

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;
Contestants

PROPOSED ORDER BY DEFAULT

Case No. 95

Claim: 696

Contests: 1766 and 3576¹

vs.

Orin Kirk;
Claimant/Contestant.

HISTORY OF THE CASE

On January 31, 1991, Vina and Orin Kirk (Claimant) filed Claim No. 696. Subsequently, Vina Kirk's interest in the property to which Claim 696 is appurtenant was transferred to Orin Kirk. Claimant has made a claim for water as a Klamath Indian Allottee, claiming an amount of water sufficient to irrigate the allotment's share of the Tribe's practically irrigable acreage. This Allottee claim is for a total of 279.3 acre-feet from one point of diversion located on Crooked Creek, for irrigation of 93.1 acres of practically irrigable acreage. The claimed period of use is March 1 through October 16 for irrigation. The claimed priority date is October 14, 1864.

¹ Don Vincent voluntarily withdrew from Contest 3576 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3576 on June 24, 2002. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3576 on January 15, 2004.

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On October 4, 1999, Oregon Water Resources Department (OWRD) entered a Preliminary Evaluation denying the claim as submitted. Claimant filed Contest 1766 on May 3, 2000. 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, and Collins Products, LLC (hereafter Klamath Project Water Users or KPWU) filed Contest 3576 on May 8, 2000.

The case was referred to the Office of Administrative Hearings (OAH).

Pursuant to an Order dated August 13, 2004, Prehearing Statements were submitted by OWRD, KPWU, and Claimant. On November 29, 2004, a Prehearing Conference was held to define the issues presented in the case and establish a schedule of further proceedings. Christopher Leahy, Attorney at Law, appeared on behalf of Claimant. Andrew Hitchings, Attorney at Law, appeared on behalf of KPWU. Jesse Ratcliffe, Assistant Attorney General, appeared on behalf of OWRD. On December 1, 2004, a Scheduling Order was issued in the above-entitled case.

On May 10, 2005, Mr. Leahy withdrew as counsel for Claimant on the basis that the property had been alienated, the ownership of the land had changed, and the Claimant was no longer the owner of the land. There was no direct testimony or exhibits filed by August 9, 2005. On September 19, 2005, a Notice of Hearing was issued, scheduling a hearing for cross-examination of witnesses on October 28, 2005, at 9:00 a.m.

On October 28, 2005, a telephone hearing was held. Administrative Law Judge Dove L. Gutman of the OAH presided. Mr. Hitchings appeared on behalf of KPWU. Mr. Ratcliffe appeared on behalf of OWRD. Claimant failed to appear for hearing. Mr. Hitchings made a Motion for Order by Default. I granted the Motion. The record closed on October 28, 2005.

EVIDENTIARY RULINGS

Exhibit 1, offered by OWRD, was admitted into the record without objection.

ISSUE

Whether the elements of a Klamath Indian Allottee claim are present in this case.

FINDINGS OF FACT

(1) No further communication or evidence from Claimant has been received by OWRD or the Office of Administrative Hearings since the date Mr. Leahy withdrew as counsel for Claimant on the basis that Claimant was no longer the owner of the land.

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(2) A Notice of Hearing in this case was sent to Claimant by certified mail on September 19, 2005, addressed to Claimant's last known address of: P.O. Box 1079, Chiloquin, Oregon; 97624.

CONCLUSIONS OF LAW

The record does not establish that the elements of a Klamath Indian Allottee claim are present.

OPINION

The burden of proof to establish a claim by a preponderance of the evidence is on the claimant. ORS 539.110; OAR 690-028-0040. For Klamath Indian Allottee cases, Claimant must prove the following elements:

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).

In this case, Claimant has not met the burden of proof. There is no evidence in the record that the current owner of the land is a Klamath Indian. In the absence of that element, the claim cannot be sustained.

ORDER

I propose the following:

Claim 696 in the name of Orin Kirk is **DENIED**.


Dove L. Gutman, Administrative Law Judge
Office of Administrative Hearings

Dated: January 18, 2006

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APPEAL PROCEDURE

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 Hearing Officer. 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
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2006, I served a true copy of the following: **PROPOSED DEFAULT 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
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Misty Fragua
Administrative Assistant