

FILED
UMATILLA COUNTY
CIRCUIT COURT



2018 NOV 13 PM 3:36

TRIAL COURT ADMINISTRATOR

BY: _____

Verified Correct Copy of Original 11/13/2018

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF UMATILLA

ELH LLC, an Oregon limited liability company; OREGON HEREFORD RANCH LLC, an Oregon limited liability company; PAUL GELISSEN; MAURICE and LUCY ZIEMER; FRANK MUELLER; CRAIG and CYNTHIA PARKS; and RICHARD and KRISTINE CARPENTER,

Plaintiffs,

v.

WESTLAND IRRIGATION DISTRICT, an irrigation district organized under the laws of the State of Oregon,

Defendant.

L&L Farms, LLC an Oregon limited liability company, and ROBERT LEVY, as Trustee of the ROBERT LEVY FAMILY TRUST,

Intervenor-Defendants and Counterclaimants,

and

AMSTAD FARMS LAND COMPANY, an Oregon limited liability company; and EAGLE RANCH,

Intervenor-Defendants and Counterclaimants.

No. 16-CV-35049

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter came before the Court on cross motions for summary judgment and partial summary judgment. On July 20, 2018, Plaintiffs filed with this court a Motion for

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1 Partial Summary Judgment (“Plaintiffs’ Motion for Partial Summary Judgment”). On July
2 25, 2018, Westland Irrigation District (“Westland”) filed with this Court its Motion for
3 Summary Judgment and Memorandum of Points and Authorities, and in the Alternative
4 Requests for Partial Summary Judgment (“Westland’s Motion for Summary Judgment”).
5 Also on July 25, 2018, the Intervenor-Defendants and Counterclaimants L & L Farms, LLC,
6 and Robert Levy, as Trustee of the Robert Levy Family Trust and Intervenor-Defendants and
7 Counterclaimants Amstad Farms Land Company LLC and Eagle Ranch (collectively
8 “Intervenors”) both filed separate Joinders (“Intervenors’ Joinders”) in Westland’s Motion
9 for Summary Judgment and further requested summary judgment on their respective
10 Counterclaims for declaratory relief. The Court reviewed the parties’ briefing and the file
11 herein. The Court heard approximately seven hours of oral argument on August 30, 2018.

12 Good cause appearing, in accordance with Umatilla County Circuit Court Local Rule
13 2.011, and after consideration of the pleadings and arguments of counsel, it is hereby ordered
14 that:

15 Plaintiffs’ Motion for Partial Summary Judgment is:

- 16 Granted
- 17 Denied in full, as follows:

18 1. Plaintiffs are not entitled to partial summary judgment on their Declaratory
19 Judgment claim for the same reasons that Westland’s Motion for Summary
20 Judgment on Plaintiffs’ Second Claim for Relief (Declaratory Judgment) is
21 granted, as set forth below.

22 Other

23 //

24 //

25 Westland’s Motion for Summary Judgment and Intervenors’ Joinders are:

- 26 Granted in full, as follows:

- 1 1. Westland’s Motion and Intervenor’s Joinder for Summary Judgment on
2 Plaintiffs’ First Claim For Relief (Unconstitutional Taking -- Article I, § 18
3 Oregon Constitution) is granted on the following grounds, each of which is
4 sufficient to support the grant of summary judgment:
 - 5 a. There are no genuine issues as to any material fact and Westland is
6 entitled to judgment as a matter of law.
 - 7 b. Plaintiffs have failed to meet their burden to show a cognizable
8 property interest. The water Plaintiffs allege has been taken is a
9 mixture of primary live flow rights and secondary, supplemental stored
10 water from the McKay Reservoir. Plaintiffs do not have a priority
11 interest in the secondary, supplemental McKay-stored water.
 - 12 c. Plaintiffs have failed to meet their burden to show that any water has
13 been taken or appropriated. Plaintiffs have never been shorted water,
14 no water has been taken from them, and Plaintiffs have never made a
15 call or formal request for water from Westland that went unanswered.
16 Moreover, Westland has never shut off water to Plaintiffs in order to
17 satisfy a request for water from a junior appurtenant water right.
- 18 2. Westland’s Motion for Summary Judgment and Intervenor’s Joinder on
19 Plaintiffs’ Second Claim For Relief (Declaratory Judgment) is granted on the
20 following grounds, each of which is sufficient to support the grant of
21 summary judgment:
 - 22 a. Westland’s water distribution practices do not violate Oregon law, and
23 no question of fact exists that could give rise to a violation of Oregon
24 law.
 - 25 b. Westland complied with Oregon’s Irrigation District Law and Oregon
26 common law. Irrigation districts are statutory creations with the

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express purpose of managing the rights of the district. ORS 545.221. Irrigation districts also have a trust obligation to manage the applicable water rights for the benefit of all patrons. *Fort Vannoy Irr. Dis. v. Water Resources Comm'n*, 345 Or 56, 86-87, 188 P3d 277 (2008). Westland's water distribution practices are consistent with, and allowed by, the 1916 Umatilla Decree and the 1903, 1907, and 1961 Live Flow Certificates, which allow for a system of rotation within Westland. These authorities, along with the Oregon Irrigation District Laws, common law, and the U.S. Bureau of Reclamation McKay Certificate with a priority date of 1924, allow Westland to distribute Umatilla River Live Flow and McKay supplemental stored water in a manner that deviates from a strict application of the prior appropriation doctrine.

- c. Plaintiffs' request for declaratory relief, that Westland is legally prohibited from delivering water to holders of Floodwater Contracts, is dismissed because Westland's distributions pursuant to the Floodwater Contracts are not improper, there is no question of fact as to whether those contracts were legally executed, and Westland has complied with the Oregon Irrigation District law and Oregon common law.
- d. Plaintiffs' request for declaratory relief, that Westland must account for deliveries of McKay Reservoir stored water on a per patron basis during the month of May, is dismissed because Westland's distributions pursuant to the Limited Water Contracts are proper, there is no question of fact as to whether those contracts were legally executed and there is no legal obligation to account for water in the manner that Plaintiffs have demanded.

- 1 e. Plaintiffs’ request for declaratory relief, seeking changes in the
- 2 accounting and tracking of secondary supplemental stored water from
- 3 McKay Reservoir, is dismissed because Plaintiffs do not have a
- 4 priority interest in McKay-stored water, and there is no legal
- 5 obligation to account for water in the manner that Plaintiffs have
- 6 demanded.
- 7 f. Plaintiffs’ request for declaratory relief, seeking to void the Limited
- 8 Water Contracts, is time barred even if there were a valid legal
- 9 challenge to these contracts. The Limited Water Contracts were
- 10 executed in 1988-1989. The statute of limitations commenced to run
- 11 at the time these contracts were executed. The Limited Water
- 12 Contracts are not void or voidable, as they do not violate any provision
- 13 of Oregon law, were executed only after Westland convened an
- 14 independent advisory board, engaged in a public process, and invited
- 15 all Plaintiffs’ predecessors in interest to participate. There is no
- 16 question of fact that would give rise to any valid claim for relief.
- 17 3. Westland’s Motion for Summary Judgment and Intervenors’ Joinder on
- 18 Plaintiffs’ Third and Fourth Claims For Relief (Negligence & Breach of
- 19 Fiduciary Duty) are granted on the following grounds, each of which is
- 20 sufficient to support the grant of summary judgment:
- 21 a. There are no genuine issues as to any material fact and Westland is
- 22 entitled to judgment as a matter of law.
- 23 b. Plaintiffs’ tort claims are time barred by the two year statute of
- 24 limitations and Plaintiffs’ failure to file a timely tort claim notice.
- 25 ORS 30.275. The only conclusion a reasonable jury could reach is that
- 26 Plaintiffs knew or should have known the critical facts to support their

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- tort claims more than two years before Plaintiffs brought suit and more than 180 days before Plaintiffs provided their tort claim notice.
- c. Plaintiffs also failed to produce admissible evidence establishing facts that could cause a reasonable juror to find each element of Plaintiffs' tort claims. Specifically, Plaintiffs failed to produce evidence establishing a question of fact that Plaintiffs suffered any damage. The undisputed evidence demonstrates that Plaintiffs have not been damaged or harmed by Westland's water distribution practices.
 - d. Westland is also immune from tort liability based upon its performance of discretionary functions. ORS 30.235(6)(c).
4. Alternatively, I make the following findings entitling Westland and Intervenor-Defendants to summary judgment against the individual Plaintiffs. There are no disputed issues of fact and Westland is entitled to judgment as a matter of law with respect to each of the following issues:
- a. ELH, LLC, has not been damaged. It is uncontroverted that Westland has never shut off water to ELH, LLC, in order to satisfy a request for water from a junior appurtenant water right.
 - b. Lucy and Maurice Ziemer have not been damaged. It is uncontroverted that Westland has never shut off water to the Ziemers in order to satisfy a request for water from a junior appurtenant water right. It is also uncontroverted that the Ziemers have never sought to increase the rental price for their property, have self-selected the rental rate for their property, have admitted they do not need more water, and were not seeking to terminate the Limited Water Contracts or Floodwater Contracts.

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- c. Craig and Cindy Parks have not been damaged. It is uncontroverted that Westland has never shut off water to the Parks in order to satisfy a request for water from a junior appurtenant water right. It is also uncontroverted that the Parks are not seeking damages, have tenants that are able to double crop, are not seeking to void the Limited Water Contracts, have admitted that they do not need more water, and have received all the water they requested.
- d. Richard and Kristine Carpenter have not been damaged. It is uncontroverted that Westland has never shut off water to the Carpenters in order to satisfy a request for water from a junior appurtenant water right. It is also uncontroverted that the Carpenters never sought to increase the rental price for their land, self-selected the rental rate for their property, and have a tenant that is able to double crop.
- e. Paul Gelissen has not been damaged. It is uncontroverted that Westland has never shut off water to the Mr. Gelissen in order to satisfy a request for water from a junior appurtenant water right. It is also uncontroverted that Mr. Gelissen has not had a problem receiving enough water to obtain the maximum production of his crop and is not seeking to void the Limited Water Contracts.
- f. Oregon Hereford Ranch, LLC, has not been damaged. It is uncontroverted that Westland has never shut off water to Oregon Hereford Ranch, LLC, in order to satisfy a request for water from a junior appurtenant water right. Jordan Bennett, an owner of Oregon Hereford Ranch, LLC, also admits that Westland has not committed any wrongdoing in its distribution of water.

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1 5. Westland and Intervenor-Defendants are instructed to submit their
2 applications for attorney fees and costs.
3 [] Denied:
4 [] Other
5 //

11/13/2018 

The Honorable Gregory L. Baxter

10 Submitted by:
11 STOEL RIVES LLP
12 By: /s/ Nicole Hancock
13 Nicole Hancock, OSB No. 025114
14 nicole.hancock@stoel.com
14 Attorney for Westland Irrigation District
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16 By: /s/ John A. Schwimmer
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18 Attorneys for Intervenor L & L Farms, LLC
18 And Robert Levy, as Trustee of the
19 Robert Levy Family Trust
20 JORDAN RAMIS
21 By: /s/ Steven L. Shropshire
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22 Steve.shropshire@jordanramis.com
23 Attorneys for Intervenor-Defendants and Counter-
23 Claimants Amstad Farms Land Co. LLC and Eagle Ranch

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CERTIFICATE OF READINESS

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I certify this proposed judgment/order is ready for judicial signature because (check all that apply):

I served on opposing counsel not less than 3 days prior to submission to the court, a true copy of the attached Order on September 13, 2018 via first class mail; or

I mailed to a self-represented party at the party's last known address not less than 7 days prior to submission to the court a true copy of the attached Order, accompanied by notice of the time period to object.

This proposed judgment/order was presented in open court.

This proposed order or judgment is ready for judicial signature because:

Each opposing party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.

Each opposing party affected by this order or judgment has approved the order or judgment, as shown by signature on the document being submitted or by written confirmation of approval sent to me.

I have served a copy of this order or judgment on all parties entitled to service and:

- a. No objection has been served on me.
- b. I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.
- c. After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection

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1 [] The relief sought is against an opposing party who has been found in default.

2 [] An order of default is being requested with this proposed judgment.

3 [] Service is not required pursuant to subsection (3) of this rule, or by statute,
4 rule, or otherwise.

5 [] This is a proposed judgment that includes an award of punitive damages and
6 notice has been served on the Director of the Crime Victims' Assistance Section as required
7 by subsection (4) of this rule.

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9 DATED: October 2, 2018.

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/s/ Nicole C. Hancock
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CERTIFICATE OF SERVICE

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I hereby certify that I served the foregoing **ORDER ON MOTIONS FOR SUMMARY JUDGMENT** on the following named person(s) on the date indicated below

by:

- mailing with postage prepaid hand delivery
- overnight delivery facsimile transmission
- email eService via Odyssey File & Serve

to said person(s) a true copy thereof, contained in a sealed envelope if by mail, addressed to said person(s) at his or her last-known address(es) indicated below.

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DATED: October 2, 2018.

/s/ Nicole C. Hancock
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