014F00000013

BEFORE THE HEARING OFFICER PANEL
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

Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; Rogue River Irrigation District; Roger Nicholson; Roger Nicholson Cattle Co.; Lloyd Nicholson Trust; Dorothy Nicholson Trust; Richard Nicholson; Jim McAuliffe; McAuliffe Ranches; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Joe McAuliffe Company; Kenneth L. Tuttle and Karen L. Tuttle DBA Double K Ranch; Dave Wood; Kenneth Zamzow; Anita Nicholson; Wm. S. Nicholson; John B. Owens; Kenneth Owens; Wm. L. Brewer; Mary Jane Danforth; Jane M. Barnes; Franklin Lockwood Barnes Jr.; Jacob D. Wood; Elmore E. Nicholson; Mary Ann Nicholson; Gerald H. Hawkins; Hawkins Cattle Co.; Owens & Hawkins; Harlowe Ranch; Terry M. Bengard; Tom Bengard; Dwight T. Mebane; Helen Mebane; Walter Seput; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams; River Springs Ranch; Pierre A. Kern Trust; William V. Hill; Lillian M. Hill; Carolyn Obenchain; Lon Brooks; Newman Enterprise; William C. Knudtsen; Wayne Jacobs; Margaret Jacobs; Robert Bartell; Hilda Francis, Francis Loving Trust; Rodney Z. James; David Cowan; James R. Goold for Tillie Goold Trust; and Duane F. Martin,
Contestants

v.

Pacificorp,
Claimant

PROPOSED ORDER

Case No. 014

Claim No. 167

Contest Nos. 3161[1] and 3279

[1] On February 25, 2002 Horsefly Irrigation District and Langell Valley Irrigation District withdrew, without prejudice, from participation in contest 3161.

HISTORY OF THE CASE

THIS PROCEEDING under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

On January 31, 1991, Pacificorp, doing business as Pacific Power and Light Co. (Claimant), filed Claim No. 167 for a total of 150 cubic feet per second (cfs) from one point of diversion located on the Link River, tributary to Klamath River. Claimant indicated that the basis for the claim was appropriation of water since November 1, 1895, with a claimed period of use from January 1 through December 31. The Adjudicator's October 4, 1999 Preliminary Evaluation found that Pacificorp had established the elements of a pre-1909 claim to the extent of the use claimed.

On May 8, 2000, Langell Valley Irrigation District, Horsefly Irrigation District, Rogue River Valley Irrigation District, and Medford Irrigation District (Irrigation Districts) filed Contest No. 3161 to Claim No. 167 to preserve their rights to water in the Lost River Basin, Four Mile Lake, and Fish Lake. Contestants Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from participation in their contest on February 25, 2002, and again with an amended withdrawal on February 27, 2002.

Also on May 8, 2000, Roger Nicholson and other water users[2] (Nicholson *et al*) filed Contest No. 3279 to Claim No. 167, contesting whether Claimant had established the elements of a pre-1909 claim. Although Nicholson *et al* filed a prehearing statement in this proceeding, they did not participate further.

On February 20, 2002, the Hearing Officer Panel issued a Notice of Hearing to the participants, including Nicholson *et al*. In response to requests by the participants to amend the hearing schedule, the Hearing Officer Panel issued an Order Amending Schedule on March 9, 2002. On April 2, 2002, the Hearing Officer Panel mailed a second Notice of Hearing by certified mail to all participants, including Nicholson *et al*. The certificate of service inadvertently indicated that the notice had been mailed by first

[2] Nicholson *et al* consists of the following contestants: Roger Nicholson; Roger Nicholson Cattle Co.; Lloyd Nicholson Trust; Dorothy Nicholson Trust; Richard Nicholson; Jim McAuliffe; McAuliffe Ranches; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Joe McAuliffe Company; Kenneth L. Tuttle and Karen L. Tuttle DBA Double K Ranch; Dave Wood; Kenneth Zamzow; Anita Nicholson; Wm. S. Nicholson; John B. Owens; Kenneth Owens; Wm. L. Brewer; Mary Jane Danforth; Jane M. Barnes; Franklin Lockwood Barnes Jr.; Jacob D. Wood; Elmore E. Nicholson; Mary Ann Nicholson; Gerald H. Hawkins; Hawkins Cattle Co.; Owens & Hawkins; Harlowe Ranch; Terry M. Bengard; Tom Bengard; Dwight T. Mebane; Helen Mebane; Walter Seput; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams; River Springs Ranch; Pierre A. Kern Trust; William V. Hill; Lillian M. Hill; Carolyn Obenchain; Lon Brooks; Newman Enterprise; William C. Knudtsen; Wayne Jacobs; Margaret Jacobs; Robert Bartell; Hilda Francis, Francis Loving Trust; Rodney Z. James; David Cowan; James R. Goold for Tillie Goold Trust; and Duane F. Martin.

class mail. On April 5, 2002, the Hearing Officer Panel sent a letter to the parties enclosing an amended certificate of service clarifying that the Notice of Hearing had been sent by certified mail on April 2, 2002, to all participants.

Pursuant to that Notice of Hearing mailed to all participants by certified mail, a hearing was held on May 13, 2002 for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed. William D. Young, Administrative Law Judge, presided. Claimant Pacificorp was represented by Jenny L. Bricker and Beverly C. Pearman. Contestant Irrigation Districts were represented by Laura A. Schroeder. Contestants Nicholson *et al* submitted no evidence or testimony into the hearing record and did not appear at the hearing. The Oregon Water Resources Department (OWRD) was represented by Renee Moulun, an authorized agency representative. I held the hearing record open to allow Claimant Pacificorp an opportunity to file a written memorandum in the form of proposed findings and conclusions and to allow Contestant Irrigation Districts and OWRD an opportunity to file written responses.

On May 22, 2002 I transmitted the following question to OWRD pursuant to OAR 137-003-0635.

> Does the OWRD have the authority to condition Water Right Certificates to state that an established pre-1909 water right does not establish a "call" or superior right to other permits or certificates affecting bodies of water not addressed in the claim filed with the Department, or is determination of the relative rights of certificate and permit holders a matter for OWRD enforcement at the time of such "call"?

On June 4, 2002, the Adjudicator, Richard D. Bailey, declined to answer the question pursuant to OAR 137-003-0635(7).

Pursuant to a briefing schedule established in my order of May 28, 2002, I received Pacificorp's Proposed Order on June 14, 2002. I received the OWRD's memorandum on June 24, 2002 and the memorandum filed by Contestant Irrigation Districts on June 28, 2002.

On July 3, 2002 Claimant Pacificorp filed a Motion to Strike Contestant Irrigation Districts' Proposed Order as untimely. I denied that motion by written order and closed the hearing record effective June 28, 2002, the date Contestant Irrigation District's response memorandum was filed.

EVIDENTIARY RULINGS

I received OWRD's Affidavit and Testimony of Teri K. Hranac and Exhibit 1 (Ref. No. 014E0020001) without objection. I received the Direct Testimony of Richard W. Barney (Ref. No. 014E00080001) without objection. I received Medford and Rogue

River Valley Irrigation Districts' Response to Claimant's Discovery Request (Ref. No. 014F00060005), also without objection.

I received the Direct Testimony of Carol Bradford - Witness for Medford and Rogue River Valley Irrigation Districts and Concurance [sic] of Testimony by Jeff Eicher, Jim Pendleton and Ralph Kime (Ref. No. 014F00060001), overruling Claimant Pacificorp's objection that the proffered evidence was irrelevant and immaterial to the claim. ORS 539.100 states that "Any person owning any irrigation works, or claiming any interest in the stream involved in the determination shall be a party to, and bound by, the adjudication. . . ." Contestants claim an interest waters from which the stream involved in the determination flows. The proffered testimony and exhibits are relevant to their contest and to their ability to participate in the hearing. It is also relevant to the issue of whether Claimant and its predecessors in interest actually applied the waters claimed to beneficial use or engaged in good faith in the construction of works for the application of water to a beneficial use within a reasonable time.

The participants did not cross-examine either of the witnesses available at the hearing.

ISSUES

(1) Did Pacificorp establish that it is entitled to a quantity of water with a pre-1909 priority and, if so, what amount?

(2) Is water from the Klamath Basin, described by water rights held by certain Contestants, "water available" for appropriation in the Klamath Adjudication?

FINDINGS OF FACT

(1) Klamath Falls Light and Power Company, PacifiCorp's indirect predecessor, was formed in 1895 and constructed the first Eastside Power Plant on the Link River in the same year. The Eastside Plant took water from Link River, via the Ankeny Canal, and began generating electricity on November 1, 1895, the claimed priority date for Claim No. 167.

(2) The Klamath Falls Light and Power Company operated the Eastside Power Plant, using water from the Ankeny Canal, until 1908. From 1904 to 1906, the Company acquired property rights and upgraded the Eastside Plant and its water delivery system. The Company constructed a second Eastside Power Plant, which utilized Link River water via a wooden flume that had sufficient capacity to carry 150 cubic feet per second (cfs). The new plant produced theoretical horsepower of 563, which is the theoretical horsepower produced with 150 cfs of water, given the available 33-foot head.

(3) By 1911, the Klamath Falls Light and Power Company had become the Klamath Power Company, which the California-Oregon Power Company (Copco), PacifiCorp's direct predecessor, purchased in 1912. In 1917, Copco signed a contract

with the United States setting forth the construction and operational details for the Link River Dam; however, the Dam was not completed until December 1921. Construction of the Link River Dam included installation of a wooden flowline, steel penstock, and surge tank that still supply the present-day Eastside Power Plant. The present Eastside Plant was the third plant constructed on the east bank of the Link River — it began operation on August 22, 1924.

(4) PacifiCorp, which was then Pacific Power & Light Company, a Maine corporation, merged with Copco in 1962. PacifiCorp operates the Eastside Power Plant with water from two separate water rights: the 150 cfs right claimed in Claim No. 167, and 1000 cfs under Certificate No. 24508, with a priority date of February 24, 1919. PacifiCorp also operates the Link River Dam pursuant to a contract with the Dam's current owner, the United States Bureau of Reclamation. The Eastside Plant presently generates 801 theoretical horsepower with the 150 cfs water right, given a 47-foot head.

(5) Contestant Irrigation Districts hold established water rights to store water in Four Mile Lake and Fish Lake with a priority date of March 31, 1910. These streams and storage facilities are not subject to the Klamath adjudication.

CONCLUSIONS OF LAW

(1) Claimant Pacificorp established the elements of a pre-1909 claim to 150 cfs for power generation, with a priority date of November 1, 1895.

(2) The evidence does not establish whether water from the Klamath Basin, described by water rights held by certain Contestants, is "water available" for appropriation in the Klamath Adjudication.

OPINION

To establish a claim in the Klamath Basin General Stream Adjudication, a claimant must prove by a preponderance of the evidence the following elements: (1) a *bona fide* intent prior to February 24, 1909 to apply the water to a currently existing or currently contemplated future beneficial use; (2) a diversion; and (3) an application to a beneficial use within a reasonable time. ORS 183.450(5); 539.010(4); *see also In re Water Rights of Silvies River*, 115 Or 27 (1925). What constitutes a "*bona fide* intent" or "reasonable time" are questions of fact particular to each case. A preponderance of the evidence, including the direct testimony of Richard W. Barney and historical and documentary evidence in the record, established the elements of a pre-1909 claim in the amount claimed: (1) Claimant's indirect predecessor had a *bona fide* intent on or before November 1, 1895 to apply the waters of the Link River to beneficial use; (2) Claimant's indirect predecessor diverted waters of Link River according to that intent; [3]

[3] The claim Pacificorp filed on January 31, 1991 identified the point of diversion as the SE¼NE¼, Section 30, Township 38 South, Range 9 Willamette Meridian. In November 1998 the point of diversion clarified as being in the NW¼ of the SE¼ (Government Lot 4) of Section 30,

and (3) Claimant's indirect predecessor applied the waters of Link River so diverted to the beneficial use of power generation within a reasonable time. A preponderance of the evidence also established that Claimant PacifiCorp operates the Eastside Power Plant with 150 cfs of water from the waters claimed in Claim No. 167. Claimant Pacificorp has met its burden.

Contestant Irrigation Districts do not dispute Pacificorp's claimed priority date. Rather, they contend that Claimant Pacificorp has failed to perfect or has forfeited its right to use Four Mile Lake and its tributaries and Fish Lake and its tributaries as sources of appropriation for the waters claimed in Claim 167. *Medford and Rogue River Valley Irrigation Districts' Response to Claimant's Discovery Request* (Ref. No. 014F00060005). They also contend that Claimant Pacificorp has never "called" for water from these sources; has failed to divert waters from those sources; has failed to apply any waters claimed from those sources to a beneficial use within a reasonable time; and, if any of those arguments fail, that Pacificorp has abandoned any claim to those waters. Despite their admission that Pacificorp has made no claim for an appropriation from Four Mile and Fish Lakes or their tributaries, the Irrigation Districts seek to prevent Pacificorp from placing a future "call" on waters of Four Mile Lake, Fish Lake, and their tributaries and has asked that the Adjudicator place a specific condition or an addendum on Claimant's water right preventing such a "call."

The greater weight of the evidence does not support Contestant Irrigation Districts' contention that waters of Four Mile Lake, Fish Lake, and their tributaries are potential sources of waters claimed in Claim 167. Also, I do not find Contestant Irrigation Districts' legal arguments regarding the issues raised by their contest persuasive and rely upon and adopt, in large part, the arguments made by OWRD.

The Findings of Fact do not include a finding regarding the ultimate sources of waters affected by this claim. This is so because the evidence is, at best, in equipoise. The only evidence supporting such a finding is in Carol Bradford's testimony (Ref. No. 014F0006001), which focused on the acquisition of water rights held by Contestant Irrigation Districts, the historical background regarding establishment of those rights, and the works created for the use of the waters of Fish Lake and Four Mile Lake. Testimony regarding the relationship between the waters set out in Claim No. 167 and the sources of the water rights for which they seek protection is scanty:

> . . .
>
> 5. The sources claimed by Pacificorp in claim 167 are unclear. They claim water from Link River, a tributary to the Klamath River. Klamath Lake is a tributary to the Link River and many sources of water supply Klamath Lake, including waters from Four Mile Lake.

Township 38 South, Range 9 East, Willamette Meridian. OWRD Exhibit 1, p. 25. (Ref. No. 014E00020001).

6. As evidenced by the geography of the area, Four Mile Lake can be considered a source of water for Klamath Lake. *See* attached map section at Exhibit 3.

. . .

34. From before 1898, the waters of Four Mile Lake and Fish Lake were not considered a source of water for the Klamath Lake in the Klamath Basin.

35. To my knowledge, there has never been a call made on the waters of Four Mile Lake and Fish Lake, or any of their tributaries, to benefit water users in the Klamath Basin or to supply water for any water rights or rights of use other than those held by [Contestant Irrigation Districts] and their predecessors in interest.

Testimony of Carol Bradford at pages 2 and 7.

Ms. Bradford's testimony, though unrepudiated, is internally inconsistent (compare paragraphs 5 and 6 with paragraph 34) and is insufficient to establish by a preponderance of the evidence that waters of Four Mile Lake, Fish Lake, or their tributaries flow or have flowed to Klamath Lake at present or in the past. On this record, there is insufficient evidence to determine whether water from Four Mile Lake or Fish Lake flows into Klamath Lake, so there is no evidentiary basis for imposing the condition sought by Contestant Irrigation Districts.

Contestant Irrigation Districts fare no better on the legal issues. Even if the evidence had established that the waters of Fish Lake or Four Mile Lake were an ultimate source of waters affected by Claimant Pacificorp's claim, the relief they seek is one of regulation and is not appropriate to this proceeding, which is to determine the relative water rights of the parties, not regulate actual water use.

Like most western states, Oregon follows the "prior appropriation" doctrine, which addresses which water rights are honored in times of shortage. *See* Robert E. Beck, *Prevalence and Definition*, 2 Waters and Water Rights, 83 (Robert E. Beck, ed. 1991). *See also* Janet C. Neuman, "Oregon," *in 6 Waters and Water Rights*, 704 (2d ed 1994) Under the prior appropriation doctrine, "a person may acquire an appropriative right on a 'first come, first served' basis by diverting water and applying it to a beneficial use." *Teel Irrigation District v. Water Resources Dept.*, 323 Or 663, 667 (1996).

The prior appropriation doctrine governs distribution of water as well as the allocation of water and in times of shortage addresses which holder of water rights can receive water. Water rights holders with a later (junior) priority date are not entitled to use water if their use would interfere with the rights of those who have earlier (senior) priority dates. Thus a water right is not an absolute right to use water, but a relative right that may only be exercised within the priority system. ORS 537.120 (subject to existing rights, and other exceptions not pertinent here "waters within the state may be appropriated for beneficial use"); ORS 540.045 (describing watermaster duties to

"distribute water among the various users . . . in accordance with the users' existing water rights of record").

Contestant Irrigation Districts seek to prevent Claimant Pacificorp from placing a "call" on waters to which the Irrigation Districts have established water rights by conditioning Pacificorp's water right to prevent such a "call." Strictly speaking, water users do not place a "call" on other users' water rights. Rather, a water user places a "call" on the stream, river, or other source that supplies its right by demanding that the watermaster distribute water among the various users according to their water rights of record. ORS 540.045. It is then the watermaster's duty to determine how that "call" shall be enforced. *Id.* The watermaster is empowered to enforce a "call" by directly regulating a water user's diversion. ORS 540.045(c). The condition that Contestants seek, therefore, is one pertaining to regulation of water rights, not to the rights themselves.

The purpose of this proceeding is to identify and determine the relative rights of individuals and entities who began using water before February 24, 1909. ORS 539.010; 539.021. Only after identification, quantification and determination of those relative rights has been completed can there be meaningful discussion regarding regulation of those rights. ORS 540.045 (watermasters regulate in accordance with "rights of record"); ORS 540.145 (the Water Resources Commission may adopt rules pertaining to distribution of water pursuant to, among other things, rights established by "an order of the . . . Director in proceedings for the determination of relative rights to the use of water."). Thus, if a "call" or complaint is placed with the watermaster, he or she will then regulate in accordance with "rights of record" and other applicable law. *Id.*; *see* OAR 690-250-0020 (distribution of surface waters). Neither general principals of the prior appropriation doctrine nor the applicable statutes entitle contestant Irrigation Districts to the regulatory condition they seek to impose on Claimant Pacificorp's Claim No. 167.

Neither the greater weight of the evidence nor the statutes and rules that govern this adjudication allow a condition on Pacificorp's water right for an action that may never occur and for which a regulatory remedy already exists. Accordingly, I decline to recommend that the Adjudicator condition Claimant Pacificorp's water right in the manner that these Contestants seek.

PROPOSED ORDER

I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final order as follows:

PacifiCorp's Claim No. 167 is approved as claimed. The terms of Claim No. 167 and any water right that may be derived therefrom are as follows:

1. Point of diversion: NW ¼ SE ¼ (Government Lot 4), Section 30, Township 38 South, Range 9 East, Willamette Meridian.

2. Source: Link River, tributary to Lake Ewauna and the Klamath River.

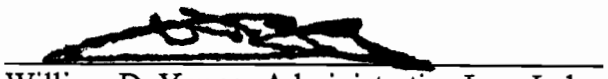
3. Use: Power.

4. Amount beneficially used: 150 cubic feet per second, measured at the point of diversion.

5. Period of Use: January 1 through December 31 of each year.

6. Priority Date: November 1, 1895.

7. Place of Use: NW ¼ NW ¼ (Lot 7), Section 32, Township 38 South, Range 9 East, Willamette Meridian.



William D. Young, Administrative Law Judge
Hearing Officer Panel

Dated: July 19, 2002

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:

Dick Bailey
Klamath Basin Adjudication
Oregon Water Resources Dept
158 12th Street NE
Salem OR 97301

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2002, I mailed by 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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