

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

Dwight Mebane; Elmore Nicholson; Richard
Nicholson; William Nicholson; 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 GRANTING MOTION FOR
RULING ON LEGAL ISSUES;
PROPOSED ORDER DENYING
CLAIM**

Case No. 256

Claims: 37

Contests: 2750¹, 3100, 3446², and 4093³

vs.

Gary Grimes; Karen Breithaupt; Eileen
Grimes,
Claimants/Contestants.

On November 9, 2004, the Klamath Project Water Users⁴ (KPWU) filed its Motion for Ruling on Legal Issues (hereafter "KPWU's Motion"). The motion seeks a ruling that, pursuant to the

¹ On February 20, 2003, Ambrose McAuliffe voluntarily withdrew Contest 2750.

² Don Vincent voluntarily withdrew from Contests 3446 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contests 3446 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3446 on January 15, 2004

³ On May 7, 2004, the Klamath Tribes voluntarily withdrew Contest 4093.

⁴ Klamath Project Water Users include the following entities: 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; and Collins Products, LLC.

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April 20, 2004 order of Administrative Law Judge William Young in Consolidated Case 900, the claim filed in this case was precluded by the previous adjudication of the Wood River and its tributaries. KPWU's Motion was accompanied by Exhibits A, B, and C and the affidavit of Daniel Kelly, which identifies the exhibits.

On December 13, 2004, Gary Grimes, Karen Breithaupt and Eileen Grimes, (Claimants) filed their response to the motion of KPWU (hereafter "Claimants' Memorandum"). On January 24, 2005, KPWU and Oregon Water Resources Department (OWRD) each filed Replies (hereafter "KPWU's Reply" and "OWRD's Reply," respectively).

ISSUE

Whether claim 256 is precluded because it was lawfully 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) Gary Grimes, Karen Breithaupt and Eileen Grimes (Claimants) filed Claim 37 in the Klamath River Basin Adjudication, seeking a *Walton* water right⁵ for irrigation of 19.2 acres

⁵ The claims of successors of Indian allottee's are known as "*Walton*" claims because they were recognized in the case of *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981). *Walton* water rights originate in federal water rights that were implicitly reserved for the benefit of Indian tribes upon the establishment of Indian reservations by treaties with the United States. Upon the "allotment" of reservation lands pursuant to the General Allotment Act of 1887, 24 Stat. 388, such water rights were transferred to individual Indian allottees. Once these allotted lands were acquired by non-Indians, these rights were transformed into rights more in the nature of state

located in the NE ¼ SE ¼ , Section 27, Township 33 South, Range 7.5 East, Willamette Meridian, in Klamath County, Oregon. The claim is for 0.48 cubic feet per second (cfs) from one point of diversion located on Fort Creek, a tributary to the Wood River, which was included in the Wood River Adjudication. The claimed place of use for Claim 37 was indicated as "Irrigated Lands" on the Adjudication Survey of Wood River, Crane Creek, Sevenmile Creek, Fourmile Creek, and their tributaries. (KPWU's Motion at 3; Claimants' Memorandum at 4; KPWU's Motion, Exhibits A, B, and C; Claimants' Response to Request for Admission No. 3.)

(2) On October 4, 1999, OWRD Adjudicator Richard D. Bailey issued his "Summary – Preliminary Evaluation" of Claim No. 37 (Preliminary Evaluation). The Preliminary Evaluation denied the Claim in its entirety on the grounds that the claimed source had previously been adjudicated. Claimants and KPWU, among others, filed Contests to Claim 37. (OWRD Ex. 1 at 187-88; KPWU's Motion at 3; Claimants' Memorandum at 4.)

(3) Subsequently, Claim 37, together with a number of other claims, was consolidated into Case 900, 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 "Case 900 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. (KPWU's Motion at 3-4; Claimants' Memorandum at 4.)

(4) On September 25, 1925, Henry Grimes, a non-Indian, received a fee patent from the United States for the lands comprising the claimed place of use in Claim 37. (KPWU's Motion at 8 and Exhibit C; Claimants' Response to Request for Admission No. 1.) Henry Grimes owned the lands comprising the claimed place of use of Claim 37 at the time of the Wood River Adjudication. (Claimants' Memorandum at 6.)

(5) On June 7 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. 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 or be declared to be in default and to have forfeited their claims. (KPWU Motion at 4, citing Case 900 Ruling at 8; Claimants' Memorandum at 5.)

(6) In addition to such publication notice, the State Engineer stated, in the Findings of State Engineer, set forth and adopted by the circuit court in the Wood River Decree entered October 5, 1932:

[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

water rights, subject to reasonable diligence and continuous use requirements. *Id.* *Walton* rights deriving from the Klamath Indian Reservation are entitled to a priority date corresponding to the date of establishment of that reservation, *i.e.*, October 14, 1864.

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.

(OWRD's Reply at 4, citing Case 900, Ref. No. 900E000200004, pp. C-4 through C-5.)

(7) "Henry Grimes" does not appear on the State Engineer's list of those to whom notice of the commencement of the Wood River Adjudication was sent by registered mail. "Henry Grimes" does not appear on the State Engineer's list of those who filed claims. (Claimants' Memorandum at 7.)

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:

- (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.)

Claimants do not contest that notice by publication was properly provided, consistent with Section 12 of the 1909 Water Code. Claimants contend, however, that the lands owned by Henry Grimes at the time of the Wood River Adjudication were not lawfully embraced in the Wood River Adjudication because he did not receive registered mail notice as required by Section 13 of the 1909 Water Code.

Pursuant to ALJ Young's ruling, the following statutes govern the preclusive effect of prior adjudications. ORS 539.200 provides:

The determinations of the Water Resources Director, as confirmed or modified as provided by this chapter [ORS chapter 539] in proceedings, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or the body of water lawfully embraced in the determination.

ORS 539.210 provides in material 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 and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant.

KPWU, as the contestant asserting the preclusive effect of a prior adjudication, has the burden of presenting evidence and the burden of proof on the issue raised by that assertion. Contestants assert that Mr. Grimes's property was lawfully embraced in the Wood River Adjudication because he received notice by publication and was not required to receive notice by certified mail because he could not be "reasonably ascertained."

The 1909 Water Code provided:

Section 13. *Notice to Claimants.* – It shall be the duty of said division superintendent [superintendent of the water division in which the stream is situated] to **send by registered mail** to each person, firm or corporation, hereinafter to be designated as claimant, claiming the right to the use of any of the waters of said stream, **and to each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries, insofar as such claimants and owners and persons in possession can reasonably be ascertained, a similar notice** setting forth the date when the State Engineer or his assistant will begin the examination of the stream and the ditches diverting the waters therefrom, and also the date when the superintendent will take testimony as to the rights to the water of said stream. Said notice must be mailed at least thirty (30) days prior to the date set therein for making the examination of the stream or the taking of testimony. (Emphasis added.)

The Wood River Decree dated October 5, 1932⁶ provides:

It is hereby considered, ordered and decreed that all things done and had by said State Engineer in the premises as found and determined, are hereby adopted and approved and made the findings and order of determination of this Court ***.

The Oregon Supreme Court held in *Abel v. Mack*, 131 Or 586, 594 (1929), that “[i]t is universally held by the courts that a judgment or decree of a court of record is conclusive of every fact necessary to uphold it, and of all matters actually determined.” The above-cited language of the decree, coupled with the decree finding that the State Engineer sent notice by registered mail 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 establishes conclusively that the State Engineer mailed certified mail notice to all required persons *who could reasonably be ascertained*. Because the State Engineer did not mail certified mail notice to Mr. Grimes, the reasonable inference arises that he *could not reasonably be ascertained*. The 1909 Water Code required certified mail notice only to those persons or entities that could reasonably be ascertained. Because Mr. Grimes could not be reasonably ascertained, the State Engineer was not required to send certified mail notice to him. Consequently, Contestants have established *prima facie* evidence that Mr. Grimes received appropriate notice – by publication - of the Wood River Adjudication and, therefore, his property was lawfully embraced in that adjudication.

Claimants have the burden of presenting evidence to rebut the inference and to establish that Mr. Grimes could have been reasonably ascertained and, therefore, the State Engineer was required to send him certified mail notice. ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”) Claimants argue that because Mr. Grimes was the record owner of property bordering on Fort Creek, he could have been reasonably ascertained. The deed transferring land from the United States to Mr. Grimes was of record. However, the deed contains no information about Mr. Grimes other than his name, and the deed alone does not establish that he could have been reasonably ascertained. Claimants presented no evidence to support their position other than the deed of record. Therefore, Claimants have not rebutted the inference that Mr. Grimes could not have been reasonably ascertained and, therefore, the State Engineer was not required to send him notice by certified mail.

Consequently, I conclude that all the lands comprising the claimed place of use in Claim 37, identified in Finding of Fact (1) were lawfully embraced in the Wood River Adjudication and are precluded from litigation in this proceeding.

ORDER

(1) The Klamath Project Water Users’ Motion for Ruling on Legal Issues is granted. Claim 37 is precluded by a prior adjudication with respect to the following lands:

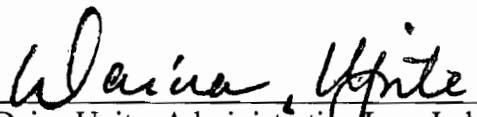
⁶ See Case 900, Ref. No. 900E00020004 at C-62.

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Township 33 South, Range 7.5 East, Willamette Meridian
Section 27: NE ¼ SE 1/4

(2) Based on the foregoing, I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as more specifically set out below:

The elements of a water right cognizable under ORS Chapter 539 are not established for Claim 37, Case 256, and the claim is denied.



Daina Upite, Administrative Law Judge
Office of Administrative Hearings

Date: July 5, 2005

NOTICE

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 are legal or factual arguments illustrating legal or factual errors in the proposed order, as demonstrated by the record. Evidence not in the record may not be offered in exceptions. 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
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301

If exceptions and arguments are not filed within the allowed period, a final order will issue.

If exceptions are filed, an opportunity may be provided for making additional written or oral argument to the Commission, at the Commission's determination and discretion. After reviewing the record, the exceptions and any additional argument, the Commission will issue the Final Order. The Commission may issue a Final Order that differs from the Proposed Order, or it may affirm the Proposed Order.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2005, I mailed a true copy of the following: **ORDER GRANTING MOTION 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:

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