

**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; 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;

**CORRECTED<sup>1</sup> PROPOSED ORDER**

Case No. 93

Claim No. 694

Contests 1764, and 3574<sup>2</sup>

Contestants,

• v.

Orin Kirk;

Claimant/Contestant.

**HISTORY OF THE CASE**

This Matter came to a hearing on June 21, 2005 at 9:00 a.m. PDT in Salem, Oregon, pursuant to a notice served upon the participants by certified mail on May 18, 2005. Administrative Law Judge (ALJ) Maurice Russell presided. This hearing was to determine the relative water rights regarding Claim 694 in the Klamath Basin General Stream Adjudication.

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<sup>1</sup> This order is corrected to include the issuance date and to correct an error in the Certificate of Service.

<sup>2</sup> Don Vincent voluntarily withdrew from Contest 3574 on November 28, 2000. *See* NOTICE OF WITHDRAWAL OF CLAIMANT. Berlva Pritchard voluntarily withdrew from Contest 3574 on June 24, 2002. *See* NOTICE OF WITHDRAWAL OF CLAIMANT.

Klamath Hills District Improvement company voluntarily withdrew, without prejudice, from Contest 3574 on January 16, 2004. *See* VOLUNTARY WITHDRAWAL OF CONTEST BY KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY.

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Claimant was served notice of the hearing on May 18, 2005, less than 60 days, but more than 30 days before the hearing. Claimant failed to appear. The ALJ waited 15 minutes for claimant, and then opened the record in the case. The Oregon Water Resources Department (OWRD) participated and was represented by Jesse Ratcliffe, Assistant Attorney General. Klamath Project Water Users appeared and was represented by Andrew Hitchings, Attorney at Law.

On January 31, 1991, Vina Kirk, Orin Kirk's predecessor in interest, filed claim 694 for water based on "Practicably Irrigable Acreage" as an Indian successor to a Klamath Indian Allottee. The instant claim was one of several, totaling 240 acres, that were filed by this claimant. The present claim is for 306 acre-feet from one point of diversion located on the Williamson River, for the irrigation of 98.7 acres. The claimed period of use is March 1 through October 16. On October 4, 1999, Richard D. Bailey, Adjudicator of the Klamath Basin General Adjudication for OWRD, issued a Preliminary Evaluation denying the claim. Claimant filed Contest 1735 on May 1, 2000. On May 4, 2000, KPWU filed Contest 3540, raising the following issues:

1. Whether there is sufficient evidence to support the right claimed.
2. Whether the required elements are established for an Allottee water right with a priority date of October 14, 1864.
3. Whether the record establishes the amount of the practicably irrigable acreage that is claimed, or that it would be technically possible or economically feasible to develop an irrigation system to serve such acreage.

#### ISSUE

Whether Claimant has established his claim for an allottee water right with a priority date of October 14, 1864.

#### EVIDENTIARY RULINGS

OWRD's Exhibit 1 was admitted into evidence without objection. The record closed without further evidence being offered.

#### FINDINGS OF FACT

(1) Claimant, Vina Kirk, Claimant's predecessor in interest, filed a Statement and Proof of Claim in the Klamath Basin Adjudication on January 31, 1991, claiming a right to water from the Williamson River for practicably irrigable acreage of 240 acres in Sections 6 and 7 of Township 32 South, Range 8 East. (OWRD Ex. 1 at 26-9.)

(2) On October 4, 1999, Richard D. Bailey, Adjudicator for the Klamath Basin General Stream Adjudication, denied Claim 694 because "[t]he elements for a practicably irrigable acreage right are not established." (OWRD Ex. 1 at 131.) The Adjudicator found that

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the land appurtenant to the claim is part of the former Klamath Indian Reservation; the Claimant is a Klamath Indian; the land is arable; and that the property has not had more than five successive years of non-Indian ownership. The Adjudicator also found that no existing uses were claimed, and that the record does not establish "it is both technically possible and economically feasible to develop an irrigation system to serve this land." (OWRD Ex. 1 at 177.)

(3) On November 1, 1992, Natural Resources Consulting Engineers, Inc., issued a report to establish a reserved surface water right claim for Claim 694. (OWRD Ex. 1 at 3.) This report indicates that the following constitute 98.7 practicably irrigable acres:

7.2	acres	NW1/4	SE1/4
32.4	acres	SW1/4	SE1/4
15.9	acres	NE1/4	SW1/4
11.1	acres	SE1/4	SW1/4

Section 6, Township 32 South, Range 8 East, Willamette Meridian; and,

28.7	acres	NE1/4	NE1/4
3.4	acres	NW1/4	NE1/4

Section 7, Township 32 South, Range 8 East, Willamette Meridian.

(OWRD Ex. 1 at 10.)

This report established that the indicated acreage could be irrigated using sprinklers, at a total cost for production of \$299 per acre per year, and that the resulting crop of alfalfa would generate annually \$450 per acre, resulting in a net benefit of \$151 per acre per year.

(4) Claimant Orin Kirk is enrolled as a Klamath Indian. (OWRD Ex. 1 at 11.) On October 8, 1956, the United States of America, Department of the Interior, acting by and through the Area Director of the Portland Area Office of the Bureau of Indian Affairs issued a deed to Friedman Kirk, which was recorded on June 7, 1985, for lands described as W1/2SE1/4, E1/2SW1/4 of Section 6, N1/2NE1/4 of Section 7, Township 32 South, Range 8 East of the Willamette Meridian, Klamath County, Oregon. The property has been in continuous Indian ownership since this deed was recorded. (OWRD Ex. 1 at 13, 131.)

### CONCLUSIONS OF LAW

Claimant has established this claim for an allottee water right with a priority date of October 14, 1864.

### OPINION

In the Klamath Basin General Stream Adjudication, a water right claimed by a Klamath 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

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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 (9<sup>th</sup> 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).

An order adverse to a party may be issued after default upon a *prima facie* case made on the record of the agency when the party has been notified of the time and place of the hearing and the party does not appear for the scheduled hearing. The record of this proceeding to date, including information in OWRD files regarding the claim became part of the contested case record upon default for the purpose of proving a *prima facie* case. ORS 183.415; OAR 137-003-0670.

In this case, the evidence contained in OWRD Exhibit 1 establishes all the elements necessary to make out an allottee water right for 98.7 practicably irrigable acres.

Natural Resources Consulting Engineers, Inc., prepared and submitted a report stating that the property described in the claim could be irrigated, and an alfalfa crop harvested that would yield a profit. No evidence was submitted to the contrary. No party objected to consideration of this report as evidence. It may therefore be considered as substantial evidence. *Cole v. Driver and Motor Vehicle Services*, 336 Or. 565 (2004).

I conclude that the uncontradicted report is sufficient to establish practicably irrigable acreage of 98.7 acres, and no participant has contested the other elements.

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**PROPOSED ORDER**

Claimant is allowed a water right as follows:

Priority October 14, 1864

306.0 acre-feet for irrigation of 98.7 acres located as follows:

7.2	acres	NW1/4	SE1/4
32.4	acres	SW1/4	SE1/4
15.9	acres	NE1/4	SW1/4
11.1	acres	SE1/4	SW1/4

Section 6, Township 32 South, Range 8 East, Willamette Meridian; and,

28.7	acres	NE1/4	NE1/4
3.4	acres	NW1/4	NE1/4

Section 7, Township 32 South, Range 8 East, Willamette Meridian

Period of use: March 1, through October 16.

January 23, 2006



Maurice L. Russell, II, Administrative Law Judge  
Office of Administrative Hearings

**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.

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Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dwight W. French, Adjudicator  
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 January 23, 2006, I mailed a true copy of the following:  
**CORRECTED 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 Hranac  
Oregon Water Resources Department  
725 Summer Street N.E., Suite "A"  
Salem, OR 97301  
[dwight.w.french@wrд.state.or.us](mailto:dwight.w.french@wrд.state.or.us)  
[teri.k.Hranac@wrд.state.or.us](mailto:teri.k.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](mailto:wganong@aol.com)

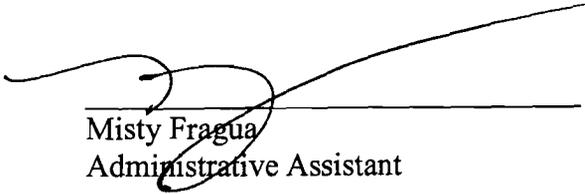
Orin Kirk  
PO Box 1079  
Chiloquin, OR 97624

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](mailto:Jesse.d.ratcliffe@doj.state.or.us)  
[Steve.sanders@doj.state.or.us](mailto:Steve.sanders@doj.state.or.us)

Courtesy Copy:  
Robert A. Stayer  
PO Box 451  
Fort Klamath, OR 97626

Courtesy Copy:  
Frieda Kirk  
PO Box 1079  
Chiloquin, OR 97624

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](mailto:psimmons@lawssd.com)  
[ahitchings@lawssd.com](mailto:ahitchings@lawssd.com)



Misty Fragua  
Administrative Assistant

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