

JUN 20 2005

WATER RESOURCES DEPT
SALEM, OREGON

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; 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; Randy
Walthall; Inter-County Title Company; Winema
Hunting Lodge, Inc.; Van Brimmer Ditch
Company; Plevna District Improvement
Company; Collins Products, LLC;
Contestants

**ORDER GRANTING MOTION FOR
RULING ON LEGAL ISSUES**

Case No. 254

Claim: 708

Contests: 2746, 2747, 2748, 2749, 2757²,
3075³, 3513⁴, 3819, and 4244⁵

vs.

LaPaloma Enterprises, LP,¹
Claimant/Contestant.

On February 28, 2005, the Klamath Project Water Users (KPWU) and the United States filed separate Motions for Ruling on Legal Issues. Both Contestants seek a determination that Parcels 3 and 6 of Claim 708 were lawfully embraced within the earlier Wood River Adjudication and therefore barred from this Klamath River Basin Adjudication. The Contestants

¹ Change of Ownership forms from the Mathis Family Trust to LaPaloma Enterprises, LP were submitted December 19, 1999 and December 23, 1999.

² Ambrose W. McAuliffe, Dwight Mebane, Elmore Nicholson, Richard Nicholson, and William Nicholson filed contest 2757 on May 8, 2000. Contest 2757 was withdrawn by Stipulation signed March 11, 2002.

³ WaterWatch of Oregon, Inc.'s Contest 3075 was dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003

⁴ Don Vincent voluntarily withdrew from Contest 3513 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contest 3513 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3513 on January 15, 2004.

⁵ On February 8, 2005, the Klamath Tribes voluntarily withdrew their Contest 4244, without prejudice.

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stipulate that Parcels 4 and 5 of Claim 708 are not subject to preclusion, because those parcels were not held in fee title at the time of the Wood River Adjudication.

The United States filed a Motion for Ruling on Legal Issues, accompanied by a Memorandum in Support and Exhibits A, B, C, and D. KPWU filed a Motion for Ruling on Legal Issues, accompanied by the affidavit of Andrew Hitchings and Exhibits A, B, C, and D. Claimant filed Answers on March 30, 2005 and Supplemental Answers on April 27, 2005. The United States, KPWU, and OWRD filed Reply briefs April 29, 2005.

ISSUE

Whether a portion of this claim is precluded because it is embraced within the Wood River 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.
- (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:

FINDINGS OF FACT

(1) On January 24, 1991, the Mathis Family Trust filed Claim 5 (Case 158). The claim covered six parcels of land. Since the parcels included noncontiguous property, the Oregon Water Resources Department (OWRD) split the claim in two: Claim 5 covered Parcels 1 & 2 and Claim 708 covered Parcels 3-6. (OWRD Ex. 1 at 261, 301.) On June 18, 1999, Charlotte M. Mathis amended the claim by filing Claim 708, on behalf of the Mathis Family

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Trust. This *Walton*⁶ claim was for 12.33 cubic feet per second (cfs) of water for irrigation of 2,295.9 acres of land and for 1,700 head of livestock. The water was drawn from Fort Creek and Crooked Creek, tributaries of the Wood River. The claimed period of use is April 1 to November 1 for irrigation, and year-round for livestock. The claimed priority date is 1864. (OWRD Ex. 1 at 1-5, 415-16.) The sources of water were previously adjudicated in the Wood River Adjudication. See Answers to Klamath Project Water User's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents to Claimant LaPaloma Enterprises, LP at Request for Admission No. 9.

(2) On October 4, 1999, the Adjudicator for OWRD, Richard D. Bailey, issued a Preliminary Evaluation, denying Claim 708 as a claim for a source which has been previously adjudicated. (OWRD Ex. 1 at 415-16.)

(3) On February 8, 2000, LaPaloma Enterprises bought the property covered by Claim 708. (OWRD Ex. 1 at 268-79.)

(4) On May 8, 2000, Claimant filed Contests 2746 (Parcel 3), 2747 (Parcel 4), 2748 (Parcel 5) and 2749 (Parcel 6). (OWRD Ex. 1 at 307, 310, 315, 320.) The other Contests that remain were filed on May 8, 2000 by the United States (Contest 3819) and the Klamath Project Water Users (Contest 3513). (OWRD Ex. 1 at 398 and 357.)

(5) Subsequently, Claim 708, 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. The consolidated proceedings resulted in an Order Amending Rulings on Motions for Ruling on Legal Issues in Consolidated Case 900, dated April 20, 2004 (hereafter Preclusion Ruling), which set forth the legal standards for determining whether a claim in the Klamath River Basin Adjudication is precluded as the result of a prior adjudication.

(6) Prior to the commencement of the Wood River Adjudication in 1928, the United States had issued fee simple patents for the following lands, and these lands remained in fee simple ownership throughout 1928 (acreage shown in parentheses):

Parcel 3

Township 33 South, Range 7.5 East, Willamette Meridian

Section 34: Lot 6 (44.3, Lot 7 (29.8, Lot 8 (2.7)

Section 35: SW ¼ NW ¼ (31.2)

⁶ 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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Section 3: N ½ N ½ NE ¼ (35.2) 143.2 acres total

Parcel 6Township 33 South, Range 7.5 East, Willamette Meridian

Section 35: SW ¼ SE ¼ (8.3), NW ¼ SE ¼ (0.1) 8.4 acres total

See Answers to United States' First Requests for Admission, Interrogatories, and Requests for Production of Documents Upon Claimant (hereafter U.S.'s Discovery Requests) at Answers to Interrogatory Nos. 1, 2 and 3; OWRD Exhibit 1 at 3 (Parcel 3) and 161 (Parcel 6).

(7) The fee simple patent for Parcel 3 was issued on December 26, 1924 to Leonard J. Woodruff, and by deed dated November 7, 1927, Leonard J. Woodruff conveyed Parcel 3 to Cary V. Loosley (Mr. Loosley), who owned the lands throughout 1928. See U.S.'s Discovery Requests at Answers to Interrogatory Nos. 1 and 2. The fee simple patent for Parcel 6 was issued December 13, 1919 to William Moore, and by deed dated July 2, 1924, William Moore conveyed Parcel 6 to B.S. Grigsby (Mr. Grigsby), who owned these lands throughout 1928. *Id.* at Answer to Request for Admission Nos. 11, 12; Answer to Interrogatory No. 2.

(8) Mr. Grigsby and Mr. Loosley had constructive notice of the Wood River Adjudication by notices published in the Evening Herald newspaper of Klamath Falls, Oregon. *Id.* at Answer to Request for Admission No. 19. Mr. Loosley also had actual notice of the deadline for filing claims in the Wood River Adjudication. *Id.* at Answer to Request for Admission No. 6.

(9) Mr. Loosley filed Statement and Proof of Claim No. 29 in the adjudication, which covered Parcel 3. *Id.* at Answer to Request for Admission No. 7. A claim covering all of Parcel 6, among other lands, was filed under Statement and Proof of Claim No. 56 by Dan Savage (Mr. Savage), who had a contract with Mr. Grigsby for the purchase of these lands. Mr. Grigsby had knowledge of the claim filed by Mr. Savage and did not file a contest to the claim. *Id.* at Answer to Request for Admission Nos. 13, 14, 15, and 16.

(10) An irrigation water right was awarded to Claim 29 on the entire 143.2 acres of Parcel 3 with a 1902 priority date. *Id.* at Answer to Interrogatory No. 6. An irrigation water right was awarded to Claim 56 on the entire 8.4 acres of Parcel 6 with a 1900 priority date, and a supplemental right on the same acreage with a 1904 priority date. *Id.*

OPINION

On April 20, 2004, Administrative Law Judge William Young issued an Order Amending Rulings on Motions for Ruling on Legal Issues in Consolidated Case 900, of which the present case was a part, in which he ruled:

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

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- (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 Case 900 at 22 (April 20, 2004).

Claimant has admitted by his responses to discovery requests that the lands listed in Finding of Fact (6) were subject to fee simple patents prior to 1928, and that they were owned by Mr. Loosley (Parcel 3) and Mr. Grigsby (Parcel 6) during the entirety of 1928, when claims were required to be filed in the Wood River Adjudication. Claimant has admitted that Mr. Loosley and Mr. Grigsby received published notice of the adjudication, and that Mr. Loosley also received actual notice. Finally, claimant has admitted that claims were filed in the adjudication covering Parcel 3 and Parcel 6. Based on the foregoing, it is clear that the lands listed in Finding of Fact (6) were "lawfully embraced within an earlier adjudication," and, therefore, are precluded from adjudication in the present Klamath River Basin Adjudication.

Claimant argues that ALJ Young's Preclusion Ruling is wrong as it relates to claimant and should be reconsidered. Claimant's argument is rejected. There is nothing about claimant's status that makes the Preclusion Ruling clearly erroneous as to claimant. Furthermore, the same argument made by claimant was considered and rejected in the Case 900 proceedings. Therefore, the "law of the case" as set forth in ALJ Young's April 20, 2004 ruling will be applied.

ORDER

The Motions for Ruling on legal Issues of the United States and Klamath Project Water Users are GRANTED, as follows:

Claim 708 is precluded by a prior adjudication as to Parcels 3 and 6, more particularly described as:

Parcel 3

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Township 33 South, Range 7.5 East, Willamette Meridian

Section 34: Lot 6 (44.3, Lot 7 (29.8, Lot 8 (2.7)

Section 35: SW ¼ NW ¼ (31.2)

Township 34 South, Range 7.5 East, Willamette Meridian

Section 3: N ½ N ½ NE ¼ (35.2)

143.2 acres total

Parcel 6

Township 33 South, Range 7.5 East, Willamette Meridian

Section 35: SW ¼ SE ¼ (8.3), NW ¼ SE ¼ (0.1)

8.4 acres total

Claim 708 is not precluded by a prior adjudication as to Parcels 4 and 5, more particularly described as follows:

Parcel 4

T 34 S., R. 7.5 E., Willamette Meridian

Section 3: S/2NE/4NE/4 (6.5), S/2NW/4NE/4 (20.0), SW/4NE/4 (40.0),
SE/4NE/4 (12.1), Lot 9 (aka NE/4NW/4) (6.6), Lot 10 (aka
SE/4NW/4) (20.6)

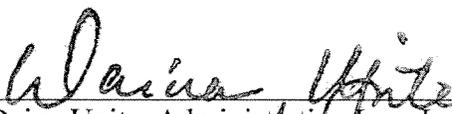
105.8 acres total

Parcel 5

T 33 S., R. 7.5 E., Willamette Meridian

Section 35: NE/4SW/4 (14.8), NW/4SW/4 (39.4), SW/4SW/4 (40.0),
SE/4SW/4 (31.3), NE/4SW/4 (20.3), SE/4SW/4 (8.7)

154.5 acres total


Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: June 17, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2005, I served a true copy of the following: **ORDER GRANTING MOTION FOR RULING ON LEGAL ISSUES**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Richard D. Bailey
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
richard.d.bailey@wrđ.state.or.us

Melvin D. Ferguson
Attorney at Law
541 Walnut Avenue
Klamath Falls, OR 97601
Phone: (541) 850-2828
Fax (541) 883-1923

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

Thomas K. Snodgrass
U.S. Department of Justice
General Litigation Section
Ben Franklin Station
P.O. Box 663
Washington D.C. 20044-0663
Phone: (202) 305-0489
Fax: (202) 305-0274
Thomas.snodgrass@usdoj.gov
klamathcase.enrd@usdoj.gov

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

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

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

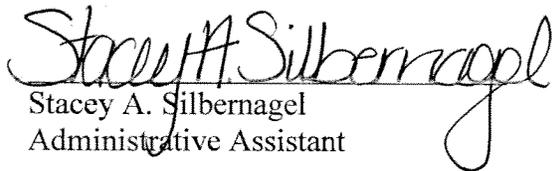
Jesse D. Ratcliffe / Stephen E.A. Sanders
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-378-4500
Fax: 503-378-3802
Jesse.d.ratcliffe@doj.state.or.us
Steve.sanders@doj.state.or.us

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Laura A. Schroeder
Schroeder Law Offices, P.C.
PO Box 12527
Portland, OR 97212
Phone: 503-281-4100
Fax: 503-281-4600
las@water-law.com


Stacey A. Silbernagel
Administrative Assistant