

RECEIVED

JUL 24 2008

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

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,	AMENDED PROPOSED ORDER ¹
Contestants	Case No. 81
	Claim: 282
	Contests: 1754 and 3561 ²

vs.

Joseph McKee; Daryl L. and Jacqueline S. Ortis;
Edward and RoseAnn Cleveland;
Claimants/Contestants.

HISTORY OF THE CASE

On November 4, 1991, Florence McKee, an enrolled member of the Klamath Tribe, filed Claim 282, based on water use on land that was formerly part of the Klamath Indian Reservation. This claim is for 554.0 acre-feet of water per year for practicably irrigable acreage of 178.7 acres. The claim is for diversion from two points on the Sprague River, a tributary to the Klamath River.

¹ This Amended Proposed Order was originally issued on July 21, 2008. However, necessary text regarding the appeal rights of the parties was omitted from that order. This order is now issued to correct that error. No other changes have been made to this order.

² Don Vincent voluntarily withdrew from Contest 3561 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3561 on June 24, 2002.

Some time prior to October 26, 1999, Florence McKee died, and her interest was transferred to Joseph McKee, also a Klamath Indian. After acquiring the property, Joseph McKee transferred all but 40 acres. As of October 20, 2004, Edward and RoseAnn Cleveland, Joseph McKee, and Daryl L and Jacqueline Ortis owned portions of the property.

On October 4, 1999, the Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation (P.E.) for this claim, preliminarily denying the Allottee claim, as having been untimely filed.

Claimants filed Contest 1754 on May 3, 2000. Klamath Irrigation District, *et al.* (KPWU) filed contest 3561 on May 8, 2000.

OWRD referred the matter to the Office of Administrative Hearings in 2004. On December 2, 2004, a Scheduling Order was issued, requiring the parties to file written Direct and Rebuttal Testimony and a list of witnesses for cross-examination, and setting the hearing in the matter for June 6, 2006. No written testimony or witness lists were filed. Consequently, on May 31, 2006, Administrative Law Judge (ALJ) Donna Brann issued a letter advising the participants that the hearing would be conducted by telephone, and that no testimony would be taken on the merits on June 6, 2006.

A hearing was convened by telephone on June 6, 2006 before ALJ Donna Brann. Claimant Joseph McKee appeared without counsel. No other property owner appeared. Klamath Project Water Users appeared by telephone through attorney Andrew Hitchings. Assistant Attorney General Walter Perry appeared for the OWRD. At the time of the hearing, ALJ Brann established a schedule for further briefing in this case, requiring all memoranda to be filed and the record closed before the end of August 2006. No legal memoranda were filed.

Sometime after conclusion of the hearing and prior to issuance an order, ALJ Brann became unavailable. ALJ Maurice L. Russell II reviewed the entire record, including the digital recording of the hearing in this case, and issued a Proposed Order on February 22, 2007.

After issuance of the Proposed Order, OWRD determined that Edward and RoseAnn Cleveland (Cleveland) were not properly served with the Notice of Hearing. A new hearing was scheduled for June 20, 2008. The sole purpose of the hearing was to permit Cleveland an opportunity to object to evidence offered into the record. All parties were properly notified via postal mail. The hearing was convened by telephone before ALJ Joe L. Allen.³ I reviewed the entire record, including the digital recording of the June 6, 2006 hearing, and Judge Russell's prior order in preparation for the new hearing. On June 20, 2008, OWRD, appearing through legal counsel, was the only party to attend the hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

No party other than OWRD submitted evidence in this matter. As such, the initial hearing on this matter was scheduled for the limited purpose of allowing objections to made to OWRD's evidence. Contestant Cleveland failed to appear at that hearing. After close of the record it was discovered that notice to Cleveland was deficient. A new hearing was scheduled to allow Cleveland to object to OWRD's evidence. Cleveland again failed to appear at the hearing.

³ Judge Russell passed away on April 28, 2008.

RECEIVED

JUL 24 2008

WATER RESOURCES DEPT
SALEM, OREGON

KBA_ACFOD_03527

After careful review of the record in this proceeding, I find myself in agreement with the conclusions and reasoning expressed by ALJ Russell in his Proposed Order dated February 22, 2007. Because no party, other than OWRD, appeared at the hearing on June 20, 2008, I find no reason to diverge from the prior order issued by ALJ Russell. Accordingly, I hereby adopt the Proposed Order of February 22, 2007 and incorporate same by reference into this Amended Proposed Order.

Based upon the foregoing, I propose that OWRD issue the following:

ORDER

Claim 282 is denied in its entirety in accordance with the Proposed Order dated February 22, 2007.



Joe L. Allen, Administrative Law Judge
Office of Administrative Hearings

Dated: July 22, 2008

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

RECEIVED

JUL 24 2008

WATER RESOURCES DEPT
SALEM, OREGON

KBA_ACFOD_03528

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2008, I mailed a true copy of the following: **AMENDED PROPOSED ORDER**, 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 / Teri K. Hranac
Oregon Water Resources Dept.
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Phone: 503-986-0826
Fax: 503-986-0901
dwight.w.french@wrđ.state.or.us
teri.k.hranac@wrđ.state.or.us

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-947-4409
Fax: 503-378-3802
jesse.d.ratcliffe@state.or.us

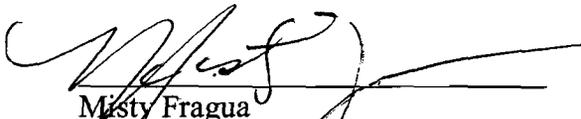
Paul S. Simmons/Andrew M. Hitchings
Somach, Simmons & Dunn
Hall of Justice Building
813 Sixth Street, Third Floor
Sacramento, CA 95814-2403
Phone: 916-446-7979
Fax: 916-446-8199
psimmons@somachlaw.com
ahitchings@somachlaw.com

Edward & Rose Ann Cleveland
19560 Sprague River Road
Sprague River, OR 97639

Daryl L. & Jacqueline Ortis
PO Box 701
Chiloquin, OR 97624

Joseph McKee
PO Box 116
Beatty, OR 97621

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


Misty Fragua
Administrative Assistant

RECEIVED
JUL 24 2008
WATER RESOURCES DEPT
SALEM, OREGON