

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

Case No. 94

Claim: 695

Contests: 1765 and 3575¹

vs.

Orin Kirk;
Claimant/Contestant.

HISTORY OF THE CASE

Claimants Vina and Orin Kirk filed Claim 258 on January 31, 1991. Subsequently, Vina Kirk's interest in the property to which the claim was appurtenant was transferred to Orin Kirk. Because Claim 258 included a number of non-contiguous properties, on December 29, 1998, Claim 258 was divided into six separate claims, five of which received a new number. The portion of Claim 258 related to the property in question in this case was renumbered as Claim 695. On October 4, 1999, OWRD issued a preliminary determination of the claim, denying the claim as precluded by the Wood River Adjudication in 1932. Claimant Orin Kirk filed Contest 1765 on May 3, 2000.

¹ Don Vincent voluntarily withdrew from Contest 3575 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3575 on June 24, 2002. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3575 on January 15, 2004.

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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 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, Berlva Pritchard, Don Vincent, Randy Walthall, InterCounty Title Company, Winema Hunting Lodge, Inc., Reames Golf and Country Club, Van Brimmer Ditch Company, Plevna District Improvement Company, and Collins Products, LLC (collectively known as Klamath Project Water Users or KPWU) filed Contest 3575 on May 8, 2000. Don Vincent withdrew from Contest 3575 on November 28, 2000. Berlva Pritchard withdrew from Contest 3575 on June 24, 2002. Klamath Hills District Improvement Company withdrew from Contest 3575 on January 16, 2004.

On April 29, 2003, this case was consolidated with a number of other cases in the Klamath Adjudication, for the purpose of determining whether the prior adjudications of the Wood River and Sprague river systems had the effect of precluding claims for water from these river systems in the Klamath Adjudication. This consolidated case was styled Case 900. On April 20, 2004, after discovery, argument and motions, Administrative Law Judge William Young (ALJ Young) issued an Order Amending Rulings on Motions for Rulings on Legal Issues in Case 900. On May 27, 2004 ALJ Young vacated the April 29, 2003 Order Consolidating Cases in Case 900, thereby severing all the consolidated cases with the following proviso: “[T]he cases associated with this consolidated case shall proceed through the contested case process in the same manner as if they had not been consolidated, except that the law of the case in each case is set out in the April 20, 2004 Order Amending Rulings on Motions for Ruling on Legal Issues.”

Thereafter, on the Motion of OWRD, Cases 50, 67, 94 and 95 were ordered consolidated for scheduling purposes and to allow a single Motion for Ruling on Legal Issues to be filed to resolve common legal issues. A Prehearing Conference was then conducted on November 29, 2004, at which a time schedule was established for proceedings in each of the four cases, whereby the cases would be again severed for hearing after a specified period during which a Motion for Ruling on Legal Issues could be filed. No such motion having been filed, the cases proceeded to hearing according to the schedule determined at the Prehearing Conference.

This matter came on for hearing on September 1, 2005. OWRD and KPWU appeared through counsel. Claimant did not appear. Administrative Law Judge Michael A. Francis, presided. Thereafter, on September 6, 2005, OWRD filed its Motion to Reopen the Record for Additional Evidence, seeking to reopen the record for admission of OWRD Exhibit 1 and the Affidavit of Teri Hranac.

EVIDENTIARY RULINGS

On September 6, 2006, OWRD filed its motion to Reopen the Record for Additional Evidence, seeking admission of OWRD Exhibit 1 and the Affidavit of Teri

Hranac. The motion recites that KPWU, the only party appearing at the hearing, had no objection to the motion. The Motion is granted, and this Proposed Order will be based on OWRD Exhibit 1.

ISSUES

Claimant/Contestant has raised the following issues in his contest:

- 1) Whether the Oregon state courts had subject matter jurisdiction of Indian water rights at the time of the Wood River Decree adjudication in 1932.
- 2) Whether the United States was a party to the Wood River adjudication.
- 3) Whether the United States waived sovereign immunity in that Wood River adjudication.
- 4) Whether Claim 235 (now 695) is precluded by the Wood River Decree.

Contestant KPWU has raised the following issues in its contest:

- 5) Whether there is sufficient evidence to support the right claimed.
- 6) Whether the required elements are established for an Allottee water right with a priority date of October 14, 1864.
- 7) Whether the record indicates the practicably irrigable acreage claimed or that it would be technically possible or economically feasible to develop an irrigation system to serve such acreage.
- 8) Whether the claim is to a source that was previous adjudicated and the claimant does not present issues that can be legally redetermined.

FINDINGS OF FACT

- 1) This claim is for 17.8 acres Practicable Irrigable Acreage in a parcel totaling 38 acres located on the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 30 Township 34 S, Range 7 E Willamette Meridian. The claimed rate is .33 cubic feet per second and duty is 55.1 acre-feet per year from Agency Creek, tributary to Crooked Creek via the agency Canal. Point of diversion is SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 30, Township 34 S Range 7 E Willamette Meridian. Claimed Period of Use is March 1 through October 16 each year. Claimed Priority Date is October 14, 1864, the date of the Treaty between the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians and the United States of America. (Ex. 1 at 1 through 6, 13.)

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- 2) The present claimant, Orin Kirk, is an enrolled member of the Klamath Indian Tribe. (Ex 1 at 14.)
- 3) The record does not establish that the property was ever part of the Klamath Indian Reservation.
- 4) Although none of the 17.8 acres noted is currently under irrigation, it is composed of soils in group number 48B and 48D, Class IVe, which are arable and irrigable by sprinkler. The slope of the land is 0.0056, and its elevation 4,180 feet. The growing season is May 3 through October 18. Water is available from Agency Creek. Natural precipitation is 18.4 inches per year. Water can be pumped by a 15 horsepower electric pump and conveyed by 2,460 feet of 4-inch pipe to the lands, where it can be applied by hand-line sprinkler. Alfalfa is a suitable crop for this land. If alfalfa is grown as an irrigated crop, at an anticipated yield of five tons to the acre, assuming a price of \$90 per ton, the crop will bring a gross return of \$450 per acre. The cost of developing the irrigation system and the cost of growing the crop will not generally exceed \$450 per acre. (Ex 1 at 5 through 7, 39 through 41.)

CONCLUSIONS OF LAW

- 1) The Oregon state courts had subject matter jurisdiction of water rights on former Indian land held in fee, whether by an Indian or not, at the time of the Wood River Decree adjudication in 1932.
- 2) The United States was not a party to the Wood River adjudication.
- 3) The United States did not waive sovereign immunity in the Wood River adjudication.
- 4) Claim 695 is not precluded by the Wood River Decree.
- 5) There is not sufficient evidence to support the right claimed.
- 6) The required elements are not established for an Allottee water right with a priority date of October 14, 1864.
- 7) The record indicates the practicably irrigable acreage claimed. It is technically possible and economically feasible to develop an irrigation system to serve the property subject to this claim.
- 8) The claim is not to a source that was previously adjudicated and the claimant does not present issues that can be legally determined.

OPINION

In Basin Adjudications, claimant has the burden of proof as to all required elements of the claim. ORS 539.110. As this claim is based on the status of claimant as an Allottee, the claimant has the burden of proving the following elements:

- 1) That the property to which the claim is appurtenant was formerly part of the Klamath Indian Reservation.
- 2) That the claimant is a Klamath Indian.
- 3) That the land is arable.
- 4) That development of a system to irrigate the land is both technically possible and economically feasible.
- 5) That the right has not been lost during any intervening non-Indian ownership.

OAR 690-028-0010(17); OAR 690-028-0010.

The Oregon state courts had subject matter jurisdiction of water rights on former Indian land held in fee, whether by an Indian or not, at the time of the Wood River Decree adjudication in 1932.

The United States was not a party to the Wood River Adjudication.

The United States did not waive sovereign immunity in the Wood River Adjudication.

This issue was decided by ALJ Young in his Order Amending Rulings on Motions for Rulings on Legal Issues in OAH Case 900. In that Order, ALJ Young concluded that when the Wood River Adjudication was issued, property that was still part of the Klamath Indian Reservation, was not within the jurisdiction of the Oregon State Courts. ALJ Young also ruled that property previously part of the reservation that was held in trust by the United States for the benefit of an Indian Allottee was also not within the jurisdiction of the Oregon state Courts. Consequently, ALJ Young concluded that properties in those categories could not have been included in the Wood River Adjudication, and were not precluded from a claim of water right in the Klamath Adjudication. However, ALJ Young also concluded that if property that was previously part of the Klamath Adjudication was conveyed in fee prior to the Wood River Adjudication, that property was subject to that adjudication, and a new water right in these proceedings was thereby precluded by the doctrine of Issue Preclusion. Pursuant to the Order Vacating Order to Consolidate of May 27, 2004 in OAH Case 900, those rulings are the law of the case in this case. Thus, the first three issues presented by claimant have been decided, and will not be revisited in this order.

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Claim 695 is not precluded by the Wood River Decree.

The claim is not to a source that was previously adjudicated and the claimant does not present issues that can be legally redetermined.

Whether the property was or was not in fee is not a necessary element of the claim. Instead, although claimants have argued the issue in their statement of contest, it is contestant KPWU's burden to show that this claim was precluded by the Wood River Adjudication. ORS 183.450(2). Since contestant KPWU did not put on any evidence in this case, and there is no evidence as to title of the property, it cannot be determined whether the claim is precluded or not. Therefore, KPWU has not met its burden, and this issue must be decided in favor of claimant.

There is not sufficient evidence to support the right claimed.

The required elements are not established for an Allottee water right with a priority date of October 14, 1864.

Throughout these proceedings it has been asserted by claimant that the title documents filed with the claim establish that the property subject to this claim was part of the Klamath Indian Reservation, and conveyed out of trust by the United States to claimant's Indian predecessors after the Wood River Adjudication. Those documents do not, however make that case.

The property in question is located in Section 30, Township 34 S, Range 7 E Willamette Meridian. The title documents filed with the claim, however, refer to property located in Sections 7 or 12 of Township 32 S, Range 8 E Willamette Meridian. This includes both the Title Report issued by Klamath County Title Company, (Ex. at 15, 16.) and the Land Status Report by the Superintendent of the Klamath Agency (Ex. at 20, 21.). Thus, there is no title evidence connected with the property subject to this claim to be found anywhere in the record in this case. Without that evidence, it cannot be found either that the property was part of the Klamath Indian Reservation or that it was held in continuous Indian ownership up to the present day. Both of these facts must be found to establish a water right by an Indian allottee. The absence of any evidence on these elements is fatal to this claim.

The record indicates the practicably irrigable acreage claimed. It would be technically possible or economically feasible to develop an irrigation system to serve such acreage.

 OAR 690-028-0010(17) defines Practicably Irrigable Acreage as follows:

 (17) "Practicably Irrigable Acreage" means lands that were set aside as part of an Indian treaty or which derived from Indian treaty rights for the purpose of developing agricultural benefits. The lands shall be capable of being identified as agricultural lands. Agricultural lands in general are lands which with water applied

without waste in amounts common to current reasonable farming practices, can produce specific crops suited to the local climate. The land must be capable of sustaining production for a reasonable number of years to offset the initial investment of farm improvements. The land shall have been part of an Indian reservation, continuously under Indian ownership and need not be irrigated now.

OAR 690-028-0010 describes the showing that must be made to satisfy the requirement of Practicably Irrigable Acreage.

- 1) Any Indian or Indian tribe claiming a right for practicably irrigable acreage shall, in addition to OAR 690-028-0025, establish that the land for which the right is claimed is arable. The claimant must show that it is technically and economically possible to develop an irrigation system to serve the land. Factors that shall be considered include but are not limited to:
 - (a) Source and availability of water;
 - (b) Soils type and classification;
 - (c) Slope of the land;
 - (d) Elevation above sea level;
 - (e) Growing season (degree days);
 - (f) Natural precipitation;
 - (g) Crop types that could be grown;
 - (h) Description of the proposed irrigation system; and
 - (i) Estimated costs of developing the irrigation system.
- (2) A claimant for practicably irrigable acreage shall identify and map all acres that are or are proposed to be irrigated. The claimant shall show existing points of diversion or storage reservoirs, as appropriate.
- (3) A claimant shall document through a chain of title statement that the lands have never had more than five consecutive years of non-Indian ownership since the date of the reservation.

The claim document includes two reports from Natural Resources Consulting Engineers, Inc., one dated November 1, 1992, and a second report dated October 1, 1999. Although the two reports are unsworn hearsay, it has been determined that hearsay may be relied upon as substantial evidence in an administrative case under certain circumstances. *Reguerro v. Teacher Standards and Practices Commission*, 312 Or 402 (1991). Particularly in this case, where no objection to consideration of the hearsay reports was interposed, the reports may be substantial evidence to support the claim.

The second report recites that it supercedes the first report. It notes that the 17.8 acres in question are Class IVe soils, described as arable soils capable of irrigation by sprinkler. The two reports together describe the development of an irrigation system

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composed of a 15 horsepower pump in Agency Creek, a pipeline across adjoining property, and a system of hand-line sprinklers to irrigate a crop of alfalfa on the 17.8 acres. Both reports also discuss the economic feasibility of such a venture, the primary difference between the reports being in the estimates of the cost of production of the crop. Interestingly, while the cost of developing the irrigation system predictably rose in the seven years between the two reports, from \$16 per acre to \$112, the cost of growing a crop actually went down during that period, from \$299 per acre to \$221 per acre. Thus the reports show that it is technically feasible to develop an irrigation system for the 17.8 acres, and that once that irrigation system is in place, a crop can profitably be grown on the parcel that will amortize the cost of developing the irrigation system. This meets the test of Practically Irrigable Acreage set out in OAR 690-028-0010 and 690-028-0026.

In view of the foregoing, I propose that the Department issue the following:

ORDER

Claim 695 is denied.



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

Dated: October 3, 2006

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 French, Adjudicator
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 October 3, 2006, 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:

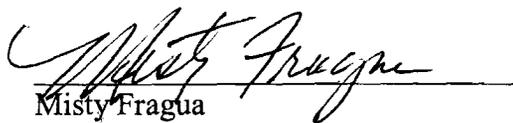
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