

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; Ambrose W. McAuliffe;
Dwight Meband; 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 Veiv Irrigation District; Sunnyside
Irrigation District; Don Johnston & Son; Brandly 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 UNITED
STATES'S MOTION FOR
RULING ON LEGAL ISSUES
AND PROPOSED ORDER
DENYING CLAIM**

Case No. 238

Claim: 131

Contests: 3110¹, 3505², and
3772³

v.

Gregory B. Bulkley; Jacqueling R. Graham; Lloyd
Powell; Lloyd Powell Development Co.; Rodney
Murray, Claimants, and

River Springs Ranch Co.,
Claimant/Contestant.

On July 19, 2005, the United States filed a Motion for Ruling on Legal Issues with
attached Exhibits 1-3. On September 1, 2005, Gregory B. Bulkley, Jacqueline R. Graham⁴,
and River Springs Ranch Co. (Claimants) responded. On September 30, 2005, the United
States replied with attached Exhibits 4-10, and OWRD replied.

¹ Water Watch of Oregon, Inc.'s Contest 2848 was dismissed. See ORDER DISMISSING WATERWATCH
OF OREGON, INCE.'S CONTESTS, May 20, 2003.

² Don Vincent voluntarily withdrew from Contest 3505 on December 4, 2000. Berlva Pritchard voluntarily
withdrew from Contst 3505 on June 24, 2002. Klamath Hills District Improvement Company voluntarily
withdrew from Contest 3505 on January 15, 2004.

³ The Klamath Tribes voluntarily withdrew their Contest No. 4160 on April 7, 2005.

⁴ Lloyd Powell; Lloyd Powell Development Co. have sold their interest to Gregory B. Bulkley and Jacquelyn R.
Graham.

River Springs Ranch Co. (Case No. 238)

Order Granting Motion for Ruling on Legal issues and Proposed Order Denying Claim

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ISSUE

Whether the filing of the statement and proof of claim on February 8, 1991 (Claim 131) by original claimant Simonsen⁵ is barred by ORS 539.210.

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 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 * * *.

FINDINGS OF FACT

(1) On September 7, 1990, OWRD sent written notice to property owners in the Klamath Basin that they had until February 1, 1991, to file a water right claim or be forever barred from asserting a claim. The notice laid out the place and manner for proper claim submission. It also stated the consequences for failure to comply with the deadline. (Harder Affidavit, Ex. 1 at 1-2.⁶)

⁵ The interests of original claimant Simonsen are now held by Claimants.

⁶ The Notice states in relevant part:

YOU MUST APPEAR at one of the times and places named above and submit proof of your claim. * * * *

If you fail to appear and submit proof of your claim to said waters, default will be entered against you. You will be barred from later asserting any claim to the use of these waters and will have forfeited all right to the use of these waters that is not already documented in a water right permit, certificate or court decree with the State of Oregon.

If you have an existing water right of record with the State of Oregon in the form of a permit, certificate or decree, but do not wish to preserve your right to challenge the claims of others then you need to do nothing more. However, you will still be bound by the final determination of rights as ultimately decreed by the court,

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(2) On November 30, 1990, Simonsen appeared at the OWRD office at 700 Main Street, Klamath Falls, Oregon and filled out a Statement and Proof of Claim and a personal check for the filing fee in the amount of \$542.38. However, Simonsen did not give OWRD's Klamath Office the Statement and Proof of Claim or the check. (OWRD Ex. 1 at 24.)

(3) On February 6, 1991, OWRD received a letter from Simonsen that stated, in pertinent part: "Upon review of my files, I noted that the enclosed application which had been completed in your Klamath Falls Office on November 30, 1990 had not been submitted as I had recalled. I found that it had been filed with the other files at year end." (OWRD Ex. 1 at 24.)

(4) On February 8, 1991, OWRD received Simonsen's Statement and Proof of Claim and a check for the filing fee in the amount of \$542.38. (OWRD Ex. 1 at 1, 26.)

OPINION

The United States Filed a Motion for Ruling on Legal Issues, moving to dismiss Claim 131 because original claimant Simonsen did not file his claim within the time limit set by ORS 539.210 and the OWRD. In their response, Claimants agree that Simonsen did not submit the statement and proof of claim or the filing fees until February 8, 1991, but argue that the ALJ should not apply the February 1, 1991 deadline as a bar to Claim 131 because: (1) Simonsen appeared at the Klamath Falls OWRD office on November 30, 1990, where an OWRD employee certified the statement and proof of claim; (2) The notice did not apply to Claim 131; (3) ORS 539.240(10) provides an exception for timely filing Claim 131; and (4) OWRD's filing deadlines have not barred claims in past adjudications.

In their replies to Claimants' response, the United States and the OWRD point out that: (1) Simonsen did not submit the statement and proof of claim to OWRD's Klamath Falls office on November 30, 1990; (2) The OWRD Notice to File Claims was not ambiguous and applied to all interested parties within the Klamath Basin Adjudication; (3) ORS 539.240 does not apply to adjudication proceedings; and (4) No extenuating circumstances require the OWRD to extend the deadline for Claim 131.

The Oregon water rights adjudication statute, ORS 539.210, prescribes when and how a water right claim must be filed in an adjudication of water rights and provides in relevant 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

The OWRD "shall set a time certain for filing statements and proofs of claim and notify all registrants by certified return receipt mail when and how the statement and proof of

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claim shall be filed.” OAR 690-028-0065(3) (1990). OWRD director, William H. Young, sent notice on September 7, 1990, to the original claimant Simonsen and other potential claimants, giving the time and manner for filing a statement and proof of claim. The notice required that property owners within the Klamath Basin Adjudication file their claims by February 1, 1991.

As explained below, the OWRD properly established February 1, 1991 as the deadline for filing Claim 131 and Simonsen’s failure to file within this deadline bars Claim 131. Each of Claimants’ arguments is considered separately.

(1) Simonsen filed his statement and proof of claim on November 30, 1990

ORS 539.210 requires a claimant to “appear and submit proof of their respective claims.” Claimants argue that Simonsen did so appear and submit proof when an OWRD employee “certified” Simonsen’s claim by notarizing it for him. His claim was not submitted; it was only notarized. Claimants did not allege anything more than notarization and did not claim actual submission as required by ORS 539.210. Claimants argue further that Simonsen in effect filed a claim because he provided all the needed information, but ORS 539.210 is explicit in requiring submission. Even if *de facto* or substantial submission were present, that would not satisfy the submission requirement.

(2) OWRD’s notice did not apply to Claim 131

Claimants argue that the last paragraph of the Notice to File Claim issued to potential claimants on September 7, 1990, tells potential claimants such as Simonsen, who have an existing water right of record and do not contemplate filing a contest, that they need not submit proof of their claim. Although this interpretation may be a plausible reading of only the last paragraph by itself, it is not a reasonable interpretation of the paragraph within the context of the whole Notice, which emphasizes that “YOU MUST APPEAR” and states clearly that failure to appear and submit proof will bar a future claim. Moreover, in his explanation why he did not file earlier, Simonsen did not mention the language in the last paragraph and did not claim that he would not contemplate filing a contest. The only excuse he stated for not filing earlier was his misfiling of his statement and proof of claim.

(3) ORS 539.240(10) provides an exception for timely filing Claim 131

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Claimants allege that ORS 539.240(1)⁷ requires the OWRD to review all the material submitted by Simonsen to determine whether it complied with ORS 539.210. However, as explained in the reply of the OWRD, the registration process described in ORS 539.240 is not an alternative to filing a Statement and Proof of Claim in the Klamath Basin Adjudication that is required by ORS 539.210. ORS 539.240(1) and the required notice set out in ORS 539.230(1)⁸ apply to the statewide registration of undetermined vested rights and federal reserve rights. It is not relevant to claims within the Klamath Basin Adjudication. Therefore, whether Simonsen complied with ORS 539.240(1) is irrelevant.

Even if ORS 539.240(1) and (4) applied to claims, Simonsen submitted no material before the deadline, so he did not substantially comply with the requirement to submit a claim before the deadline. Moreover, Claimants have not shown good cause for Simonsen filing late.

(4) OWRD's filing deadlines have not barred claims in past adjudications.

As explained in the Reply Briefs of the United States and the OWRD, the alleged waivers of the time limits by OWRD in other cases did not actually occur. Specifically, in the Klamath Basin Adjudication, the August 26, 1996 Notice to File Claim was not a decision by OWRD to accept untimely claims, but rather a separate claim period established for the United States and the Klamath Tribes and necessitated by the *United States v. Oregon* litigation. See *United States v. Oregon*, 774 F Supp 1568 (D Or 1991). Therefore, the OWRD has not failed to bar claims before and has not acted inconsistently by supporting dismissal of Simonsen's claim. Its support of the United States's Motion is a reasonable interpretation of the law and is accepted. *Don't Waste Oregon Com. v. Energy Siting Council*, 320 Or 132 (1994) (where an agency's interpretation of its own rule is plausible and

⁷ ORS 539.240 states:

Claim to undetermined right to appropriate surface water; registration statement; contents; effect of failure to file; recognizing changes to right; rules. (1) Any person, corporation or governmental agency claiming an undetermined vested right, federal reserved right or right derived from such rights to appropriate surface water under ORS 539.010 shall file in the office of the Water Resources Department, on or before December 31, 1992, a registration statement of the claim.

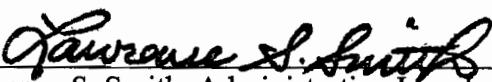
⁸ ORS 539.230(1) states in relevant part:

Notice of need to file registration statement; publication requirements; additional methods of providing notice. (1) In order to preserve information relating to claims to undetermined vested rights as described in ORS 539.010 and federal reserved rights, the Water Resources Director shall prepare a general notice stating the need for any person, corporation or governmental agency claiming an undetermined vested right, federal reserved right or a right derived from such rights to file a registration statement as required under ORS 539.240. The notice shall outline the process for obtaining a blank registration statement and shall describe the rights that may be claimed under this chapter.

not inconsistent with the wording of the rule itself, the rule's context or with any other source of law, there is no basis for asserting that the rule has been misinterpreted by the agency.)
.Simonsen's claim is dismissed as untimely filed.

ORDER

The United States Motion for Ruling on Legal Issues is granted. Claim 131 is dismissed pursuant to ORS 539.210.


Lawrence S. Smith, Administrative Law Judge
Office of Administrative Hearings

Dated: November 18, 2005

NOTICE TO THE PARTIES: If you are not satisfied with this Order, please read the following.

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 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

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
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In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
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United States of America; ~~The Klamath Tribes~~; 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 DENYING KPWU'S
REQUEST FOR MOTION FOR
RULING ON LEGAL ISSUES**

Case No.238

Claim: 131

Contests: 2848¹, 3110, 3505², 3772, and 4160³

vs.

Gregory B. Bulkley; Jacqueline R. Graham;
Lloyd Powell, Lloyd Powell Development Co.; Rodney Murray;
Claimants, and
River Springs Ranch Co.;
Claimant/Contestant

On July 19, 2005, Klamath Project Water Users (KPWU) filed a Motion for Ruling on Legal Issues. On September 1, 2005, Claimants filed a Response. On September 30, 2005, KPWU filed a Reply.

¹ WaterWatch of Oregon, Inc.'s Contest 2848 was dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003

² Don Vincent voluntarily withdrew from Contest 3505 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contest 3505 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3505 on January 15, 2004.

³ The Klamath Tribes voluntarily withdrew Contest 4126. See, KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated April 7, 2005.

River Springs Ranch Co. (238)

Order Denying KPWU's Motion for Ruling on Legal Issues

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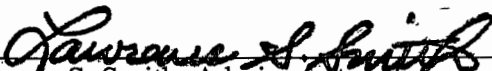
Whether the prior Sprague River Adjudication precludes a portion of Claim 131 from this proceeding.

DISCUSSION

KPWU seeks an order ruling that portions of the lands comprising Claim 131 were lawfully embraced within the earlier Sprague River Adjudication, and are therefore precluded from this proceeding pursuant to ORS sections 539.200 and 539.210. On July 19, 2005, the United States filed a Motion for Ruling on Legal Issues. The motion sought a ruling, pursuant to ORS 539.210, that Claim 131 should be dismissed for failure to timely file the statement and proof of claim. The ALJ granted the United States' Motion and dismissed Claim 131 in its entirety. Because Claim 131 has been dismissed for failure to timely file the claim, a final order on the merits with respect to the issue of preclusion could have no practical effect on or concerning the rights of the parties, and is therefore moot. *State v. Macey*, 320 Or. 408, 412 (1994); *Brumnett v. PSRB*, 315 Or 402, 406 (1993). Consequently, KPWU's motion is denied because it is moot.

ORDER

KPWU's Motion for Ruling on Legal Issues is denied as moot.


Lawrence S. Smith, Administrative Law Judge
Office of Administrative Hearings

Dated: November 18, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2005, I mailed a true copy of the following:
ORDER DENYING KPWU'S REQUEST FOR MOTION FOR RULING ON LEGAL ISSUES and ORDER GRANTING UNITED STATES' MOTION FOR RULING ON LEGAL ISSUES 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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Salem, OR 97301
Teri.Hranac@wrdd.state.or.us

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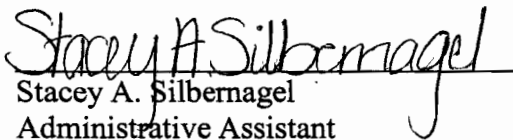
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