

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

APG CO., an Oregon Corporation,)

NO. 88-254 CV

Plaintiff,)

JUDGMENT
OF DISMISSAL

vs.)

DIVISION OF STATE LANDS
OF THE STATE OF OREGON,)

Defendants.)

This matter came before the Court upon the Stipulation of Plaintiff, by and through William M. Ganong, Attorney for Plaintiff, and the Defendant, by and through William F. Cloran, Assistant Attorney General, of counsel for Defendant, for a Judgment of Dismissal.

The Court being fully advised in the premises finds as follows:

1. Plaintiff filed its Complaint For Declaratory Relief which alleged:

a. That Plaintiff is a corporation organized under the laws of the State of Oregon, presently existing and doing business in the State of Oregon with its principal place of business at Klamath Falls, Oregon;

b. That at all times material herein, the Division of State Lands is an agency of the State of Oregon;

c. That a controversy had arisen between Plaintiff and Defendant regarding the interests of Plaintiff in the following described property situate in Klamath County, Oregon:

All submerged land within 50 feet of the line of ordinary highwater of Lake Ewauna, a navigable lake located in parts of Township 38 South, Range 9 East, and Township 39 South, Range 9, East, Klamath County, Oregon, and Upper Klamath Lake, a navigable lake located in part of Township 36 South, Range 6 E. W.M., Township 34 S., 35 S., 36 S., 37 S., Range 7 E. W.M., Township 34 S., 35 S., 36 S., R 7 1/2, E. W.M., Township 37 S., 38 S., Range 8 E. W.M., Township 37 S., 38 S., Range 9 E., W.M., Klamath County, Oregon, including the outlet of said lake commonly known as Link River, and being covered by the waters of Lake Ewauna, Link River and Upper Klamath Lake including the Northern Arm of the Upper Klamath Lake known as Agency Lake;

and the scope, terms and provisions of the following documents between plaintiff and defendant collectively, referred to herein as "Lease": Submerged and Submersible Land Lease dated August 22, 1977, recorded January 17, 1978, in Volume M-78, Page 1081, Official Records of Klamath County, Oregon; Amendment Agreement dated February 16, 1983, recorded April 6, 1984, in Volume M-84, Page 6859, Official Records of Klamath

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1 County, Oregon; and Second Lease Amendment dated April 20, 1984, recorded
2 April 26, 1984, in Volume M-84, Page 6863, Official Records of Klamath
3 County, Oregon. A true copy of the Lease was attached to the Complaint as
4 Exhibit A. The controversy is: Defendant contends there are
5 uncertainties and defects in the Lease which make those rights granted
6 Plaintiff by the Lease either fully or partially invalid. Plaintiff
7 contends all the Lease provisions are valid, and, to the extent any Lease
8 provision is invalid, Plaintiff is entitled to the return of consideration
9 paid by Plaintiff to Defendant for that right, together with interest from
10 the date of each payment. Plaintiff is prepared and willing to pay
11 Defendant the rent specified in the Lease, but is uncertain if it should
12 pay any such rent and, if so, the amount. Plaintiff hereby offers to pay
13 any rent determined by the Court to be due and owing; and

14 d. That the Lease provides for the prevailing party to recover,
15 in addition to costs and disbursements, such sums as the court may adjudge
16 reasonable as attorney fees, including any attorney fees and costs on
17 appeal. Plaintiff has been required to employ the services of an
18 attorney, and, by reason of the foregoing, Plaintiff should be granted
19 reasonable attorney fees, costs and disbursements in this action.

20 Plaintiff's Complaint prayed for a Judgment and Decree of the Court:

21 a. That this court determine the rights of the parties herein;

22 b. That this court determine the Lease to be fully valid; or

23 c. That if this court determines all of the Lease to be invalid,
24 it grant Plaintiff judgment for all of the consideration paid by
25 Plaintiff to Defendant, with interest thereon;

26 d. That this court determine the amount of rent Plaintiff should
27 pay Defendant;

28 e. This court grant Plaintiff judgment for Plaintiff's costs,
disbursements, and reasonable attorney fees incurred herein (or on
appeal); and

f. This court grant other and further relief as it deems just
and proper.

2. The Defendant then filed its Answer which:

a. Admitted the allegations of paragraphs 1 and 2 of Plaintiff's
Complaint (subparagraphs 1(a) and (b), above);

b. Admitted that an actual controversy existed between the parties
concerning the legal affect of the documents (lease and amendments
described in the Complaint) which Plaintiff identified; but

c. Denied that Plaintiff was entitled to a return of any payments made to
Defendant; and

1 d. Denied that the prevailing party was entitled to recover its
2 reasonable attorney fees, in addition to its cost and disbursements, from
3 the other party.

4 Defendant's Answer also alleged two counterclaims:

5 a. That realleged paragraphs 1 and 2 of its Answer and requested
6 declaratory judgment in its favor; and

7 b. That the water of the lakes and rivers mentioned in the leases are the
8 property of the public. That Title to the lands under and adjacent to
9 such waters is vested in the State of Oregon by reason of its admission
10 into the United States. That the algae and bioproduct of said waters
11 overlying the lands are likewise the property of the State of Oregon;

12 c. That from 1977 until the present plaintiff extracted from waters of
13 the State of Oregon overlying its submerged lands the produce of said
14 waters in the form of algae and other bioproduct which plaintiff used to
15 manufacture and sell certain commercial products;

16 d. That the algae and bioproduct extracted from the waters of the State
17 by plaintiff has a reasonable value to be proven at trial but believed to
18 be in the amount of \$150,000;

19 e. That Defendant allowed plaintiff to extract the algae and product of
20 its waters at plaintiff's special request and insistence and upon the
21 representation that plaintiff would pay to defendant the reasonable value
22 of the algae and produce; and

23 f. That if the contract between plaintiff and defendant is invalid in
24 whole or in part, plaintiff will be unjustly enriched at the expense of
25 the people and school children of Oregon unless it is required to pay the
26 reasonable value of the algae and produce to the defendant for deposit in
27 the Common School Fund.

28 Defendant's Answer and Counterclaim prayed for a Judgment and Decree of
the Court:

a. Settling the validity or invalidity of the leases identified in
the Complaint;

b. For a Judgment awarding Defendant the reasonable value of all
algae and produce removed from the waters of the State pursuant to
the leases; and

c. For its cost and disbursements incurred in this suit and such
other relief as the Court deems just.

3. Plaintiff then filed its Reply to Defendant's said Counterclaim.

Said Reply alleged:

a. That Declaratory Judgment should be entered in favor of
Plaintiff not Defendant; and

1 b. That admitted that Plaintiff removed algae from the State's
2 waters pursuant to the Lease, but denied that Defendant was entitled
3 to receive the reasonable value thereof.

4 4. Plaintiff then filed its Motion For Partial Summary Judgment. Said
5 Motion asked the Court to determine and declare the validity or invalidity of
6 the 1982 Agreement Amending the original Lease between the parties and also
7 determining and declaring the validity or invalidity of the original 1977 lease
8 between the parties.

9 Plaintiff filed a Memorandum in Support of its Motion for Summary Judgment
10 which alleged that certain actions of Defendant described therein constituted a
11 repudiation of Plaintiff's Lease rights.

12 Plaintiff's said Memorandum posed three questions:

13 a. Did the Defendant properly accept Plaintiff's 1982 bid and
14 execute the Amended Agreement?

15 b. If the variances between Plaintiff's 1982 bid and the 1982 bid
16 notice are material, is the Defendant estopped from denying the
17 validity of the Agreement?

18 c. If the 1982 Amendment Agreement is invalid, is the original 1977
19 Lease valid?

20 The Plaintiff argued that the Answer to each said question is "yes" and
21 that the Court need consider and answer each successive question only if it
22 answered "no" to the preceeding question.

23 5. Defendant filed a Memorandum In Opposition To Plaintiff's Motion For
24 Summary Judgment. Said Memorandum stated:

25 a. That the Defendant does not contest the validity of the original 1977
26 lease and does not challenge the rights and obligations of the parties
27 under that lease;

28 b. That Defendant was justified in advising Plaintiff that it would not
consent to the assignment of Plaintiff's Lease rights because of the legal
uncertainties inherent in the lease; and

c. That the Defendant does not dispute the Plaintiff's Answer to the
three questions posed in Plaintiff's said Memorandum and, therefore, there
is no judiciable constroversy between the parties concerning the issues
raised by the Plaintiff's Motion.

1 However, Defendant's Memorandum did ask the Court to find that Defendant
2 acted properly in refusing to consent to the Assignment (novation) of
3 Plaintiff's lease rights.

4 6. Both parties filed Affidavits in support of their Memorandums.

5 7. The Attorneys for the Parties presented oral argument in support of
6 their clients' respective positions to the Honorable Rodger Isaacson on February
7 21, 1989. Following oral argument, Judge Isaacson took this matter under
8 advisement.

9 8. While Plaintiff's said Motion was under advisement, by letter dated
10 March 21, 1989 and signed by William F. Cloran, Assistant Attorney General, of
11 Counsel to Defendant, the Defendant conveyed to an offer of Settlement to
12 Plaintiff.

13 9. By letter dated March 30, 1989, Plaintiff notified Defendant of its
14 acceptance of said offer.

15 10. Said Settlement provides that the parties shall:

16 a. Enter into a written Agreement amending the Lease Agreement
17 between the parties as evidenced in the draft Third Amendment to
18 Lease submitted to Plaintiff on June 8, 1989, DOJ document 024GH,
and providing generally:

19 1. The First and Second Amendments to the Lease
20 are revoked in their entirety;

21 2. The description of the Leased Land contained in
22 the original Lease is replaced by the following:

23 Submerged land 50 feet or more from the line of
24 Ordinary Low Water of Upper Klamath Lake, a navigable
lake located in parts of

- 25 a) T 35 S and 36 S, R 6 E, W.M.;
26 b) T 34 S, 35 S, 36 S, and 37 S, R 7 E, W.M.;
27 c) T 34 S, 35 S and 36 S, R 7 1/2 E, W.M.;
28 d) T 37 S and 38 S, R 8 E, W.M.; and
e) T 38 S, R 9 E, W.M.,

Klamath County, Oregon, including the outlet of said
lake commonly known as Link River and lying north of the

1 Link River Bridge located in Section 32, T 38, R 9 E,
2 W.M.; and being covered by the waters of Link River and
3 Upper Klamath Lake including the Northern Arm of Upper
4 Klamath Lake known as Agency Lake. The Leased premice
5 within said area shall be two parcels described as
6 follows:

7 a. Parcel 1 is comprised of approximately 1/2 acre
8 of submerged land in the Link River near the mouth of
9 the "A" Canal, as shown an Attachment "1" to said Third
10 Lease Amendment; and

11 b. Parcel 2 is that portion of the Leased land
12 which LESSEE may, from year to year, designate in
13 writing subject to the terms set forth hereat. The site
14 designated shall be comprised of nine-tenths (0.9) acre
15 or less. The site designated shall not be, at the time
16 of selection by LESSEE, under lease to another party.
17 LESSEE shall inform STATE of its selection prior to July
18 1 of each year. STATE shall promptly advise LESSEE of
19 any conflicting leases affecting the site designated.
20 LESSEE may, from year to year, designate a different
21 site.

22 The intent of parcel 2 is to provide LESSEE the
23 flexibility to designate from year to year that portion
24 of the leased land which LESSEE may use in addition to
25 or instead of parcel 1. Said flexibility is constrained
26 only by the limitations that LESSEE may make a new
27 designation only once a year, and that LESSEE may not
28 site Parcel 2 on an area already under lease to another;

4. The "Royalty" schedule, Article II, is deleted and
replaced by a rent schedule;

5. Article III, "Purpose" is amended to delete the
State's duty to defend against third party claims to
ownership of the algae;

6. The exclusivity provisions of Article IV of the
Lease are amended to delete LESSEE's exclusive right to
harvest algae from the Leased Land and to add LESSEE's
exclusive right to use the leased premises for the
purpose of removal and processing algae for commercial
purposes;

7. Article VI, "Assignment," is Amended to delete the
word "novation" and to provide that the State's consent
to the Assignment of LESSEE's leasehold interest will
not be unreasonably withheld;

8. Article XII "Indemnification" is amended to require
LESSEE to obtain general liability insurance; and

1 9. The amendments contained in the Third Lease
2 Amendment supersede the prior amendments and are to be
3 construed as though originally contained in Lease
4 ML-1016-S and all covenants, terms, conditions, and
5 provisions of Lease not expressly amended by the Third
6 Lease Amendment shall remain in full force and effect.

7 b. The parties shall enter into a reciprocal release of all claims
8 and liabilities now existing, whether known or unknown; and

9 c. The Defendant shall pay to the Plaintiff the sum of \$68,000 in
10 consideration for Plaintiff's agreement to the terms of settlement set
11 forth above.

12 11. On April 24, 1989 the Oregon State Land Board approved the terms of the
13 Settlement and in May, 1989, the subcommittee of the Oregon State Legislature
14 Ways and Means Committees approved the said disbursement of funds by the
15 Defendant to the Plaintiff.

16 12. The parties have further stipulated:

17 a. That the Settlement recited hereinabove is a fair, equitable and
18 just Settlement of the claims set forth in Plaintiff's Complaint,
19 Defendant's Answer and Counterclaims, Plaintiff's Reply and Motion
20 for Partial Summary Judgment and Defendant's Memorandum In
21 Opposition thereto;

22 b. That the Lease between the parties dated August 22, 1977 and
23 recorded in Vol. M-78 at pages 1081 to 1088, inclusive, as Amended
24 as provided in paragraph 10(a) above, is a valid and enforceable
25 Agreement between the parties and the the parties have complied with
26 all of the terms, covenants, conditions and provisions of said
27 Lease;

28 c. That all other claims set out in the pleadings filed herein
should be dismissed with prejudice; and

d. That each party shall bear and pay its own costs of suit, disbursements and attorney's fees.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

a. That this suit and all claims set out in the pleadings filed herein are dismissed with prejudice; and

b. That each party shall bear and pay its own costs of suit, disbursements and attorney's fees.

Dated this 7 day of July, 1989.

Rodger Isaacson
Rodger Isaacson
Circuit Court Judge, Protém

Plaintiff, APG Co., and Defendant, State of Oregon, stipulate to the entry of the foregoing Judgment of Dismissal.

William M. Danong
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Telephone: (503) 882-7228

William F. Cloran
William F. Cloran, OSB #72050
Assistant Attorney General of
Attorneys for Defendant

STATE OF OREGON

County of Klamath
I, LYN G. HARDY, Clerk of the Court of the County of Klamath
and the State of Oregon, do hereby certify that the foregoing copy has been
by me compared with the original and it is a transcript therefrom, and
of the whole of such original, and it appears on file or of record in my
office and in my case books.
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed
the seal of said Court, this 7 day of July, A.D. 19 89

LYN G. HARDY,
Clerk of Court

By Cathryn Gehring

Return To:

APG Co.
635 Main
Klamath Falls, Or. 97601

JUDGMENT OF DISMISSAL- Page 8

STATE OF OREGON: COUNTY OF KLAMATH: ss.

Filed for record at request of Giacomini & Knieps the 21st day
of July, A.D., 19 89 at 4:50 o'clock P M., and duly recorded in Vol. M89,
of Deeds on Page 13407.

Evelyn Biehn - County Clerk

By Roseline Mullendore

FEE \$43.00