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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

WATER RESOURCES DEPT
SALEM, OREGON

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
a Tributary of the Pacific Ocean

Kurt Gruen; Reyna Gruen¹; United States
of America;
Contestants

**ORDER GRANTING MOTION FOR
LEGAL RULING AND FOR SUMMARY
JUDGMENT, AND PROPOSED ORDER
DENYING CLAIM**

vs.

Raymond J. Driscoll; Barbara A. Driscoll;
Claimants.

Case No. 185

Claim: 50

Contests: 1713, 3738, and 4105²

On January 4, 2005, Contestant the United States of America (United States) filed a Motion for Ruling on Legal Issues pursuant to OAR 137-003-0580, for determinations that (1) under OAR 137-003-0570(12), the requests for admissions served by the United States upon Raymond J. Driscoll and Barbara A. Driscoll (Claimants) have not been responded to, and should be deemed admitted; and (2) that Claimants' deemed admissions establish that there is no basis for the claim, which should, therefore, be denied. Contestants James Root and Valerie Root do not oppose the motion. Claimants have not filed a response to the United States' Motion for Ruling on Legal Issues and supporting affidavit.

LEGAL STANDARD: Motions and requests for legal rulings are governed by OAR 137-003-0580, which establishes standards for evaluating the motion, and which states, in 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

¹ James Root and Valerie Root have acquired the property of Kurt Gruen and Reyna Gruen, and appeared in the place of the Gruens as Contestants.

² The Klamath Tribes voluntary withdrew Contest 4105 on July 16, 2004. See, KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST.

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(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, the following Findings of Fact are made:

FINDINGS OF FACT

(1) Claimants filed Claim No. 50 on January 29, 1991. Claimants made a claim for water as a non-Indian successor to a Klamath Indian Allottee, claiming an amount of water sufficient to irrigate the allotment's share of the Tribe's "practically irrigable acreage" ("PIA").³ (Oregon Water Resources Department (OWRD) Prehearing Statement at p. 3.) Other issues in Claim No. 50 include whether the primary purpose of the Klamath Reservation is limited only to domestic, livestock and irrigation, whether the bottling of water is a use that can include a *Walton* right, whether the bottling of water as a use was timely developed, and if so, whether the amount of water claimed for bottling was timely developed. (Scheduling Order in Case No. 185, dated September 23, 2004, by Maurice Russell, Administrative Law Judge ("Scheduling Order").)

(2) On October 4, 1999, OWRD issued its Preliminary Evaluation, preliminarily denying the claim because Claimants could not meet the elements required to establish a "*Walton* claim."⁴ (OWRD Prehearing Statement at p. 4.) Kurt Gruen filed Contest 1713 on May 3, 2000. The United States filed Contest 3738 on May 8, 2000. (*Id.*)

³ Claims for water rights of non-Indian successors to Indian water 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*).

⁴ Claimants seeking to establish a *Walton* water right have the burden of persuasion and the burden of proving by a preponderance of the evidence the following elements of a *Walton* water right: (1) The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe; (2) The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor; (3) The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except, that: (4) The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first purchaser of land from an Indian owner; and (5) After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors. *See, Nicholson et al. v. United States*, Klamath Adjudication Case No. 272, Ruling on United States' Motion for Ruling on Legal Issues, dated August 4, 2003, by William D. Young, Administrative Law Judge, at p. 9.

(3) On September 23, 2004, the Oregon Office of Administrative Hearings mailed to Claimants and the other participants a Scheduling Order, requiring participants to submit requests for discovery no later than October 13, 2004, requiring participants to respond to discovery requests no later than November 8, 2004, allowing participants to file Motions for an Order Requiring Discovery no later than November 23, 2004, and requiring responses to Motions for an Order Requiring Discovery no later than November 30, 2004. (Scheduling Order at p. 2.)

(4) On October 13, 2004, the United States served written discovery requests on Claimants for Interrogatories, Request for Admissions, and Requests for Production of Documents, for Claimants to respond in writing no later than November 8, 2003 (*sic*). (United States' Discovery Requests to Claimant.) Claimants failed to respond to the United States' discovery requests by the November 8, 2004 deadline. (United States Motion for Ruling on Legal Issues, dated January 4, 2005, at p. 1.)

(5) On November 23, 2004, the United States filed a Motion for an Order Requiring Discovery, seeking an order requiring Claimants to respond to its written discovery requests, including requests for admissions. (United States Motion for an Order Requiring Discovery.) Claimants did not file any response to the Motion for an Order Requiring Discovery by the November 30, 2004 deadline for doing so.

(6) On December 6, 2004, an Administrative Law Judge granted the United States' Motion and ordered Claimants to respond to the United States' discovery requests, including requests for admissions, no later than December 20, 2004. (Order Requiring Discovery, dated December 6, 2004, by Ken L. Betterton, Administrative Law Judge ("Discovery Order").) The United States did not receive objections or responses from Claimants by December 20, 2004, or before the United States filed its Motion for Ruling on Legal Issues on January 4, 2005. (United States Motion for Ruling on Legal Issues at pp. 1-2, Affidavit of David W. Harder in support of the Motion at pp. 1-2.)

(7) The United States' discovery requests included a warning as to the consequences of any failure to respond to the discovery requests. The instructions set forth in the requests contained the following language: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION TO ANY REQUESTS FOR ADMISSIONS WITHIN THE TIME ALLOWED WILL RESULT IN ADMISSION OF THE REQUEST." (United States' Motion for Ruling on Legal Issues, United States' Discovery Requests to Claimant, Ex. A at p. 2, ¶ G.)

(8) Through Claimants' deemed admissions, Claimants have admitted, among other things, that: (1) They have not provided sufficient title information regarding Indian Allottee ownership of the claimed place of use and/or transfer of the property to non-Indian ownership for Claim No. 50 (*Id.*, Ex. A at pp. 5-6, Request for Admission ("RFA") Nos. 1, 2 and 7); (2) The place of use was not used for bottling water by the last Indian owner (*Id.*, Ex. A, at pp. 5-6, RFA Nos. 3, 5 and 8); (3) The claimed place of use was not developed for bottling water by the first non-Indian within a reasonable period of time (*Id.*, Ex. A, pp. 5-7, RFA Nos. 3-6, 9, 11); and (4) The claimed place of use has not been continually irrigated since it was first owned by a non-Indian. (*Id.*, Ex. A, p. 7, RFA No. 10.)

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The United States' Motion for Ruling on Legal Issues should be granted in its entirety.

(1) Pursuant to OAR 137-003-0570(12), the requests for admissions served by the United States upon Claimants, and not responded to by them, are deemed admitted; and

(2) Claimants' deemed admissions establish that there is no factual basis for Claim No. 50.

OPINION

OAR 137-003-0570(12) states:

Failure to respond to a request for admissions required by a discovery order shall be deemed an admission of matters that are the subject of the request for admissions, unless the party or agency failing to respond offers a satisfactory reason for having failed to do so, or unless excluding additional evidence on the subject of the request for admissions would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the administrative law judge does not treat failure to respond to the request for admissions as admissions, the administrative law judge may grant a continuance to enable the parties and the agency to develop the record as needed.

Pursuant to OAR 137-003-0570(12), Claimants' failure to respond to the United States' requests for admissions are deemed admission of matters that were the subject of the request for admission.⁵ Accordingly, each request for admission is deemed admitted.

To effectuate the deemed admissions, the United States asked that notice of the facts admitted be taken, as they are not in dispute. OAR 137-003-0615.⁶ While it may be appropriate to take notice of the judicially cognizable fact of the existence of the documents in the case file, it is usually inappropriate to take

⁵ This provision contains two narrow exceptions that could operate to avoid a deemed admission. A party can avoid the mandatory deemed admission if (1) the party can demonstrate a "satisfactory reason" for failing to respond, or (2) excluding additional evidence would violate the duty to conduct a full and fair hearing. In this regard, Claimants have not objected or responded to discovery requests served by the United States. Claimants have not responded to the United States' motion and have made no attempt to show a "satisfactory reason" for failing to respond to United States' discovery request.

⁶ ORS 183.450(4) states, in part that "The hearing officer and agency may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency." Judicial or official notice is a short-cut to creating a record regarding particular adjudicative facts. "Judicially cognizable facts" are those facts of which a court can take judicial notice so, despite the general rule that the Oregon Rules of Evidence (ORE) do not apply in the contested case process, ORE determine what is a judicially cognizable fact.

notice of the truth of information stated in the case file.⁷ In this case, however, it is permissible to take notice of the truth of information stated in the case file, as the deemed admissions remove all dispute as to any material fact.

Claimants are deemed to have admitted, among other things, that because they cannot establish the elements of an Allottee right, that they cannot establish the elements of a *Walton* water right,⁸ and that there was “no factual basis to support a water right for the claimed place of use in Claim No. 50. The United States, which seeks summary judgment and denial of Claimants’ claim in its entirety on the basis that they have admitted that they cannot establish the elements of the claimed water right, and that there is no factual support for the claim, is entitled to the ruling it seeks.

ORDER

Based on the foregoing, a recommendation is made to the Adjudicator for the Klamath Basin General Stream Adjudication to enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below:

The elements of a water right cognizable under ORS chapter 539 are not established for Claim No. 50 and the claim is denied.



KEN L. BETTERTON, Administrative Law Judge
Office of Administrative Hearings

Date: January 31, 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.

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⁷ See Laird C. Kirkpatrick, *Oregon Evidence* (2nd ed 1989).

⁸ The claim was initially filed as an Allottee claim. If the land transferred into non-Indian ownership, the claim would be for a water right as a non-Indian successor to an Allottee (*i.e.*, a *Walton* claim.) Because Claimants cannot establish the elements of a valid Allottee claim, no right would exist to succeed to as a *Walton* claim.

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:

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

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2005, I mailed a true copy of the following: **ORDER GRANTING MOTION FOR LEGAL RULING AND FOR SUMMARY JUDGMENT, AND 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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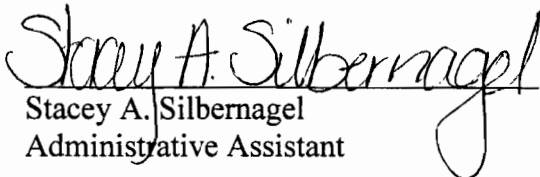
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