

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; Klamath Hill 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; 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;	PROPOSED ORDER
Contestants	Case No. 99
	Claim: 707
	Contests: 1772 and 3583 ¹

vs.

Mary Nan Reyes;
Claimant/Contestant.

HISTORY OF THE CASE

On December 27, 1991, Mary Nan Reyes, an enrolled member of the Klamath Tribe, filed Claim 707, based on water use on land that was formerly part of the Klamath Indian Reservation. This claim is for 15.9 acre-feet of water per year for 5.1 acres of practicably irrigable acreage. The claim is for diversion from one point on the Sprague River, a tributary to the Klamath River.

On October 4, 1999, the Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation (P.E.) for this claim, preliminarily denying the Allottee claim, as having

¹ Don Vincent voluntarily withdrew from Contest 3583 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3583 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3583 on January 15, 2004.

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been untimely filed. Claimant filed Contest 1772 on May 3, 2000. Klamath Irrigation District, *et al.* (KPWU) filed contest 3583 on May 8, 2000.

OWRD referred the matter to the Office of Administrative Hearings in 2004. On December 8, 2004, a Scheduling Order was issued, requiring the parties to file written Direct and Rebuttal Testimony and a list of witnesses for cross-examination, and setting the hearing in the matter for December 12, 2006. No written testimony or witness lists were filed. Consequently, on November 9, 2006, Administrative Law Judge (ALJ) Maurice L. Russell, II issued a hearing notice setting the hearing to be conducted by telephone on December 12, 2006 as previously scheduled.

A hearing was convened by telephone on December 12, 2006 before ALJ Maurice L. Russell, II. Klamath Project Water Users appeared by telephone through attorney Andy Hitchings. Assistant Attorney General Jesse Ratcliffe appeared for the OWRD. At the time of the hearing, ALJ Russell found claimant to be in default, and held the record open until January 3, 2007 for further submissions by OWRD and a response by claimant. On December 15, 2006, OWRD filed a Motion to Admit or Take Judicial Notice of Attachments 1 and 2 and Motion to Deny Claim as Untimely filed. Claimant filed no response.

EVIDENTIARY RULINGS

OWRD Exhibit 1 was offered and admitted into evidence. OWRD also moved to Admit or Take Judicial Notice of Attachments 1 and 2 on December 15, 2006. There being no objection, the motion is granted. Attachments 1 and 2 are admitted into evidence as pages 153 through 157 to OWRD Exhibit 1. The record closed on January 3, 2007.

Contestant KPWU objected to admission of OWRD Exhibit 1 pages 3 through 12 and 33 through 44 as inadmissible hearsay, lacking foundation. This objection was overruled, and pages 3 through 12 and 33 through 44 of OWRD Exhibit 1 were admitted, subject to consideration of weight.

ISSUES

- 1. Whether OWRD is estopped from denying the claim on the grounds that it was filed late, assuming OWRD's actions over the past years do not already constitute a de facto acceptance of the claim.**
- 2. Whether there is sufficient evidence to support a surface water claim of 1.59 acre-feet for future irrigable acreage.**
- 3. Whether there is sufficient evidence to support the right claimed.**
- 4. Whether the required elements are established for an Allottee water right with a priority date of October 14, 1864.**
- 5. Whether the claim was timely.**

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FINDINGS OF FACT

1. This claim was originally filed for 15.9 acre-feet of water per year for practicably irrigable acreage of 5.1 acres from one diversion point on the Sprague River. (OWRD Ex. 1 at 7.) The claimed place of use is: NE ¼ SW ¼ Section 19 T34S, R8E.W.M. (*Id.* at 12.)
2. On September 7, 1990, OWRD issued a Notice to File Claim, setting a deadline of February 1, 1991 for all claimants to file a claim in the Klamath Basin Adjudication. (*Id.* at 153, 154.) OWRD subsequently allowed members of the Klamath Indian Tribe who were claiming water rights as allottees of property formerly within the Klamath Indian Reservation, an extension to June 1, 1992 to file a completed claim document, so long as a “base claim” providing certain information was filed on or before February 1, 1991, and additional information was submitted on or before September 1, 1991. (*Id.* at 155-57.) Mary Nan Reyes, the original claimant, filed the information required for a “base claim” on December 27, 1991, well after the date set in the notice as extended. (*Id.* at 23, 28.) On January 24, 1992, OWRD sent claimant’s counsel a letter advising that the claim had been filed after the deadline, and that “we [OWRD] are reviewing the implications of the late filing.” (*Id.* at 86.) Subsequently, OWRD asked for information from claimant on several occasions before October 4, 1999, when OWRD issued the Preliminary Evaluation proposing to deny the claim as untimely. (*Id.* at 151.)

CONCLUSIONS OF LAW

1. **OWRD is not estopped from denying the claim on the grounds that it was filed late, and OWRD’s actions over the past years do not already constitute a de facto acceptance of the claim.**
2. **It is not necessary to address whether there is sufficient evidence to support a surface water claim of 554 acre-feet per year for future irrigable acreage.**
3. **It is not necessary to address evidence to support the right claimed.**
4. **It is not necessary to address whether the evidence establishes the required elements are not established for an Allottee water right with a priority date of October 14, 1864.**
5. **The claim was not timely filed.**

OPINION

In basin-wide adjudications, a claimant has the burden of proof as to all required elements of the claim. ORS 539.110. The burden of presenting evidence to support a particular fact or position in a contested case rests on the proponent of the fact or position. ORS 183.450. 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

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claim must be allowed.

This claim was based on the status of claimant as an Indian Allottee from the former Klamath Indian Reservation. Therefore, 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.

It is not necessary, however, to reach the merits of this claim, because it was not filed within the time provided by OWRD's Notice to File Claim. The Oregon water rights adjudication statute, ORS 539.210, prescribes when and how a water right claim must be filed in an adjudication of water rights and provides in relevant part:

Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred.

The OWRD "shall set a time certain for filing statements and proofs of claim and notify all registrants by certified return receipt mail when and how the statement and proof of claim shall be filed." OAR 690-028-0065(3) (1990).

Claimant conceded in the Statement of Contest that the deadline for filing the claim was February 1, 1991, and that the claim was filed on December 27, 1991, almost 11 months later. Thus, unless there is some lawful basis for excusing the late filing, this claim cannot be allowed in any event.

Claimant argued, however, that federal law prohibited dismissal of this claim based on an untimely filing, citing cases holding that federal reserved rights and Indian rights cannot be lost by abandonment or nonuse. A failure to timely file a claim in an adjudication, however, is not either abandonment or non-use. The cases cited by claimant do not apply in a case such as that presented here, where claimant was provided notice of a deadline and filed the claim nine months after the deadline had lapsed. Claimant has provided no authority that would exempt

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Indian or federal claimants from the procedural requirements of an adjudication. Indeed, by waiving sovereign immunity through the McCarran Amendment, 43 U.S.C. §666, the United States subjected its water rights, and those of the Indians under its charge, to "the judgments, orders, and decrees of the court having jurisdiction, * * * in the same manner and to the same extent as a private individual under like circumstances* * *." 43 U.S.C. §666(a)(2).

Claimant also argued that OWRD was estopped from denying this claim by its conduct. In order for a government agency to be subject to equitable estoppel, there must be a false or misleading statement. That false or misleading statement must be one of "existing material fact and not of intention, nor may it be a conclusion from facts or a conclusion of law." In the absence of statutory authority, statements of one government agency cannot bind another. *Mannelin v. DMV*, 176 Or App 9, 13 (2001). Moreover, statements by a state agency "may not bind the state to any arrangement that contravenes the statutes." *Does 1 through 7 v. State of Oregon*, 164 Or. 543, 560, *rev den* 330 Or 138 (1999).

Here, no false or misleading statement of fact was made. OWRD advised claimant in 1992 that it would decide what impact the late filing would have. OWRD later asked claimant for substantial additional information. At most, these communications were statements of intention, not material fact. Moreover, ORS 539.210 is unambiguous in its imposition upon potential claimants of the duty to timely file their claims, and is equally unambiguous in barring claims that are not timely filed. Since estoppel cannot compel a state to act in a way that contravenes a statute and allowing an untimely claim would do so, estoppel does not apply here. *Id.*

In any event, the cases cited by claimant for support are inapposite. *City of Hillsboro v. Housing Development Corp. of Washington County*, 61 Or App 484 (1983), cited for the proposition that "absent prejudice to the other party, dismissal would be inappropriate" for a late-filed appeal, was a case in which the Oregon Land Use Board of Appeals held its offices open for 11 minutes after closing on the last day for filing an appeal, to accommodate a party who was stuck in traffic. The Court of Appeals concluded that, under the terms of the governing statute, holding the office open for such a short time did not violate either applicable statute or rule, and therefore allowed the appeal. The distinction between an 11-minute delay on the same day a filing was due, and a nine-month delay, is obvious and material.

I conclude that the claim was not filed within the time prescribed by statute and OWRD's Notice to File Claim, as extended. It is therefore barred.

Based upon the foregoing, I propose that OWRD issue the following:

ORDER

Claim 707 is denied in its entirety.


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

Dated: February 23, 2007

Proposed Order
Klamath Adjudication Case 99
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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:

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 February 27, 2007, I served a true copy requested 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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