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## Case 282 Corrected Partial Order of Determination

Dwight French

*Adjudicator, Klamath Basin General Stream Adjudication*

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**BEFORE THE DIRECTOR  
OF THE WATER RESOURCES DEPARTMENT  
OF THE STATE OF OREGON**

**KLAMATH BASIN GENERAL STREAM ADJUDICATION**

In the Matter of the Claim of	)	CORRECTED PARTIAL ORDER OF
THE KLAMATH TRIBES AND THE	)	DETERMINATION
UNITED STATES DEPARTMENT OF	)	
INTERIOR, BUREAU OF INDIAN	)	
AFFAIRS AS TRUSTEE ON BEHALF OF	)	Water Right Claims 671 – 673
THE KLAMATH TRIBES	)	(Klamath River and its tributaries)
	)	

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The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

**A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS  
TO THE PROPOSED ORDER**

1. Claims 671 – 673 and that Portion of Claim 612 pertaining to the Klamath River and its tributaries, (Claimants: THE KLAMATH TRIBES; AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS AS TRUSTEE ON BEHALF OF THE KLAMATH TRIBES (BIA)) and their associated contests<sup>1</sup> were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 282.
2. Claim 612 was filed by the Klamath Tribes. It is a composite claim that incorporates by reference each of the United States Bureau of Indian Affairs' claims based on the hunting, trapping, fishing, and gathering purposes of the Klamath Treaty of 1864. The portion of Claim 612 pertaining to the Klamath River incorporates by reference BIA Claims 671 – 673.
3. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claims 671 – 673, and that Portion of Claim 612 pertaining to the Klamath River and its tributaries on April 16, 2012.

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<sup>1</sup> Claim 671: 2064, 3070, 3257, 3373, 3657, 3932, 4061; Claim 672: 2065, 3071, 3258, 3374, 3658, 3933, 4062; Claim 673: 2066, 3072, 3259, 3375, 3659, 3934, 4063; Claim 612: 2062, 2730, 3016, 3249, 3314, 3644, 4002.  
CORRECTED PARTIAL ORDER OF DETERMINATION  
CLAIMS 671-673 (Klamath River and its tributaries)

4. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) the Oregon Water Resources Department, (2) Upper Basin Contestants, (3) the Klamath Tribes, United States and Klamath Project Water Users (KPWU), who filed a Joint Limited Exception. Responses to exceptions were timely filed by the United States and the Klamath Tribes.
5. The exceptions filed to the Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claims 671 – 673 and that Portion of Claim 612 pertaining to the Klamath River and its tributaries. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.8, A.9, A.10, A.11, and A.12, below.
6. For administrative convenience, OWRD has addressed Claim 612 in a separate Partial Order of Determination for Claim 612. Section B.2 of this Partial Order of Determination makes a legal conclusion about the relationship between Claim 612 and the United States' Claims 671 – 673, and the ownership of the water rights that are recognized in these claims.
7. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
  - a. The “Procedural History” is adopted in its entirety.
  - b. The “Evidentiary Rulings” is adopted in its entirety.
  - c. The “Expert Testimony” is adopted in its entirety.
  - d. The “Issues” is adopted is adopted in its entirety.
  - e. The “Findings of Fact” is adopted with modifications, as set forth in Section A.8, below.
  - f. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.9, below.
  - g. The “Opinion” is adopted with modifications, as set forth in Section A.10, below.
  - h. The section titled “Order” is replaced in its entirety as set forth in Section A.11, below. Consistent with Sections A.8, A.9, A.10, A.11 and A.12, below, the outcome of Order has been modified to reflect the denial of Claims 671, 672, and 673.
  - i. The “Attachment A” is not adopted, as set forth in Section A.12, below.
  - j. The “Order on Amended Stipulation” is adopted with relevant terms and certain exceptions as set forth in Section A.13, below.
8. **Findings of Fact.** Within the Proposed Order’s “Findings of Fact” section, Findings of Facts 11, 16, and 17 are modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):
  - a. *Modifications to Finding of Fact 11:*
    11. Claim 671 identifies the upper and lower reach boundaries’ longitude and latitude coordinates (NAD 27) as well as township-range designations. The township-range description for the upper reach boundary is identified as

Township 40 south, Range 7 east, Section 6, Southwest  $\frac{1}{4}$  Northeast Northwest  $\frac{1}{4}$  (T 40S, R 7E, S 6, SW $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  ), distance from NW corner, S 14° 24' 25" E, 2,138.4 ft. The lower reach boundary is identified as T 41 S, R 5E, S 13, NE $\frac{1}{4}$  NW $\frac{1}{4}$ , distance from NW corner S 70° 58' 60" E, 1918.3 ft. (OWRD Ex. 49 at 17-19).

**Reasons for Modifications:** To provide the correct location, as supported by the evidence, for the upper reach boundary for Claim 671; to correct a citation to the record.

b. *Modifications to Finding of Fact 16:*

16. Claim 673 claimed instream flows in a reach of the Link River extending from Lake Ewauna to the Link River dam. The claim asserted a water right to support migratory passage of anadromous salmonid fish species into and out of the Klamath River basin. The claim asserted a water right for the period January 1 through December 31 each year. The claimed flows for physical habitat encompassed the natural up to 700 cfs. (OWRD Ex. 51 at 1 through 13.)

**Reasons for Modifications:** To correct a citation to the record.

c. *Modifications to Finding of Fact 17:*

17. Claim 673 identifies the upper and lower reach boundaries' longitude and latitude coordinates as well as township-range designations. The township-range description for the upper reach boundary is identified as ~~T 34 S, R 7E, S 6, SE $\frac{1}{4}$  NE $\frac{1}{4}$~~  T 38 S, R 9E, S 30, NW $\frac{1}{4}$  SE $\frac{1}{4}$ , distance from NW ~~SE~~ corner, S ~~1° 55' 54" E, 1937.7~~ N 37° 42' 12" W, 2579 ft. The lower reach boundary is identified as ~~T 35 S, R 7E, S 3, NW $\frac{1}{4}$  NW $\frac{1}{4}$~~  T 38 S, R 9E, S 32, NE $\frac{1}{4}$  SW $\frac{1}{4}$ , distance from NW corner, S ~~30° 40' 00" E, 3963 ft. S 61° 20' 14" E, 337.3~~ (OWRD Ex. ~~5 at 16~~ 51 at 13.)<sup>2</sup>

<sup>2</sup> The map of record (OWRD Ex. 51 at 13) gives a written description of the upper and lower reaches as T 38 S, R 9E, S 30, NW $\frac{1}{4}$  SE $\frac{1}{4}$ , distance from SE corner, N 36° 8' 23" W, 1762.9 ft.; and T 38 S, R 9E, S 32, NE $\frac{1}{4}$  SW $\frac{1}{4}$ , distance from SE corner N 21° 0' 7" W, 1908.3 ft.; respectively. (These are even different from the TRS and bearing and distances cited in the ALJ's Proposed Order.) Plotting these bearing and distances listed on the map of record from the specified corners does not place the upper and lower reaches in the mapped locations according to the CORRECTED PARTIAL ORDER OF DETERMINATION  
CLAIMS 671-673 (Klamath River and its tributaries)

**Reasons for Modifications:** To provide the correct locations, as supported by the evidence, for the upper and lower reach boundaries for Claim 673; to correct a citation to the record.

d. *Additional Finding of Fact 41:*

41. The entirety of the Klamath River reaches claimed in Claims 671, 672 and 673 (as well as the equivalent portion of Claim 612) lie entirely outside the boundaries of the former Klamath Indian Reservation.

**Reason for Modification:** To more fully set forth findings of fact as supported by a preponderance of evidence in the record.

9. **Conclusions of Law.** Within the Proposed Order’s “Conclusions of Law” section, Conclusions of Law 1 through 4 are modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):
1. Claimants are not entitled to claim instream flows outside the boundaries of the former reservation in order to fulfill the purposes of the reservation.
  2. Given that Claimants’ off-reservation water right claims are outside the scope of the federal reserved water right doctrine, and therefore must be denied as a matter of law, it is unnecessary in this case to determine whether the claimed instream flows are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes’ on-reservation fishing rights guaranteed by the treaty of 1864.
  3. It is unnecessary in this case to determine whether the Tribes’ treaty rights have ~~not~~ been extinguished on lands no longer owned by the Tribes.
  4. It is unnecessary in this case to determine whether the Klamath Restoration Act of 1986 ~~did not limit~~ limited the restoration of the Tribes’ treaty rights on former reservation land.

**Reason for Modification:** To make the Conclusions of Law consistent with OWRD’s interpretation of the law.

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notations for the “Upper Boundary” or “Lower Boundary” noted on the topographic map of record. Thus, the bearing and distance measurements were calculated by OWRD in UTM 10, NAD 27.

10. **Opinion.** The Proposed Order's "Opinion" section is replaced in its entirety as follows:

It is undisputed that the each of the river reaches claimed in Claims 671, 672 and 673 (as well as the equivalent portion of Claim 612) lies entirely outside the boundaries of the former Klamath Indian Reservation. OWRD concludes that off-reservation water right claims are outside the scope of the federal reserved water right doctrine as a matter of law. The claims must be denied for this reason. It is therefore unnecessary to reach the other legal issues raised in this case.

The statutes and rules governing this proceeding place limits on OWRD's ability to modify or delete factual findings made by the ALJ. OWRD therefore incorporates all of the Proposed Order's factual findings by reference (irrespective of whether those findings appear in the designated "Findings of Fact" section), despite the fact that most of the findings are not relevant given OWRD's determination of the off-reservation water right claim issue.

OWRD's conclusion with respect to off-reservation federal reserved water right claims is discussed in detail below.

**A. The Claimants' claims for off-reservation water rights are not supported by the underlying principles of the federal reserved water right doctrine**

As is described in detail below, there is no federal precedent in support of off-reservation federal reserved water rights. Nor is there any basis for expanding the federal reserved water right doctrine to include implied off-reservation federal reserved water rights.

The federal reserved water right doctrine is judge-made law. It determines whether a court should imply that the federal government intended to create a water right when reserving a specific piece of land for a specific purpose, notwithstanding the fact that neither Congress nor the executive branch explicitly created a water right to benefit that land.

Recognizing the origins of the doctrine, the United States Supreme Court has found that federal reserved water right claims require "careful examination," both "because the reservation [of water] is implied, rather than expressed" and because, "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 US 696, 701-02 (1978).

Allowing implied off-reservation federal reserved water rights would be at odds with this admonition. Recognition of such rights would give the implied right in water a greater scope than the explicit right in land. A federal reservation of land has an explicitly defined, geographically limited scope. The primary purposes of that reservation of land apply only within the reservation's explicitly defined boundaries. Recognition of implied off-reservation federal reserved water

rights would allow the *implied* exercise of federal authority (the reservation of water) to greatly exceed the *explicit* exercise of federal authority, by permitting an implied reservation of water that could greatly exceed the boundaries of the explicit reservation of land.

This is not merely a theoretical concern. An implied reservation of water to benefit a reservation of land for the harvest of anadromous fish – no matter how small the reservation of land or how significant the fishery – could result in implied water rights ranging from the ocean up to the headwaters of all of a river’s tributaries. So construed, the judicially created federal reserved water rights doctrine would completely undermine Congress’s historical deference to state water law.

The implied creation of a water right potentially far greater in geographic scope than the explicit reservation of land does not square with the *New Mexico* court’s directive to treat the federal reserved water right doctrine conservatively. OWRD therefore concludes that it is inappropriate to so dramatically expand the federal reserved water right doctrine.

**B. The cases relied on in support of an off-reservation water right are inapplicable**

None of the cases cited by the Claimants in support of off-reservation water rights to support on-reservation hunting and fishing rights are applicable. The cited cases are not determinative of the issue at hand. Nor do they provide persuasive support for the Claimants’ position. The Claimants cite to *Arizona v. California*, 376 US 340 (1964); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032, 1033-35 (9th Cir. 1985); *Washington Dep’t of Ecology v. Acquavella*, No. 77-2-01484-5, Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places (Wash. Super. Ct. Sept. 1, 1994); and *United States v. Adair*, 723 F2d 1394 (9<sup>th</sup> Cir 1983) (*Adair II*) as support for their position. OWRD addresses each of these cases below.

The Claimants characterize *Arizona*, 376 US at 344-45, as having awarded “reserved water rights from the Colorado River for the Cocopah Reservation, even though the river lies approximately two miles outside reservation boundaries.” Claimants’ Joint Post-Hearing Response Brief at 53 (emphasis in original; internal citations omitted). The Claimants argue that *Arizona* was premised on the Cocopah Reservation being two miles from the Colorado River. On the contrary, the relative locations of the Cocopah Reservation and the Colorado River, and the effect the relative locations might have on an award of water rights, was at not at issue in *Arizona*. The decision does not even mention the relative locations of the Cocopah Reservation and the river. Under these circumstances, the decision could not have been premised on the Colorado River being off the reservation.

As the Claimants acknowledge, the boundaries of the Cocopah Reservation were in dispute, although not in the *Arizona* proceeding, at the time of the *Arizona*

decision. A 1972 Opinion of the Solicitor of the Department of the Interior states: “Over the years there have been considerable differences of opinion regarding interpretation of the Executive Order” that created the Cocopah Reservation. Opinions of the Solicitor, page 2051, December 21, 1972 (“1972 Opinion”) (attached hereto as Exhibit A). Specifically, the dispute pertained to whether the Executive Order intended to include lands bordering the Colorado River within the Reservation. *Id.* The 1972 Opinion reversed an earlier opinion issued by the Solicitor of the Interior, and concluded that the “reservation as created by the Executive Order...extended to the Colorado River.” *Id.* at 2052. Given that the issue of awarding reserved water rights in off-reservation bodies of water was not in dispute in *Arizona*, and that the reservation boundaries were uncertain at the time of the *Arizona* decision,<sup>3</sup> *Arizona* provides no support for the Claimants’ position.

The Claimants next cite to a ruling issued by a federal district court judge in the state of Washington, which was affirmed by the Ninth Circuit Court of Appeals in *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032, 1033-35 (9th Cir. 1985). The district court judge’s ruling required the Yakima Irrigation Project to maintain a certain quantity of water at a location outside of the primary Yakama Reservation boundaries to support the Yakama Nation’s treaty fishing rights. Civ. No. 21, Instructions to the Watermaster (E.D. Wash. Oct. 31, 1980) (attached as Attachment C4 to the Affidavit of David W. Harder in Support of the United States’ and Klamath Tribes’ Memorandum in Support of Joint Motion for Ruling on Legal Issues Defining the Tribal Water Rights, submitted July 8, 2005) (referred to herein as “Instructions to Watermaster”).

The treaty establishing the Yakama Reservation is different from the Klamath Treaty in a critical respect. Unlike the Klamath Treaty, the Yakama treaty reserved fishing rights for the Yakama Nation at “usual and accustomed [fishing] places” outside the primary boundaries of the Yakama Reservation. *Kittitas*, 763 F.2d at 1033. In other words, the Yakama hold rights to use land for a specific purpose at locations outside the primary reservation boundaries. The district court ruling specifically states that the reach of river protected by the ruling “is a part of a fishery reserved to the Yakama Indian Nation and its members pursuant to its treaty with the United States....” Instructions to the Watermaster at 2. The water rights affirmed by *Kittitas* are therefore based on a specific, underlying fishing right (a right in land at the “usual and accustomed fishing places”) for which there is no equivalent in the Klamath Treaty.

In addition, the *Kittitas* cases did not involve the adjudication of the Yakama Nation’s federal reserved water rights (or the adjudication of any other water rights). The Ninth Circuit stated specifically that the parties to the proceeding

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<sup>3</sup> While the view of the United States Department of Interior Solicitor at the time of the *Arizona* decision was that the Colorado River was not on and did not border the Cocopah Reservation, the 1972 Opinion makes clear that the Solicitor’s view at the time of the *Arizona* decision was not universally shared.



“intended no general adjudication of water rights.” *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F2d 1032, 1035 (1985).

Finally, the *Kittitas* cases do not engage in any analysis of the federal reserved water rights doctrine that supports an expansion of the doctrine to include off-reservation water rights at locations that do not constitute “usual and accustomed [fishing] places.” *Kittitas* provides no support for the Claimants’ position.

The Claimants also cite *Washington Dep’t of Ecology v. Acquavella*, No. 77-2-01484-5, Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places (Wash. Super. Ct. Sept. 1, 1994) (OWRD Ex. 2 at 717-731) as having awarded off-reservation water rights. *Acquavella* is a decision of a Washington state superior court, and therefore does not serve as applicable precedent in this proceeding.

Nor does *Acquavella* serve as persuasive authority. *Acquavella* pertains to the treaty establishing the Yakama Reservation, which is different from the Klamath Treaty in a critical respect. Unlike the Klamath Treaty, the Yakama treaty reserved fishing rights for the Yakama Nation at “usual and accustomed [fishing] places” outside the primary boundaries of the Yakama Reservation. OWRD Ex. 2 at 726, 731. In other words, the Yakama hold rights to use land for a specific purpose at locations outside the primary reservation boundaries. The court thus addresses the question of water rights at locations where the Yakama Nation also had treaty fishing rights. *Acquavella* does not engage in any analysis of the federal reserved water rights doctrine that supports an expansion of the doctrine to include off-reservation water rights at locations that do not constitute “usual and accustomed [fishing] places.” *Acquavella* provides no support for the Claimants’ position.

Finally, the Claimants’ cite to language in *United States v. Adair*, 723 F2d 1394 (9<sup>th</sup> Cir 1983) (*Adair II*), that describes the process for determining the primary purposes of an Indian reservation, and the canons of Indian treaty interpretation. Reliance on *Adair II* misses the mark. The question posed by the Claimants’ off-reservation water right claim is whether the federal reserved water right doctrine is broad enough to permit implied water rights *under any circumstances* at locations geographically unconnected to (i.e., not either bordering or within) a federal reservation of land. If the doctrine is not so broad (and OWRD concludes that it is not), then the purposes of a particular federal reservation, or the documents creating a particular federal reservation, are immaterial.

The Claimants repeatedly cite to portions of *Adair II* that describe the determination of the *purposes* of the reservation. *See, e.g., Adair II*, 723 F2d at 1408, n13. It is in this context, and this context only, that the *Adair II* court treats Indian reservations differently than other federal reservations of land. As the *Adair II* court explained, determination of the purposes of the reservation is based on an interpretation of the treaty creating the reservation. In this context, canons

of Indian treaty construction may apply. But the purpose of the reservation is only one element of a federal reserved water right, and it is an element that speaks to the character of the land actually reserved. It does not address the effects of a reservation on far-flung locales. The *Adair II* court's discussion of the purpose of a reservation is therefore inapplicable to the question of off-reservation water rights.

In conclusion, the Claimants' claims for off-reservation water rights are not supported by either the underlying principles of the federal reserved water right doctrine or by the case law. The off-reservation portion of Claims 668 is therefore denied.

**Reasons for Modification:** To make the Opinion section consistent with the Department's legal conclusions, and to describe the legal reasoning behind certain of the Department's legal conclusions.

11. **Order.** The section titled "Order" is replaced as follows:

Claims 671, 672, and 673, and those portions of Claim 612 that pertain to the Klamath River are denied because those claimed reaches lie entirely outside of the former Klamath Indian reservation boundary.

**Reasons for Modifications:** To reflect the Findings of Fact, Conclusions of Law and Opinion sections.

12. **Attachment A.** Because the claims are denied in their entirety, Attachment A to the Proposed Order, which sets forth flow levels for the reaches claimed, is neither adopted nor incorporated into this Partial Order of Determination.
13. **Order on Amended Stipulation.** On June 19, 2009, the ALJ entered an Order on Klamath Tribes, United States, and Klamath Project Water Users' 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 ("Order on Stipulation"). The Order on Stipulation provided that certain of its terms "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" the enumerated claims and contests.

On April 11, 2012, the United States filed the following documents:

AMENDED STIPULATION OF CONDITIONAL WITHDRAWAL OF KWPU'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 AND ATTACHMENTS 1 AND 2 ("Amended Stipulation");

JOINT MOTION FOR APPROVAL OF 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; and

[PROPOSED] 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.

The Amended Stipulation is an agreement between Claimants (the Klamath Tribes and the United States), Contestants Klamath Project Water Users ("KPWU"), and the Oregon Water Resources Department ("OWRD"). The Amended Stipulation is comprised of five sections. Section A is a stipulation of facts. Section B provides for the conditional withdrawal of KPWU's contests in this case. Section C provides for a conditional limitation on the exercise of the water rights recognized in this case. Section D requests the ALJ to enter a proposed order implementing the Amended Stipulation. Section E provides general terms pertaining to the Amended Stipulation.

On April 25, 2012, the ALJ entered the 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 ("Order on Amended Stipulation"). The Order on Amended Stipulation is intended to implement the Amended Stipulation. The Order on Amended Stipulation supersedes and replaces the Order on Stipulation.

The Order on Amended Stipulation states that certain of its terms "shall be included in the Proposed Order on Claims 671, 672, 673 and 612." However, the Proposed Order does not explicitly include those terms or otherwise reference the Order on Amended Stipulation.

To provide clarity as to the status of the Order on Amended Stipulation, the Adjudicator adopts the Order on Amended Stipulation,<sup>4</sup> except as described below, and incorporates into this Partial Order of Determination the relevant terms, as follows:

1. Regarding Contests 3657, 3658, 3659, and 3644 filed by KPWU,<sup>5</sup> the following terms are a part of this Partial Order of Determination.

<sup>4</sup> Even if the ALJ erred in failing to reference or incorporate the Order on Amended Stipulation in the Proposed Order, OWRD has the authority, which the Adjudicator hereby exercises, to incorporate terms of the Amended Order into this Partial Order of Determination. OAR 137-003-0665; 137-003-0655. The Claimants properly raised this issue in exceptions to which Contestants had an opportunity to respond.

<sup>5</sup> 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, CORRECTED PARTIAL ORDER OF DETERMINATION  
CLAIMS 671-673 (Klamath River and its tributaries)

- a. Subject to paragraph 1.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,<sup>6</sup> consistent with ORS 539.150. Nothing in the Amended Stipulation or this “Order on Amended Stipulation” section of this Partial Order of Determination shall limit the exceptions which the United States, the Klamath Tribes and KPWU (collectively, the “Parties to the Amended Stipulation”) 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.
  - b. If none of the events described in paragraph 2.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.
2. Regarding Claims 671, 672, 673, and 612, the following terms are a part of this Partial Order of Determination, with the following clarification. This Partial Order of Determination denies the claimed water rights in their entirety. As a result, this paragraph 2, which limits the scope or extent of a call made by the Klamath Tribes and United States under any water rights that have been determined under Claims 671, 672, 673, and 612, is inapplicable. This Paragraph 2 is nonetheless incorporated into this Partial Order of Determination in the event that a decree is ultimately entered that approves some part or all of Claims 671, 672, 673, and 612. In that event, this Paragraph 2 would take effect.
    - a. From the time the Amended Stipulation was filed until the On Project Plan Implementation Deadline, any exercise of the water rights determined for

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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.

<sup>6</sup> As used in this “Order on Amended Stipulation” section of this Partial Order of Determination, the term “Claim 612” refers to Claim 612 insofar as it adopts and incorporates by reference Claims 671, 672 and 673.

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 2.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 2.a and paragraph 2.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 to the Amended Stipulation’s 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 to the Amended Stipulation’s exceptions pursuant to such processes; and
  - iii. Following KPWU’s litigation of exceptions as provided in paragraph 2.c.ii immediately above or following KPWU having foregone the final opportunity to fully litigate exceptions as provided in paragraph 2.c.ii 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 2.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 2.a and paragraph 2.b above shall become permanent and unconditional.

- e. For purposes of this paragraph 2, “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

In addition to the incorporation of these terms, the Adjudicator makes the following findings with respect to the incorporated terms:


1. The provisions in paragraph 2.a. and paragraph 2.b, above, limit the scope or extent of a call made by the Klamath Tribes and United States. As described above, paragraphs 2.a and 2.b, above, are inapplicable under the terms of this Partial Order of Determination. In the event that a water right is ultimately decreed for any part of Claims 671, 672, 673 or 612, and paragraphs 2.a. and 2.b become effective, 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.
  2. Nothing in the Amended Stipulation diminishes, affects, defines, or resolves 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 diminishes, affects, defines, or resolves 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 defines, or is intended to define, the scope and attributes of the Tribal Water Rights, either to satisfy the Tribes’ treaty rights or otherwise.
14. On April 14, 2010, Claimants and Contestant PacifiCorp entered into that certain “Settlement Agreement Between PacifiCorp, the Klamath Tribes, and the United States Bureau of Indian Affairs as Trustee on Behalf of the Klamath Tribes” (Settlement Agreement) to resolve PacifiCorp’s contests. Pursuant to the Settlement Agreement, Claimants, PacifiCorp, and OWRD executed a “Stipulation to Resolve Contests 2062, 2064, 2065 and 2066” effective May 7, 2010 and ordered by Administrative Law Judge Joe Allen on June 28, 2010. On July 26, 2010, PacifiCorp filed a related Notice of Withdrawal of Contests.

The Stipulation to Resolve Contests 2062, 2064, 2065 and 2066 executed by the Claimants, PacifiCorp and OWRD is adopted and incorporated as if set forth fully herein.

## B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
  - a. The “Procedural History” is adopted in its entirety.
  - b. The “Evidentiary Rulings” is adopted in its entirety.
  - c. The “Expert Testimony” is adopted in its entirety.
  - d. The “Issues” is adopted is adopted in its entirety.
  - e. The “Findings of Fact” is adopted with modifications, as set forth in Section A.8, above.
  - f. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.9, above.
  - g. The “Opinion” is replaced is adopted with modifications, as set forth in Section A.10, above.
  - h. The section titled “Order” is replaced in its entirety as set forth in Section A.11, above. Consistent with Sections A.8, A.9, A.10, A.11 and A.12, above, the outcome of Order has been modified to reflect the denial of Claims 671, 672, and 673.
  - i. The “Attachment A” is not incorporated into this Partial Order of Determination, as set forth in Section A.12, above.
  - j. The “Order on Amended Stipulation” is adopted with relevant terms and certain exceptions as set forth in Section A.13, above.
2. Both the United States and the Klamath Tribes filed claims based on the hunting, trapping, fishing and gathering purposes of the Klamath Treaty of 1864. The Klamath Tribes’ Claim 612 incorporates the United States’ claims in this case by reference. The Klamath Tribes’ claims are duplicative of the United States’ claims, not additive. The United States holds the rights recognized herein in trust for the Klamath Tribes. *Colorado River Water Conservation Dist. v. United States*, 424 US 800, 810 (1976). As a result, Claim 612 is denied. Claim 612 is addressed in a separate Partial Order of Determination for Claim 612, and the United States’ Claims 671 – 673 are determined in this Partial Order of Determination for Claims 671 – 673.
3. Based on the file and record herein, IT IS ORDERED that Claims 671 – 673 are denied and are of no force or effect.

Dated at Salem, Oregon on February 28, 2014

  
Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication