

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~~; 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.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC;
Contestants

**ORDER ON MOTIONS FOR RULING
ON LEGAL ISSUES; PROPOSED
ORDER DENYING CLAIM**

Case No. 181

Claim: 45

Contests: 2829¹, 3271, 3449², 3790, and 4100³

vs.

Roger Nicholson; Richard Nicholson;
Dorothy Nicholson Trust;
Claimants/Contestants.

HISTORY

The Contestants United States and Klamath Project Water Users (KPWU) filed motions for a ruling on the legal issue of whether the lands covered within Claim 45 were lawfully included within the prior Wood River Adjudication and are therefore now

¹ WaterWatch of Oregon, Inc.'s Contest 2829 was dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

² Don Vincent voluntarily withdrew from Contests 3449 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contests 3449 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3449 on January 15, 2004.

³ The Klamath Tribes voluntarily withdrew Contest 4100. See KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated January 19, 2005.

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precluded from participation in the pending Klamath River Adjudication. The United States and KPWU argue that reference to the federal ownership of the Agency Project or the *Walton*⁴ Rights therefrom, should not be allowed since it constitutes an attempt to re-examine the Preclusion Ruling of Administrative Law Judge Young.

On July 15, 2005 the United States filed its Motion for Ruling on Legal Issues, as well as the Klamath Project Water Users (KPWU) which filed a similar motion. On September 8, 2005, Claimants filed a Response to the United States' Motion. Claimant did not respond to the KPWU's motion. On September 16, 2005, Claimants sent to the Administrative Law Judge a letter stating that the filing was to be in response to both motions. On October 7, 2005, Oregon Water Resources Department filed a reply to the Claimant's Response to the United States' Motion for Ruling on Legal Issues. On October 7, 2005, the United States also filed a Reply. In that the motions filed by the United States and KPWU are similar in nature, for the purpose of this order I have consolidated them into a single motion.

ISSUE

Whether Claim 45 is barred as to all portions of the claimed place of use included within the Fee Patented Lands due to the preclusive effect of the Wood River Adjudication, and no water right for these lands may be adjudicated in the Klamath Basin Adjudication.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Motions for Ruling on Legal Issues (Summary Judgment) are governed by OAR 137-003-0580, which establishes standards for evaluating the motion and states in material part:

- (6) The administrative law judge shall grant the motion for a legal ruling if:
 - (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
 - (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

⁴ Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "Walton" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*).

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(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party ***.

Considering the evidence in a manner most favorable to the non-moving party, I make the following determinations:

FINDINGS OF FACT

1. Roger Nicholson, Richard Nicholson, and the Dorothy Nicholson Trust ("Claimants") are the current claimants under Claim 45 (the "Claim") filed in the Klamath Basin Adjudication. As non-Indian successors in interest to Indian allottees, Claimants seek a *Walton* water right for the irrigation of certain lands located in Klamath County, Oregon, and for livestock watering and fish and wildlife purposes. (OWRD Exhibit 1 at 1).

As set forth above, Claimants seek a "Walton" water right for irrigation, livestock watering, and fish and wildlife uses. The lands comprising the claimed place of use (the "Fee Patented Lands") are described as follows:

Township 33 South, Range 7.5 East, Willamette Meridian
Section 35: SW/4SE/4

Containing approximately 2.0 acres.

2. On October 4, 1999, Oregon Water Resources Department ("OWRD") Adjudicator Richard D. Bailey issued his "Summary - Preliminary Evaluation" of Claim No. 45 (the "Preliminary Evaluation"). The Preliminary Evaluation denied the Claim in its entirety on the grounds that the claimed source had previously been adjudicated in the Wood River Adjudication. After the issuance of the Preliminary Evaluation, the United States, among other parties, filed a contest to the Claim. OWRD Exhibit 1. Following the contest-filing period, Claim 45, together with 32 other claims, was consolidated into Case No. 900 by order dated May 6, 2003, for the purpose of determining the effect of the Wood River proceedings on the present adjudication. (Case 900, Order Vacating Order to Consolidate, May 27, 2004.)

3. The law governing resolution of the preclusion issue is set forth in Administrative Law Judge William D. Young's Order Amending Ruling on Motions for Ruling on Legal Issues dated April 20, 2004 in Case No. 900 (the "Preclusion Ruling").

4. Having determined in the Preclusion Ruling the legal rules governing resolution of the claim preclusion issue, ALJ Young terminated the consolidated proceedings by order May 27, 2004, and each of the consolidated cases was subsequently activated for further, individual proceedings. The May 27 Order specifically instructed that the consolidated cases shall continue through the contested case process in the same manner as if they had not been consolidated, provided that "the law of the case" in each

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of the contested cases shall be as set forth in the Preclusion Ruling. (Case 900, Order Vacating Order to Consolidate, May 27, 2004 at 2.)

5. The United States had issued a fee simple patent for the following lands within the claimed place of use for Claim 45 (the "Fee Patented Lands") as of the deadline for filing claims in the Wood River Adjudication (August 21, 1928):

Township 33 South, Range 7.5 East, Willamette Meridian
Section 35: SW/4SE/4

Containing approximately 2.0 acres

6. At the time of the commencement of the Wood River Adjudication (August 21, 1928), the subject property was owned by B.S. Grigsby ("Mr. Grigsby"). (Discovery Responses at Response to Request for Admission No. 2.)

7. On June 7, 1928, and June 14, 1928, notice of the Wood River Adjudication was published in the Evening Herald, a newspaper of general circulation in Klamath County, Oregon. (Findings and Order of Determination in the Matter of the Determination of the Relative Rights to the Use of the Waters of the Wood River, Crane Creek, Seven-Mile Creek and Four-Mile Creek, Tributaries of Agency Lake, dated June 21, 1932 ("Wood River Findings"), included in OWRD Exhibit 1 filed in Case No. 900 in the Klamath Basin Adjudication at p. C-4.) The "Notice to Water Users" informed water users of the Wood River and its tributaries that they were required to appear and assert their claims in the adjudication at certain places and on certain dates or be declared in default and to have forfeited their claims. (Preclusion Ruling at 8, ¶(4).) The notice stated, in part:

[Y]ou are hereby required to appear at one of the times and places above named and submit proof of your claim to the use of the waters of said stream or a tributary thereof, if any such right is claimed by you; and you are further notified that if you fail to so appear and submit proof of your claim to said waters, default will be entered against you, and you will be barred and estopped from subsequently asserting any right to the use of said waters, and will be held and deemed to have forfeited all right to the use of said waters theretofore claimed by you.

(Exhibit 1 to Affidavit of Walter R. Echo-Hawk in Support of Klamath Tribes' and United States' Memorandum in Support of Joint Motion for Ruling on Legal Issues, filed in Preclusion Ruling, dated October 29, 2003 ("Echo-Hawk Affidavit").)

8. In addition to such publication notice,

[T]he State Engineer [of Oregon] did send by registered mail to each person, firm or corporation claiming a right to the use of any of the waters

of said streams, and to each person, firm or corporation owning or being in possession of lands bordering on or having access to said streams or their tributaries, insofar as said claimants could reasonably be ascertained, a notice similar to such notice, setting forth the date when the State Engineer or his authorized assistants would receive the statements and proofs of claim of the various claimants to the waters of said streams and their tributaries."

(Wood River Findings at p. C-5, ¶5.)

9. Mr. Grigsby is not included on the State Engineer's list of those to whom notice of the commencement of the Wood River Adjudication was sent by registered mail on or before June 5, 1928. (Wood River Findings.)

10. After the publication and mailing of such notice, the State Engineer accepted for filing claims in the Wood River Adjudication on Monday and Tuesday, July 16 and 17, 1928, and for a period of 30 days, beginning Monday, July 23, and ending Tuesday, August 21, 1928. (Wood River Findings at p. C-5.)

11. A certain Dan Savage ("Mr. Savage") filed a claim under Proof 56 for the Fee Patented Lands, among other lands. (Discovery Responses at Response to Request for Admission No. 14; Wood River Findings at C-54.) Based on the statement and proof of claim submitted in support of Proof No. 56, it appears that Mr. Savage had a contract to purchase the subject lands from Mr. Grigsby as of the time he filed Proof No. 56. (See Statement and Proof of Claim of Dan Savage for Proof No. 56, dated July 9, 1928, at 27-28, included as part of Exhibit 2 to Echo-Hawk Affidavit.) The Wood River Findings indicate that Mr. Grigsby did not file a contest to Mr. Savage's application. (Wood River Findings at C-7 to C-8 (listing five contests filed in Wood River Adjudication, which list does not include any contests filed against Proof No. 56 or any contests filed by Mr. Grigsby).) Ultimately, a water right was adjudicated in the Wood River proceedings for the Fee Patented Lands, among other lands, with a 1900 priority date. (Discovery Responses at Response to Request for Admission No. 15; Wood River Findings at C-54, as affirmed by Wood River Decree, dated October 5, 1932 (the "Wood River Decree"), included in OWRD Exhibit 1 (Case 900) at C-62-66.)

CONCLUSION OF LAW

The determination made in the Preclusion Ruling remains the law of this case.

OPINION

Claimants argue that they are not precluded from making a federal reserved rights claim in this proceeding, first because there were changes in the law concerning federal reserved rights following the commencement of the Wood River Adjudication, and second because sovereign immunity barred involuntary joinder of the United States as a

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party in state water rights adjudications at the time of the Wood River Adjudication. Claimants' Response at 8-10.

In the Preclusion Ruling, ALJ Young held that a claim is precluded from consideration in the present Klamath Basin Adjudication if: (1) the claim seeks a water right upon a stream or water source embraced by the Wood River Adjudication; (2) the claim lands were owned in fee simple at the time of the prior adjudication; and (3) appropriate notice of the prior adjudication was provided to the owners of the relevant lands. Preclusion Order at 13 and 16.

This holding was premised upon the general rule, adopted by the Oregon legislature, that "a water rights adjudication is conclusive upon all those with appropriate notice of the proceedings and their privies, as to all matters actually litigated, or that could have been litigated, whether they participated or not." Preclusion Ruling at 11. ALJ Young made it clear that this rule is an absolute one that applies to all who were "lawfully embraced" within the earlier proceedings regardless of whether there have since been any major, intervening changes in the law. As stated by ALJ Young, the statutory scheme established by the Oregon legislature for the adjudication of water rights "set[s] out no exclusion, nor has an Oregon court suggested that the preclusive effect of a prior adjudication is in any way lessened if the water right was lawfully embraced in the earlier adjudication, despite changes in the law." Preclusion Ruling at 13. Thus, the only question that must be answered in determining whether a particular claim in the Wood River basin is precluded in the Klamath Basin Adjudication is whether the predecessors-in-interest of the current claimant were "lawfully embraced" by the Wood River proceedings and were therefore subject to the civil jurisdiction of Oregon's courts. *Id.*

With respect to whether water rights associated with allotted lands could have been "lawfully embraced" by the Wood River Adjudication, ALJ Young acknowledged that, prior to 1952, sovereign immunity precluded the exercise of civil jurisdiction by Oregon's courts over water rights owned by the United States. Preclusion Ruling at 14. Such protection extended both to water rights owned by the United States on its own behalf and in its capacity as trustee for the Klamath Tribes and as trustee for the benefit of individual Indian allottees.

ALJ Young further ruled, however, that once the United States issued a fee simple patent for any allotted lands, the United States' interest in the lands terminated, and sovereign immunity no longer prevented the Oregon courts from exercising civil jurisdiction over water rights appurtenant to the lands. As stated by ALJ Young, "If a particular parcel was owned in fee at the time of an earlier adjudication, the water right appurtenant to that property whether owned by an Indian or by a non-Indian, was no longer protected by sovereign [immunity] and was subject to Oregon's civil jurisdiction from the date the patent was issued in fee." Preclusion Ruling at 16.

ALJ Young did note that claimants in the Klamath Basin Adjudication have a potential defense against the preclusive effect of the prior adjudication if they can

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establish that there was improper notice of the adjudication made to their predecessors-in-interest.

As stated in a footnote in the Preclusion Ruling, "A prior adjudication could not, however, bar anyone whose predecessors-in-interest were not served with adequate notice of the prior adjudication." Preclusion Ruling, at 11 n. 12. Where this defense is unavailable, however, the governing rule is that lands owned in fee at the time of the prior adjudication are barred from consideration in the present proceedings, whether or not an actual claim was filed for such lands in the prior proceedings.

In the "Preclusion Order" Judge Young ruled:

[T]he general determination of whether doctrines of preclusion apply to these claims based on earlier adjudications shall be as follows:

- (1) It is unnecessary to resort to equitable doctrines of issue and claim preclusion to decide whether claims are barred by previous adjudications. ORS 539.200 and 539.210 provide an adequate standard.
- (2) ORS 539.200 and 539.210 do not include any "change in the law" exception to their applicability.
- (3) Claims may be barred from this adjudication if the present claim was lawfully embraced within an earlier adjudication.
- (4) Parties asserting preclusive effect of a prior adjudication have the burden of presenting evidence and the burden of proof on the issue raised by that assertion.

(Order Amending Rulings on Motions for Ruling on Legal Issues in Consolidated Preclusion Ruling at 22, April 20, 2004.)

The Preclusion Ruling similarly instructed that "appropriate claim specific motions may be filed in the individual cases to apply the legal standard established in this consolidated case." Preclusion Ruling at 7. Accordingly, ALJ Young made it clear that the law set forth in the Preclusion Ruling should not be re-litigated in the individual case proceedings. Rather, where preclusion remains an issue in particular cases, the Preclusion Ruling should simply be applied as the "law of the case" to the individual facts of each such case.

Claimants' arguments effectively require the ALJ to reconsider the Preclusion Ruling. Claimants have no grounds for making such a request. The Preclusion Ruling provides the law of Case 181 on the issue of the preclusive effect of the prior Wood River

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Adjudication. Preclusion Ruling at 2. Indeed, the purpose of consolidating cases into Case 900 was to provide the “most prompt and efficient resolution of the specific legal issue common to each of the claims requested for consolidation.” Order Granting Motion to Consolidate and Scheduling Prehearing Conference, April 29, 2003, Case No. 900, p. 3. In other words, its purpose was to avoid having to determine the same legal issue in a multitude of individual cases, and the resulting potential for inconsistent results and increased burden on the OAH, the parties, and OWRD. Thus, by effectively requesting a reconsideration of the Preclusion Ruling in this proceeding, Claimants are attempting to defeat the “sole purpose” of the consolidation. See Order Vacating Order to Consolidate, May 27, 2004, Case No. 900, p. 2.

Further, the Preclusion Ruling considered and rejected the precise arguments raised by Claimants in their Response. With regard to Claimants’ argument that preclusion does not apply due to changes in the law of federal reserved rights, the Preclusion Ruling held:

Some participants suggest that there have been major changes in the law altering the legal landscape since earlier adjudications. The cases cited by these claimants generally deal exclusively with equitable doctrines, not with the statutes that control analysis of these cases. The statutes set out no exclusion, nor has an Oregon court suggested that the preclusive effect of a prior adjudication is in any way lessened if the water right was lawfully embraced in the earlier adjudications, despite changes in the law.

Preclusion Ruling at 13.

Having been explicitly taken into account in the Preclusion Ruling, Claimants’ reiteration of this argument provides no basis for the ALJ’s reconsideration.

The Preclusion Ruling also addressed the argument that the United States’ sovereign immunity prevented consideration of *Walton* rights in the Wood River Adjudication. ALJ Young held:

Although fee allottee and *Walton* rights derive from federal water rights, they are not rights owned by the United States or the Klamath tribes, and thus, immune from suit. They are derivative rights without the protection of the United States’ or the Tribes’ sovereign immunity and are entirely subject to Oregon’s civil jurisdiction. If a particular parcel was owned in fee at the time of an earlier adjudication, the water right appurtenant to that property *** was no longer protected by sovereign immunity and was subject to Oregon’s civil jurisdiction from the date the patent was issued in fee.

Preclusion Ruling at 16. Thus, Claimants have no basis to request the reconsideration of ALJ Young’s Preclusion Ruling, which remains the “law of the case” in Case 181.

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As applied to Claim 45, the foregoing rules of law dictate that the notice of the Wood River Adjudication published in the Evening Herald provided Mr. Grigsby all the notice of the adjudication that was required by Oregon Law.

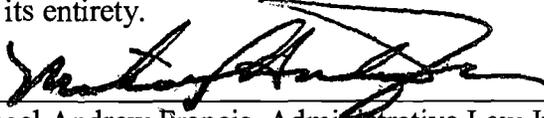
Finally, the facts demonstrate that an actual claim was filed in the Wood River Adjudication for the Fee Patented Lands, and an actual water right with a 1900 priority date was adjudicated to these lands. The notification prior to the proceedings, by virtue of the notice published in the Evening Herald, establishes that the Claimants are precluded from pursuing the Claim as to the Fee Patented Lands.

ORDER

1. The Motions for Ruling on Legal Issues of the United States and KPWU are granted.
2. Claim 45 is precluded by a prior adjudication with respect to the following lands:

Township 33 South, Range 7.5 East, Willamette Meridian
Section 35: SW/4SE/4 (2.0 acres)

CLAIM 45 is denied in its entirety.



Michael Andrew Francis, Administrative Law Judge
Office of Administrative Hearings

Date: November 29, 2005

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

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must be filed with the Adjudicator at the following address:

Dwight W. French
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 November 29, 2005, I mailed a true copy of the following:
**ORDER ON MOTIONS FOR RULING ON LEGAL ISSUES; PROPOSED
ORDER DENYING CLAIM**, 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 Dept.
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Phone: 503-986-0826
Fax: 503-986-0901
Teri.Hranac@wrđ.state.or.us

Ronald S. Yockim
Attorney at Law
548 SE Jackson St., Suite 7
PO Box 2456
Roseburg, OR 97470
Phone: (541) 957-5900
Fax: (541) 957-5923
ryockim@mcsi.net

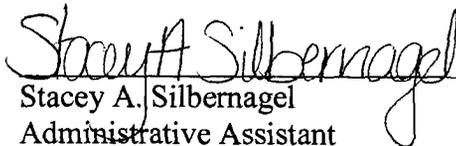
Barbara Scott-Brier
Oregon Dept. of Fish & Wildlife
500 NE Multnomah St., Suite 607
Portland, OR 97232
Phone: 503-231-2139
Fax : 503-231-2166

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

Thomas K. Snodgrass
U.S. Department of Justice
Environment & Natural Resource Div.
Suite 945, North Tower
999 18th Street
Denver, CO 80202
Phone: (303) 312-7326
Fax: (303) 312-7379
Thomas.snodgrass@usdoj.gov
Klamathcase.enrd@usdoj.gov

William M. Ganong
Attorney at Law
514 Walnut Ave.
Klamath Falls, OR 97601
Phone: 541-882-7228
Fax: 541-883-1923
wganong@aol.com

Jesse D. Ratcliffe / Stephen E.A. Sanders
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-947-4500
Fax: 503-947-3802
Jesse.d.ratcliffe@doj.state.or.us
Steve.sanders@doj.state.or.us


Stacey A. Silbernagel
Administrative Assistant

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