

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

Cynthia L. Barrett, Trustee of Sydney's 1995 Irrevocable Trust, 12/27/95; Elaine G. Kerns, Sydney K. Giacomini and E. Martin Kerns, as Initial Trustees of the Elaine G. Kerns 1992 Trust 1/24/92; Mathis Family Trust; John M. Mosby; Marilyn Mosby; Robert Cook, TPC, LLC; PacifiCorp; Rogue River Valley Irrigation District; Medford 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; Nicholson Investments, LLC; William S. Nicholson; John B. Owens; Kenneth Owens; William L. Brewer; Mary Jane Danforth; Jacob D. Wood; Elmore E. Nicholson; Mary Ann Nicholson; Gerald H. Hawkins; Hawkins Cattle Co.; Owens & Hawkins; Harlow Ranch; 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

**[PROPOSED] ORDER ON
KLAMATH TRIBES, UNITED
STATES, AND KLAMATH PROJECT
WATER USERS' STIPULATION OF
CONDITIONAL WITHDRAWAL OF
KPWU CONTESTS TO CLAIMS 616
AND 622 AND CONDITIONAL AND
INTERIM NO-CALL PROVISIONS
BY THE UNITED STATES AND
KLAMATH TRIBES**

Case No. 286

Claim No. 616 and 622

Contest Nos. 2062, 2063, 2731, 2732, 2741, 2742, ~~3020, 3021~~¹, 3123², 3253³, 3254, 3318, 3324⁴, 3648, 3654⁵, 3883, 4006 and 4012

¹ WaterWatch of Oregon, Inc.'s Contests 3020 and 3021 were dismissed. Order Dismissing WaterWatch of Oregon, Inc.'s Contests, May 20, 2003.

² Change of Title Interest for Contest 2123 from Boyd Braren, Boyd Braren Trust to Robert Cook, TPC, LLC (10/25/05).

³ Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew, without prejudice, from Contests 3253 and 3254.

⁴ William Bryant voluntarily withdrew from Contests 3318 and 3324 on October 31, 2003. Dave Wood voluntarily withdrew from Contests 3318 and 3324 on October 26, 2004. Change of Title Interest for Contests 3318 and 3324 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3318 and 3324 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3318 and 3324 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contests 3318 and 3324 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3318 and 3324 from Walter Seput to Wayne James, Jr. (5/2/05). Change of Title Interest for Contests 3318 and 3324 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3318 and 3324 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3318 and 3324 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3318 and 3324 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3318 and 3324 on September 13, 2005. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily served a Notice of Withdrawal of Contests on April 7, 2007.

CASE 286: [PROPOSED] ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS' STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU CONTESTS TO CLAIMS 616 AND 622 AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES

Trust; William V. Hill; Lillian M. Hill; Carolyn Obenchain; Lon Brooks; Newman Enterprise; 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; Modoc Point Irrigation District; Peter M. Bourdet; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; Peggy Marengo; Jerry L. and Linda R. Neff; Duane Martin; 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; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Modoc Lumber Co.; Bradley S. Luscombe; Randy Walthall; Inter-County 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.

1. The “Stipulation of Conditional Withdrawal of KPWU Contests to Claims 616 and 622 and Conditional and Interim No-Call Provisions by the United States and Klamath Tribes” (Stipulation) is hereby approved and the Parties to the Stipulation (Klamath Project Water Users, Klamath Tribes, United States, Bureau of Indian Affairs) and Oregon Water Resources Department (“OWRD”) shall comply with its terms. To the extent KPWU have any

⁵ Don Vincent voluntarily withdrew from Contests 3648 and 3654 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3648 and 3654 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3648 and 3654 on January 15, 2004.

obligation to exhaust administrative remedies before OWRD, remedies have been exhausted, consistent with Section E.4. of the Stipulation.

2. Regarding contests 3648 and 3654 filed by Klamath Project Water Users (KPWU),⁶ the following terms are a part of this Order and shall be included in the Proposed Order issued under ORS 183.464(1) and OAR 137-003-0645 and any other Order or Judgment *determining* these contests.

a. If the Klamath River Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities (“Restoration Agreement”) becomes effective and the Secretary of the Interior publishes both notices described in Section B.2 of the Stipulation (Sections 1.5.2 and 15.3.4 of the Restoration Agreement, attached as Attachment 1 to the Stipulation), the conditional withdrawal by KPWU of their Contests 3648 and 3654 of Claims 616 and 622 shall become permanent and no longer conditional.

b. If the Restoration Agreement does not become effective or the Secretary does not publish both, or either of, the notices described in paragraph B.2 of the Stipulation, the conditional withdrawal by KPWU of their Contests in Case 286 shall no longer be in effect. Thereafter, the Parties shall be entitled to fully litigate KPWU’s exceptions, and KPWU shall be entitled to fully litigate the exceptions of the Klamath

⁶ For purposes of this Order, Klamath Project Water Users include Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Malin Irrigation District, Midland Improvement District, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Modoc Lumber Co., Bradley S. Luscombe, Randy Walthall and Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Collins Products LLC and Plevna District Improvement Company

Tribes and United States or any other party, to any Findings of Fact and Order of Determination on Claims 616 and 622 before the State of Oregon Circuit Court. KPWU shall file any exceptions to the Findings of Fact and Order of Determination on claims 616 and 622 as required by ORS 539.130 and ORS 539.150. KPWU shall provide notice to the Court and parties in the Circuit Court by January 31, 2013 of the previously filed exceptions to the Findings of Fact and Order of Determination on Claims 616 and 622 that they wish to pursue; or, if the deadline for filing such exceptions in Circuit Court has not passed before January 31, 2013, KPWU may file their exceptions on or before the due date. Nothing in this Order shall limit the exceptions which the Parties may pursue in the Circuit Court, or the utilization they may make of the Findings of Fact and Order of Determination on claims 616 and 622 in the Circuit Court, under the circumstances of the first sentence of this paragraph, provided that any exception filed by KPWU must not be inconsistent with the Contest Dismissal Agreement and Stipulation Between Klamath Project Water Users, the Klamath Tribes, and the United States; [Proposed] Order of the Hearing Officer in Case 003. KPWU's right to fully litigate shall include all sufficient time to prepare and present and defend in the case and discovery opportunities equivalent to those of other parties; and all other parties to the case shall have equivalent opportunities to litigate against KPWU's exceptions

c. The Parties have no further discovery obligations regarding each other during the contested case process before the Office of Administrative Hearings or OWRD.

3. Regarding Claims 616 and 622, the following terms are a part of this Order and shall be included in the Proposed Order on claims 616 and 622 issued under ORS 183.464(1) and OAR 137-003-0645 and any other Order or Judgment determining these water rights claims.

a. If the Restoration Agreement becomes effective and the Secretary publishes both notices described in Sections 1.5.2 and 15.3.4 of the Restoration Agreement, the following limitations to water rights determined under Claims 616 and 622 shall apply:

i. from the time the Stipulation was filed until the date selected by the Klamath Water and Power Agency under Section 15.3.9.A of the Restoration Agreement, including any extension of that date as provided in Section 15.3.9.B of the Restoration Agreement, any exercise of the water rights determined for Claims 616 and 622 shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908;

ii. after the date selected by the Klamath Water and Power Agency under Section 15.3.9.A of the Restoration Agreement, including any extension of that date under the circumstances provided in Section 15.3.9.B of the Restoration Agreement, or, if no such date is timely selected, then after December 1, 2017, any exercise of the water rights determined for Claims 616 and 622 shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908, except to the extent that diversion under any such

rights is precluded by the limitations on diversion of water in Appendix E-1 of the Restoration Agreement, attached hereto.

b. If the Restoration Agreement does not become effective or the Secretary does not publish both, or either of, the two notices described in paragraph B.2 of the Stipulation, the following limitation shall apply: any exercise of the water rights determined for Claims 616 and 622 in the Findings of Facts and Order of Determination issued under ORS 539.130(1) shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908; Provided, that this limitation shall not apply to any judgment of the Circuit Court issued under ORS 539.150.

4. Nothing in the Stipulation or this Order shall diminish or affect in any way: a) the rights of Contestants other than KPWU to contest or oppose claims 616 and 622 or any other claims, or b) any contests other than contests 3648 and 3654.

Administrative Law Judge

Date _____