

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; the Klamath Tribes;
Horsefly Irrigation District; Langell Valley
Irrigation District; ~~Medford Irrigation District;~~
~~Rogue River Valley Irrigation District;~~
Klamath Irrigation District; Klamath Drainage
District; Tulelake Irrigation District; Klamath
Basin Improvement District; Ady District
Improvement Company; Enterprise Irrigation
District; ~~Klamath Hills District Improvement~~
~~Co.~~; Malin Irrigation District; Midland District
Improvement Company; 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 Co.; Winema Hunting Lodge,
Inc.; Reames Golf and Country Club; Van
Brimmer Ditch Co.; Plevna District
Improvement Company; and Collins Products,
LLC; Francis Loving Trust, Hilda Francis,
Trustee; Robert Bartell; Thomas W. Mallams;
Contestant(s)

PROPOSED ORDER

Case No. 148

Claim(s): 286

Contest(s): 3209¹, 3425², 3859, and 4211

vs.

Klamath Sprig and Honker Club, Inc.;
Claimant(s).

¹ Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew from Contest 3209. See VOLUNTARY WITHDRAWAL OF CONTEST 3209 BY MEDFORD IRRIGATION DISTRICT AND ROGUE RIVER VALLEY IRRIGATION DISTRICT (Nov. 17, 2005).

² Don Vincent voluntarily withdrew from Contest 3425 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3425 on June 24, 2002. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3425 on January 15, 2004.

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HISTORY OF THE CASE

THIS PROCEEDING pursuant to ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

Claim 286 was filed by Klamath Sprig and Honker Club, Inc. The claim was based upon use of water or construction of works for the application of water prior to February 24, 1909. The claim was filed on April 28, 1997, and is a claim for 50 cubic feet per second (cfs) from two points of diversion on the Link River Dam, tributary to Tule Lake, for the irrigation of 887 acres and wetland habitat. The claimed period of use is January 1 through June 30 for irrigation, and September 1 to January 1 for wetland habitat. The claimed priority date is December 31, 1950.

On October 4, 1999, the Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation of Claims, concluding (in this case) that Claimant had failed to establish the elements of a pre-1909 water right.

On May 8, 2000, four contests were filed in the matter. The "Districts" (Langell Valley Irrigation District, Horsefly Irrigation District, Medford Irrigation District and Rogue River Valley Irrigation District) filed contest 3209. The parties later to be known collectively as Klamath Project Water Users (KPWU) filed contest 3425. The United States filed contest 3859. The Klamath Tribes filed contest 4211.

On May 14, 2003, claim 286 was consolidated into Lead Case 003 for a determination of whether the United States was the proper holder of the water right to the water in the Klamath Project. After Administrative Law Judge (ALJ) Maurice L. Russell, II, determined that the United States is the proper holder of all water rights within the Klamath Project,³ he terminated the consolidated proceedings and the individual claims, including claim 286, were activated for further proceedings.

On November 17, 2005 Rogue River Valley Irrigation District and Medford Irrigation District voluntarily withdrew from contest 3209.

On May 24, 2006, ALJ Dove Gutman issued an Order Granting Joint Motion Clarifying Scope of Proceedings, requiring certain language related to the application of the Klamath Adjudication to water from the Lost River be included in the Proposed Order in this case.

Pursuant to a Scheduling Order issued March 23, 2006, on June 13, 2006, the United States filed the Direct Testimony of Cecil Lesley, and the Written Direct Testimony and Affidavit of Loring Gurney. Claimant did not file any Direct Testimony.

On June 27, 2006, the United States amended its contest.

³ Klamath Adjudication Case No. 003, Amended Interim Order at 40.
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On July 12, 2006, Claimant filed "Klamath Sprig and Honker Club, Inc.s' Response and Objections to United State's filing of Direct Testimony and Exhibits; Written Direct Testimony and Affidavit of Cecil Lesley and Written Direct Testimony and Affidavit of Loring Gurney." Despite reference to "objections" in the caption to the document, no evidentiary objections can be discerned in this document, which is composed mainly of argument.

Pursuant to a Notice of Hearing issued July 13, 2006, and a subsequent prehearing conference held by telephone on August 11, 2006, a hearing by telephone in this matter was held on August 17, 2006 at 9:00 a.m. Stephen Palmer appeared on behalf of the United States of America. Carl Ullman appeared on behalf of the Klamath Tribes. Paul Simmons appeared on behalf of the Klamath Project Water Users (KPWU). Steven Shropshire appeared on behalf of Horsefly Irrigation District and Rogue River Valley Irrigation District. Jesse Ratcliffe appeared for Oregon Water Resources Department (OWRD). Klamath Sprig and Honker Club did not appear.

Thereafter, on August 17, 2006, a post-hearing briefing schedule was issued by ALJ Gutman, requiring claimant's written argument to be filed by September 22, 2006. Claimant having filed no argument by the date specified, the other participants declined to file argument, and the record was closed.

After the close of the record in this case, the matter was reassigned to me for completion of the Proposed Order. I have reviewed the entire record, including the recordings of proceedings before ALJ Gutman.

EVIDENTIARY RULINGS

OWRD Exhibit 1 and Exhibits U1 through U5 were admitted into the record without objection.

ISSUES OF LAW

- 1. Whether there is sufficient evidence to support the right claimed.**
- 2. Whether the required elements have been established for this claim.**
- 3. Any vested water right on all or a portion of the claimed Place of Use is included in the claims filed by the United States for the Klamath Project.**
- 4. There is insufficient information on the development of water on this Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right.**
- 5. Natural flooding/subirrigation/natural overflow is not a valid water right.**
- 6. There is insufficient information to support a period of use for irrigation outside of March 1 to October 31.**

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7. **The diversion rate exceeds what can be beneficially used at the Place of Use.**
8. **Any assertion of riparian rights is outside the scope of this adjudication and was not part of the claim as filed.**
9. **Any pre-1909 use of water on the claimed place of use has been abandoned.**
10. **Any vested water right on all or a portion of the claimed Place of Use is included in the claims filed by the United States for the Klamath Project.**

FINDINGS OF FACT

1. This claim is for 2,600 acre-feet of water applied for irrigation and wildlife habitat purposes to 887 acres located in Sections 2, 3, 4 and 5, T 47 N R 3 E. M.D.B. and M. Claimed priority date is 1950. (OWRD Ex. 1, at 1 through 4; Exs. U3, U4.)
2. The property in question is near the former shores of Lower Klamath Lake. Prior to 1909, all or part of the property may have been flooded during seasonal rises in the water level of the lake. (Ex. U3.) At that time, the property was part of a larger parcel exceeding 2,300 acres that was farmed by grazing and production of hay. (Ex. U3.)
3. By the 1930s, the entrance to Lower Klamath Lake from Klamath River had been blocked, preventing water from entering Lower Klamath Lake, and causing the lake to dry up. (Ex. U3.)
4. Since at least 1970, the property in question has been used partly for wetland habitat for waterfowl. (Ex. U3.)

CONCLUSIONS OF LAW

1. **There is not sufficient evidence to support the right claimed.**
2. **The required elements have not been established for this claim.**
3. **Any vested water right subject to this adjudication on all or a portion of the claimed Place of Use is included in the claims filed by the United States for the Klamath Project.**
4. **There is insufficient information on the development of water on this Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right.**
5. **Natural flooding/subirrigation/natural overflow may form the basis for a valid water right, but such a right has not been established in this case.**

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6. There is insufficient information to support a period of use for irrigation outside of March 1 to October 31.

7. The diversion rate may exceed what can be beneficially used at the Place of Use.

8. Any assertion of riparian rights is outside the scope of this adjudication and was not part of the claim as filed.

9. Any pre-1909 use of water on the claimed place of use may have been abandoned.

DISCUSSION

The burden of proof to establish a claim in the Klamath Adjudication is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division*, 47 Or App 437 (1980); *Metcalf v. AFSD*, 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

Here, claimant submitted no evidence. All evidence in the case was either contained in the original claim file, admitted as OWRD Exhibit 1, or was submitted by the United States. That evidence, which included claimant's responses to discovery conducted by the United States, does not establish a pre-1909 water right.

In order to establish such a water right, Claimant must show that (1) prior to February 24, 1909, the appropriator had an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) water was subsequently diverted from the natural channel by means of a ditch, channel or other structure; and (3) water was applied within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930). It has also been held that harvesting of hay and other products nurtured by natural overflow of water and subirrigation of land can be sufficient water use to establish a pre-1909 appropriation. *In re Silvies River* 115 Or 27, 66 (1925). Here, the evidence is sufficient to show that, in all probability, part, if not all, the land in question was subject to seasonal flooding, prior to blockage of the connection between Lower Klamath Lake and the Klamath River. The evidence also shows that the larger parcel of which the land in question was once a part, was farmed through grazing and production of hay. The evidence in its present form is not sufficient to show that the particular place of use claimed was so used prior to 1909. In any event, claimant no longer asserts a pre-1909 right, having instead argued that the right is based on riparian water rights recognized under California law.

Instead of evidence, claimant submitted a document that addressed the issues presented by the United States in its Statement of Contest. In that document, claimant asserted that, rather

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than the pre-1909 right asserted in its claim document, its participation in these proceedings was based on a riparian right based upon the property's location on the banks of Lower Klamath Lake.

The Klamath Adjudication was established to determine the relative rights of persons who divert water from the Klamath River in Oregon, even though the place of use may be located in California. ORS 539.021⁴ The riparian claim asserted in this case is indistinguishable from an assertion of a water right by any other person diverting water from the Klamath River after it crosses the border in California. Nor has claimant shown how such a riparian right to divert water in California, if it exists, can be converted into a right to divert water from the Link River Dam, in Oregon. This would, of course, also be true of a right based upon natural overflow from Lower Klamath Lake.

In other words, to the extent the claim is raised as a pre-1909 water right, it has not been shown that it is based on a diversion from the Klamath River *in Oregon*, or that water was beneficially used on the place of use prior to 1909 as claimed. To the extent the claim asserts a riparian right under California law, the claim is outside the scope of the Klamath Adjudication, and cannot be allowed.

Prior to hearing, ALJ Gutman issued an order clarifying the scope of proceedings to exclude a claim to water from the Lost River. That order provided that specific language describing that exclusion be recited in the Proposed Order in this case.

Based upon the foregoing, I recommend that the Water Resources Department issue the following:

ORDER

The Klamath Basin Adjudication, of which Case No. 148 is a part, does not include a determination of the relative rights to the use of waters of the Lost River basin, as opposed to waters of the Klamath River basin. Therefore, nothing in this Proposed Order shall constitute or be construed as a finding or determination with respect to rights of any claimant, contestant, party, person or agency (collectively, the Parties) to the right to use the waters of the Lost River, including but not limited to the Lost River, Clear Lake, Gerber Reservoir, and their tributaries. The decision in this case will not affect any of the Parties rights to the use of waters of the Lost River or its tributaries. Nothing in this order is intended to prevent any of the Parties from filing exceptions, should the Adjudicator's findings of fact and order of determination deviate from this Proposed Order in this regard.

⁴ ORS 539.021(1) described the general authority of the Water Resources Director respecting Water Basin Adjudications. That statute provides as follows: (1) The Water Resources Director upon the motion of the director or, in the discretion of the director, upon receipt of a petition from one or more appropriators of surface water *from any natural watercourse in this state* shall make a determination of the relative rights of the various claimants to the waters of that watercourse. (emphasis added.)

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Claim 286 is not allowed.


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

Dated: January 19, 2007

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, 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 22, 2007, I mailed a true copy of the following: **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Stephen R. Palmer, Attorney
US Department of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825
Phone: 916-978-5683
Fax: 916-978-5694

Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624
Phone: 541-783-3081
Fax: 541-783-2609
bullman3@earthlink.com

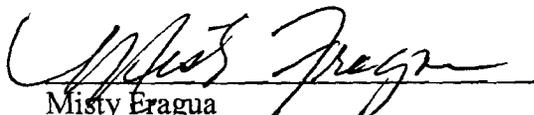
Dwight W. French / Teri K. Hranac
Oregon Water Resources Dept.
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Phone: 503-986-0826
Fax: 503-986-0901
Teri.k.Hranac@wrđ.state.or.us
Dwight.W.French@wrđ.state.or.us

Steven L. Shropshire
Jordan Schrader PC
PO Box 230669
Portland, OR 97281
Phone: 503-598-7070
Fax: 503-598-7373
steve.shropshire@jordanschrader.com

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

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-947-4500
Fax: 503-378-3802
Jesse.d.ratcliffe@doj.state.or.us

Earl Cummings
Klamath Sprig and Honker Club, Inc.
PO Box 900
Geyserville, CA 95441
earlec@starband.net
earlewc@yahoo.com


Misty Eragua
Administrative Assistant