

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 Bureau of Reclamation; The
Klamath Tribes;
Contestants,

vs.

Richard K. Hart;
Claimant.

PROPOSED ORDER

Case No. 123

Claim No. 173

Contest No. 3831, 4173

HISTORY OF THE CASE

On February 1, 1991, Richard K. Hart filed Claim No. 173, asserting a water right for 1.59 Cubic Feet per Second (cfs) of water from two points of diversion on Cold Creek and Johnson Creek, Tributary to Jenny Creek, for irrigation of 111.5 acres located in Sections 8 and 17, T. 39 S., R.5. E.W.M. based on an initiation date of 1878. Thereafter, on October 4, 1999, Oregon Water Resources Department (OWRD) entered a Preliminary Evaluation allowing the claim as submitted. The United States filed its contest on May 3, 2000. The Klamath Tribes filed their contest on May 4, 2000. Claimant did not file a contest.

The case was then referred to the Hearing Officer Panel (now the Office of Administrative Hearings) for hearing.

Pursuant to an Order of May 10, 2002, Prehearing Statements were submitted by OWRD, the United States, and the Klamath Tribes. Claimant did not file a Prehearing Statement. On June 18, 2002, a Prehearing Conference was held, to define the issues presented by the case, and establish a schedule of further proceedings. Claimant did not appear.

The United States filed a Motion for Summary Judgment on September 23, 2002. After briefing, in which Claimant did not participate, the Motion for Summary Judgment was denied by Order of December 11, 2002, and the matter was set down for hearing.

After Direct and Rebuttal Testimony had been filed in writing by the participants, except Claimant, a hearing for cross-examination of witnesses was held on August 6, 2003. Claimant did not appear. The participants requested the opportunity to file additional argument concerning aspects of the case, which was allowed.

The record closed on December 8, 2003. Claimant has filed nothing and made no appearance since the commencement of this case for hearing, and is in default.

EVIDENTIARY RULINGS

Exhibits 123E00002001 and 123E00002002, offered by OWRD, and Exhibits 123E00003001 through 123E00003004, offered by the United States, were admitted into the record without objection. Claimant filed no evidence. The evidentiary record closed on August 6, 2003.

ISSUES

1. Whether the Place of Use has not been continuously irrigated.
2. Whether there is sufficient information on the development of water on this Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right.

FINDINGS OF FACT

1. In 1966, Claimant's predecessors Dan H. and Regina E. Adams, filed an application to appropriate 1.96 cfs from Cold Creek and Johnson Creek to irrigate 156.3 acres in Sections 8, 17 and 18, T. 39 S., R. 5.E.W.M. At that time the applicants expressly disclaimed the intention to waive or abandon "any vested water right appurtenant to said land." (Ex. 123E00002002 at 13.) The application was accompanied by a letter from William L. Wales, Jr., Consulting Engineer, which asserted as follows:

[T]he lands covered by this filing have been under continuous irrigation since 1878 according to the testimony of Mrs. Alice Parker, widow of the son of the original locator on the land. Please refer to our correspondence on this matter in August, 1963.

OWRD Exhibit 1, (123E00002001 at 7.)

2. The statement of Mrs. Alice Parker, and the other correspondence mentioned in the letter of 1966 as being dated August, 1963, have not been located in the files of OWRD. On May 17, 1977, Wales submitted a Notice of Intention to File Claim in the Klamath Adjudication on behalf of the Adams. The cover letter for that Notice made reference to an affidavit that had been previously filed. (Ex. 123E00002002 at 1.) On May 26, 1977, Myron V. Bish responded to this letter on behalf of the Department. In that response, Bish advised Wales that the affidavit

mentioned in Wales' letter had not been found. (Ex. 123E00002002 at 8.)

3. In 1978, a field inspection report was prepared, describing the present use of water on the property substantially as stated in the Claim. (Ex. 123E00002002 at 3.)

4. By 1991 ownership of the land had passed to Claimant, Richard K. Hart, who filed the claim in this case. (Ex. 123E00002001 at 1.) That claim was for 1.59 cfs for irrigation for pasture from Johnson Creek and Cold Creek, tributary of Jenny Creek. (Ex. 123E00002001 at 1.) No further communication or evidence from Claimant has been received by OWRD or the Office of Administrative Hearings since the date the claim was filed, despite numerous letters and documents that were transmitted to Claimant between that filing date and the date of this order.

5. Notice of the Hearing in this case was sent to Claimant by certified mail at Claimant's last known address; 812 Beach, Calexico, CA 92231. (Certificate of Service.)

A certified mailing receipt for delivery of the Notice of Hearing in this case to Claimant was received by the Office of Administrative Hearings on June 23, 2003, signed by Veronica Gutierrez. (Return Receipt, # 7002 2030 0001 3975 4272.)

CONCLUSIONS OF LAW

1. The record does not establish that Place of Use has been continuously irrigated.
2. 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.

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. In order to meet that burden, Claimant must show (1) an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, channel or other structure; and (3) the application of the water within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930).

In this case, Claimant has not met this burden. The only evidence in the file suggesting the possibility of a pre-1909 use of water is the letter from Wales, indicating that there is other correspondence establishing this point. However, that other correspondence has not been located.

Because this case involves a determination of the application of water prior to February 24, 1909, it is inevitable and necessary that a greater reliance be placed on inference and hearsay than in other administrative cases. It would be a very unusual case where testimony could be taken at

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hearing from a percipient witness to conditions that obtained 94 years before. Nonetheless, although hearsay is generally admissible in administrative proceedings, (*Pierce v. MVD*, 125 OR App 79,85 (1993)) where hearsay is offered as substantial evidence of a fact at issue, it is necessary to apply the five-part test first stated in *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991).

In *Reguero*, the Supreme Court has enunciated 5 factors to be considered in determining whether hearsay is "substantial evidence" such as will support agency action. These factors are as follows:

[1] the alternative to relying on the hearsay evidence; [2] the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy; [3] the state of the supporting or opposing evidence, if any; [4] the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and [5] the consequences of the decision either way."

Reguero, 312 Or at 418.

The Court of Appeals has applied the analysis established in *Reguero* in several cases, including *Cole v. DMV*, 172 Or App 573 (rev. allowed, 2001) and *Dinsmore v. DMV*, 175 Or App 509 (rev. allowed, 2001). As the court noted in *Dinsmore*, accepting hearsay as substantial evidence prevents Protestants from exercising an important right of cross-examination, and should not be done lightly.

In this case the only evidence pointing to a pre-1909 water use are the two letters from Wales, which are hearsay. Indeed, they may fairly be described as "double hearsay" in that they do not describe the use, itself, but merely refer to other documents that do so. An analysis of these documents under *Reguero* shows that it cannot be treated as substantial evidence of a water right.

First, it is unknown whether the declarant is available. The first letter was written in 1966. Wales sent the second letter in 1977. Whether Wales is still alive and available to testify is not stated in the file.

Second, the hearsay evidence is important. Without this letter, there could be no evidence at all on matters dispositive of this case.

Third, there is no corroboration to the facts stated in the letter, either as to the existence of other correspondence or as to the content of that correspondence.

Fourth, the efficacy of cross-examination of the declarant, were he available, is clear. Had Wales testified, the circumstances under which the missing correspondence was prepared could have been explored, and any reliance on Wales' letter could well have been unnecessary.

Finally, the consequences of the decision in this case are of the utmost significance, at least as great as that in *Reguero*, and perhaps more so. The determination of this case will establish or dispense with the existence of a right appurtenant in the land in perpetuity.

Under the circumstances, I conclude that the hearsay evidence presented in this case for water use before 1909 does not meet three of the five standards applicable under *Reguero*, and does not, therefore, qualify as substantial evidence of the facts that evidence presents.

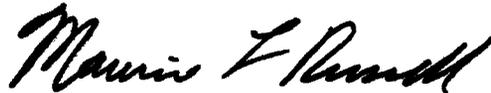
Without those letters as substantial evidence, there is no evidence whatever of a pre-1909 use of water on the property subject to this claim. Claimant had ample opportunity to submit evidence on this point, and did not do so. In the absence of substantial evidence, the claim cannot be sustained.

In view of the foregoing, it is unnecessary to address the effect of the Requests for Admissions by the Klamath Tribes.

ORDER

I recommend the Department order as follows:

Claim 173 in the name of Richard K. Hart is **DISAPPROVED**.



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

Dated: January 27, 2004

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.

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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:

Richard D. Bailey
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301

CERTIFICATE OF SERVICE

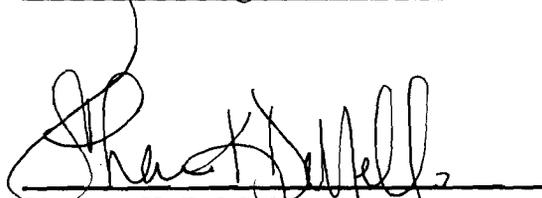
I hereby certify that on January 27, 2004, I mailed a true copy of the following: **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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