

OCT 19 2004

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON

WATER RESOURCES DEPT
SALEM, 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,

**ORDER GRANTING MOTION
FOR LEGAL RULING AND
PROPOSED ORDER DENYING
CLAIM**

Case No. 249

Claim No. 679

Contests 3564,¹ 3776, and 4238²

Contestants,

v.

John Mills; Lillian Mills,
Claimants

On August 9, 2004, the United States of America (United States) filed a Motion for Ruling on Legal Issues for determinations that (1) pursuant to OAR 137-003-0570(12), the requests for admissions served by the United States and the Klamath Project Water Users³ (KPWU) upon John Mills and Lillian Mills (Claimants) should be deemed admitted based on Claimants' failure to provide responses despite the order requiring discovery; and (2) that Claimants' deemed admissions establish that the elements of a *Walton*⁴ water right are not met and, therefore, the claim should be denied.

¹ Don Vincent voluntarily withdrew from Contest 3564 on November 28, 2000. Berlva Pritchard voluntarily withdrew from Contest 3564 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew, without prejudice, from Contest 3564 on January 16, 2004.

² The Klamath Tribes voluntarily withdrew their Contest No. 4238 on July 26, 2004.

³ All remaining Contestants, except the United States, are collectively referred to as the Klamath Project Water Users.

⁴ 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*);

KPWU concurred in the motion. Claimants did not file a response to the United States' motion.

LEGAL STANDARD: Motions for rulings on legal issues (Summary Judgment) are governed by Oregon Administrative Rule (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) Oscar T. Anderson filed claim 679 on January 31, 1991 as a Klamath Indian Allottee. (OWRD Ex. 1 at 29-32.) The property to which this claim is appurtenant was subsequently purchased by John and Lillian Mills (Claimants) who, on information and belief, are not Klamath Indians. (*Id.* at 41.) Claimants now have a claim for water as non-Indian successors to a Klamath Indian Allottee.

(2) The claim seeks 129.8 acre feet of water for irrigation of 19.4 acres of land, livestock use for 40 head (existing uses), and 14.8 acres of "practicably irrigable acreage." The claimed season of use is March 1 through October 16 for irrigation and year round for livestock. The claimed priority date is October 14, 1864. (*Id.* at 46.)

(3) On October 4, 1999, the Adjudicator for the Klamath Basin general stream adjudication, Richard D. Bailey, issued a Preliminary Evaluation recommending approval

Colville Confederated Tribes v. Walton, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton I*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

John Mills and Lillian Mills (249)

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of the current irrigation claim for irrigation of 19.4 acres at a rate of 0.38 cfs, less than the amount claimed, and 480 gallons per day for livestock use. The Preliminary Evaluation recommended the practicably irrigable acreage be denied. (*Id.* at 47.)

(4) In May 2000, KPWU filed Contest 3654, the United States filed Contest 3776, and the Klamath Tribes filed Contest 4238 to the claim. (*Id.* at 73, 123, 127.) The Klamath Tribes subsequently withdrew their contest.

(5) Pursuant to written notice sent to all participants, including Claimants, a pre-hearing conference was held on January 12, 2004. Claimants did not file a prehearing statement nor did they appear at the prehearing conference, both of which were required by the Prehearing Order. A discovery schedule, which was memorialized by a Scheduling Order, was arrived at and agreed to by the participants in the prehearing conference.

(6) On or about May 6, 2004, pursuant to the January 13, 2004 Scheduling Order, the United States and KPWU served discovery requests on Claimants, which included requests for admissions. Claimants failed to respond to the discovery requests by the deadline of June 21, 2004, or at any time thereafter.

(7) On June 28, 2004, the United States, with the support of the other Contestants, filed a Motion for an Order Requiring Discovery based upon the failure of Claimants to respond to discovery requests propounded by each of the Contestants. On July 8, 2004, an Order Requiring Discovery and Modifying Scheduling Order was issued by Administrative Law Judge Daina Upite, which required Claimants to respond to the discovery requests previously served by the United States on or before July 19, 2004. As of August 9, 2004, Claimants had not responded to any discovery requests. (Affidavit of David W. Harder, August 9, 2004.)

(8) The discovery requests of both the United States and KPWU included a warning that failure to respond to any request for admission within the time allowed will result in admission of the request. (United States' Motion for Ruling on Legal Issues, Exhibit A at 3 and Exhibit B at 2.)

(9) Through Claimant's deemed admissions, they have admitted, among other things, that: (1) they have not provided sufficient title information regarding Indian ownership of the claimed place of use and/or transfer of the property to non-Indian ownership (*Id.*, Ex. A at 5-6, RFA Nos. 1-3.); (2) the claimed place of use was not irrigated by the last Indian owner (*Id.*, Ex. A at 6, RFA No. 4.); (3) the claimed place of use was not developed for irrigation by the first non-Indian owner within a reasonable period of time (*Id.*, RFA No. 5.); and (4) the claimed place of use has not been continually irrigated since it was first owned by a non-Indian (*Id.*, RFA No.6.).

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CONCLUSIONS OF LAW

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

(2) Claimants' deemed admissions establish that Claim 679 fails to meet the basic elements of a *Walton* claim and, therefore, should be denied.

OPINION

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), 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 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.

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.)

Claimants are deemed to have admitted, among other things, that they have not provided sufficient title information regarding Indian ownership of the claimed place of use and/or transfer of the property to non-Indian, that the claimed place of use was not irrigated by the last Indian owner, that the claimed place of use was not developed for irrigation by the first non-Indian owner within a reasonable period of time, and that the claimed place of use has not been continually irrigated since it was first owned by a non-Indian. Therefore, Claimants in Claim 679 have failed to prove the basic elements of a *Walton* water right.

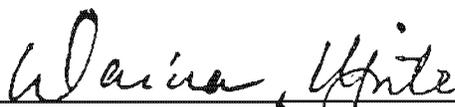
Consequently, the United States is entitled to a ruling in its favor on the legal issue presented, and Claim 679 should be denied.

ORDER

(1) The United States' Motion for Ruling on Legal Issues is granted. Claimants' failure to respond to United States' request for admissions is deemed an admission of the matters that are the subject of the request for admission.

(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 679, and the claim is denied.



Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: October 18, 2004

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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

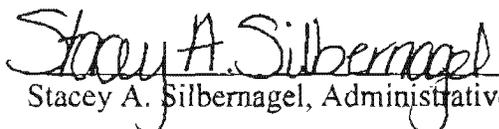
I hereby certify that on October 18, 2004, I mailed a true copy of the following: **ORDER GRANTING MOTION FOR LEGAL RULING AND PROPOSED ORDER DENYING CLAIM**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Richard D. Bailey
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
richard.d.bailey@wrđ.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

Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624
Phone: 541-783-3081
Fax: 541-783-2698
bullman@cdsnet.net

David W. Harder
United States Department of Justice
Indian Resources Section
Suite 945, North Tower
999 18th Street
Denver, CO 80202
Phone: 303-312-7328
Fax: 303-312-7379
David.Harder@usdoj.gov


Stacey A. Silbernagel, Administrative Assistant

Walter Echo-Hawk/Lorna Babby
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Phone: 303-447-8760
Fax: 303-443-7776
wechohwk@narf.org
babby@narf.org

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

Walter Perry/Justin Wirth
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-378-4409
Fax: 503-378-3802
walter.perry@doj.state.or.us
justin.wirth@doj.state.or.us

John and Lillian Mills
PO Box 212
Beatty, OR 97621

Teri Hranac
Oregon Water Resources Dept.
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Phone: 503-986-0826
Fax: 503-986-0901
Teri.Hranac@wrđ.state.or.us