

6-19-2010

Case 282 Stipulation to Resolve

Douglas W. MacDougal
Attorney, PacifiCorp

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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

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STATE OF OREGON

for the

WATER RESOURCES DEPARTMENT

Office of Admin. Hearings

WATER RESOURCES DEPT

SEASIDE, OREGON

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

STIPULATION TO RESOLVE
CONTESTS 2062, 2064, 2065
and 2066

Case No. 282

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

Contests: **2062, 2064, 2065, and**
2066, 3016, 3070, 3071, 3072¹,
3249, 3257, 3258, 3259², 3314³,

~~Pacificorp; WaterWatch of Oregon, Inc.; Horsefly
Irrigation District; Langell Valley Irrigation District;
Medford Irrigation District; Rogue River Valley
Irrigation District; Roger Nicholson; Richard Nicholson;
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; Gerald H. Hawkins;
Hawkins Cattle Co.; Owens & Hawkins; Harlow Ranch;~~

¹ WaterWatch of Oregon, Inc.'s contests 3016, 3070, 3071, and 3072 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

² 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.

³ 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 Wayne James, 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, 3373-3375 on April 6, 2007.

Terry M. Bengard; Tom Bengard; Dwight T. 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; Robert Bartell; Rodney Z. James; Hilda Francis for Francis Loving Trust; David M. Cowan; James R. Goold for Tillie Goold Trust; Duane F. Martin; Modoc Point Irrigation District; Peter M. Bourdet; 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. Luscumbe; 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.

Claimants the Klamath Tribes (“Tribes”) and the United States Bureau of Indian Affairs as Trustee on Behalf of the Klamath Tribes (USBIA), and Contestant PacifiCorp (collectively,

⁴ 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.

3373, 3374, 3375, 3644, 3657,
3658, 3659⁴, 3932, 3933, 3934,
4002, 4061, 4062, 4063

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“Parties”), and the Oregon Water Resources Department (“OWRD”) hereby agree and stipulate and request the Adjudicator to resolve the above-captioned Claims and Contests in Klamath Basin Adjudication (“KBA”) Case 282 as follows.

A. STIPULATED FACTS

1. On April 30, 1997, the USBIA, as Trustee on behalf of the Tribes, filed Claims 671, 672 and 673 with OWRD.
2. On April 29, 1997, the Tribes filed Claim 612, which incorporates by reference Claims 671, 672 and 673. Claims 671, 672, 673 and that portion of Claim 612 pertaining to the Klamath River are hereafter collectively referred to as the "Claims".
3. On March 31, 2000, the Tribes submitted a "corrected" claim form for Claim 612.
4. On October 4, 1999, the Adjudicator, Richard D. Bailey, issued Preliminary Evaluations denying the Claims.
5. PacifiCorp did not file contests to the Adjudicator's Preliminary Evaluations of the Claims.
6. On May 5, 2000, PacifiCorp filed Contest Nos. 2062, 2064, 2065 and 2066 to the Claims.
7. On or about October 5, 2004, PacifiCorp filed Amended Statements of Contest of the Claims.
8. OWRD, PacifiCorp, the Tribes and the USBIA agree that the above-described contests can be resolved without the need for hearing based on the terms described below.
9. PacifiCorp, the Tribes and the USBIA have also agreed to the terms of the Settlement Agreement Between PacifiCorp, the Klamath Tribes, and the United States, Bureau of Indian Affairs set forth in Exhibit 1 attached hereto.

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B. TERMS OF THE AGREEMENT

1. Definitions. The following definitions are applicable only to this Stipulation, and neither the defined terms nor the use of any defined term herein expressly or impliedly affects the determination of any water right claim or contest in the KBA:

a. *Anadromous Fish Presence*: When anadromous fish have volitional passage to the J.C. Boyle Bypass Reach after Downstream Facilities Removal, or as a result of a volitional fish passage plan required by the Federal Energy Regulatory Commission (“FERC”) and incorporated into PacifiCorp’s FERC license for its hydroelectric facilities on the Klamath River;

provided, however, Anadromous Fish Presence shall not be deemed to have occurred if such presence is the result of anthropogenic placement of fish above, within or below the J.C. Boyle Bypass Reach, including as a result of scientific studies, experiments or investigations, prior to Downstream Facilities Removal, unless such placement is part of a FERC fish passage plan. Anthropogenic placement does not include volitionally returning adult anadromous fish;

provided, further, this definition does not predetermine the sequence of Facilities Removal to be identified in the Secretarial Determination and Detailed Plan under the Klamath Hydroelectric Settlement Agreement.

b. *Critical Period*: The time from the first October following Anadromous Fish Presence until J.C. Boyle Dam Removal.

- c. *Dam Removal Entity*: The entity designated by the Secretary of the Interior pursuant to the Final Klamath Hydroelectric Settlement Agreement to take possession or ownership of PacifiCorp's Facilities for the purposes set out in the Final Klamath Hydroelectric Settlement Agreement.
- d. *Downstream Facilities*: Copco No. 1 facilities, Copco No. 2 facilities, and Iron Gate facilities excluding Iron Gate hatchery.
- e. *Downstream Facilities Removal*: The physical removal of all or part of each of the Downstream Facilities such that the river at each of the Downstream Facilities locations is free-flowing and allows volitional fish passage.
- f. *Final Klamath Hydroelectric Settlement Agreement*: An agreement negotiated by the Parties and others dated February 18, 2010, involving settlement of other Klamath Basin issues including disposition or management of PacifiCorp hydroelectric system dams on the Klamath River.
- g. *Final Klamath Hydroelectric Settlement Agreement Flows*: Any specific flow requirements in the J.C. Boyle Bypass Reach as may be identified in or developed pursuant to the Final Klamath Hydroelectric Settlement Agreement, so long as such agreement is in effect and enforceable
- h. *Governmental Authority*: Any requirements now or hereafter imposed upon PacifiCorp by any statute, rule, regulations, mandate, or order of any court, governmental body, or agency.

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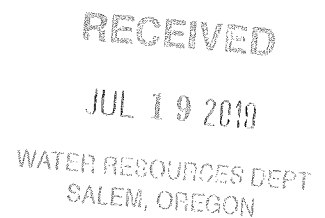
- i. *Initial Period*: The time from the filing of this Stipulation to the beginning of the Critical Period.
- j. *Interim Bypass Flow Condition*: The Tribal Instream Flows in claim 671 in case 282 as limited by the applicable Interim J.C. Boyle Flows during the Initial Period and Critical Period. The portion of the Klamath River covered by claim 671 (and incorporated also into the Tribes' claim 612) that is subject to this Interim Bypass Flow Condition, runs from the J.C. Boyle Reservoir to the Oregon-California border.
- k. *Interim J.C. Boyle Flows*: The instream flow schedule during the Initial Period and during the Critical Period at the J.C. Boyle Dam on the Klamath River as set forth in Exhibit 2 attached hereto and made a part hereof, which may include combined flow releases from the J.C. Boyle Dam, the fish ladder, and fish bypass outflows into the J.C. Boyle Bypass Reach, and which flows shall not thereafter be reduced by PacifiCorp throughout the J.C. Boyle Bypass Reach, except as may be necessary and desirable, in the Parties' judgment, to provide water for fish hatchery or fish holding purposes.
- l. *J.C. Boyle Bypass Reach*: The reach of the Klamath River between i) the point most downstream from either the J.C. Boyle Dam or any appurtenant fish passage facilities that now exist or may be constructed in the future from which flow is released into the Klamath River and ii) the J.C. Boyle powerhouse.

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- m. *J.C. Boyle Dam*: The J.C. Boyle Dam and all associated facilities and appurtenant works currently licensed to PacifiCorp.
- n. *J.C. Boyle Dam Removal*: The physical removal of all or part of J.C. Boyle Dam to the point where the river at the J.C. Boyle Dam location is free-flowing and allows volitional fish passage; provided, however, J.C. Boyle Dam Removal shall not be deemed to have occurred so long as PacifiCorp or the Dam Removal Entity, as the case may be, requires use of the river or diversion of river flows for the removal process.
- o. *Stipulation*: The agreement reflected in this document entered into by the Parties and OWRD.
- p. *Tribal Instream Flows*: The amount of instream flows or lake levels claimed by the Tribes and USBIA for cases 282 and 286, respectively, in the KBA, until such time as said claims are judicially confirmed or modified by a final decree in the KBA which is no longer subject to appeal, remand or rehearing. Thereafter, the Tribal Instream Flows shall be as set forth in said decree.

2. The Parties stipulate as follows:

- a. The Tribes and USBIA stipulate to the Interim J.C. Boyle Flows and the Interim Bypass Flow Condition on the Tribal Instream Flows
- b. PacifiCorp stipulates to the Tribal Instream Flows, as described herein, to the Interim J.C. Boyle Flows, and to maintain the applicable Interim J.C. Boyle Flows during the Initial and Critical Periods.



- c. PacifiCorp, the Tribes and USBIA stipulate that, subject to subsection 2.f., below, no more than the applicable Interim J.C. Boyle Flows shall be required by the Tribes or USBIA to be released to the J.C. Boyle Bypass Reach by PacifiCorp during the Initial Period and the Critical Period. Such releases shall be deemed to fully satisfy the portion of the Tribal Instream Flows for the J.C. Boyle Bypass Reach (portions of Claims 612 and 671) during the Initial and Critical Periods.
- d. The Tribal Instream Flows shall be subject to the Interim Bypass Flow Condition during the Initial and Critical Periods. The flows to be released pursuant to the Instream Bypass Flow Condition in the J.C. Boyle Bypass Reach during the Initial and Critical Periods shall:
- i. be governed by the schedule of Interim J.C. Boyle Flows in Exhibit 2, whether or not the Tribal Instream Flows have become enforceable by OWRD; and
 - ii. be a condition on the water right during the Initial and Critical Periods after the Tribal Instream Flows have become enforceable by OWRD, or to the extent they have been determined to be enforceable by the appropriate administrative or judicial proceeding; and

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iii. after the final decree referred to in subsection 1.p of this

Settlement, not exceed the flows set forth in such decree if such flows are less than the Interim J.C. Boyle Flows.

- e. During the Initial and Critical Periods, if PacifiCorp is operating the J.C. Boyle facilities using, in part, a limited license for generation purposes, the Tribes and the USBIA agree not to place a call on water rights for the portion of the Tribal Instream Flows from the J.C. Boyle Reservoir to the Oregon-California border (portions of Claims 612 and 671) in excess of the Interim J.C. Boyle Flows. Thereafter, the Tribes and the USBIA agree not to place a call on water rights with a priority before March 16, 2000, for the portion of the Tribal Instream Flows from the J.C. Boyle Reservoir to the Oregon-California border (portions of Claims 612 and 671) during the Initial and Critical Periods in excess of the Interim J.C. Boyle Flows.
- f. The Tribal Instream Flows may be further affected, if at all, by any Final Klamath Hydroelectric Settlement Agreement Flows. For only so long as a Final Klamath Hydroelectric Settlement Agreement exists as an enforceable agreement, without remaining conditions to its effectiveness, any Final Klamath Hydroelectric Settlement Agreement Flows specifically provided in Interim Measure 13 therein shall become the Interim J.C. Boyle Flows of this Stipulation, subject to all of the terms and conditions of this Stipulation, and enforceable as the Interim Bypass Flow Condition

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hereof, and shall govern over any inconsistent Interim Bypass Flow Condition of this Stipulation.

- g. At the end of the Critical Period, the Interim Bypass Flow Condition shall terminate and there shall be no further limitation on the Tribal Instream Flows as a result of this Stipulation.

RESOLUTION BASED ON TERMS OF STIPULATION

- 3. PacifiCorp agrees that, pursuant to this Stipulation, its contests in KBA Case 282 have been satisfactorily resolved and hereby withdraws such contests consistent with this Stipulation and PacifiCorp's Notice of Withdrawal of Contests attached hereto as Exhibit 3 and incorporated herein. Such resolution of contests vitiates the need for a hearing on PacifiCorp's contests before the Office of Administrative Hearings.
- 4. The Parties agree that withdrawal of contests and execution of the Stipulation shall not be deemed PacifiCorp's concession of any legal (including jurisdictional) or factual bases for the Tribes' or USBIA's claims in KBA Case Nos. 282 or 286, or elsewhere in the KBA.
- 5. PacifiCorp will not file exceptions to or oppose the Tribes' or USBIA's claims in KBA cases 277, 279-281, 284-285 in the Circuit Court phase of the KBA, or any appeals thereof, or any other proceedings. The Parties will not oppose, object to, challenge, or seek to limit or modify this Stipulation, or any of its terms, provisions, conditions, or covenants, in any proceeding, except upon the written mutual consent of the Parties.
- 6. If the Adjudicator's Findings of Fact and Order of Determination, or subsequent judicial order, do not accord with the terms of this Stipulation, each of the Parties

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reserves all rights they may have to file exceptions to such Findings of Fact and Order of Determination in the Circuit Court, or to file a response to such exceptions and participate in any appeals.

7. The Parties reserve the right to participate in any future proceedings authorized by law in the event any challenge is raised to the Stipulation which seeks to challenge, undermine, or change the terms of the Stipulation in any respect.
8. The Stipulation shall be binding upon and inure to the benefit of the Parties and their successors, beneficiaries (including tribal members to the extent of the Tribes' authority) and assigns.
9. No third-party beneficiaries are intended by this Stipulation, and no person or entity other than a Party hereto shall have the right to enforce it.
10. The terms, conditions, and covenants of this Stipulation are not severable.
11. This Stipulation may be executed in counterparts.
12. The Parties acknowledge that OWRD will not, as a result of this Stipulation, regulate selectively against any water right of record, notwithstanding any provision of this Stipulation to the contrary.
13. Each Party and OWRD represents and warrants that it has authority to enter into the Stipulation.
14. OWRD staff will recommend to the Adjudicator that the Findings of Fact and Order of Determination resolve PacifiCorp's contests to case 282 on the terms of this Stipulation.

Limitation on the Scope of This Stipulation:

15. The Parties and OWRD agree that the following-described limitations apply to this Stipulation:

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- a. Nothing in this Stipulation defines, or is intended to define, the scope and attributes of the Tribes' rights to water as claimed by the Tribes or USBIA, either to satisfy the Tribes' tribal treaty rights or otherwise.
- b. Nothing in this Stipulation affects, resolves or defines any water rights of any person or entity not a Party to this Stipulation, or affects, resolves or defines the contests of persons or entities other than PacifiCorp to the claims in cases 282 or 286.
- c. Neither the Director of OWRD nor his representatives have participated in any negotiations leading to this Stipulation with the Parties regarding or defining the scope and attributes of the Tribes' rights to water.
- d. Nothing in this Settlement is intended or shall be construed to predetermine the outcome of any regulatory or administrative proceeding relating to PacifiCorp's pending reauthorization of HE No. 180 before OWRD, or any request by PacifiCorp for use of water under a limited license for FERC Project No. 2082.
- e. Nothing in this Stipulation is intended or shall be construed to prevent OWRD or any non-party to this Stipulation from requiring, consistent with applicable law, or advocating for flow regimes in the J.C. Boyle Bypass Reach that are different from those agreed to by USBIA, the Tribes and PacifiCorp in the attached Exhibit 2.
- f. This Stipulation, or any terms thereof, shall not be offered as evidence or treated as a concession or admission as to any factual or legal issue or other matter, and may not be used in KBA proceedings on any other claim

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or contest or in any other proceeding (except to interpret or enforce the terms of this Stipulation).

- g. Neither this Stipulation nor its terms shall be used to establish precedent with respect to any other claim or contest or other matter in the KBA or in any other proceedings.

IT IS HEREBY SO STIPULATED:

JOHN R. KROGER
Attorney General

Jesse D. Ratcliffe
Assistant Attorney General
Of Attorneys for Oregon Water
Resources Department

Dated: 4/27/10

KLAMATH TRIBES

Carl V. Ullman
Of Attorney for Claimant Klamath Tribes

Dated: March 10, 2010

IGNACIA S. MORENO
Assistant Attorney General

SCHWABE, WILLIAMSON & WYATT, P.C.

David W. Harder
Barbara Scott-Brier
Of Attorneys for Claimant United
States, Bureau of Indian Affairs
Dated: _____

Douglas W. MacDougal
Jay T. Waldron
Of Attorneys for Contestant PacifiCorp

Dated: May 7, 2010

ORDER

IT IS HEREBY SO ORDERED:

Dated this 26 day of June, 2010.

Administrative Law Judge, Joe L. Allen

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or contest or in any other proceeding (except to interpret or enforce the terms of this Stipulation).

- g. Neither this Stipulation nor its terms shall be used to establish precedent with respect to any other claim or contest or other matter in the KBA or in any other proceedings.

IT IS HEREBY SO STIPULATED:

JOHN R. KROGER
Attorney General

KLAMATH TRIBES

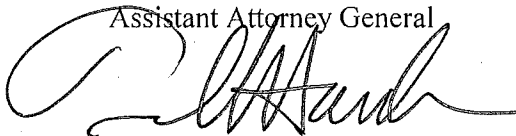
Jesse D. Ratcliffe
Assistant Attorney General
Of Attorneys for Oregon Water
Resources Department
Dated: _____

Carl V. Ullman
Of Attorney for Claimant Klamath Tribes

Dated: _____

IGNACIA S. MORENO
Assistant Attorney General

SCHWABE, WILLIAMSON & WYATT, P.C.



David W. Harder
Barbara Scott-Brier
Of Attorneys for Claimant United
States, Bureau of Indian Affairs
Dated: April 9, 2010

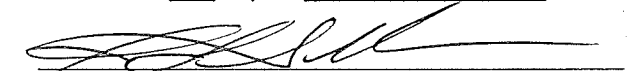
Douglas W. MacDougal
Jay T. Waldron
Of Attorneys for Contestant PacifiCorp

Dated: _____

ORDER

IT IS HEREBY SO ORDERED:

Dated this 28 day of June, 2010.



Administrative Law Judge, Joe C. Allen

Exhibit 1

To STIPULATION TO RESOLVE CONTESTS 2062, 2064, 2065 and 2066

**SETTLEMENT AGREEMENT BETWEEN PACIFICORP, THE KLAMATH TRIBES, AND
THE UNITED STATES BUREAU OF INDIAN AFFAIRS AS TRUSTEE ON BEHALF OF
THE KLAMATH TRIBES**

Contestant PacifiCorp, and the Claimants Klamath Tribes (Tribes) and the United States Bureau of Indian Affairs as Trustee on Behalf of the Klamath Tribes (USBIA), the Parties to this Settlement (Parties), agree on the following terms to resolve PacifiCorp's contests to the Tribes' and USBIA's claims in Klamath Basin Adjudication (KBA) cases 282 and 286:

2. Definitions:

- a. *Anadromous Fish Presence*: When anadromous fish have volitional passage to the J.C. Boyle Bypass Reach after Downstream Facilities Removal, or as a result of a volitional fish passage plan required by the Federal Energy Regulatory Commission ("FERC") and incorporated into PacifiCorp's FERC license for its hydroelectric facilities on the Klamath River;

provided, however, Anadromous Fish Presence shall not be deemed to have occurred if such presence is the result of anthropogenic placement of fish above, within or below the J.C. Boyle Bypass Reach, including as a result of scientific studies, experiments or investigations, prior to Downstream Facilities Removal, unless such placement is part of a FERC fish passage plan. Anthropogenic placement does not include volitionally returning adult anadromous fish;

provided, further, this definition does not predetermine the sequence of Facilities Removal to be identified in the Secretarial Determination and Detailed Plan under the Klamath Hydroelectric Settlement Agreement.

- b. *Critical Period*: The time from the first October following Anadromous Fish Presence until J.C. Boyle Dam Removal.
- c. *Dam Removal Entity*: The entity designated by the Secretary of the Interior pursuant to the Klamath Hydroelectric Settlement Agreement to take possession or ownership of PacifiCorp's Facilities for the purposes set out in the Klamath Hydroelectric Settlement Agreement.

- d. *Downstream Facilities*: Copco No. 1 facilities, Copco No. 2 facilities, and Iron Gate facilities excluding Iron Gate hatchery.
- e. *Downstream Facilities Removal*: The physical removal of all or part of each of the Downstream Facilities such that the river at each of the Downstream Facilities locations is free-flowing and allows volitional fish passage.
- f. *Effective Date*: This Settlement Agreement shall become effective upon the occurrence of all of the following events: (a) passage of a resolution by the Tribal Council of the Klamath Tribes approving and ratifying the Settlement Agreement; (b) proper execution of the Settlement by all Parties; (c) occurrence of a general meeting of the General Council of the Klamath Tribes wherein (i) a quorum is present and (ii) no action is taken to reverse any prior Tribal Council action to approve, ratify, or execute this Settlement; and (d) execution of the Stipulation to Resolve Contests referred to in subsection 4.d below.
- g. *Facilities or Facility*: The following specific hydropower facilities, within the jurisdictional boundary of FERC Project No. 2082: Iron Gate facilities, Copco No. 1 facilities, Copco No. 2 facilities, and J.C. Boyle facilities and appurtenant works currently licensed to PacifiCorp.
- h. *Force Majeure*: Any event reasonably beyond PacifiCorp's control that prevents or materially interferes with the performance of an obligation of PacifiCorp, that could not be avoided with the exercise of due care, and that occurs without the fault or negligence of PacifiCorp. The term shall include without limitation any forced or unscheduled outages at J.C. Boyle Dam and appurtenant works currently licensed to PacifiCorp, and PacifiCorp's reasonable and necessary Timely responses thereto.
- i. *Governmental Authority*: Any requirements now or hereafter imposed upon PacifiCorp by any statute, rule, regulation, mandate, or order of any court, governmental body, or agency.
- j. *Initial Period*: The time from the Effective Date to the beginning of the Critical Period.
- k. *Interim Bypass Flow Condition*: The Tribal Instream Flows in claim 671 in case 282 as limited by the applicable Interim J.C. Boyle Flows during the Initial Period and Critical Period. The portion of the Klamath River covered by claim 671 (and incorporated also into the Tribes' claim 612) that is subject to this Interim Bypass Flow Condition runs from the J.C. Boyle Reservoir to the Oregon-California border.

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- l. *Interim J.C. Boyle Flows*: The instream flow schedule during the Initial Period and during the Critical Period at the J.C. Boyle Dam on the Klamath River as set forth in Appendix A attached hereto and made a part hereof, which may include combined flow releases from the J.C. Boyle Dam, the fish ladder, and fish bypass outflows into the J.C. Boyle Bypass Reach, and which flows shall not thereafter be reduced by PacifiCorp throughout the J.C. Boyle Bypass Reach, except as may be necessary and desirable, in the Parties' judgment, to provide water for fish hatchery or fish holding purposes.
- m. *J.C. Boyle Bypass Reach*: The reach of the Klamath River between i) the point most downstream from either the J.C. Boyle Dam or any appurtenant fish passage facilities that now exist or may be constructed in the future from which flow is released into the Klamath River and ii) the J.C. Boyle powerhouse.
- n. *J.C. Boyle Dam*: The J.C. Boyle Dam and all associated facilities and appurtenant works currently licensed to PacifiCorp.
- o. *J.C. Boyle Dam Removal*: The physical removal of all or part of J.C. Boyle Dam to the point where the river at the J.C. Boyle Dam location is free-flowing and allows volitional fish passage; provided, however, J.C. Boyle Dam Removal shall not be deemed to have occurred so long as PacifiCorp or the Dam Removal Entity, as the case may be, requires use of the river or diversion of river flows for the removal process.
- p. *Klamath Hydroelectric Settlement Agreement*: An agreement negotiated by the Parties and others dated February 18, 2010, involving settlement of other Klamath Basin issues including disposition or management of PacifiCorp hydroelectric system dams on the Klamath River.
- q. *Klamath Hydroelectric Settlement Agreement Flows*: Any specific flow requirements in the J.C. Boyle Bypass Reach as may be identified in or developed pursuant to the Klamath Hydroelectric Settlement Agreement, so long as such agreement is in effect and enforceable.
- r. *Settlement*: The agreement reflected in this document, and in the "Stipulation to Resolve Contests 2062, 2064, 2065 and 2066", entered into by the Parties.
- s. *Timely*: Any performance of an obligation by the deadline established in the applicable provision of this Settlement, and otherwise in a manner reasonably calculated to achieve the bargained-for benefits of this Settlement.
- t. *Tribal Instream Flows*: The amount of instream flows or lake levels

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claimed by the Tribes and USBIA for cases 282 and 286, respectively, in the KBA, until such time as said claims are judicially confirmed or modified by a final decree in the KBA which is no longer subject to appeal, remand or rehearing. Thereafter, the Tribal Instream Flows shall be as set forth in said decree.

Klamath Tribes' and USBIA's Covenants:

3. The Tribes and USBIA stipulate as follows:

- a. The Tribes and USBIA agree to the Interim J.C. Boyle Flows and the Interim Bypass Flow Condition on the Tribal Instream Flows.
- b. Subject to subsection 2.e., no more than the applicable Interim J.C. Boyle Flows shall be required to be released to the J.C. Boyle Bypass Reach by PacifiCorp during the Initial Period and the Critical Period. Such releases shall be deemed to fully satisfy the portion of the Tribal Instream Flows for the J.C. Boyle Bypass Reach (portions of Claims 612 and 671) during the Initial and Critical Periods.
- c. The Tribal Instream Flows shall be subject to the Interim Bypass Flow Condition during the Initial and Critical Periods. The flows to be released pursuant to the Instream Bypass Flow Condition in the J.C. Boyle Bypass Reach during the Initial and Critical Periods shall:
 - i. be governed by the schedule of Interim J.C. Boyle Flows in Appendix A, whether or not the Tribal Instream Flows have become enforceable by the Oregon Water Resources Department (OWRD);
 - ii. be a condition on the water right during the Initial and Critical Periods after the Tribal Instream Flows have become enforceable by OWRD, to the extent they are enforceable; and
 - iii. after the final decree referred to in subsection 1.t of this Settlement, not exceed the flows set forth in such decree if such flows are less than the Interim J.C. Boyle Flows.
- d. During the Initial and Critical Periods, if PacifiCorp is operating the J.C. Boyle facilities using, in part, a limited license for generation purposes, the Tribes and the USBIA agree not to place a call on water rights for the portion of the Tribal Instream Flows from the J.C. Boyle Reservoir to the Oregon-California border (portions of Claims 612 and 671) in excess of the Interim J.C. Boyle Flows. Thereafter, the Tribes and the USBIA agree not to place a call on water rights with a priority before March 16, 2000, for the portion of the Tribal Instream Flows from the J.C. Boyle Reservoir

to the Oregon-California border (portions of Claims 612 and 671) during the Initial and Critical Periods in excess of the Interim J.C. Boyle Flows.

- e. From and after the Effective Date, the Tribal Instream Flows may be further affected, if at all, by any Klamath Hydroelectric Settlement Agreement Flows. For only so long as a Klamath Hydroelectric Settlement Agreement exists as an enforceable agreement, without remaining conditions to its effectiveness, any Klamath Hydroelectric Settlement Agreement Flows specifically provided in Interim Measure 13 therein shall become the Interim J.C. Boyle Flows of this Settlement, subject to all of the terms and conditions of this Settlement, and enforceable as the Interim Bypass Flow Condition hereof, and shall govern over any inconsistent Interim Bypass Flow Condition of this Settlement.
- f. At the end of the Critical Period, the Interim Bypass Flow Condition shall terminate and there shall be no further limitation on the Tribal Instream Flows as a result of this Settlement.
- g. The Tribes and USBIA will not oppose PacifiCorp's application for a new water right or limited license, or any application by PacifiCorp to OWRD to increase its water right under its hydroelectric license No. 180, from the current 2500 cfs up to a maximum of 3000 cfs, as PacifiCorp shall determine, with a priority date of March 2000 or later, in order to maximize power production and thereby facilitate the purposes of the Klamath Hydroelectric Settlement Agreement prior to the termination of the Critical Period. The Tribes and USBIA shall not oppose PacifiCorp's efforts in this regard in all applicable federal and state administrative and judicial proceedings.
- h. The USBIA and Tribes will not file exceptions to or oppose PacifiCorp's KBA claims in the applicable Circuit Court proceedings or appeal thereof, or any other proceeding.

PacifiCorp's Covenants:

4. PacifiCorp stipulates as follows:

- a. PacifiCorp stipulates to the Tribal Instream Flows, as described herein, and to the Interim J.C. Boyle Flows.
- b. PacifiCorp agrees to maintain the applicable Interim J.C. Boyle Flows during the Initial Period and Critical Period. Notwithstanding any other provision of this Settlement to the contrary, PacifiCorp shall not be obligated by the Tribes or USBIA to maintain any Interim J.C. Boyle Flows that are in excess of any specific limitation on the maximum

allowable flows specified by any Governmental Authority, or in excess of the Tribal Instream Flows.

- c. During the Critical Period, PacifiCorp will operate J.C. Boyle Dam as a run-of-river facility with a targeted ramp rate not to exceed two inches per hour.
- d. PacifiCorp's obligations to maintain the Interim J.C. Boyle Flows in subsections 3.b and 3.c above are subject to Force Majeure, and to the requirements of removal of appurtenant works, site remediation, periodic maintenance, testing and repair of the J.C. Boyle Dam and appurtenant works, as reasonably necessary. In the event any of these factors causes PacifiCorp to be unable to maintain the Interim J.C. Boyle Flows, PacifiCorp shall give reasonable notice to the Tribes and USBIA, and will consult with the Tribes and USBIA regarding how to conduct PacifiCorp's necessary work with the least adverse impact on fish; provided, however, the final decision on how to conduct such work and minimize such impacts shall be at the sole discretion of PacifiCorp.
- e. PacifiCorp agrees that, pursuant to this Settlement, its contests in KBA Cases 282 and 286 have been satisfactorily resolved and such resolution vitiates the need for a hearing on PacifiCorp's contests before the Office of Administrative Hearings. Pursuant to the Stipulation to Resolve Contests, PacifiCorp will withdraw its contests against the USBIA's and Tribes' claims in KBA Case Nos. 282 and 286, and, except for circumstances in which subsection 4.f of this Settlement would apply, agrees not to file exceptions to such claims in the applicable Circuit Court proceeding or in any other forum.
- f. The withdrawal of contests and execution of the Settlement shall not be deemed PacifiCorp's concession of any legal (including jurisdictional) or factual bases for the Tribes' or USBIA's claims in KBA Case Nos. 282 or 286, or elsewhere in the KBA.
- g. PacifiCorp will not file exceptions to or oppose the Tribes' or USBIA's claims in KBA cases 277, 279-281, 284-285 in the Circuit Court phase of the KBA, or any appeals thereof, or any other proceedings.
- h. PacifiCorp shall (i) install and operate a flow gage in the J.C. Boyle Bypass Reach in a manner consistent with Interim Measure 12 of the Klamath Hydroelectric Settlement Agreement, or (ii) if the Klamath Hydroelectric Settlement Agreement is not in effect, as may be required by a Government Authority, or (iii) if not otherwise required by a Government Authority,, use an alternative measuring approach agreed to by the Parties.

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- i. For a period of five (5) years beginning on a date within four (4) years of the Effective Date of this Settlement, PacifiCorp will cooperate with the Tribes in good faith in the investigation and consideration of renewable generation resources. PacifiCorp will provide the Tribes with reasonable, high-level technical support and advice on renewable energy projects that the Tribes may develop in the Klamath Basin, particularly regarding the Tribes' Giiwas property, and assist in determining whether certain sites and projects are technologically and economically feasible. Provided, however, that PacifiCorp is not required to provide specific services or support for any such projects, nor to enter into a specific transaction related to the development, ownership, or purchase of any project. The Tribes shall not base their decision of whether to develop any renewable generation resource solely on the high-level technical support, advice or any feasibility determination provided by PacifiCorp.

- j. Subject to all Timely regulatory and other approvals of Governmental Authority, PacifiCorp will:
 - i. Convey to the Tribes ownership in fee simple of one of the following two real properties, subject to the limitations and conditions set forth below: (a) Parcel 1000, or (b) the Parcel 1600 Flag Lot (each as defined below).

The Tribes shall inform PacifiCorp in writing of their selection of Parcel 1000 or the Parcel 1600 Flag Lot (such selected property being referred to herein as the "Property") not later than one (1) year after the Effective Date of this Settlement. The conveyance of the Property to the Tribes may be by quitclaim deed without representation or warranty, express or implied, of any kind, or by other limited warranty deed, as PacifiCorp may determine; shall, unless otherwise provided, expressly disclaim any rights of legal access to the Property, and shall be subject to all encumbrances and conditions existing at the time of conveyance, including easement reservations, if any, for access to and ongoing operation, construction, repair or maintenance of PacifiCorp facilities located on the parcel.

Parcel 1000. Taxlot R3907-00000-01000-000 (Lot 7) consists of approximately 24 acres in Township 39 South, Range 7 East, situated north of the Klamath River between Keno Dam and J. C. Boyle Reservoir, and is shown on the map in Appendix B attached hereto ("Parcel 1000"). If the Tribes select Parcel 1000, PacifiCorp will use commercially reasonable efforts to acquire an access easement appurtenant to Parcel 1000 for the benefit of the Tribes and their successors and assigns. PacifiCorp specifically

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disclaims all representations and warranties regarding access to Parcel 1000 and PacifiCorp's ability to obtain such an access easement, and the Tribes acknowledge and agree that PacifiCorp shall have no liability whatsoever to the Tribes as a result of PacifiCorp's failure to obtain such an access easement.

Parcel 1600 Flag Lot. Taxlot R3907-00000-01600-000 currently consists of approximately 452.5 acres in Township 39 South, Range 7 East, situated south of the Klamath River between Keno Dam and J. C. Boyle Reservoir, and is shown on the map in Appendix B attached hereto ("Parcel 1600"). If the Tribes select the Parcel 1600 Flag Lot, as hereinafter defined, PacifiCorp will use commercially reasonable efforts to acquire an access easement appurtenant to the Parcel 1600 Flag Lot for the benefit of the Tribes and their successors and assigns. PacifiCorp specifically disclaims all representations and warranties regarding access to Parcel 1600 Flag Lot and PacifiCorp's ability to obtain such an access easement, and the Tribes acknowledge and agree that PacifiCorp shall have no liability whatsoever to the Tribes as a result of PacifiCorp's failure to obtain such an access easement. If the Tribes select the Parcel 1600 Flag Lot, the Tribes shall undertake all steps and processes necessary to partition Parcel 1600 into two legal lots of record in compliance with all applicable land use and subdivision laws. All expenses arising in connection with such partitioning (including, without limitation, survey costs, government fees, and all required studies and analyses) shall be borne solely by the Tribes. Any such surveys shall include locations of electrical facilities and provide metes and bounds descriptions for lots. A copy of such surveys shall be provided to PacifiCorp. PacifiCorp shall reasonably cooperate with such partitioning and related activities, but at no cost to PacifiCorp. The two lots will consist of: (1) a so-called "flag lot" consisting of approximately eighty (80) acres and situated along the western boundary of Parcel 1600 in the approximate location shown on Appendix B (the "Parcel 1600 Flag Lot"), subject to reconfiguration and relocation as may be reasonably required by PacifiCorp; and (2) the remainder of Parcel 1600, consisting of approximately 372.5 acres (the "Parcel 1600 Remainder"). PacifiCorp shall reserve from the conveyance of the Parcel 1600 Flag Lot a perpetual access and public and private utility easement appurtenant to the Parcel 1600 Remainder (the "Parcel 1600 Easement") sixty (60) feet in width over a portion of the Parcel 1600 Flag Lot in the approximate location and configuration shown on Appendix B. PacifiCorp shall, not more than sixty (60)

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days following receipt of the Tribes written notice of selection of Parcel 1600, provide the Tribes with a draft deed to Parcel 1600 Flag Lot with the draft Parcel 1600 Easement. The Parcel 1600 Easement reservation may be incorporated into the Parcel 1600 Flag Lot deed or accomplished by separate grant to PacifiCorp, at PacifiCorp's sole discretion (the "Parcel 1600 Conveyance Documents"). Promptly following the Tribes' receipt of the draft Parcel 1600 Conveyance Documents, the Tribes shall review and comment upon such draft and the Tribes and PacifiCorp shall negotiate in good faith to reach a mutually acceptable final form of the Parcel 1600 Conveyance Documents. If for any reason: (a) the Tribes and PacifiCorp have not reached a mutually agreeable final form of the Parcel 1600 Conveyance Documents within thirty (30) days after PacifiCorp's provision of an initial draft, or (b) PacifiCorp reasonably believes that it will be unable to convey the Parcel 1600 Flag Lot to the Tribes for any reason whatsoever (including, without limitation, in connection with any applicable approvals which may be required for the proposed conveyance), PacifiCorp shall have the absolute and unilateral right to terminate the Tribes' right to select Parcel 1600 Flag Lot pursuant to the terms of this Agreement, and the Tribes shall promptly notify PacifiCorp of the Tribes' alternate selection of Parcel 1000.

Conveyance of the Property to the Tribes shall occur on or before the later to occur of (a) fifteen (15) months after the Effective Date of this Settlement, or (b) ninety (90) days after any completion of any partitioning or other required processes or approvals from Governmental Authority have been obtained; *provided, however*, if the Tribes have not notified PacifiCorp in writing of their selected parcel within one (1) year of the effective date of this Settlement, or have withdrawn a selection previously made, unless otherwise expressly agreed to by the parties in writing, the Tribes will be deemed to have irrevocably waived their right to acquire a parcel from PacifiCorp under this Settlement, and PacifiCorp shall have no further obligations under this section.

- ii. Prior to selection of the Property, permit access to the Tribes' representatives for reasonable due diligence purposes; provided, PacifiCorp shall be under no duty to provide any other or replacement parcels in the event none of the parcels are selected by the Tribes, or to in any way improve the parcels. All tribal due diligence investigations shall be at the Tribes' sole expense. Prior to conveyance, the Tribes shall give PacifiCorp reasonable advance notice of any desired entry onto the Property, and shall

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provide PacifiCorp the opportunity to accompany the Tribes' representative on the Property. The Tribes' entry shall be at the Tribes' own risk and the Tribes hereby agree to indemnify PacifiCorp for or against any claim or injury. Additionally, the Tribes' investigations shall not damage the Property, and if as a result of the investigations damage to the Property has occurred, the Tribes shall restore the Property to its original condition within twenty (20) days after notice to do so from PacifiCorp.

- iii. Unless otherwise noted above, pay any recording fees for the deed, and one-half of any escrow fees. All other costs related to the conveyance, if any, including without limitation the cost of any title reports, surveys, or title insurance, if any, shall be borne by the Tribes.

- k. Subject to any contrary or inconsistent requirements of Governmental Authority, PacifiCorp will commit to keeping a boat launch below Iron Gate Dam with parking nearby, and to keep campgrounds on Iron Gate Reservoir; however, PacifiCorp cannot commit that the campgrounds will remain free of charge. Additionally, the above facilities may be altered, removed, or abandoned based on requirements of PacifiCorp's FERC license or to support project decommissioning efforts.

Other Covenants:

- 5. The following additional covenants shall apply to this Settlement:
 - a. This Settlement resolves all issues among the Parties regarding flows in the J.C. Boyle Bypass Reach. As a result, no Party in any forum will assert or argue for any position, or take any action that:
 - i. challenges, limits or attempts to modify PacifiCorp's operation of the J.C. Boyle Dam, including but not limited to flows to the plant or flows or ramp rates inconsistent with this Settlement prior to the termination of the Critical Period; or
 - ii. would, if successful, cause or require flows in the J.C. Boyle Bypass Reach to be less than or more than the Interim J.C. Boyle Flows, or achieve a result otherwise inconsistent with any of the terms or conditions of this Settlement; or
 - iii. would advocate for or justify higher or lower flows in any proceeding, such as, but not limited to: the KBA, FERC Project 2082 relicensing, future license implementation, or related

proceedings, or Clean Water Act or Endangered Species Act proceedings;

however, the Parties agree that they are not able at this time to anticipate all situations in which a Party might “assert or argue for any position, or take any action” whose impacts must be evaluated against the requirement of this subsection 4.a. As a result, the Parties agree that they are not able to specify at this time all future actions that would, and all future actions that would not, violate this subsection 4.a. Accordingly, the Parties agree to follow the examples set forth in Appendix C and use them as a guide to interpreting and applying this subsection 4.a.

- b. During the Initial and Critical Periods, the Parties shall not seek or assert the need for any flows within the Klamath Hydroelectric Settlement Agreement that are inconsistent with the Interim J.C. Boyle Flows set forth in this Settlement.
- c. The Interim J.C. Boyle Flows fully satisfy the Parties’ obligations to one another insofar as flows in the J.C. Boyle Bypass Reach are concerned, and no other habitat needs of fish shall be cause for any Party to seek or assert in any forum the need for any greater or lesser flow during the Initial and Critical periods.
- d. The Parties agree to execute that certain “Stipulation to Resolve Contests 2062, 2064, 2065 and 2066” which is incorporated into this Settlement by this reference and made a part hereof. PacifiCorp agrees to file notices of withdrawal of its contests in KBA Cases 282 and 286.
- e. The Parties will not oppose, object to, challenge, or seek to limit or modify this Settlement, or any of its terms, provisions, conditions, or covenants, in any proceeding, except upon the written mutual consent of the Parties.
- f. If the Adjudicator’s Findings of Fact and Order of Determination, or subsequent judicial order, do not accord with the terms of this Settlement, each of the Parties reserves all rights they may have to file exceptions to such Findings of Fact and Order of Determination in the Circuit Court, or to file a response to such exceptions and participate in any appeals.
- g. The Parties reserve the right to participate in any future proceedings authorized by law in the event any challenge is raised to the Settlement which seeks to challenge, undermine, or change the terms of the Settlement in any respect.
- h. The Parties will request that OWRD staff recommend to the Adjudicator that the Findings of Fact and Order of Determination resolve PacifiCorp’s contests to cases 282 and 286 on the terms of this Settlement.

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- i. The Parties agree that this Settlement, or any terms thereof, shall not be offered as evidence or treated as a concession or admission as to any factual or legal issue or other matter, and may not be used in KBA proceedings on any other claim or contest or in any other proceeding (except to interpret or enforce the terms of this Settlement).
- j. The Parties agree that neither this Settlement nor its terms shall be used to establish precedent with respect to any other claim or contest or other matter in the KBA or in any other proceedings.
- k. Nothing in this Settlement shall prohibit any Party from seeking enforcement of the Interim J.C. Boyle Flows or the Interim Bypass Flow Condition or any other provision of this Settlement; provided, however, this Settlement shall not create a cause of action in contract for monetary damages for any alleged breach by any Party of this Settlement, and no Party shall seek monetary damages for any alleged breach of this Settlement.
- l. The Settlement shall be binding upon and inure to the benefit of the Parties and their successors, beneficiaries (including tribal members to the extent of the Tribes' authority) and assigns.
- m. No third-party beneficiaries are intended by this Settlement, and no person or entity other than a Party hereto shall have the right to enforce it.
- n. Each Party represents and warrants that it has authority to enter into the Settlement.
- o. The terms, conditions, and covenants of this Settlement are not severable.
- p. This Settlement may be executed in counterparts.
- q. Each Party shall bear its own costs and attorneys' fees incurred in connection with this Settlement, and each Party waives all claims against the other parties for reimbursement of any fees or costs incurred in the KBRA.
- r. The Parties agree and acknowledge that this Settlement has been drafted after full and arms-length negotiations and that the usual rule of contractual construction that all ambiguities shall be construed against the drafting party does not apply to any interpretation of this Settlement.
- s. The Parties acknowledge that OWRD will not, as a result of this Settlement, regulate selectively against any water right of record, notwithstanding any provision of this Settlement to the contrary.

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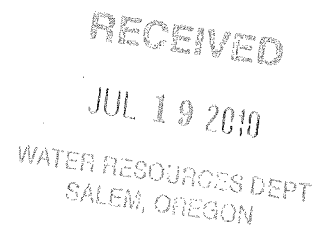
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Limitation On the Scope of This Settlement:

6. The Parties agree that the following-described limitations apply to this Settlement:
- a. Nothing in this Settlement defines, or is intended to define, the scope and attributes of the Tribes' rights to water, either to satisfy the Tribes' tribal treaty rights or otherwise.
 - b. Nothing in this Settlement affects, resolves or defines any water rights of any person or entity not a Party to this Settlement, or affects, resolves or defines the contests of other persons or entities to the claims in cases 282 or 286.
 - c. OWRD has not participated in any substantive negotiation of any of the terms of this Settlement among the Parties. Neither the Director of OWRD nor his representatives have participated in any negotiations with the Parties regarding or defining the scope and attributes of the Tribes' rights to water.
 - d. Nothing in this Settlement is intended or shall be construed to predetermine the outcome of any regulatory or administrative proceeding relating to PacifiCorp's pending reauthorization of HE No. 180 before OWRD, or any request by PacifiCorp for use of water under a limited license for FERC Project No. 2082.

Dispute Resolution:

6. Arbitration is the exclusive means of resolving disputes between the non-federal Parties (PacifiCorp and the Tribes) arising under this Settlement, that they have been unable to resolve through negotiation or mediation. The non-federal Parties shall first make a good faith effort to resolve any disputes through direct negotiation or mediation. If the good faith effort does not resolve a dispute, any non-federal Party may pursue the following remedy.
- a. Any non-federal Party may compel arbitration by the other non-federal Party under this section 6 by providing written notice to the other Parties. The notice shall contain a concise statement of the disputed issue or issues to be arbitrated. Within ten days after delivery of said notice, the other non-federal Party shall either concur in writing in the statement or provide an alternative statement of the issue or issues which that non-federal Party believes should be decided.
 - b. Within fifteen days of the delivery of the written notice compelling arbitration, each non-federal Party to the arbitration shall select an arbitrator and provide written notice to the other Parties of the name and



contact information of the arbitrator chosen. The two arbitrators shall confer and by joint agreement select a third arbitrator. The three arbitrators shall jointly determine a time and place of the arbitration and shall jointly determine the rules that shall govern the arbitration and shall provide notice of such to each non-federal Party.

- c. The arbitrators shall adopt rules they deem fair and reasonable, including the fashioning of appropriate non-monetary remedies, subject to the limitations of this section 6, and any applicable requirements of Oregon or federal law.
- d. The arbitrators shall invite concurrence on the statement of the issue or issues to be arbitrated. If the Parties are unable to agree, the arbitrators shall frame a statement of the issue or issues to be arbitrated which in their judgment is no broader than necessary to fairly resolve the dispute. In either case, the arbitrators will confine their deliberations and award strictly to such issue or issues settled upon.
- e. The arbitrating Parties shall bear their own legal costs related to any arbitration and shall each pay an equal share of the cost for the arbitrators and their reasonable expenses.
- f. Any arbitration award shall be in writing, shall be final and binding over the participating Parties, self-executory, and without further appeal, other than to a court specified in subsection 6.h, below, for (i) compulsion to arbitrate, (ii) confirmation or vacation of the arbitration award or decision, and (iii) enforcement of the arbitration award or decision.
- g. Any award or decision by the arbitrators shall be limited to the remedies of injunction and specific performance of the prohibitions and allowances of this Settlement, and determinations as to the meaning of the provisions of this Settlement. The award shall not include monetary or other damages of any kind.
- h. By this section on Dispute Resolution the Klamath Tribes provide a limited and irrevocable waiver of sovereign immunity from unconsented suit, to be strictly and narrowly construed and enforced only under the terms and conditions set forth here. The waiver is for the sole purposes of (i) allowing judicial compulsion of arbitration, (ii) confirmation or vacation of a non-monetary arbitration award or decision, or (iii) enforcement of the arbitration award or decision, made pursuant to this section 6. Such action may be brought by PacifiCorp, its successors, or assigns, and no other person or entity. No other causes of action or claims in law or equity are cognizable against the Klamath Tribes pursuant to this limited waiver.

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This limited waiver does not allow actions to be brought against Tribal Council members, officers, agents, employees, or attorneys or others acting on behalf of the Klamath Tribes, in their individual capacities. No assets of the Klamath Tribes or any Tribal Council member, employee, agent, officer, attorney, or other person acting on behalf of the Klamath Tribes may be used to satisfy any arbitration award or judgment, or any judicial order or determination. Any action to compel arbitration, confirm or vacate an arbitration award or decision, or enforce an arbitration award or decision shall be heard in the United States District Court for the District of Oregon, or, if that court does not have jurisdiction, then in the state courts of Oregon, and Oregon law shall apply.

- i. The Klamath Tribes consent and agree that it shall not be necessary in any litigation, arbitration, or other dispute resolution proceedings pertaining to this Settlement that there first be any deferral to or exhaustion of remedies in the Klamath Tribal Court, or any dispute resolution tribunal created by the Klamath Tribes.
- j. The dispute resolution provisions of this Settlement shall not be deemed to limit any rights or remedies as may exist in law or in equity between USBIA and any of the non-federal Parties.

IN WITNESS WHEREOF,

The Parties, through their duly authorized representatives, have caused this Settlement to be executed as of the last date set forth under the signatures below.

PACIFICORP

KLAMATH TRIBES

By: _____
 Its: _____
 Date: _____

By: _____
 Its: _____
 Date: _____

UNITED STATES BUREAU OF INDIAN AFFAIRS

UNITED STATES DEPARTMENT OF JUSTICE

By: _____
 Its: _____
 Date: _____

By: _____
 Its: _____
 Date: _____

By: _____
 Its: _____
 Date: _____

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Appendix A

TO SETTLEMENT AGREEMENT BETWEEN PACIFICORP, THE KLAMATH TRIBES, AND THE UNITED STATES BUREAU OF INDIAN AFFAIRS AS TRUSTEE ON BEHALF OF THE KLAMATH TRIBES

Interim J.C. Boyle Flow Schedule

The following flow regimes from the J.C. Boyle Dam through the bypass reach to the J.C. Boyle powerhouse, shall apply to this Settlement as the Interim J.C. Boyle Flows, which are exclusive of natural accretions from springs into the Bypass Reach. Except as provided in subsection 2.e., only the "Flow Releases at Dam" shall be the flows required by this Settlement as the Interim J.C. Boyle Flows; however, except as provided in subsection 1.1, PacifiCorp shall not divert the natural accretions from springs throughout the J.C. Boyle Bypass Reach. PacifiCorp shall not be obligated by the Tribes or USBIA to release more flows than the Interim J.C. Boyle Flows in the event the "Approximate Flows Below Springs" are different from those listed below, or in the event they may ever diminish; or to release any flows in excess of the Tribal Instream Flows, or which are in excess of any specific limitation on the maximum allowable flows specified by any Governmental Authority.

A. Initial Period:

During the Initial Period as defined in this Settlement, the flow releases into the J.C. Boyle Bypass Reach from J.C. Boyle Dam, in cubic feet per second, shall continue to be:

| <u>Month</u> | <u>Flow Releases at Dam</u> | <u>Approximate Flows Below Springs with Flow Releases at Dam</u> |
|--------------|---------------------------------|--|
| January | 100 | 320 |
| February | 100 | 320 |
| March | 100 | 320 |
| April | 100 | 320 |
| May | 100 | 320 |
| June | 100 | 320 |
| July | 100 | 320 |
| August | 100 | 320 |
| September | 100 | 320 |

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| | | |
|----------|-----|-----|
| October | 100 | 320 |
| November | 100 | 320 |
| December | 100 | 320 |

B. Critical Period:

During the Critical Period as defined in the Settlement, the flow releases from the J.C. Boyle Dam into the J.C. Boyle Bypass Reach, in cubic feet per second, shall be:

| <u>Month</u> | <u>Flow Releases at Dam</u> | <u>Approximate Flows Below Springs with Flow Releases at Dam</u> |
|--------------|---------------------------------|--|
| January | 200 | 420 |
| February | 200 | 420 |
| March | 200 | 420 |
| April | 300 | 520 |
| May | 300 | 520 |
| June | 200 | 420 |
| July | 200 | 420 |
| August | 200 | 420 |
| September | 200 | 420 |
| October | 200 | 420 |
| November | 200 | 420 |
| December | 200 | 420 |

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Appendix B

**To SETTLEMENT AGREEMENT BETWEEN PACIFICORP, THE KLAMATH TRIBES, AND THE
UNITED STATES BUREAU OF INDIAN AFFAIRS**

Maps Showing Approximate Subsection 3.j Parcel Configurations and Locations

Parcel 1600 Flag Lot (Approximate Configuration)

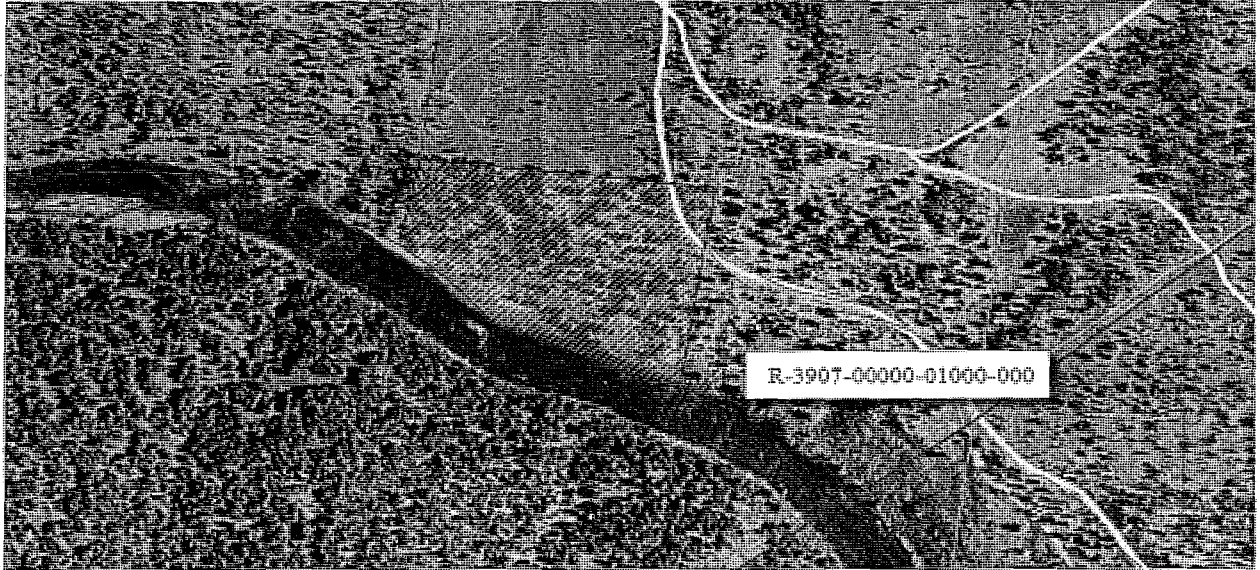


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Appendix C

TO SETTLEMENT AGREEMENT BETWEEN PACIFICORP, THE KLAMATH TRIBES, AND THE UNITED STATES BUREAU OF INDIAN AFFAIRS

Examples and Guide to Subsection 4.a of the Settlement

The Parties agree that they are not able to anticipate all situations in which a Party might “assert or argue for any position, or take any action” whose impacts must be evaluated against the requirement of subsection 4.a of this Settlement. As a result, the Parties agree that they are not able to specify at this time all future actions that would, and all future actions that would not, violate subsection 4.a. Accordingly, the Parties agree to follow the examples set forth below and use them as a guide to interpreting and applying subsection 4.a. The discussion and examples apply to proceedings pursuant to statutes (“statutory proceedings”) including, but not limited to, those under the Federal Power Act and Federal Energy Regulatory Commission, the Endangered Species Act, and the Clean Water Act, as well as to actions or proceedings independent of statutory proceedings.

An action will be judged by whether its successful accomplishment will have the effect disallowed in subsection 4.a. Thus, during the pendency of this Settlement,

A. A Party may not, for example:

- i. Bring, or join in, a lawsuit or any portion of an administrative proceeding that demands higher or lower flows than the Interim J.C. Boyle Flows.
- ii. Advance a position in the KBA that requires higher or lower flows than the Interim J.C. Boyle Flows.
- iii. Make a “call” based on any water right that requires higher or lower flows than the Interim J.C. Boyle Flows.
- iv. Advocate for fish management actions or habitat improvements whose accomplishment requires higher or lower flows than the Interim J.C. Boyle Flows, or velocity or depth standards that cannot be accomplished without higher or lower flows than the Interim J.C. Boyle Flows.
- v. Advocate for water quality standards or outcomes whose accomplishment requires higher or lower flows than the Interim J.C. Boyle Flows, for example, by requiring higher flows than the Interim J.C. Boyle Flows to dilute pollutants.

B. But a Party may, for example:

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- i. Advocate for and participate in fish habitat restoration or improvement whose accomplishment does not require higher or lower flows than the Interim J.C. Boyle Flows, for example, gravel placement, vegetation propagation, or predator control.
- ii. Advocate for water quality standards or outcomes whose accomplishment does not require higher or lower flows than the Interim J.C. Boyle Flows, for example, enforcing discharge permit requirements or imposing measurement requirements.
- iii. Advocate for and participate in reintroduction of anadromous fish to the Upper Klamath Basin, or the management of fish or fisheries including disease prevention, that will be accomplished without higher or lower flows than the Interim J.C. Boyle Flows.
- iv. Participate in proceedings bearing on operation of PacifiCorp's Facilities in California on the Klamath River whose outcomes do not require higher or lower flows than the Interim J.C. Boyle Flows.
- v. Participate in matters of distribution of water among Upper Klamath Lake, the Klamath Reclamation Project, National Wildlife Refuges, and the Klamath River that do not require higher or lower flows than the Interim J.C. Boyle Flows.
- vi. Participate in proceedings that determine how anadromous fish travel around PacifiCorp's Facilities on the Klamath River, such as, volitional passage, trap & haul, or dam removal, whose outcomes do not require higher or lower flows than the Interim J.C. Boyle Flows.

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Exhibit 2

To STIPULATION TO RESOLVE CONTESTS 2062, 2064, 2065 and 2066

Interim J.C. Boyle Flow Schedule

PacifiCorp, the Tribes and USBIA agree the following flow regimes from the J.C. Boyle Dam through the bypass reach to the J.C. Boyle powerhouse, shall apply to this Stipulation as the Interim J.C. Boyle Flows, which are exclusive of natural accretions from springs into the Bypass Reach. Except as provided in subsection 2.f., only the "Flow Releases at Dam" shall be the flows required by this Stipulation as the Interim J.C. Boyle Flows; however, except as provided in subsection 1.k, PacifiCorp shall not divert the natural accretions from springs throughout the J.C. Boyle Bypass Reach. PacifiCorp shall not be obligated by the Tribes or USBIA to release more flows than the Interim J.C. Boyle Flows in the event the "Approximate Flows Below Springs" are different from those listed below, or in the event they may ever diminish; or to release any flows in excess of the Tribal Instream Flows, or which are in excess of any specific limitation on the maximum allowable flows specified by any Governmental Authority.

A. Initial Period:

During the Initial Period as defined in this Stipulation, the flow releases into the J.C. Boyle Bypass Reach from J.C. Boyle Dam, in cubic feet per second, shall continue to be:

| Month | Flow Releases at Dam | Approximate Flows Below Springs with Flow Releases at Dam |
|-----------|----------------------|---|
| January | 100 | 320 |
| February | 100 | 320 |
| March | 100 | 320 |
| April | 100 | 320 |
| May | 100 | 320 |
| June | 100 | 320 |
| July | 100 | 320 |
| August | 100 | 320 |
| September | 100 | 320 |
| October | 100 | 320 |

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| | | |
|----------|-----|-----|
| November | 100 | 320 |
| December | 100 | 320 |

B. Critical Period:

During the Critical Period as defined in the Stipulation, the flow releases from the J.C. Boyle Dam into the J.C. Boyle Bypass Reach, in cubic feet per second, shall be:

| Month | Flow Releases at Dam | Approximate Flows Below Springs with Flow Releases at Dam |
|-----------|----------------------|---|
| January | 200 | 420 |
| February | 200 | 420 |
| March | 200 | 420 |
| April | 300 | 520 |
| May | 300 | 520 |
| June | 200 | 420 |
| July | 200 | 420 |
| August | 200 | 420 |
| September | 200 | 420 |
| October | 200 | 420 |
| November | 200 | 420 |
| December | 200 | 420 |

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Exhibit 3

To STIPULATION TO RESOLVE CONTESTS 2062, 2064, 2065 and 2066

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

~~Pacificorp; WaterWatch of Oregon, Inc.; Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; Rogue River Valley Irrigation District; Roger Nicholson; Richard Nicholson; 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; Gerald H. Hawkins; Hawkins Cattle Co.; Owens & Hawkins; Harlow Ranch;~~

PACIFICORP'S NOTICE OF WITHDRAWAL OF CONTESTS

Case No. 282

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

Contests: **2062, 2064, 2065, 2066,**
~~3016, 3070, 3071, 3072¹,~~
~~3249, 3257, 3258, 3259²,~~
~~3314³, 3373, 3374, 3375,~~

¹ WaterWatch of Oregon, Inc.'s contests 3016, 3070, 3071, and 3072 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

² 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.

³ 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 Wayne James, 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

Terry M. Bengard; Tom Bengard; Dwight T. 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; Robert Bartell; Rodney Z. James;
Hilda Francis for Francis Loving Trust; David M.
Cowan; James R. Goold for Tillie Goold Trust; Duane F.
Martin; Modoc Point Irrigation District; Peter M.
Bourdet; 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.

Pursuant to the "Stipulation to Resolve Contests 2062, 2064, 2065 and 2066" to which
this Notice of Withdrawal of Contests is attached as Exhibit 3, PacifiCorp voluntarily withdraws

3314, 3373-3375 on March 1, 2007. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily withdrew from
Contests 3314, 3373-3375 on April 6, 2007.

⁴ 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.

3644, 3657, 3658, 3659⁴,
3932, 3933, 3934, 4002,
4061, 4062, 4063

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its contests in Klamath Basin Adjudication Case 282. The withdrawn contests are more specifically described as follows:

1. Contests 2064, 2065, 2066; and
2. That portion of Contest 2062 pertaining to the above-captioned claims filed by the United States Bureau of Indian Affairs and the Klamath Tribes.

PacifiCorp understands that this Notice of Withdrawal of Contests is a legal document that may have certain legal consequences. PacifiCorp acknowledges that it has not received any advice about whether it should sign this document from the Oregon Water Resources Department, the Oregon Department of Justice, and/or any person employed by or representing these agencies or the State of Oregon.

DATED _____, 2010.

PACIFICORP

By: _____
Douglas W. MacDougal, OSB No. 98077
Of Attorneys for PacifiCorp

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

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This Notice of Withdrawal of Contests was acknowledged before me on _____, 2010 by Douglas W. MacDougal.

(Signature of notarial officer)
Notary Public for _____
My Commission Expires: _____

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2010, I served the foregoing
STIPULATION TO RESOLVE CONTESTS 2062, 2064, 2065 and 2066 on the following
parties at the following addresses:

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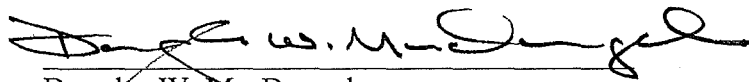
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via e-mail to those persons for whom e-mail addresses are listed above, and to all recipients by mailing to them a true and correct copy thereof, certified by me as such, placed in a sealed envelope addressed to them at the addresses set forth above, and deposited in the U.S. Post Office at Portland, Oregon on said day with postage prepaid.


Douglas W. MacDougal

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2010, I mailed a true copy of the following: **Signed Stipulation to Resolve contests 2062, 2064, 2065, and 2066**, 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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Certificate of Service; Case 282, Claims: 671-673, and that Portion of Tribal Claim 612 pertaining to the Klamath River.

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