimant did not file a response to the motion by the deadline of February 10, 2005. (*See* Discovery Order, Case 245, Claim 263, dated February 17, 2005.)

(8) On February 14, 2005, ALJ Upite held a second prehearing conference. (See Letter to Participants, Case 245, Claim 263, dated February 22, 2005.) Claimant did not attend the second prehearing conference. (*Id.*)

(9) On February 17, 2005, ALJ Upite issued a Discovery Order which required Claimant to respond to the United States' discovery requests by February 28, 2005. (Discovery Order, Case 245, Claim 263, dated February 17, 2005.) As of March 18, 2005, Claimant has not responded to the discovery requests, or filed any objections. (See United States' Motion for Ruling on Legal Issues, Case 245, Claim 263, dated March 18, 2005.)

(10) The United States' discovery request included the following warning: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION TO ANY REQUESTS FOR ADMISSION WITHIN THE TIME ALLOWED MAY RESULT IN ADMISSION OF THE REQUEST. (OAR 137-003-0570(12))." (United States' Request for Admission, Interrogatories, Requests for Production of Documents, and Request for Entry Upon Land, p.3, ¶J, Case 245, Claim 263, dated December 3, 2004.)

(11) Based on his deemed admissions, Claimant has admitted that (1) Claim 263 is precluded because it was filed after the deadline; (2) Claimant has not established the elements of a *Walton* water right for Claim 263; (3) Claimant has not provided sufficient information regarding the chain of title; (4) Claimant has not provided sufficient information regarding development of irrigation works; and (5) Claimant has not proven that the land has been under continuous irrigation since the first non- Indian successor. (United States' Request for Admission, Interrogatories, Requests for Production of Documents, and Request for Entry Upon Land, Request Nos.1-15, Case 245, Claim 263, dated December 3, 2004.)

### 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 263 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

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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.)

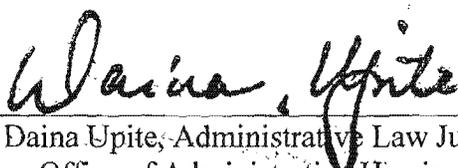
Claimant is deemed to have admitted, among other things, that he has not established the elements of a *Walton* water right. Therefore, because Claimant in Claim 263 has failed to prove the basic elements of a *Walton* water right, Claim 263 should be denied.

## ORDER

(1) The United States' Motion for Ruling on Legal Issues is granted. Claimant's failure to respond to the 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:

The elements of a water right cognizable under ORS Chapter 539 are not established for Claim 263, and the claim is denied.



Daina Upite, Administrative Law Judge  
Office of Administrative Hearings

Date: May 19, 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:

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

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 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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