

4-16-2012

Case 282 Order Re: Sipluation of Conditional Withdrawal of Contests to Claims 671, 672, 673 and That Portion of Claim 612 Pertaining to the Klamath River and Conditional and Interim No-Call Provisions by the United States and Klamath Tribes

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Senior Administrative Law Judge, Office of Administrative Hearings

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Allen, Joe L., "Case 282 Order Re: Sipluation of Conditional Withdrawal of Contests to Claims 671, 672, 673 and That Portion of Claim 612 Pertaining to the Klamath River and Conditional and Interim No-Call Provisions by the United States and Klamath Tribes" (2012). *In re Klamath River (Klamath Tribe)*. 12.

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

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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

~~Pacificorp; WaterWatch of Oregon, Inc.; Horsefly
Irrigation District; Langell Valley Irrigation District;
Medford Irrigation District; Rogue River Valley
Irrigation District; Roger Nicholson; Richard Nicholson;
NBCC, LLC; Agri Water, LLC; Maxine Kizer;
Ambrose McAuliffe; Susan McAuliffe; Kenneth L.
Tuttle and Karen L. Tuttle dba Double K Ranch; Dave
Wood; Kenneth Zamzow; Nicholson Investments, LLC;
William S. Nicholson; John B. Owens; Kenneth Owens;
William L. Brewer; Mary Jane Danforth; Jane M.
Barnes; Franklin Lockwood Barnes, Jr.; Jacob D. Wood;
Elmore E. Nicholson; Mary Ann Nicholson; Nicholson
Loving Trust; Gerald H. Hawkins; Hawkins Cattle Co.;
Owens & Hawkins; Harlow Ranch; Terry M. Bengard;
Tom Bengard; Robinson Best; Mebane; Helen Mebane;
Sevenmile Creek Ranch, LLC; James G. Wayne, Jr.;
Clifford Rabe; Tom Griffith; William Gallagher;
Thomas William Mallams; River Springs Ranch; Pierre
A. Kern Trust; William V. Hill; Lillian M. Hill; Carolyn
Obenchain; Lon Brooks; Newman Enterprise; William
C. Knudtsen; Wayne Jacobs; Margaret Jacobs; Michael
LaGrande; Rodney Z. James; Hilda Francis for Francis
Loving Trust; David M. Cowan; James R. Goold for
Tillie Goold Trust; Duane F. Martin; Modoc Point~~

**ORDER ON KLAMATH TRIBES,
UNITED STATES, AND KLAMATH
PROJECT WATER USERS'
AMENDED STIPULATION OF
CONDITIONAL WITHDRAWAL OF
KPWU'S CONTESTS TO
CLAIMS 671, 672, 673, AND THAT
PORTION OF CLAIM 612
PERTAINING TO THE KLAMATH
RIVER AND CONDITIONAL AND
INTERIM NO-CALL PROVISIONS
BY THE UNITED STATES AND
KLAMATH TRIBES**

Case No. 282

Claims: 671, 672, 673, and that Portion
of Claim 612 pertaining to the
Klamath River

Contests: ~~2062, 2064, 2065, 2066¹,
3016, 3070, 3071, 3072², 3249,
3257, 3258, 3259³, 3314⁴,~~

¹ Pacificorp voluntarily withdrew from Contests 2062, 2064, 2065, and 2066 on July 26, 2010.

² WaterWatch of Oregon, Inc.'s contests 3016, 3070, 3071, and 3072 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

³ Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3249, 3257, 3258 and 3259 on October 16, 2003. Medford and Rogue River Valley Irrigation Districts voluntarily withdrew from Contests 3249, 3257, 3258 and 3259 on June 14, 2006.

⁴ On October 31, 2003, William Bryant voluntarily withdrew from Contest 3314. On October 26, 2004, Dave Wood voluntarily withdrew from Contests 3314 and 3373-3375. Change of Title Interest for Contests 3314, and 3373-3375 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3314 and 3373-3375 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contest 3314 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contest 3314 and 3373-3375 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contest 3314 and 3373-3375 from Walter Seput to James Wayne, Jr. (5/2/05). Change of Title Interest for Contests 3314 and 3373-3375 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3314 and 3373-3375 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3314 and 3373-3375 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3314, 3373-3375 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3314, 3373-3375 on September 13, 2005. Change of Ownership filed for Contests 3314 and 3373-3375 reflecting that William V. Hill is deceased and his ownership rights transferred to Lillian M. Hill (6/15/06). Sevenmile Creek Ranch, LLC voluntarily withdrew from Contests 3314, 3373-3375 on March 1, 2007. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily withdrew from Contests 3314 and 3373-3375 on April 6, 2007. Mary Jane Danforth voluntarily withdrew from Contests 3314 and 3373-3375 on June 19, 2008. Modoc Point Irrigation District voluntarily withdrew from Contests 3373-3375

~~Irrigation District; Peter M. Bourdet; Peter M. Bourdet and Linda Long; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; William Bryant; Peggy Marengo; Jerry L. Neff & Linda R. Neff; 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 Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Modoc Lumber Co.; Bradley S. Luscombe; Berlva Pritchard; Don Vincent; Randy Walthall; InterCounty Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; Collins Products, LLC;~~

Contestants

vs.

United States, Bureau of Indian Affairs, as Trustee on behalf of the Klamath Tribes;
Claimant/Contestant, and

The Klamath Tribes;
Claimant/Contestant.

3373, 3374, 3375, 3644, 3657,
~~3658, 3659~~⁵, 3932, 3933, 3934,
4002, 4061, 4062, 4063

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1. The “AMENDED STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU’S CONTESTS TO CLAIMS 671, 672, 673, AND THAT PORTION OF CLAIM 612 PERTAINING TO THE KLAMATH RIVER AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES” (“Amended Stipulation”) is hereby approved and the Parties to the Amended Stipulation (Klamath Project Water Users (“KPWU”), Klamath Tribes, United States,

on November 13, 2008. Change of Title Interest for Contest 3314 and 3373-3375 from Robert Bartell to Michael LaGrande (1/9/09). Change of Title Interest for Contests 3314, 3373-3375 from Elmore E. Nicholson and Mary Ann Nicholson to Nicholson Loving Trust (12/8/09). Change of Title Interest for Contests 3314 from Peter M. Bourdet to Peter Bourdet & Linda Long (1/8/09). Jacob D. Wood voluntarily withdrew from Contests 3314, 3373-3375 on January 15, 2010. Change of portion of Title Interest for Contests 3314, 3373-3375 from Roger Nicholson and Richard Nicholson to NBCC, LLC (3/17/2010). Change of Title Interest for Contests 3314 and 3373-3375 from Dwight & Helen Mebane to Farm Credit West, PCA (7/20/2011), and from Farm Credit West, PCA to PCA Acquired Properties, LLC (7/20/2011), and from PCA Acquired Properties, LLC to Robinson Best, LLC (7/20/2011).

⁵ Don Vincent voluntarily withdrew from Contest 3644, 3657, 3658, and 3659 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3644, 3657, 3658, and 3659 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3644, 3657, 3658, and 3659 on January 15, 2004. The remaining entities comprising Klamath Project Water Users, conditionally withdrew from Contests 3644, 3657, 3658, and 3659 on May 18, 2009. See STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU’S CONTESTS TO CLAIMS 671, 672, 673, AND THAT PORTION OF

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Bureau of Indian Affairs) and Oregon Water Resources Department (“OWRD”) shall comply with its terms. To the extent KPWU have any obligation to exhaust administrative remedies before OWRD, remedies have been exhausted, consistent with section E.6 of the Amended Stipulation.

2. Regarding Contests 3657, 3658, 3659, and 3644 filed by KPWU,⁶ the following terms are a part of this Order and shall be included in the Proposed Order issued under ORS 183.464(1) and OAR 137-003-0645 and any other Order or Judgment determining these contests.

a. Subject to paragraph 2.b, KPWU may file exceptions in the Circuit Court to the Findings of Fact and Order of Determination on Claims 671, 672, 673, and Claim 612,⁷ consistent with ORS 539.150. Nothing in the Amended Stipulation or this Order shall limit the exceptions which the Parties may pursue or oppose in the Circuit Court, or the use they may make of the Findings of Fact and Order of Determination on Claims 671, 672, 673, and 612 in the Circuit Court. The Parties to the Amended Stipulation have, and have had since the entry of the 2009 Stipulation, no further discovery obligations regarding each other during the contested case process before the Office of Administrative Hearings or OWRD.

CLAIM 612 PERTAINING TO THE KLAMATH RIVER AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES (MAY 18, 2009).

⁶ For purposes of this Order, Klamath Project Water Users include Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Malin Irrigation District, Midland Improvement District, 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 and Inter-County Title Co., Inter-County Properties Co., Randolph and Jane Walthall 1995 Trust, Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Collins Products LLC, and Plevna District Improvement Company.

⁷ As used in this Order, the term “Claim 612” refers to Claim 612 insofar as it adopts and incorporates by reference Claims 671, 672 and 673.

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b. If none of the events described in paragraph 3.c.i have occurred and the Secretary publishes the notice under section 15.3.4.A of the KLAMATH BASIN RESTORATION AGREEMENT FOR THE SUSTAINABILITY OF PUBLIC AND TRUST RESOURCES AND AFFECTED COMMUNITIES ("Restoration Agreement") (including a notice under section 15.3.4.A following its amendment as provided in section 15.3.4.B of the Restoration Agreement, as applicable), KPWU shall refrain from filing exceptions to the Findings of Fact and Order of Determination or, if exceptions to the Findings of Fact and Order of Determination have already been filed, timely cease any litigation on exceptions and file the necessary pleading to dismiss their exceptions and the conditional withdrawal by KPWU of their Contests 3657, 3658, 3659, and 3644 shall become permanent and no longer conditional.

3. Regarding Claims 671, 672, 673, and 612, the following terms are a part of this Order and shall be included in the Proposed Order on Claims 671, 672, 673, and 612 issued under ORS 183.464(1) and OAR 137-003-0645 and any other Order or Judgment determining these water rights claims.

a. From the time the Amended Stipulation was filed until the On Project Plan Implementation Deadline, any exercise of the water rights determined for Claims 671, 672, 673, and 612 (the "Tribal Water Rights") shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908.

b. After the On Project Plan Implementation Deadline, any exercise of the water rights determined for Claims 671, 672, 673, and 612 shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908, except that the exercise of the water rights determined for Claims 671, 672, 673,

and 612 may seek regulation such that DIVERSION (as defined in Appendix E-1 of the Restoration Agreement) is equal to the maximum DIVERSION that can occur if Appendix E-1 of the Restoration Agreement has been filed and is in effect. The exception that applies under this paragraph 3.b applies at all times after the On Project Plan Implementation Deadline, regardless of whether Appendix E-1 has in fact been filed and is in effect at that time.

c. If the following events have all occurred, the conditional limitations on the exercise of the Tribal Water Rights set out in paragraph 3.a and paragraph 3.b above shall cease and be of no further force or effect:

i. The Restoration Agreement has terminated without the Secretary of the Interior having published a notice under either section 15.3.4.A or 15.3.4.C of the Restoration Agreement, or the Secretary of the Interior has published the notice in the Federal Register described in section 15.3.4.C of the Restoration Agreement, or the Klamath Tribes have withdrawn from the Restoration Agreement under section 33.2.2 of the Restoration Agreement; and

ii. KPWU have fully litigated the Parties' exceptions to the Findings of Fact and Order of Determination for Claims 671, 672, 673, and 612 consistent with the processes described in section 15.3.2.B.ii.b of the Restoration Agreement or have foregone their final opportunity to fully litigate the Parties' exceptions pursuant to such processes; and

iii. Following KPWU's litigation of exceptions as provided in paragraph 3.c.ii immediately above or following KPWU having foregone the final opportunity to fully litigate exceptions as provided in paragraph 3.c.ii

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immediately above, a judgment or decree (or amended judgment or decree) has been issued regarding Claims 671, 672, 673, and 612 under ORS 539.150(4) or 539.190 and is operative.

d. If none of the events described in paragraph 3.c.i have occurred and the Secretary publishes the notice described in section 15.3.4.A of the Restoration Agreement (including a notice under section 15.3.4.A following its amendment as provided in section 15.3.4.B of the Restoration Agreement, as applicable), then the conditional limitations on the exercise of the Tribal Water Rights set out in paragraph 3.a and paragraph 3.b above shall become permanent and unconditional.

e. For purposes of this paragraph 3, "On Project Plan Implementation Deadline" means the applicable deadline for full and complete implementation of the On Project Plan as established under sections 15.3.8.A or 15.3.8.B of the Restoration Agreement.

4. The provisions in paragraph 3.a. and paragraph 3.b limit the scope or extent of a call made by the Klamath Tribes and United States under any water right that has been determined under Claims 671, 672, 673, and 612. Such provisions do not change the principle that any regulation by OWRD curtailing use of water shall be as provided in ORS 540.045(1)(a), based on the priority of regulated rights, with the latest priority right curtailed first.

5. Nothing in the Amended Stipulation or this Order shall diminish, affect, define, or resolve in any way: (a) the rights of Contestants other than KPWU to contest or oppose Claims 671, 672, 673, and 612; or (b) any contests other than Contests 3657, 3658, 3659, and 3644; or (c) any other claims of the Claimants. Nothing in the Amended Stipulation or this Order shall diminish, affect, define, or resolve in any way any other water rights or any other

claim, contest, or case in the Klamath Basin Adjudication. In addition, nothing in the Amended Stipulation or this Order defines, or is intended to define, the scope and attributes of the Tribal Water Rights, either to satisfy the Tribes' treaty rights or otherwise.

6. This Order supersedes and replaces the June 19, 2009 "ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS' STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU CONTESTS TO CLAIMS 671, 672, 673, AND THAT PORTION OF CLAIM 612 PERTAINING TO THE KLAMATH RIVER AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES."



Joe L. Allen, Senior Administrative Law Judge
Office of Administrative Hearings

Date: April 25, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2012, I mailed a true copy of the following: **ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS' AMENDED STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU'S CONTESTS TO CLAIMS 671, 672, 673, AND THAT PORTION OF CLAIM 612 PERTAINING TO THE KLAMATH RIVER AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES**, 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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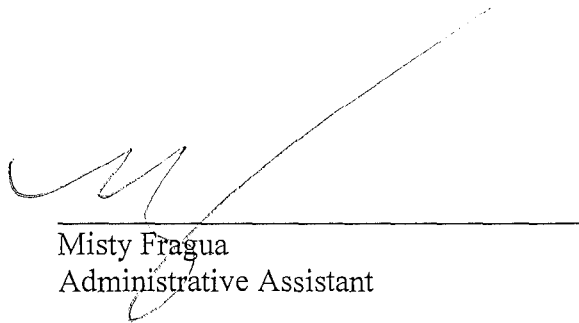
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Administrative Assistant

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