

**KLAMATH BASIN RESTORATION AGREEMENT**  
**FOR THE**  
**SUSTAINABILITY OF PUBLIC AND TRUST RESOURCES AND AFFECTED**  
**COMMUNITIES**

**January 7, 2010 Public Review Draft**

**TABLE OF CONTENTS**

**PART I. GENERAL PROVISIONS .....1**

**1. Introduction.....1**

1.1. Parties.....1

    1.1.1. Non-Federal Parties .....1

    1.1.2. Federal Agencies as Parties .....2

    1.1.3. Addition of Other Parties .....3

1.2. General Recitals .....3

    1.2.1. Klamath Hydroelectric Project .....3

    1.2.2. Klamath Reclamation Project and Other Irrigation Deliveries .....3

    1.2.3. Sustainable Tribal Communities .....3

1.3. Goals of the Agreement .....4

1.4. Structure of Agreement.....4

1.5. Effectiveness .....5

    1.5.1. Effective Date .....5

    1.5.2. Performance .....5

1.6. Term of the Agreement .....5

1.7. Definitions and Acronyms .....5

**2. Legal Responsibilities, Reservation of Rights, and Precedents .....13**

2.1. Compliance with Legal Responsibilities .....13

2.2. Reservation of Rights.....13

    2.2.1. Generally.....13

    2.2.2. Reservations Regarding Federal Appropriations .....13

    2.2.3. Availability of Public Funds .....14

    2.2.4. Reservations Regarding Legislative Proposals .....14

    2.2.5. Reservations Regarding Regulations .....14

    2.2.6. No Pre-decisional Commitment.....14

    2.2.7. No Alteration of Environmental Review .....14

    2.2.8. Enforceability.....15

    2.2.9. No Argument, Admission, or Precedent .....15

    2.2.10. Protection of Interests .....16

    2.2.11. No Determination of Water Rights by the Agreement .....16

    2.2.12. Trinity River.....16

**3. Obligations under the Agreement .....17**

3.1. Obligation to Support.....17

    3.1.1. Authorizing Legislation .....17

        A. Additional Authorities .....17

        B. Support for Proposed Legislation .....17

            i. Legislation.....17

            ii. Participation in Legislative Process .....17

    3.1.2. Regulatory Approvals .....18

    3.1.3. Defense of Agreement .....18

        A. Litigation.....18

|           |        |  |           |
|-----------|--------|--|-----------|
|           | B.     | Comments .....   | 18        |
|           | C.     | Scientific Research.....   | 18        |
| 3.2.      |        | Obligation to Implement .....  | 18        |
|           | 3.2.1. | General.....   | 18        |
|           | 3.2.2. | Cooperation Among the Parties .....  | 18        |
|           | 3.2.3. | Lead or Responsible Party .....  | 19        |
|           | 3.2.4. | Timeliness.....  | 19        |
|           | A.     | General.....   | 19        |
|           | B.     | Implementation of Obligations Consistent with Sequence in the Agreement..... | 19        |
|           |        | i. Dispute Resolution.....   | 19        |
|           |        | ii. Funding .....  | 19        |
|           |        | iii. Litigation.....   | 20        |
|           |        | iv. Cooperation.....   | 20        |
|           |        | v. Obligation to Cure.....   | 20        |
|           |        | vi. Authorizing Legislation .....  | 21        |
|           | C.     | Extension of Time.....   | 21        |
|           | 3.2.5. | Environmental Review.....  | 22        |
|           | 3.2.6. | Force Majeure .....  | 22        |
|           | A.     | Suspension of Obligation.....  | 22        |
|           | B.     | Remedies.....  | 22        |
| <b>4.</b> |        | <b>Funding .....</b>   | <b>23</b> |
|           | 4.1.   | Budget.....  | 23        |
|           |        | 4.1.1. Support.....  | 23        |
|           |        | 4.1.2. Appendix C-2.....   | 23        |
|           |        | A. Proposed Budget for the First Ten Years of Implementation .....           | 23        |
|           |        | B. Adjustment Based on Changed Circumstances .....                           | 23        |
|           |        | 4.1.3. Maximum Benefits.....   | 24        |
|           |        | 4.1.4. Other Funds.....  | 24        |
|           | 4.2.   | Klamath River Basin Restoration Agreement Fund .....                         | 24        |
|           |        | 4.2.1. Establishment of Accounts by Program or Sub-Program .....             | 24        |
|           |        | 4.2.2. Management of Fund .....  | 24        |
|           |        | A. Receipt of Funds .....  | 24        |
|           |        | B. Disbursement .....  | 25        |
|           |        | C. Accounting and Reporting .....  | 25        |
|           | 4.3.   | Accountability for Use of Funding .....                                      | 25        |
| <b>5.</b> |        | <b>Coordination and Oversight .....</b>                                      | <b>25</b> |
|           | 5.1.   | Purpose.....   | 25        |
|           | 5.2.   | Structure.....   | 25        |
|           | 5.3.   | Funding of Coordination and Oversight .....                                  | 25        |
|           | 5.4.   | Accountability.....  | 25        |
|           |        | 5.4.1. Adaptive Management .....   | 26        |
|           |        | 5.4.2. Reporting.....  | 26        |
|           |        | A. Real-Time Reporting .....   | 26        |
|           |        | B. Annual and Decadal Reports .....  | 26        |

|           |  |           |
|-----------|--|-----------|
| <b>6.</b> | <b>Dispute Resolution .....</b>  | <b>26</b> |
| 6.1.      | Cooperation.....   | 26        |
| 6.2.      | Costs.....   | 27        |
| 6.3.      | Implementation .....   | 27        |
| 6.4.      | Non-Exclusive Remedy .....   | 27        |
| 6.5.      | Dispute Resolution Procedures .....  | 27        |
| 6.5.1.    | Dispute Initiation Notice.....   | 27        |
| 6.5.2.    | Informal Meetings.....   | 27        |
| 6.5.3.    | Referral to Klamath Basin Coordinating Council.....                              | 27        |
| 6.5.4.    | Mediation .....  | 27        |
| 6.5.5.    | Dispute Resolution Notice .....  | 28        |
| <b>7.</b> | <b>Other General Provisions.....</b>   | <b>28</b> |
| 7.1.      | Notice.....  | 28        |
| 7.2.      | Amendment of the Agreement.....  | 28        |
| 7.2.1.    | General.....   | 28        |
| A.        | Untimely or Inadequate Performance of Obligation.....                            | 28        |
| B.        | Untimely or Inadequate Funding .....   | 29        |
| C.        | Severability .....   | 29        |
| D.        | Material Inconsistency of Authorizing Legislation .....                          | 29        |
| E.        | Other Changed Circumstances.....   | 29        |
| F.        | Procedures in Event of Unresolved Dispute Regarding<br>Proposed Amendments ..... | 29        |
| 7.2.2.    | New Party.....   | 29        |
| 7.3.      | Severability .....   | 30        |
| 7.4.      | Enforcement.....   | 30        |
| 7.4.1.    | Contractual Obligations .....  | 30        |
| A.        | Dispute Resolution.....  | 30        |
| B.        | Remedy .....   | 30        |
| C.        | Venue .....  | 30        |
| 7.4.2.    | Regulatory Obligations .....   | 30        |
| A.        | Dispute Resolution.....  | 31        |
| B.        | Remedy .....   | 31        |
| C.        | Venue .....  | 31        |
| 7.4.3.    | Enforceability of Planning Obligations .....                                     | 31        |
| 7.4.4.    | No Third Party Beneficiaries .....   | 31        |
| 7.4.5.    | Actions Against a Federal Agency Party .....                                     | 31        |
| 7.5.      | Withdrawal.....  | 31        |
| 7.6.      | Termination.....   | 32        |
| 7.6.1.    | Termination.....   | 32        |
| 7.6.2.    | Cure for Potential Termination Event.....  | 32        |
| 7.6.3.    | Obligations Surviving Termination .....  | 32        |
| A.        | Surviving Obligations .....  | 32        |
| B.        | Treatment of Communications Related to Agreement .....                           | 32        |
| 7.7.      | Successors and Assigns.....  | 33        |
| 7.8.      | Joint Venture.....   | 33        |
| 7.9.      | Governing Law .....  | 33        |

|   |           |
|---|-----------|
| 7.9.1. Contractual Obligation.....  | 33        |
| 7.9.2. Regulatory Obligation.....   | 33        |
| 7.9.3. Reference to Statutes or Regulation.....   | 33        |
| 7.10. Elected Officials not to Benefit.....   | 33        |
| 7.11. Entire Understanding .....  | 34        |
| <b>PART II. KLAMATH HYDROELECTRIC PROJECT .....</b>   | <b>34</b> |
| <b>8. General.....</b>  | <b>34</b> |
| 8.1. Support for Hydroelectric Settlement .....   | 34        |
| 8.2. Relationship between Restoration Agreement and Hydroelectric Settlement .....                      | 34        |
| 8.2.1. Concurrent Execution .....   | 34        |
| 8.2.2. Coordinated Implementation .....   | 34        |
| <b>PART III. FISHERIES PROGRAM.....</b>   | <b>34</b> |
| <b>9. Overview of Klamath Basin Fisheries Restoration, Reintroduction, and Monitoring Program .....</b> | <b>34</b> |
| 9.1. Recitals.....  | 35        |
| 9.1.1. Blockage of Passage .....  | 35        |
| 9.1.2. Other Harmful Conditions .....   | 35        |
| 9.1.3. Benefits of Reintroduction.....  | 35        |
| 9.1.4. Benefits of Restoration .....  | 35        |
| 9.2. Program Elements.....  | 35        |
| 9.2.1. Purposes .....   | 35        |
| 9.2.2. Approaches .....   | 36        |
| 9.2.3. Geographic Scope .....   | 36        |
| 9.2.4. Plans.....   | 36        |
| A. Plan Coordination .....  | 36        |
| B. Mitigation of Adverse Impacts .....  | 37        |
| 9.2.5. Use of Best Available Science.....   | 37        |
| 9.2.6. Fisheries Program Goals.....   | 37        |
| 9.3. Funding .....  | 37        |
| <b>10. Fisheries Restoration Plan .....</b>   | <b>38</b> |
| 10.1. Phase I of the Fisheries Restoration Plan.....  | 38        |
| 10.1.1. Preparation .....   | 38        |
| 10.1.2. Plan Elements.....  | 38        |
| 10.2. Phase II of the Fisheries Restoration Plan .....  | 39        |
| 10.2.1. Preparation and Adoption .....  | 39        |
| 10.2.2. Plan Elements.....  | 39        |
| 10.2.3. Plan Revision .....   | 39        |
| <b>11. Fisheries Reintroduction and Management Plan.....</b>  | <b>39</b> |
| 11.1. Oregon Wildlife Policy .....  | 40        |
| 11.1.1. General Policy.....   | 40        |
| 11.1.2. Amended Klamath Policy .....  | 40        |
| A. Goal: Self-Sustaining Populations of Anadromous Fish .....   | 40        |

|            |  |           |
|------------|--|-----------|
| B.         | Fish Plans .....   | 40        |
| C.         | Policies .....   | 40        |
| 11.2.      | Oregon Fisheries Reintroduction and Management Plans.....                          | 41        |
| 11.2.1.    | Preparation and Adoption .....   | 41        |
| 11.2.2.    | Elements.....  | 42        |
| A.         | Schedule.....  | 42        |
| B.         | Lost River.....  | 43        |
| 11.3.      | Oregon Implementation .....  | 43        |
| 11.3.1.    | Implementation of Phase I Reintroduction .....                                     | 43        |
| A.         | Above Upper Klamath Lake .....   | 43        |
| B.         | Below Upper Klamath Lake .....   | 43        |
| C.         | Sport and Commercial Fisheries .....   | 43        |
| D.         | Research.....  | 44        |
| 11.3.2.    | Implementation of Phase II Reintroduction.....                                     | 44        |
| 11.4.      | California Fisheries Reintroduction Plan.....                                      | 44        |
| 11.4.1.    | General.....   | 44        |
| 11.4.2.    | Reintroduction Plan .....  | 45        |
| 11.4.3.    | Adaptive Management.....   | 45        |
| 11.4.4.    | Conservation Hatchery.....   | 45        |
| <b>12.</b> | <b>Fisheries Monitoring Plan.....</b>  | <b>46</b> |
| 12.1.      | Preparation and Adoption .....   | 46        |
| 12.2.      | Fisheries Monitoring Plan.....   | 46        |
| 12.2.1.    | Status and Trends.....   | 46        |
| 12.2.2.    | Data Related to Environmental Water .....  | 46        |
| 12.2.3.    | Effectiveness Monitoring.....  | 47        |
| 12.2.4.    | Limiting Factors.....  | 47        |
| 12.2.5.    | Data System .....  | 47        |
| 12.2.6.    | Specification of Responsibilities.....   | 47        |
| 12.2.7.    | Periodic Review Regarding Fisheries Outcomes.....                                  | 47        |
| A.         | Review .....   | 47        |
| B.         | Responsive Actions.....  | 48        |
| C.         | Further Extension of the Agreement.....  | 48        |
| <b>13.</b> | <b>Funding and Implementation .....</b>  | <b>48</b> |
| 13.1.      | Funding Program Planning in 2010 .....   | 48        |
| 13.2.      | Annual Funding Review .....  | 48        |
| 13.3.      | Program Funding Allocation Prior to Klamath Basin Advisory Council<br>Charter..... | 49        |
| 13.3.1.    | Funding Proposals from Planning Groups.....  | 49        |
| 13.3.2.    | Implementation by Funding Entities.....  | 49        |
| 13.4.      | Annual Reporting.....  | 49        |
| 13.5.      | Funding Process Subsequent to Council Charter.....                                 | 49        |
|            | <b>PART IV. WATER RESOURCES PROGRAM.....</b>                                       | <b>50</b> |
| <b>14.</b> | <b>Overview of Water Resources Program .....</b>                                   | <b>50</b> |
| 14.1.      | Elements.....  | 50        |

|            |   |           |
|------------|---|-----------|
| 14.2.      | Consistency with Applicable Law .....   | 50        |
| 14.3.      | Funding .....   | 50        |
| 14.3.1.    | On-Project Plan and Power for Water Management Fund .....                           | 50        |
| 14.3.2.    | Water Use Retirement Fund and Off-Project Reliance Fund .....                       | 51        |
| 14.3.3.    | The Klamath Drought Fund .....  | 51        |
| <b>15.</b> | <b>On-Project Water Users Program.....</b>  | <b>52</b> |
| 15.1.      | Water Diversions for Klamath Reclamation Project and Klamath Basin                  |           |
|            | National Wildlife Refuges .....   | 52        |
| 15.1.1.    | Klamath Reclamation Project .....   | 52        |
| A.         | Collaboration on Irrigation Diversions and Environmental<br>Water Management .....  | 52        |
| i.         | Purpose and Scope .....   | 52        |
| ii.        | Obligations .....   | 53        |
| B.         | DIVERSION and DIVERSION Limitations .....   | 54        |
| i.         | DIVERSION .....   | 54        |
| ii.        | No Creation of Rights .....   | 54        |
| 15.1.2.    | Water Diversions for Tule Lake and Lower Klamath National Wildlife<br>Refuges ..... | 55        |
| A.         | Recitals.....   | 55        |
| i.         | National Wildlife Refuges Generally.....  | 55        |
| ii.        | TID Operations and the Refuges.....   | 55        |
| iii.       | KDD Operations and LKNWR.....   | 56        |
| iv.        | Delivery of Water to Wildlife Refuges .....   | 56        |
| B.         | Purpose and Scope .....   | 56        |
| i.         | TLNWR .....   | 56        |
| ii.        | LKNWR.....  | 57        |
| C.         | Date Section 15.1.2 Becomes Effective and Support for<br>Agreement Terms.....       | 57        |
| D.         | Klamath Reclamation Project Diversions .....  | 57        |
| i.         | Water for TLNWR and LKNWR Lease Lands .....   | 58        |
| ii.        | Refuge Water Allocations.....   | 58        |
| iii.       | Measurement Points.....   | 58        |
| iv.        | Conveyance Losses .....   | 58        |
| E.         | Refuge Allocation .....   | 59        |
| i.         | Summer Period.....  | 59        |
| ii.        | Winter Period .....   | 59        |
| iii.       | Other Refuge Uses .....   | 60        |
| iv.        | Points of Measurement for Refuge Allocation .....                                   | 61        |
| F.         | Shortages.....  | 61        |
| i.         | Summer Period Shortages.....  | 61        |
| ii.        | Winter Period Shortage.....   | 62        |
| G.         | Delivery Facilities .....   | 63        |
| i.         | TID Water Deliveries.....   | 63        |
| ii.        | KDD Water Deliveries.....   | 63        |
| iii.       | North Canal Water Deliveries.....   | 64        |
| iv.        | On-Project Plan and Refuge Lease Lands .....  | 64        |

|       |         |  |    |
|-------|---------|--|----|
|       | v.      | Plan for General Parameters of Delivery of Refuge Allocation.....  | 64 |
|       | vi.     | Schedule for Deliveries of Refuge Allocation .....   | 64 |
|       | vii.    | North Canal as Point of Diversion .....  | 64 |
|       | H.      | Other .....  | 65 |
|       | i.      | Pass-Through of Excess Water .....   | 65 |
|       | ii.     | Determination of Passed-Through Excess Water .....   | 65 |
|       | iii.    | LKNWR Acquisition of Lands .....   | 65 |
|       | I.      | Contracts .....  | 65 |
|       | J.      | Interim Agreement .....  | 65 |
|       | K.      | Term and Effect of Section 15.1.2 .....  | 66 |
| 15.2. |         | On-Project Plan .....  | 66 |
|       | 15.2.1. | Purpose and Scope .....  | 66 |
|       | 15.2.2. | Development, Adoption, Implementation, and Administration.....   | 67 |
|       | A.      | Funding .....  | 67 |
|       | B.      | Schedule.....  | 68 |
|       | i.      | Development and Adoption .....   | 68 |
|       | ii.     | Implementation .....   | 68 |
|       | iii.    | Administration .....   | 68 |
|       | iv.     | Periodic Amendment .....   | 70 |
|       | 15.2.3. | Elements.....  | 70 |
|       | 15.2.4. | Measures Related to Groundwater.....   | 70 |
|       | A.      | Objective of No Adverse Impact .....   | 71 |
|       | i.      | Definition .....   | 71 |
|       | ii.     | Baseline for Determination of Adverse Impact .....   | 72 |
|       | B.      | Technical Investigation.....   | 72 |
|       | i.      | Purpose and Scope .....  | 72 |
|       | ii.     | Lead Agency .....  | 72 |
|       | iii.    | Funding for Investigation.....   | 73 |
|       | iv.     | Cooperation among Parties and Use of Results.....  | 73 |
|       | v.      | Periodic Amendment of Plan Based on Investigations and Monitoring.....   | 73 |
|       | vi.     | Costs Associated with Remedy for Adverse Impact or Other Modification of Plan .....  | 74 |
|       | vii.    | Further Consideration of Results of Investigation and Monitoring .....   | 75 |
|       | C.      | Existing Wells.....  | 75 |
|       | D.      | New Wells.....   | 75 |
|       | E.      | Use of Further Investigations Related to Fisheries .....   | 75 |
| 15.3. |         | Water Rights Assurances Related to Water Diversions to the Klamath Reclamation Project, the Klamath Basin Adjudication, The Klamath Tribes, the Three California Indian Tribes, and the United States as Trustee ..... | 76 |
|       | 15.3.1. | Assurances by the Klamath Reclamation Project Regarding Project Water.....   | 76 |
|       | A.      | Diversion Limitation .....   | 76 |
|       | B.      | Validation.....  | 77 |



|         |  |    |
|---------|--|----|
| C.      | Dedication .....   | 77 |
| D.      | Enforceability of Diversion Limitations .....  | 78 |
| E.      | No Evidence Supporting Loss of Water Right .....   | 78 |
| 15.3.2. | Assurances Regarding Tribal Water Rights.....  | 78 |
| A.      | Certain Klamath Tribal Water Rights Unaffected .....   | 78 |
| B.      | Resolution of Adjudication Contests Related to Klamath Tribal<br>Water Rights, and Related Commitments.....                          | 79 |
| i.      | Recitals.....  | 79 |
| ii.     | Adjudication Filings and Related Activities Based on<br>This Agreement.....  | 79 |
| iii.    | Non-Use of Findings and Judgment/Decree .....  | 82 |
| iv.     | Survival .....   | 83 |
| C.      | Tribal Rights Unresolved-Unquantified .....  | 83 |
| i.      | Become permanent and unconditional upon the<br>publication of the notice by the Secretary described in<br>Section 15.3.4.A; or ..... | 83 |
| ii.     | Terminate if the Secretary publishes the notice<br>described in Section 15.3.4.C. ....   | 83 |
| 15.3.3. | Assurances of Non-Interference with Klamath Reclamation Project<br>Diversions by the Klamath Tribes .....                            | 83 |
| 15.3.4. | Notice and Publication by the Secretary, and Related Actions .....   | 84 |
| A.      | Publication of Notice Making Assurances Final and Permanent...84   |    |
| B.      | Modified Basis for Notice Under Section 15.3.4.A.....  | 85 |
| C.      | Negative Notice and Prerequisites .....  | 85 |
| 15.3.5. | Relinquishment and Release of Claims Against the United States by<br>the Klamath Tribes.....   | 85 |
| A.      | Claims Relinquished and Released by the Klamath Tribes .....   | 85 |
| B.      | Reservation of Rights and Retention of Claims by the Klamath<br>Tribes .....   | 86 |
| C.      | Events that Must Occur Before the Klamath Tribes Relinquish<br>and Release Claims .....  | 87 |
| D.      | Tolling of Claims .....  | 88 |
| 15.3.6. | Assurances By and Between the Yurok Tribe and the United States .....  | 89 |
| A.      | Assurances by the Yurok Tribe.....   | 89 |
| B.      | Relinquishment and Release of Claims Against the United<br>States by the Yurok Tribe .....   | 89 |
| i.      | Claims Relinquished and Released by the Yurok Tribe ....   | 89 |
| ii.     | Reservation of Rights and Retention of Claims by the<br>Yurok Tribe.....   | 90 |
| iii.    | Events that Must Occur Before the Yurok Tribe<br>Relinquishes and Releases Claims.....   | 91 |
| iv.     | Tolling of Claims .....  | 92 |
| 15.3.7. | Assurances By and Between the Karuk Tribe and the United States .....  | 93 |
| A.      | Assurances by the Karuk Tribe.....   | 93 |
| B.      | Relinquishment and Release of Claims Against the United<br>States by the Karuk Tribe .....   | 93 |

|            |  |            |
|------------|--|------------|
| i.         | Claims Relinquished and Released by the Karuk Tribe ....   | 93         |
| ii.        | Reservation of Rights and Retention of Claims by the<br>Karuk Tribe.....   | 94         |
| iii.       | Events that Must Occur Before the Karuk Tribe<br>Relinquishes and Releases Claims.....                                   | 95         |
| iv.        | Tolling of Claims .....  | 96         |
| 15.3.8.    | Interim Assurances by All of the Tribes and Schedule for<br>Enforceability of Diversion Limitations .....                | 97         |
| 15.3.9.    | Assurances by the United States .....  | 98         |
| 15.3.10.   | Inapplicability of Section 1.6; Consistency .....  | 99         |
| 15.4.      | Other Terms Related to Wildlife Refuges, Klamath Reclamation Project<br>Operations and Agriculture.....                  | 99         |
| 15.4.1.    | Purpose.....   | 99         |
| 15.4.2.    | D Pumping Plant.....   | 99         |
| A.         | D Pumping Plant Costs .....  | 99         |
| B.         | Nonpayment of D Pumping Plant Costs .....  | 100        |
| C.         | Term and Effect of Section 15.4.2.....   | 100        |
| 15.4.3.    | Wildlife and Agriculture on Wildlife Refuge Lease Lands and Other<br>Klamath Reclamation Project Agricultural Lands..... | 100        |
| A.         | Refuge Lease Lands.....  | 100        |
| B.         | Non-Federal Lands.....   | 100        |
| 15.4.4.    | Disposition of Refuge Lease Land Revenues .....  | 100        |
| A.         | Past Net Revenues from Leasing of Refuge Lands .....   | 100        |
| B.         | Future Net Revenues from Leasing of Refuge Lands.....  | 102        |
| C.         | Operation and Maintenance .....  | 102        |
| D.         | Waivers .....  | 102        |
| 15.4.5.    | Terms Regarding Operations of Certain Klamath Reclamation Project<br>Facilities.....                                     | 103        |
| A.         | Facilities Historically Operated by PacifiCorp.....  | 103        |
| i.         | Recitals.....  | 103        |
| ii.        | Link River Dam .....   | 103        |
| iii.       | Keno Dam and Development.....  | 103        |
| iv.        | Assignment .....   | 104        |
| B.         | Conveyance.....  | 104        |
| C.         | Survival.....  | 104        |
| 15.4.6.    | Provisions of Title II of Public Law 97-293 .....  | 104        |
| 15.4.7.    | Consultation .....   | 104        |
| <b>16.</b> | <b>Off-Project Water Program.....</b>  | <b>105</b> |
| 16.1.      | Scope and Purposes.....  | 105        |
| 16.2.      | Resolving Off-Project Water Use Issues .....   | 105        |
| 16.2.1.    | Off-Project Water Settlement .....   | 105        |
| A.         | Support for OPWAS .....  | 105        |
| B.         | Reciprocal Assurances Approach to OPWAS .....  | 105        |
| C.         | Water Use Retirement Program within the OPWAS .....  | 106        |
| D.         | Schedule for Negotiation .....   | 106        |
| E.         | Participation by Parties .....   | 106        |

|            |  |            |
|------------|--|------------|
| F.         | Procedures in the Klamath Basin Adjudication .....           | 106        |
| i.         | Stay .....   | 106        |
| ii.        | Filing the OPWAS .....                                       | 107        |
| iii.       | Failure or Incomplete Filing .....                           | 107        |
| 16.2.2.    | Water Use Retirement Program .....                           | 107        |
| A.         | Upper Basin Team .....                                       | 107        |
| i.         | Upper Basin Team Function .....                              | 107        |
| ii.        | UBT Membership .....   | 108        |
| iii.       | Federal Lead Party .....                                     | 108        |
| iv.        | Decision-Making and Oversight of UBT .....                   | 108        |
| B.         | Water Use Retirement Program Purpose .....                   | 108        |
| C.         | WURP Program Area .....                                      | 109        |
| D.         | Term of the WURP .....                                       | 109        |
| E.         | Measures to Achieve WURP Purpose .....                       | 109        |
| F.         | Determination of Achievement of WURP Purpose .....           | 110        |
| G.         | Voluntary Participation .....                                | 110        |
| H.         | Compensation for Voluntary Participation .....               | 110        |
| I.         | Protection of Acquired Rights .....                          | 111        |
| J.         | OWRD Policy .....  | 111        |
| 16.3.      | Fisheries Habitat Improvement Program .....                  | 111        |
| 16.3.1.    | Purpose .....  | 111        |
| 16.3.2.    | Program Elements .....                                       | 111        |
| <b>17.</b> | <b>Power for Water Management Program .....</b>              | <b>111</b> |
| 17.1.      | Purposes .....   | 111        |
| 17.2.      | Program Elements and Funding .....                           | 112        |
| 17.3.      | Eligibility .....  | 112        |
| 17.3.1.    | On-Project Power Users .....                                 | 112        |
| A.         | General .....  | 112        |
| B.         | Ineligibility .....  | 112        |
| 17.3.2.    | Off-Project Power Users .....                                | 113        |
| 17.3.3.    | Notification .....   | 114        |
| 17.4.      | Program Management .....                                     | 114        |
| 17.4.1.    | Management Entity .....                                      | 114        |
| 17.4.2.    | Authorities .....  | 115        |
| 17.4.3.    | Guidelines for Power for Water Management Program .....      | 115        |
| 17.4.4.    | Administration .....   | 116        |
| A.         | Methods for Distributing Funds to Eligible Power Users ..... | 116        |
| B.         | Independent Entity .....                                     | 116        |
| 17.4.5.    | Reporting .....  | 116        |
| 17.4.6.    | Regulatory Approvals .....                                   | 116        |
| 17.4.7.    | Net Metering .....   | 116        |
| 17.5.      | Interim Power Program .....                                  | 117        |
| 17.5.1.    | Purpose .....  | 117        |
| 17.5.2.    | Duration .....   | 117        |
| 17.5.3.    | Implementation .....   | 117        |
| 17.6.      | Federal Power .....  | 117        |

|            |   |            |
|------------|---|------------|
| 17.7.      | Renewable Power Program.....  | 117        |
| 17.7.1.    | Program Purpose.....  | 117        |
| 17.7.2.    | Financial and Engineering Plan .....  | 118        |
| A.         | General.....  | 118        |
| B.         | Cooperative Evaluation.....   | 118        |
| 17.7.3.    | Funds for Investments in Renewable Energy; Use of Project Revenues.....                       | 119        |
| 17.7.4.    | Conservation and Efficiency.....  | 120        |
| <b>18.</b> | <b>Additional Water Conservation and Storage.....</b>   | <b>120</b> |
| 18.1.      | General.....  | 120        |
| 18.2.      | Measures to Restore Upper Klamath Lake Water Storage and Reconnect<br>Historic Lake Bed ..... | 120        |
| 18.2.1.    | Williamson River Delta .....  | 120        |
| 18.2.2.    | Agency Lake Ranch and Barnes Ranch.....   | 121        |
| A.         | Recital .....   | 121        |
| B.         | Transfer of Lands.....  | 121        |
| C.         | Reconnection.....   | 121        |
| D.         | Pumped Storage Operations.....  | 122        |
| E.         | Management After Cessation of Pumped Storage .....  | 122        |
| 18.2.3.    | Wood River Wetland Restoration Project.....   | 122        |
| 18.2.4.    | Off-Project Water Use Retirements above Upper Klamath Lake.....                               | 123        |
| 18.2.5.    | Alternatives .....  | 123        |
| 18.2.6.    | Additional Conservation .....   | 123        |
| 18.3.      | Future Storage Opportunities .....  | 123        |
| 18.3.1.    | Technical Investigation.....  | 123        |
| 18.3.2.    | Use of Additional Storage.....  | 123        |
| A.         | Reservations.....   | 123        |
| B.         | Support.....  | 124        |
| <b>19.</b> | <b>Drought, Climate Change, and Emergency.....</b>  | <b>124</b> |
| 19.1.      | Purpose and Scope .....   | 124        |
| 19.2.      | Drought .....   | 125        |
| 19.2.1.    | Lead Entity to Develop Drought Plan.....  | 125        |
| 19.2.2.    | Content of the Plan.....  | 125        |
| 19.2.3.    | Preparation, Adoption, and Approval of the Drought Plan .....                                 | 128        |
| 19.2.4.    | Drought or Extreme Drought Declaration .....  | 130        |
| 19.2.5.    | Implementation and Enforcement.....   | 130        |
| 19.3.      | Emergency .....   | 131        |
| 19.3.1.    | Definition of Emergency.....  | 131        |
| 19.3.2.    | Lead Agencies.....  | 131        |
| 19.3.3.    | Content of the Plan.....  | 131        |
| 19.3.4.    | Schedule.....   | 131        |
| 19.3.5.    | Response Procedures .....   | 131        |
| A.         | Notice.....   | 131        |
| B.         | Emergency Requiring Immediate Response.....   | 132        |
| C.         | Response .....  | 132        |
| D.         | Dispute Resolution.....   | 132        |

|            |  |            |
|------------|--|------------|
| 19.3.6.    | Permissible Responses .....  | 132        |
| 19.4.      | Climate Change.....  | 133        |
| 19.4.1.    | Purpose.....   | 133        |
| 19.4.2.    | Technical Assessment.....  | 133        |
| 19.4.3.    | Schedule.....  | 133        |
| 19.4.4.    | Use of Results .....   | 133        |
| 19.4.5.    | Response .....   | 133        |
| 19.5.      | Off-Project Reliance Program.....  | 134        |
| 19.5.1.    | Purpose.....   | 134        |
| 19.5.2.    | Elements of the Off-Project Reliance Program .....   | 134        |
| 19.5.3.    | Eligibility .....  | 136        |
| <b>20.</b> | <b>Environmental Water.....</b>  | <b>136</b> |
| 20.1.      | Purpose and Scope .....  | 136        |
| 20.2.      | Measures to Produce Environmental Water .....  | 136        |
| 20.3.      | Managed Environmental Water .....  | 138        |
| 20.3.1.    | Water Rights and other Legal Requirements .....  | 138        |
| 20.3.2.    | Coordination and Oversight.....  | 138        |
| 20.3.3.    | Real-Time Management.....  | 138        |
| 20.4.      | Interim Flow and Lake Level Program Pending Implementation of Irrigation<br>Plans.....                     | 138        |
| 20.4.1.    | Purpose.....   | 138        |
| 20.4.2.    | Definition .....   | 139        |
| 20.4.3.    | Interim Program.....   | 139        |
| A.         | The Role of Technical Advisory Team.....   | 139        |
| 20.4.4.    | Expenditures .....   | 140        |
| 20.4.5.    | Integration of Programs and Reduction and Termination of<br>Expenditures .....                             | 140        |
| A.         | Integration of Planning and Implementation .....   | 140        |
| B.         | Termination of Interim Program.....  | 141        |
| 20.5.      | Protection of Environmental Water .....  | 141        |
| 20.5.1.    | Not Available for Consumptive Use.....   | 141        |
| 20.5.2.    | Oregon Protections.....  | 141        |
| A.         | Existing Instream Water Right Applications .....   | 141        |
| B.         | New Instream Water Right Applications.....   | 142        |
| C.         | Existing Instream Water Right Claims of Various Federal<br>Agencies.....                                   | 142        |
| D.         | Conversion of Existing PacifiCorp Water Rights to Instream<br>Water Rights .....                           | 142        |
| E.         | Identification of Needs and Priorities for Stream Flow<br>Restoration for the Klamath Basin in Oregon..... | 142        |
| 20.5.3.    | California Protections .....   | 143        |
| A.         | Dedication of Instream Flows.....  | 143        |
| 20.5.4.    | Additional Measures to Protect Environmental Benefits of Flows .....                                       | 143        |
| A.         | Water Quality Generally .....  | 143        |
| B.         | State TMDLs.....   | 143        |
| C.         | Out-of-Basin Water Transfers.....  | 143        |

**PART V. REGULATORY ASSURANCES .....143**

**21. Overview of Regulatory Assurances for Fisheries and Water Resources Programs143**

21.1. Consequences of Reintroduction .....143

    21.1.1. Recitals.....143

        A. Consequences on Land and Water Users.....143

        B. Interests of Land and Water Users.....144

        C. Resulting Commitments.....144

    21.1.2. Avoidance or Minimization of Adverse Impact .....144

    21.1.3. Fish Entrainment Alleviation at Klamath Reclamation Project

        Diversions and Related Actions.....145

        A. Fish Entrainment Alleviation.....145

        B. Related Actions.....145

        C. Coordination with Fisheries Program .....145

    21.1.4. Unforeseen Circumstances.....146

        A. Unforeseen Circumstances Affecting Commitments.....146

        B. Meet and Confer Procedure .....146

21.2. Consequences of Restoration.....146

21.3. Consequences of Water Deliveries .....147

    21.3.1. Changed Circumstances.....147

        A. Obligation of Federal and State Public Agency Parties.....147

            i. Widest Reasonable Scope of Evaluations for Purpose of

                Regulatory Approvals of Diversion Limitations.....147

            ii. Considerations in Regulatory Approvals of Diversion

                Limitations .....148

            iii. Applicable Law for Regulatory Approvals of Diversion

                Limitations .....148

        B. Obligations of Other Parties.....148

            i. Recital .....148

            ii. Support for Regulatory Approvals of Diversion

                Limitations .....149

            iii. Assurances Before Diversion Limitations Are In Effect .149

            iv. Assurances Once Diversions Limitations Are In Effect ..150

            v. Concurrent Process in Emergencies.....152

            vi. Limitations .....152

21.4. Reservations.....152

    21.4.1. Reservation of Rights by the Tribes.....152

    21.4.2. Water Rights .....152

    21.4.3. No Implied Existence of Regulatory Authority .....153

21.5. Funding .....153

**22. Federal Endangered Species Act .....153**

22.1. Section 7 Consultation .....153

    22.1.1. Measures to Increase Water Storage in Upper Klamath Lake .....153

    22.1.2. Water Deliveries to Klamath Reclamation Project.....153

    22.1.3. NMFS and FWS Biological Opinions .....154

22.2. Section 10 Incidental Take Permit.....154

|            |  |            |
|------------|--|------------|
| 22.2.1.    | Section 10(a)(1)(B) Permit for Listed and Unlisted Species .....   | 154        |
| 22.2.2.    | General Conservation Plan for Use in Application for Section<br>10(a)(1)(B) Permit .....                         | 155        |
| A.         | Development of a General Conservation Plan.....  | 155        |
| B.         | Standards for the General Conservation Plan .....  | 155        |
| C.         | Covered Activities and Potential Measures for the General<br>Conservation Plan .....                             | 156        |
| 22.2.3.    | Alternative to Develop Habitat Conservation Plans for Use in<br>Application for Section 10(a)(1)(B) Permit ..... | 156        |
| 22.2.4.    | Alternative to Apply for Section 10(a)(1)(A) Permit .....  | 156        |
| 22.2.5.    | Participation of Other Parties and the Public .....  | 157        |
| 22.2.6.    | Changed Circumstances.....   | 157        |
| 22.2.7.    | Funding .....  | 157        |
| 22.2.8.    | Duty to Support.....   | 157        |
| 22.2.9.    | Dispute Resolution.....  | 158        |
| 22.3.      | Integration of Section 7 and Section 10 Processes .....  | 158        |
| 22.4.      | Reconsideration of Limitations on Diversions .....   | 158        |
| 22.5.      | Reservation .....  | 159        |
| 22.6.      | Integration of Essential Fish Habitat Consultations.....   | 159        |
| <b>23.</b> | <b>Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act.....</b>                                   | <b>159</b> |
| 23.1.      | Applicants .....   | 159        |
| 23.2.      | Actions by FWS.....  | 159        |
| 23.3.      | Reservation of Authority.....  | 160        |
| <b>24.</b> | <b>California Laws.....</b>  | <b>160</b> |
| 24.1.      | California Endangered Species Act .....  | 160        |
| 24.1.1.    | Application.....   | 160        |
| 24.1.2.    | Coordination .....   | 160        |
| 24.1.3.    | Geographic Scope .....   | 161        |
| 24.2.      | California Fully Protected Species.....  | 161        |
| 24.2.1.    | Recital .....  | 161        |
| 24.2.2.    | New Legislation .....  | 161        |
| 24.3.      | Reservation of Authority.....  | 161        |
| <b>25.</b> | <b>Oregon Laws.....</b>  | <b>161</b> |
| 25.1.      | Water Quality.....   | 161        |
| 25.1.1.    | New Designated Use.....  | 161        |
| 25.1.2.    | Agriculture .....  | 162        |
| 25.1.3.    | Forestry .....   | 162        |
| 25.1.4.    | Alternative Measures .....   | 162        |
| 25.1.5.    | Existing Obligations.....  | 162        |
| 25.2.      | Fish Passage and Screening .....   | 162        |
| 25.3.      | Reservations .....   | 162        |

|  |            |
|--|------------|
| <b>PART VI. COUNTIES' MITIGATION AND BENEFITS PROGRAM.....</b>                 | <b>163</b> |
| <b>26. Overview of Counties' Impacts Mitigation and Benefits Program .....</b> | <b>163</b> |
| 26.1. Recitals.....  | 163        |
| 26.2. General Obligations .....  | 163        |
| 26.3. Purposes .....   | 164        |
| 26.4. Funding .....  | 164        |
| <b>27. Klamath County.....</b>   | <b>164</b> |
| 27.1. Recitals.....  | 164        |
| 27.2. Adoption .....   | 164        |
| 27.3. Approach.....  | 164        |
| 27.3.1. Economic Development.....  | 164        |
| 27.3.2. Property Taxes .....   | 165        |
| 27.3.3. Other .....  | 165        |
| <b>28. Siskiyou County .....</b>   | <b>165</b> |
| 28.1. Funding .....  | 165        |
| 28.2. Consultation .....   | 166        |
| 28.3. Fishing Closure .....  | 166        |
| 28.4. Water Right Claim. ....  | 166        |
| 28.5. Implementation Generally .....   | 166        |
| 28.6. Certain Claims .....   | 166        |
| <b>29. Humboldt County .....</b>   | <b>167</b> |
| 29.1. Funding .....  | 167        |
| 29.2. Consultation .....   | 167        |
| 29.3. Fishing Closure .....  | 167        |
| 29.4. Certain Claims .....   | 168        |
| <b>30. Del Norte County .....</b>  | <b>168</b> |
| 30.1. Funding .....  | 168        |
| 30.2. Consultation .....   | 168        |
| 30.3. Fishing Closure .....  | 168        |
| 30.4. Certain Claims .....   | 169        |
| <b>PART VII. TRIBAL PROGRAM .....</b>  | <b>169</b> |
| <b>31. Overview of Tribal Program.....</b>                                     | <b>169</b> |
| 31.1. Recitals.....  | 169        |
| 31.2. Purposes .....   | 169        |
| 31.3. Funding .....  | 170        |
| <b>32. Tribal Participation in Fisheries and Other Programs.....</b>           | <b>170</b> |
| 32.1. Purpose.....   | 170        |
| 32.2. Term of Funding .....  | 170        |
| 32.3. Other Funding .....  | 170        |



|  |   |            |
|--|---|------------|
| <b>33.</b>   | <b>Long-term Economic Revitalization Projects .....</b> | <b>170</b> |
| 33.1.  | Other Funds.....  | 170        |
| 33.2.  | Mazama Project .....                                    | 170        |
| 33.2.1.  | Acquisition.....  | 170        |
| 33.2.2.  | Withdrawal.....   | 171        |
| 33.2.3.  | Sections Surviving Withdrawal .....                     | 171        |
| <b>34.</b>   | <b>Klamath Tribes' Interim Fishing Site.....</b>        | <b>171</b> |
| 34.1.  | Petition .....  | 171        |
| 34.2.  | Alternative Procedure .....                             | 171        |
| 34.3.  | No Adverse Impact .....                                 | 172        |
| <b>PART VIII. EXECUTION OF AGREEMENT .....</b>   |   | <b>172</b> |
| <b>35.</b>   | <b>Authority.....</b>                                   | <b>172</b> |
| 35.1.  | General.....  | 172        |
| 35.2.  | Public Agency Parties.....                              | 172        |
| <b>36.</b>   | <b>Counterparts .....</b>                               | <b>172</b> |
| <b>37.</b>   | <b>Concurrent Execution .....</b>                       | <b>172</b> |
| <b>38.</b>   | <b>New Parties .....</b>                                | <b>172</b> |
| <b>Appendix A Elements for the Proposed Federal Legislation.....</b>   |   | <b>A.1</b> |
| <b>Appendix B Proposed California and Oregon State Legislation.....</b>  |   | <b>B.1</b> |
| <b>Appendix B-1 Proposed CEQA Legislation Language .....</b>   |   | <b>B.2</b> |
| <b>Appendix B-2 California Water Bond Legislation .....</b>  |   | <b>B.3</b> |
| <b>Appendix B-3 Proposed Oregon Legislation for 2011 Legislation Session.....</b>                                      |   | <b>B.4</b> |
| <b>Appendix C Schedule and Budget for Implementation of Agreement .....</b>  |   | <b>C.1</b> |
| <b>Appendix C-1 Schedule for Implementation of Agreement.....</b>  |   | <b>C.2</b> |
| <b>Appendix C-2 Budget for Implementation of Agreement.....</b>  |   | <b>C.6</b> |
| <b>Appendix D Coordination and Oversight of the Klamath Basin Restoration Agreement .D.1</b>                           |   |            |
| <b>Appendix D-1 Klamath Basin Coordinating and Advisory Councils and Subgroups .....</b>                               |   | <b>D.2</b> |
| <b>Appendix D-2 Technical Advisory Team, Managed Environmental Water, and Upper Basin Team .....</b>                   |   | <b>D.9</b> |
| <b>Appendix E Implementing Documents Related to Klamath Reclamation Project and other Water Resource Matters .....</b> |   | <b>E.1</b> |
| <b>Appendix E-1 Klamath Reclamation Project Diversion Limitations.....</b>   |   | <b>E.2</b> |

**Appendix E-2 Groundwater Investigation Scope of Work Prepared by the United States Geological Survey (USGS) .....E.39**

**Appendix E-3 Instream Water Right Applications and Protests .....E.47**

**Appendix E-4 Federal Instream Water Right Claims Not to be Opposed .....E.49**

**Appendix E-5 Simulated Klamath River Flows and Upper Klamath Lake Levels.....E.51**

**Appendix E-6 Klamath Basin Adjudication Case 282 and 286 Documents .....E.6.1**

**Appendix F Authorized Representatives of the Parties ..... F.1**

**PART I.**  
**GENERAL PROVISIONS**

**1. Introduction**

**1.1. Parties**

**1.1.1. Non-Federal Parties**

This “Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities,” referred to throughout this document as the “Klamath Basin Restoration Agreement” or the “Agreement” is made and entered into by and among the following Non-Federal Parties who sign this Agreement within 60 days of the Effective Date.

**State of California**

California Department of Fish and Game  
California Natural Resources Agency

**State of Oregon**

Oregon Department of Environmental Quality  
Oregon Department of Fish and Wildlife  
Oregon Water Resources Department

**Tribes**

Karuk Tribe  
Klamath Tribes  
Yurok Tribe

**Counties**

Del Norte County, California  
Humboldt County, California  
Klamath County, Oregon  
Siskiyou County, California

**Parties Related to Klamath Reclamation Project**

Ady District Improvement Company  
Collins Products, LLC  
Enterprise Irrigation District  
Don Johnston & Son  
Inter-County Properties Co, which acquired title as Inter-County Title Company  
Klamath Irrigation District

Klamath Drainage District  
Klamath Basin Improvement District  
Klamath Water Users Association  
Klamath Water and Power Agency  
Bradley S. Luscombe  
Malin Irrigation District  
Midland District Improvement Company  
Modoc Lumber Company  
Pine Grove Irrigation District  
Pioneer District Improvement Company  
Plevna District Improvement Company  
Poe Valley Improvement District  
Reames Golf and Country Club  
Shasta View Irrigation District  
Sunnyside Irrigation District  
Westside Improvement District #4  
Tulelake Irrigation District  
Van Brimmer Ditch Company  
Randolph and Jane Walthall 1995 Trust  
Westside Improvement District #4  
Randy Walthall and Inter County Title Company  
Winema Hunting Lodge, Inc.

### **Upper Klamath Irrigators**

Klamath Off-Project Water Users Association  
Upper Klamath Water Users Association

### **Other Organizations**

American Rivers  
California Trout  
Friends of the River  
Institute for Fisheries Resources  
National Center for Conservation Science and Policy  
Northern California/Nevada Council Federation of Fly Fishers  
Pacific Coast Federation of Fishermen's Associations  
Salmon River Restoration Council  
Trout Unlimited

#### **1.1.2. Federal Agencies as Parties**

Prior to the enactment of Authorizing Legislation, neither the United States nor any of its agencies, officers, or employees shall be a Party to this Agreement, or shall be required to implement any obligation under this Agreement. The Non-Federal Parties execute the Agreement having received separate letters from the Department of the Interior, the National Marine Fisheries Service, and the

Department of Agriculture, expressing their intent to take actions consistent with this Agreement to the extent such actions are consistent with the agency's existing legal authorities and appropriations are available for such purposes. Upon enactment of Authorizing Legislation that authorizes and directs federal agencies to become parties to this Agreement, the following agencies of the United States ("Federal Agency Parties") shall become Parties to this Agreement:

National Marine Fisheries Service;  
United States Department of Agriculture, Forest Service; and  
United States Department of the Interior, including Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, and Fish and Wildlife Service.

Prior to any Federal agency becoming a Party to this Agreement as described above, whenever this Agreement attributes an action to a Federal agency, that attribution states an expectation of the Non-Federal Parties, rather than an obligation of the Federal agency under this Agreement.

### **1.1.3. Addition of Other Parties**

Sixty days after the Effective Date, other entities may subsequently become Parties by following the procedures established in Section 7.2.2.

## **1.2. General Recitals**

### **1.2.1. Klamath Hydroelectric Project**

The Klamath Hydroelectric Project (FERC No. 2082), located on the Klamath River and its tributaries, blocks the upstream passage of anadromous and other fish at River Mile 195 and has other adverse impacts as a result of flow regulation. The Klamath Hydroelectric Settlement Agreement (Hydroelectric Settlement) establishes a process for potential Facilities Removal and operation of the Hydroelectric Project until that time.

### **1.2.2. Klamath Reclamation Project and Other Irrigation Deliveries**

The Parties enter into this Agreement to resolve longstanding disputes between them regarding the amounts, timing, and other conditions of diversion and delivery of water for irrigation, National Wildlife Refuges, and related uses within the Klamath Reclamation Project and by non-federal entities in the Upper Klamath Basin regarding flows and lake levels that support Fish Species and wildlife. The resolution achieved here is intended to protect the sustainability of the agricultural uses and communities along with public and trust resources.

### **1.2.3. Sustainable Tribal Communities**

Tribes have lived in the Klamath River Basin since time immemorial and are expected to continue to do so using sustainable resource-based economies. There

are tribal fishing rights in various locations that have associated water rights for the fish to propagate and produce sufficient numbers for harvest. The Tribes, irrigators, and the United States have differed in administrative and judicial settings over the amounts of water needed for fish. This Agreement seeks to resolve these substantial differences and also to provide the Tribes with both sustainable natural resources and sustainable communities.

### **1.3. Goals of the Agreement**

The Agreement is intended to result in effective and durable solutions which: (i) restore and sustain natural production and provide for Full Participation in Harvest Opportunities of Fish Species throughout the Klamath Basin; (ii) establish reliable water and power supplies which sustain agricultural uses and communities and National Wildlife Refuges; (iii) contribute to the public welfare and the sustainability of all Klamath Basin communities through these and other measures provided herein to resolve the disputes described in Section 1.2.

### **1.4. Structure of Agreement**

The Agreement consists of eight parts.

Part I (Sections 1 - 7) states general provisions. These include the purpose of the Agreement, the Parties' obligations to support and implement, funding, dispute resolution, coordination and oversight, and other general provisions.

Part II (Section 8) states the Parties' obligations to support the Hydroelectric Settlement. The Hydroelectric Settlement establishes a process for potential Facilities Removal and operation of the Hydroelectric Project until that time.

Part III (Sections 9 - 13) states the Fisheries Restoration, Reintroduction, and Monitoring Program. This will contribute to the sustainability and robust harvestable surplus of anadromous and other fisheries throughout the Klamath Basin.

Part IV (Sections 14 - 20) states the Water Resources Program. This consists of schedules, plans, and other provisions to substantially change the management of delivered water supply for irrigation and related uses in the Klamath Reclamation Project, Upper Klamath Basin, and National Wildlife Refuges. Additionally, it addresses other matters related to the Klamath Reclamation Project and the National Wildlife Refuges. It also describes the Power for Water Management Program to provide power security for the eligible Power Users and for the National Wildlife Refuges through the use of conservation and efficiency improvements as well as new renewable power generation. This Part also includes additional water conservation and storage provisions, the preparation of the Drought Plan, provisions for Climate Change, and management of Environmental Water.

Part V (Sections 21 – 25) states the regulatory Assurances under the federal Endangered Species Act and other laws, related to the performance of the Fisheries and Water Resources Programs.

Part VI (Sections 26 – 30) states the Counties’ Impacts Mitigation and Benefits Program. This will assure that the implementation of the Hydroelectric Settlement and the performance of obligations under this Agreement will occur in a manner that reflects the interests of Klamath County, Oregon; Del Norte, Humboldt, and Siskiyou Counties, California and their residents.

Part VII (Sections 31 - 34) states the Tribal Program. This will assure that the implementation and the performance of obligations under this Agreement will occur in a manner that benefits the interests of the Karuk Tribe, Yurok Tribe, and Klamath Tribes and their members.

Part VIII (Sections 35 – 38) provides for execution of the Agreement.

The Appendices are certain documents which implement the Agreement.

## **1.5. Effectiveness**

### **1.5.1. Effective Date**

This Agreement shall take effect on February \_\_, 2010 (Effective Date). As provided in Sections 8.2.1 and 37, each Non-Federal Party shall execute this Agreement and the Hydroelectric Settlement concurrently.

### **1.5.2. Performance**

When this Agreement has been so executed, the Parties shall perform obligations which are performable under their existing authorities. Until Authorizing Legislation is enacted, the Parties shall not perform, or be expected to perform, any obligations which require authorizations or appropriations arising from the Authorizing Legislation.

## **1.6. Term of the Agreement**

Except as otherwise expressly provided, the term of the Agreement as to Contractual Obligations shall be 50 years from the Effective Date.

## **1.7. Definitions and Acronyms**

**Applicable Law** shall mean: general law which (i) exists outside of this Agreement, including a Constitution, statute, regulation, court decision, or common law, and (ii) applies to obligations or activities of Parties contemplated by this Agreement. The use of this term is not intended to create a contractual obligation to comply with any law that would not otherwise apply.

**Assurance** or **Assurances** shall mean: Contractual or Regulatory Obligations, or both, depending on the context within the Agreement.

**Authorizing Legislation** shall mean: the legislation enacted by Congress and the Oregon and California Legislatures, respectively, to authorize and implement this Agreement. Appendices A and B state the proposals for such legislation which the Non-Federal Parties shall support pursuant to Section 3.1.1. The term “federal legislation” as used in this Agreement includes but is not limited to federal Authorizing Legislation.

**Best Efforts** shall mean: performance of an obligation or attempt to correct non-performance of an obligation in a reasonable manner and good faith, and with that level and quality of effort appropriate to achieve the goals of this Agreement.

**BIA** shall mean: U.S. Department of the Interior’s Bureau of Indian Affairs.

**BLM** shall mean: U.S. Department of the Interior’s Bureau of Land Management.

**CDFG** shall mean: California Department of Fish and Game.

**CESA** shall mean: the California Endangered Species Act set forth in California Fish and Game Code sections 2050 *et seq.*

**Charter** shall mean: charters pursuant to the Federal Advisory Committee Act for the Klamath Basin Advisory Council, the Technical Advisory Team, and any other appropriate sub-group, under which non-Public Agency Parties will provide recommendations to the federal Public Agency Parties regarding the implementation of federal obligations under this Agreement.

**Collaborative Management** shall mean: the participation by mutual agreement of the Tribes, federal agencies, and/or state agencies as partners in the management of Klamath Basin anadromous fisheries and related tribal trust resources to the extent allowed by Applicable Law and this Agreement.

**Consensus** shall mean: the absence of opposition by any Party to a proposal or recommendation, including following any Dispute Resolution Procedures as stated in Section 6.5 or following any decision-making process as used by the Klamath Basin Coordinating Council, the Klamath Basin Advisory Council, and the Technical Advisory Team.

**Contractual Obligations** shall mean: those obligations under this Agreement that are not subject to Regulatory Approval.

**Coordination and Oversight** shall mean: the process described in this Agreement, including Appendix D, to provide coordination and oversight of the implementation of the programs and other obligations of this Agreement.

**Dam Removal Entity** shall have that meaning provided by Section 1.4 of the Hydroelectric Settlement: an entity designated by the Secretary that has the legal, technical, and financial capacities for Facilities Removal as set forth in Section 7.1 of the Hydroelectric Settlement.



**Dispute Initiation Notice** shall mean the notice described in Section 6.5.1.

**Dispute Resolution Procedures** shall mean: the procedures established by Section 6.5.

**DIVERSION** shall have the meaning assigned by Appendix E-1, Term 1.b.

**Drought** shall mean: a drought of lesser scale than Extreme Drought as addressed in the Drought Plan under Section 19.2.

**Due Diligence** shall mean: a Party's taking all reasonable steps to implement its obligations under this Agreement.

**Effective Date** shall mean: the date stated in Section 1.5.1.

**Emergency** shall mean: an event as defined in Section 19.3.1.

**Environmental Water** shall mean: the quantity and quality of water produced pursuant to Section 20 or other provisions of this Agreement to benefit Fish Species and other aquatic resources.

**ESA** shall mean: the federal Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*

**Extreme Drought** shall have the meaning established in the Drought Plan and as required by Section 19.2.2.A.i.a.

**FACA** shall mean: the Federal Advisory Committee Act, 5 U.S.C. Appendix 2.

**Facilities** shall have the meaning provided by Section 1.4 of the Hydroelectric Settlement: the following specific hydropower facilities, within the jurisdictional boundary of FERC Project No. 2082: Iron Gate Dam, Copco No. 1 Dam, Copco No. 2 Dam, and J.C. Boyle Dam and appurtenant works currently licensed to PacifiCorp.

**Facilities Removal** shall have that meaning provided by Section 1.4 of the Hydroelectric Settlement: physical removal of all or part of each of the Facilities to achieve at a minimum a free-flowing condition and volitional fish passage, site remediation and restoration including previously inundated lands, measures to avoid or minimize adverse downstream impacts, and all associated permitting for such actions.

**Federal Agency Party** shall mean: each of the Federal entities that are listed as Parties in Section 1.1.2.

**FERC** shall mean: Federal Energy Regulatory Commission.

**Fish Managers** shall mean: a federal, state, or tribal agency which has responsibility under Applicable Law to manage one or more Fish Species or their habitat in the Klamath Basin.

**Fish Species, Fish, Fisheries, or Species** (when referencing Fish), shall mean: the historic complement of species (including races) of fish that naturally occupied the Klamath River Basin.

**Force Majeure** shall mean: an event beyond the reasonable control of a Lead or Responsible Party that prevents the Timely performance of an obligation despite the exercise of Due Diligence. Such events may include natural disasters as well as all unavoidable legal impediment or prohibitions.

**Forest Service** shall mean: Forest Service, USDA.

**Full Participation in Harvest Opportunities** shall mean: full participation in Tribal, ceremonial, subsistence, and commercial; ocean-commercial and recreational; and in-river recreational harvest opportunities for anadromous Fish Species.

**Fully Protected Species** shall mean: a species listed as fully protected under applicable provisions of the California Fish and Game Code.

**FWS** shall mean: U.S. Department of the Interior's Fish and Wildlife Service.

**Hydroelectric Facilities** shall mean: Copco 1, Copco 2, Iron Gate, and J.C. Boyle dams.

**Hydroelectric Settlement** shall mean: the Klamath Hydroelectric Settlement Agreement as executed concurrent with this Agreement and as thereafter amended.

**Hydroelectric Project** shall mean: PacifiCorp's Klamath Hydroelectric Project (FERC no. 2082).

**Instream Use of Water** shall mean: the use of water in lakes, rivers, and their tributaries.

**Keno Facility** means Keno Dam, lands underlying Keno Dam, appurtenant facilities and PacifiCorp-owned property described as Klamath County Map Tax Lot R-3907-03600-00200-000 located in Klamath County, Oregon.

**Klamath Basin Advisory Council** or **KBAC** shall mean: the advisory entity established pursuant to the Federal Advisory Committee Act, as described in Appendix D-1.

**Klamath Basin Coordinating Council** or **KBCC** shall mean: the coordinating entity established by this Agreement, as described in Appendix D-1.

**KDD** shall mean: Klamath Drainage District.

**KID** shall mean: Klamath Irrigation District.

**Klamath Off-Project Water Users Association** or **KOPWU** shall mean: a non-profit organization representing the interests of its members, which are Off-Project Power Users. Off-Project Power Users are Pacific Power's agricultural customers in the State of

Oregon within the Klamath and Lost River Drainages outside the Klamath Reclamation Project.

**Klamath Project Water Users or KPWU** shall mean: the following of the contractors associated with the Klamath Reclamation Project: Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage 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 Company, Bradley S. Luscombe, Randolph Walthall and Jane Walthall as trustees under declaration of trust dated 1995, and Inter-County Property Company which acquired title as Inter-County Title Company, Reames Golf and Country Club, Winema Hunting Lodge, Inc., Van Brimmer Ditch Company, Collins Products, LLC, and Plevna District Improvement Company.

**Klamath Project Water Entities** shall mean: those Klamath Project Water Users who will file a validation or confirmation action pursuant to Section 15.3.1.B: Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage 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, Plevna District Improvement Company, and Van Brimmer Ditch Company.

**Klamath Reclamation Project** shall mean: the federal reclamation project authorized, constructed, managed, and operated under the federal Reclamation Act of June 17, 1902, 32 Stat. 388, as amended and supplemented, including dams, canals, and other works and interests for water diversion, storage, delivery, drainage and flood control, and similar functions. When used in reference to a geographic area or area of use or reuse of water, the term shall mean: all land in the Upper Klamath River Basin which is any one or more of the following: (i) within the boundary or service area of any public district or other water distribution entity which, or land of any individual or other entity who, has contracted with the United States, pursuant to the Federal Reclamation laws for water service or for the repayment of the costs of construction, operation and maintenance of irrigation, drainage or other reclamation works benefiting such district or other entity, and/or operation and maintenance of such works, and all land of individuals or companies or other entities who are parties to contracts with the United States of such nature; (ii) within the Service Area of the Klamath Reclamation Project as identified on the map incorporated by reference under Article II.B and D of the Klamath River Basin Compact; or (iii) within the boundaries of TLNWR or LKNWR.

**Klamath River Basin or Klamath Basin** shall mean: the lands tributary to the Klamath River in Oregon and California. The term includes the Lost River and Tule Lake Basins.

**Klamath Tribes** shall mean: the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, parties to the Treaty of Council Grove of 1864.

**Klamath Water and Power Agency (KWAPA)** shall mean: an intergovernmental and joint powers entity currently made up of water agencies within the Klamath Reclamation Project, as established under an intergovernmental agreement on June 12, 2008 pursuant to Oregon Revised Statutes Chapter 190 and Chapter 5 (commencing with section 6500) of Division 7 of Title 1 of the California Government Code.

**Lead Party** shall mean: the Party identified as having primary responsibility (as among the Parties) for implementation of an obligation under the Agreement. The term does not mean “Lead Agency” under California Environmental Quality Act, the National Environmental Policy Act, or other Applicable Law.

**Lead Responsibility** shall mean: the responsibility of the Lead Party.

**Lower Klamath Basin** shall mean: the lands tributary to the Klamath River below the current site of Iron Gate Dam in Siskiyou County, California.

**LKNWR** shall mean: Lower Klamath National Wildlife Refuge.

**Managed Environmental Water** shall mean: the quantity and quality of Environmental Water that is legally stored or maintained, or could legally be stored or maintained, in Upper Klamath Lake or any subsequently-developed stored water under the authority of Reclamation or other federal agency. This is a subset of Environmental Water, which includes water not stored or otherwise maintained in Upper Klamath Lake.

**NMFS** shall mean: U.S. Department of Commerce’s National Marine Fisheries Service.

**Non-Federal Parties** shall mean: the Parties other than the Federal Agency Parties.

**Notice** shall mean: written notice pursuant to the requirements and procedures of Section 7.1.

**NPS** shall mean: U.S. Department of the Interior’s National Park Service.

**ODEQ** shall mean: Oregon Department of Environmental Quality.

**ODFW** shall mean: Oregon Department of Fish and Wildlife.

**Off-Project Power User** shall mean: any Off-Project Irrigator who uses electrical power for irrigation pumping (surface water or groundwater) including drainage. The Parties intend that the definition embrace any user of power within the class described in the agreement dated 1956 between the California Oregon Power Company, predecessor in interest of PacifiCorp, and Klamath Basin Water Users Protective Association, as the predecessor in interest of the Klamath Off-Project Water Users Association, for uses described in that agreement, regardless of the date of installation of any pump or associated meter.

**Off-Project Irrigator** shall mean: any water user who is a Claimant in the Klamath Basin Adjudication in the Off-Project Area, or a holder of a State water right permit or certificate for irrigation use in the sub-basins identified in Section 16.2.2.C.

**On-Project Power User** shall mean: any person or entity who uses electrical power to provide irrigation (surface water or groundwater) or drainage or wildlife benefit on, or serving, land in the Klamath Reclamation Project. The Parties intend this the definition embrace any user of electrical power to the extent that such user operates the type or class of pumps described in Exhibit B including Rate Schedule B of Contract No. 14-06-200-5075, dated January 31, 1956, between the United States, Department of the Interior, and California Oregon Power Company, regardless of the date of installation of any such pump or any associated meter.

**On-Project Plan Area, or OPPA,** shall mean: the areas that rely in whole or part on water diverted from the Settlement Points of Diversion identified in Appendix E-1, exclusive of all of LKNWR other than Area K lands.

**OWRD** shall mean: Oregon Water Resources Department.

**Participants** mean non-Parties who participate in one or more of the programs in this Agreement.

**Parties** shall mean: the signatories of this Agreement from among the entities listed in Section 1.1.1 and, with respect to Federal Agency Parties, as provided in Section 1.1.2. Additional entities may become Parties after the Effective Date as provided in Section 1.1.3, 7.2.2, 37, and 38.

**Power Users** means On-Project Power Users and Off-Project Power Users.

**Public Agency Party** shall mean each Tribe and each other Party which is a public agency established under Applicable Law, including Federal Agency Parties as provided in Section 1.1.2.

**Reclamation** shall mean: the U.S. Department of the Interior's Bureau of Reclamation.

**Refuge, National Wildlife Refuge, or Wildlife Refuge** shall mean: LKNWR or TLNWR, as applicable in context; or if plural shall mean both LKNWR and TLNWR.

**Regulatory Agency Party** shall mean each Public Agency Party which has regulatory authority to permit or otherwise regulate implementation of obligations under the Agreement or activities of Parties contemplated by this Agreement.

**Regulatory Approval** shall mean: each permit or other approval under a regulatory statute necessary to implement any of the obligations, or activities of Parties as contemplated, under this Agreement.

**Regulatory Obligations** shall mean: each of those obligations proposed, or activities of Parties contemplated, by this Agreement which are subject to Regulatory Approval and, upon such approval, are enforceable under regulatory authority.

**Responsible Party** shall mean: a Party identified as having significant but not primary responsibility for the implementation of an obligation under this Agreement. The term is not intended to mean “Responsible Agency” under California Environmental Quality Act or other Applicable Law.

**Secretaries** shall mean: the Secretaries of the Interior, Commerce, and Agriculture.

**Secretary** shall mean: the Secretary of the Interior.

**Settlement Points of Diversion** shall have the meaning assigned by Appendix E-1, Term 1.a.

**SWRCB** shall mean: State of California Water Resources Control Board.

**Technical Advisory Team** or **TAT** shall mean: the team established by Appendix D-2 of this Agreement.

**TID** shall mean: Tulelake Irrigation District.

**Timely** or **Timeliness** shall mean: performance of an obligation or act by the deadline established in the applicable provision, and otherwise in a manner reasonably calculated to achieve the bargained-for benefits of the Agreement.

**TLNWR** shall mean: Tule Lake National Wildlife Refuge.

**Tribes** shall mean: the Yurok Tribe, Karuk Tribe, and Klamath Tribes.

**Upper Basin Team** or **UBT** shall mean: that team constituted pursuant to Section 16.2.2.A.

**Upper Klamath River Basin** or **Upper Klamath Basin** shall mean: the lands tributary to the Klamath River above the current location of Iron Gate Dam in Siskiyou County, California and including Lost River and Tule Lake Basins.

**Upper Klamath Water Users Association** or **UKWUA** shall mean: a non-profit organization representing the power, water and regulatory protection interests of its members within the Klamath and Lost River Drainages outside the Klamath Reclamation Project.

**USGS** shall mean: the U.S. Geological Survey.

**USDA** shall mean: the U.S. Department of Agriculture.

**Water Managers** shall mean: entities, including federal, state, and tribal agencies, irrigation and drainage districts, and other water management entities that have

responsibility under Applicable Law for management of water resources, including storage and diversion, in the Klamath Basin.

**Water Use Retirement Program** or **WURP** shall mean: the program identified in Section 16.2.2.

## **2. Legal Responsibilities, Reservation of Rights, and Precedents**

### **2.1. Compliance with Legal Responsibilities**

Except as otherwise expressly provided, by executing this Agreement, each Party represents that it believes that this Agreement is consistent with its statutory, regulatory, or other legal obligations for conservation, use, or management of affected resources of the Klamath River Basin. In the implementation of this Agreement, Public Agency Parties shall comply with all applicable legal authorities, including Authorizing Legislation, National Environmental Policy Act, Endangered Species Act, Clean Water Act, and other Applicable Law.

### **2.2. Reservation of Rights**

#### **2.2.1. Generally**

Nothing in this Agreement is intended or shall be construed to affect or limit the authority or obligation of any Party to fulfill its constitutional, statutory, and regulatory responsibilities or comply with any judicial decision. Nothing in this Agreement shall be interpreted to require any Federal Agency Party, a State, or any other Public Agency Party to implement any action which is not authorized by Applicable Law or where sufficient funds have not been appropriated for that purpose by Congress or the States. The Parties expressly reserve all rights not granted, recognized, or relinquished in this Agreement.

#### **2.2.2. Reservations Regarding Federal Appropriations**

All actions required of any Federal Agency Party in implementing this Agreement are subject to appropriations by Congress. Nothing in this Agreement shall be interpreted as or constitute a commitment or requirement that any Federal Agency Party obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or other Applicable Law. Nothing in this Agreement is intended or shall be construed to commit a federal official to expend federal funds not appropriated for that purpose by Congress. Nothing in this Agreement is intended to or shall be construed to require any official of the executive branch to seek or request appropriations from Congress to implement any provision of this Agreement. To the extent that the expenditure or advance of any money or the performance of any obligation of the United States, the Secretaries, or a Federal Agency Party under this Agreement is to be funded by appropriation of funds by Congress, the expenditure, advance, or performance shall be contingent upon the appropriation of funds by Congress that are available for this purpose and the apportionment of such funds by the Office of Management and Budget. No breach of this

Agreement shall result and no liability shall accrue to the United States, the Secretaries, or Federal Agency Party in the event such funds are not appropriated or apportioned.

**2.2.3. Availability of Public Funds**

Funding by any Public Agency Party under this Agreement is subject to the requirements of Applicable Law. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, reprogramming or expenditure of any funds by the States or other Public Agency Party except as otherwise permitted by Applicable Law.

**2.2.4. Reservations Regarding Legislative Proposals**

Nothing in this Agreement shall be deemed to limit the authority of the executive branch of the United States government to make recommendations to Congress on any particular proposed legislation.

**2.2.5. Reservations Regarding Regulations**

Nothing in this Agreement is intended or shall be construed to deprive any public official of the authority to revise, amend, or promulgate regulations.

**2.2.6. No Pre-decisional Commitment**

Nothing in this Agreement is intended or shall be construed to be a pre-decisional commitment of funds or resources by a Public Agency Party. Nothing in this Agreement is intended or shall be construed to predetermine the outcome of any Regulatory Approval or other action by a Public Agency Party necessary under Applicable Law in order to implement this Agreement.

**2.2.7. No Alteration of Environmental Review**

Nothing in this Agreement is intended or shall be construed to modify the application of the National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), or other Applicable Law, to the environmental review of any program, plan, policy, or action (or project) under this Agreement. The use of the word, "final," with reference to development or adoption of any program, plan, policy, or action, (i) describes the schedule for such development or adoption and (ii) does not modify the application of NEPA, CEQA, or other Applicable Law to such development or adoption.

- A. Nothing in this Agreement shall be interpreted to limit the discretion under Applicable Law of any Public Agency Party to alter any program, plan, policy, or action of such Party in response to information and considerations developed during the environmental review process.



- B. Nothing in this section shall be construed to prevent an action which has independent utility from proceeding before environmental review is complete on any program or plan described in this Agreement, provided that such action itself has been subject to environmental review to the extent required by Applicable Law.

**2.2.8. Enforceability**

Except as set forth in this section, nothing in this Agreement is intended to be, or shall be construed as, a waiver of sovereign immunity by the United States, the State of California, the State of Oregon, any Tribe, or any other similarly situated Public Agency Party. This Agreement does not obligate the United States or any Federal Agency Party to affirmatively support this Agreement regarding any state or local legislative, administrative, or judicial action before a state administrative agency or court.

Each Tribe and each other Public Agency Party listed in Section 1.1.1 (excepting the agencies of the States) hereby agrees that if such Party brings or joins litigation in court or an administrative adjudication process, and seeks relief affecting the interests of any other Party to this Agreement, such Party's participation in the litigation or adjudicative proceeding is deemed a consent to that court's or adjudicatory body's jurisdiction over all defenses and counter-claims, related to this Agreement, in the action. Further, if such Party brings or joins litigation in court or an administrative adjudication process, and seeks relief affecting the interests of any other Party, it agrees it will not seek to bar such other Parties from asserting or seeking to enforce the provisions of this Agreement by way of defense or counter-claim in such a proceeding. The consents here provided are effective for the term of the commitments herein as provided in Sections 1.6 and 15.3.10.

The State of Oregon acknowledges that the Oregon legislature has waived Oregon's sovereign immunity to suits upon contract in an Oregon state court, to the extent described in and pursuant to ORS 30.320.

**2.2.9. No Argument, Admission, or Precedent**

Nothing in this Agreement or any of the attachments thereto shall be offered for or against a Party, including any Federal Agency Party, as argument, admission, admission of wrongdoing, liability, or precedent regarding any issue of fact or law in any mediation, arbitration, litigation, or other administrative or legal proceeding, except that this Agreement may be used in any future proceeding to interpret or enforce the terms of this Agreement, consistent with Applicable Law. This Agreement may also be used by any Party, including any Federal Agency Party, in litigation by or against non-Parties to implement or defend this Agreement. Except as provided in Section 15.3, nothing in this Agreement precludes any Party, including any Federal Agency Party, from continuing to

assert their previously asserted legal positions in the Klamath Basin Adjudication (KBA). This section shall survive any termination of this Agreement.

**2.2.10. Protection of Interests**

Each Party may, in a manner consistent with this Agreement, protect, defend, and discharge its interests and duties in any administrative, regulatory, legislative or judicial proceeding.

**2.2.11. No Determination of Water Rights by the Agreement**

No water rights or water rights claims of any Party are determined or quantified herein. No water rights or potential water rights claims of any non-party to the Agreement are determined herein. No provision of this Agreement shall be construed as a waiver or release of any tribal water or fishing rights in the Klamath River Basin in California, including claims to such water or fishing rights that have not yet been determined or quantified. The Secretary will not take any action in any proceeding within the adjudication of Klamath Basin water rights in the State of Oregon that eliminates the existence or quantifies the amount of any tribal water or fishing rights in California.

**2.2.12. Trinity River**

The Parties intend that this Agreement not adversely affect the Trinity River Restoration Program, and further intend that the Trinity River Restoration Program not adversely affect this Agreement.

Nothing in the Tribal statement of understandings below binds any Party to any particular interpretation of the law or requires any Party to take particular actions, or excuses any action otherwise required by Applicable Law or this Agreement.

The Karuk, Yurok and Klamath Tribes reaffirm and rely upon their view of the existing fishery restoration goals and principles for the Trinity River Fishery Restoration Program, as follows:

- A. Restoration of the Trinity River fish populations to pre-Trinity Dam construction levels;
- B. Fishery restoration shall be measured not only by returning anadromous fish spawners but also by the ability of dependent tribal and non-tribal fishers to participate fully in the benefits of restoration through meaningful subsistence and commercial harvest opportunities;
- C. An appropriate balance between stocks of natural and hatchery origins shall be maintained to minimize negative interactions upon naturally produced fish by hatchery mitigation releases;

- D. A collaborative working relationship between federal agencies and the above mentioned Tribes; and
- E. Portions of federal activities that are associated with fishery restoration programs are Indian Programs for the purposes of the Indian Self-Determination Act.

### 3. **Obligations under the Agreement**

#### 3.1. **Obligation to Support**

##### 3.1.1. **Authorizing Legislation**

###### A. **Additional Authorities**

The Parties acknowledge that implementation of certain obligations under this Agreement will require additional authorizations and appropriations by the United States Congress, the California Legislature, and the Oregon Legislature. Obligations that require such additional authorization or appropriations shall become effective upon enactment of that legislation. The Non-Federal Parties intend and anticipate that such legislation will provide the federal authorizations necessary for Federal Agencies to become Parties hereto as provided in Section 1.1.2, and for the Federal Agency Parties to fully implement the federal obligations under this Agreement.

###### B. **Support for Proposed Legislation**

###### i. **Legislation**

The Non-Federal Parties agree jointly to request and to support the proposal and enactment of federal, California, and Oregon legislation materially consistent with Appendices A and B; *provided* that nothing in this Agreement shall be deemed to limit the authority or discretion of the federal or state executive branches consistent with Applicable Law.

###### ii. **Participation in Legislative Process**

Pursuant to this section, Section 6.5, or Section 7.2.1.E, and Applicable Law, the Parties shall periodically confer in order jointly to promote legislation materially consistent with Appendices A and B, including evaluation of introduced bills and amendments for material consistency with this Agreement and Appendices A and B, and, as necessary, propose recommendations for amendment of bills, to preserve the bargained-for benefits of this Agreement.

**3.1.2. Regulatory Approvals**

The Parties shall support the application for and granting of Regulatory Approvals not inconsistent with the Agreement.

**3.1.3. Defense of Agreement**

Subject to Section 2.2, each Party shall support and defend this Agreement in each applicable venue or forum, including any administrative or judicial action in which it participates, and which concerns the validity of any Regulatory Approval or Authorizing Legislation.

**A. Litigation**

Subject to Section 3.2.4.B.v, the form of support or defense in such administrative or judicial action shall be left to the discretion of each Party, including what specific litigation positions to recommend or take in any such action. This section does not apply to a dispute or action challenging the adequacy of a Party's performance of an obligation under this Agreement.

**B. Comments**

Each Party may comment on the consistency of any plan, other document, or data arising in the implementation of this Agreement and not otherwise set forth in the Appendices. The Parties acknowledge that their comments may conflict due to differing good-faith interpretations of the applicable obligations under this Agreement.

**C. Scientific Research**

Nothing in this Agreement shall prevent scientific research or the publication of the same by any Party.

**3.2. Obligation to Implement**

**3.2.1. General**

Each Party shall implement each of its obligations under this Agreement in good faith and with Due Diligence. Any obligation identified as an obligation of all of the Parties does not obligate any individual Party to take any action itself or itself make any specific commitment other than to participate in the applicable procedures.

**3.2.2. Cooperation Among the Parties**

The Parties shall cooperate in the implementation of this Agreement. A Party shall not act in a manner that results in an action or requirement that is

inconsistent with the Agreement unless necessary to comply with statutory, regulatory or other legal responsibilities; in which event, the Party shall provide Timely Notice to other Parties to permit Dispute Resolution Procedures pursuant to Section 6.5.

**3.2.3. Lead or Responsible Party**

Parties shall be Lead or Responsible Parties with non-common responsibilities for the performance of obligations under this Agreement, either by designation in this Agreement or, following the Effective Date, by acceptance of a designation recommended by the Klamath Basin Coordinating Council, that is allowed under Applicable Law.

**3.2.4. Timeliness**

**A. General**

Each Party shall Timely implement its obligations.

**B. Implementation of Obligations Consistent with Sequence in the Agreement**

The Parties developed Appendix C-1 as guidance summarizing the anticipated sequence of performance of certain obligations under this Agreement. As provided in Section 5.4 and Appendix D-1, the KBCC shall prepare and adopt a detailed workplan and schedule to implement all of the measures and commitments in this Agreement and shall periodically update the workplan and schedule. The Parties shall make Best Efforts to implement this Agreement in a manner consistent with the workplan and schedule.

**i. Dispute Resolution**

The Parties shall make Best Efforts to use Dispute Resolution Procedures under Section 6 at the earliest possible time that a claim of untimely performance or any other form of non-performance arises.

**ii. Funding**

Subject to Section 4.1.4, the Non-Federal Parties shall make Best Efforts to Timely secure public or private funding in the amounts estimated in Appendix C-2 on a schedule consistent with this Agreement.

### **iii. Litigation**

A Party may bring an action to enforce a Regulatory or Contractual Obligation, as provided in Section 7.4; *provided* that such action may be brought against Federal Agency Parties only as further provided in Section 7.4.5. Recognizing the cost and other consequences of such litigation, a Party has discretion whether and how to use litigation to assist in the implementation of the obligations under this Agreement.

### **iv. Cooperation**

The obligation to assist in the implementation of this Agreement is joint and several to all Parties, as well as individual to each Party. In seeking funding, or using Dispute Resolution Procedures or litigation, as described above, each Party will be mindful of the efforts of other Parties and will seek to cooperate to achieve efficiencies and avoid duplication or other unnecessary costs or efforts.

### **v. Obligation to Cure**

The filing of an action by one Party against another Party over rights or obligations addressed in this Agreement is deemed to constitute a failure of the mutual obligations set forth in this Agreement. Such failure triggers, on the part of all Parties, an obligation to preserve the benefits of the Agreement for all Parties, including any Party who is, or could be, adversely affected by such litigation. Parties directly affected by the action, as well as other Parties with interests in, or obligations in this Agreement related to, the subject of the action, shall:

- (1) meet and confer promptly and in good faith to confirm that the Dispute Resolution Procedures in Section 6 have identified the nature of the dispute, the provisions of this Agreement which failed to achieve the bargained-for benefits as to affected Parties, and the potential remedies for the defect; or
- (2) if not already completed, take appropriate steps to secure Timely performance of obligations under this Agreement; or
- (3) seek amendment of the Agreement pursuant to Section 7.2; or
- (4) otherwise make Best Efforts, consistent with Sections 6 and 7.2, to develop and implement a functional cure to preserve the bargained-for benefits under the Agreement for all Parties, including the Parties adversely affected by the litigation; and
- (5) seek a supervised settlement conference in the adjudicatory forum and advise the court or presiding officer of their Contractual Obligations under this Agreement, including this provision of the Agreement. Further, if an action is

commenced against a Party by a non-Party that relates to right or obligations addressed in this Agreement, the Parties shall to the maximum extent practicable and applicable, comply with the obligations of (2) through (5) above.

**vi. Authorizing Legislation**

The Parties acknowledge that federal and state legislation is necessary to implement certain obligations in this Agreement as well as the Hydroelectric Settlement, and proposed federal and state legislation supported by the Parties is attached as Appendices A and B. Within 60 days after enactment of Authorizing Legislation, any Party which believes that such legislation is not materially consistent with Appendix A or B shall provide a Dispute Initiation Notice pursuant to Section 6.5.1. “Material consistency,” as related to this Agreement means that the legislation does not substantially diverge from the bargained-for benefits of this Agreement, as proposed to be implemented through Appendix A and B. The purpose of the Dispute Resolution Procedures in this circumstance shall be to develop a resolution, such as (1) a joint effort to secure an amendment to the legislation or (2) a mutually agreeable amendment to Contractual Obligations under this Agreement, to restore the bargained-for benefits. The meaning of “materially consistent” in this section shall not control the application of the term “materially inconsistent” in Section 8.11.2.A. of the Hydroelectric Settlement.

**C. Extension of Time**

Except as otherwise provided in this Agreement, if any Party requires more time than permitted by this Agreement to perform an obligation, that Party shall provide Notice to other Parties thirty days before the applicable deadline. The Notice shall explain: (i) the obligation that the Party is attempting to perform; (ii) the reason that performance is or may be delayed; (iii) the steps the Party has taken or proposes to take to Timely complete performance; and (iv) the Party’s request for additional time to complete performance. If any other Party disputes the request for additional time, that other Party shall initiate the Dispute Resolution Procedures stated in Section 6. This provision does not apply to any applicable deadline imposed by Applicable Law. The Parties may follow the procedures for amendment to the Agreement, if no Party objects to the extension.

**3.2.5. Environmental Review**

Each Public Agency Party shall undertake environmental review as required by Applicable Law in the development of, and before commitment to, any program, plan, policy, or implementing action provided for under this Agreement.

**3.2.6. Force Majeure**

**A. Suspension of Obligation**

During a Force Majeure event, and except as otherwise provided in this Agreement, the Lead or Responsible Party shall be relieved of any specific obligation directly precluded by the event, as well as those other obligations whose performance is materially impaired, but only for the duration of such event.

**B. Remedies**

If a Force Majeure event occurs, and except as otherwise provided in this Agreement:

- i.** The Lead or Responsible Party shall provide Notice within three days of the onset of the event. Such Notice shall describe the occurrence, nature and expected duration of such event. That initial Notice shall be followed by further Notice within seven days of the onset of the event, describing the steps the Party has taken or proposes to be taken to prevent or minimize the interference with the performance of any affected obligation under this Agreement;
- ii.** The Lead or Responsible Party shall thereafter provide periodic Notice to the other Parties of the efforts to address and resolve a Force Majeure event; and
- iii.** If any other Party disputes the Lead or Responsible Party's claim of a Force Majeure event, or the adequacy of the efforts to address and resolve such event, such Party shall initiate the Dispute Resolution Procedures stated in Section 6.



## 4. **Funding**

### 4.1. **Budget**

#### 4.1.1. **Support**

The Non-Federal Parties shall support authorizations and appropriations of public funds, as well as securing of non-public funds, to implement the Agreement. Further, each of the Non-Federal Parties shall support allocation and reprogramming of existing funds to implement this Agreement, including actions to commence immediately any activities allowed under Applicable Law. However, each funding entity shall retain its discretion and authority to make final decisions regarding allocation and reprogramming of existing funds, consistent with Applicable Law.

#### 4.1.2. **Appendix C-2**

##### A. **Proposed Budget for the First Ten Years of Implementation**

As of the Effective Date, Appendix C-2 estimates the amounts of funding necessary for the implementation of each of the programs of this Agreement, as well as the performance of specific obligations, from 2012 to 2021. Unless otherwise provided, these amounts are stated in 2007 dollars, subject to adjustment using federal Office of Management and Budget guidelines to account for the effects of inflation. The Non-Federal Parties support authorizations and appropriations of Federal and state funds, as well as securing of non-public funds to cover this proposed budget. Periodically, the KBAC or KBCC, as applicable, shall adopt or recommend a successor form of Appendix C-2 to estimate required funding for the continued implementation of each of these programs.

##### B. **Adjustment Based on Changed Circumstances**

The KBAC or KBCC, as applicable, shall amend estimated funding in Appendix C-2 or any successor as appropriate if any event occurs that materially affects the cost, feasibility, or benefits of performance of an obligation under this Agreement, including adaptive management pursuant to Section 5.4.1. Any entity intended identified to receive congressionally appropriated funds identified in Appendix C-2 or this Agreement that does not sign the Agreement, or withdraws from the Agreement subsequent to execution of the Agreement pursuant to the terms authorizing withdrawal, will no longer be eligible to receive any such funds pursuant to this Agreement. In such a circumstance, the appropriate Secretary or Agency may choose to reallocate these funds towards another purpose under the Agreement.

#### **4.1.3. Maximum Benefits**

The Parties recognize that Applicable Law governs the expenditure of all public funds appropriated to implement this Agreement. In addition, using Best Efforts, the Parties shall seek to use the procedures in this Agreement, including the Coordination and Oversight procedures stated in Section 5, to assure that the expenditure of funds occurs in a cost-effective manner to optimize the public benefits resulting from performance of obligations arising under this Agreement.

#### **4.1.4. Other Funds**

An estimate in Appendix C-2 does not limit Parties other than Federal and State Public Agency Parties from seeking additional or other funds to perform an obligation under this Agreement or for a related purpose. The Non-Federal Parties agree to support efforts to secure additional funding if the KBAC or KBCC, as applicable, determines that such funding is needed to support this Agreement; *provided* that any such effort shall not be inconsistent with the obligation of the Parties to support authorizations and appropriations for programs and obligations under this Agreement as estimated in Appendix C-2.

### **4.2. Klamath River Basin Restoration Agreement Fund**

Within one year of the Effective Date, and consistent with Applicable Law, the Parties other than Public Agency Parties shall establish the Klamath River Basin Restoration Agreement Fund (Restoration Agreement Fund). This will be a dedicated account to hold funds which are both: (i) received from non-federal sources to perform obligations under this Agreement and (ii) not otherwise under the lawful control by the United States, or by California, Oregon, a County or other local agency, or a Tribe, pursuant to Applicable Law.

#### **4.2.1. Establishment of Accounts by Program or Sub-Program**

The Restoration Agreement Fund shall include an account for implementation of each program or sub-program of this Agreement, as appropriate.

#### **4.2.2. Management of Fund**

The Parties other than Public Agency Parties shall agree to a manager for the Restoration Agreement Fund and to procedures for management. Such procedures shall include requirements for:

##### **A. Receipt of Funds**

Receipt of funds from any lawful source, including but not limited to charitable foundations for performance of obligations under this Agreement;

**B. Disbursement**

Application by Parties or non-Parties for disbursement of funds to perform obligations as specified by this Agreement, and reviews of such application by the Parties, and resolution of any disputes about the sufficiency or otherwise the approvability of the application; and

**C. Accounting and Reporting**

Accounting and reporting by the Parties, funding sources, and the public, to assure that expenditures comply generally with Section 4.1 and specifically with any other conditions established by the sources of funding managed by the Restoration Agreement Fund.

**4.3. Accountability for Use of Funding**

Funding through Federal and state agencies will be provided through contract, agreement, or other arrangements, as appropriate under Applicable Law and applicable policy.

**5. Coordination and Oversight**

**5.1. Purpose**

The Coordination and Oversight process established by this Agreement shall provide and facilitate coordination, cooperation, and accountability by Parties such that all obligations of the Agreement are performed effectively, Timely, and at the appropriate scales. Such Coordination and Oversight does not supplant existing authorities or supersede Applicable Law. It shall provide for public involvement to help guide implementation of the Agreement.

**5.2. Structure**

The Parties shall support and participate in the coordination and oversight structure stated in Appendix D.

**5.3. Funding of Coordination and Oversight**

The Non-Federal Parties shall support authorizations and appropriations of funding, in the amount of \$3.3 million as estimated in Appendix C-2, to fund the coordination and oversight structure for the first ten years after the Effective Date.

**5.4. Accountability**

The Parties generally agree to use procedures, including adaptive management and reporting, as applicable, in performance of obligations under this Agreement so as to maximize public benefits.

#### **5.4.1. Adaptive Management**

The adaptive management process will include specific objectives for the benefits of performance (such as a change in the present condition of fish habitat), metrics to track achievement of those objectives, monitoring and evaluation, and procedures to use the evaluation results to inform and improve future management and funding of that obligation.

#### **5.4.2. Reporting**

Subject to Applicable Law, the Klamath Basin Coordinating Council (KBCC) or Klamath Basin Advisory Council (KBAC), as applicable, shall evaluate and report on the status of performance of all programs under this Agreement.

##### **A. Real-Time Reporting**

The KBCC or KBAC, as applicable, shall report monitoring results on a real-time basis through a web-site or similar mechanism.

##### **B. Annual and Decadal Reports**

The KBCC shall publish an annual report not later than March 31 in the following year, to evaluate the status of performance of the obligations under this Agreement, any causes for delay or non-performance, and any efforts to cure such non-performance. In addition, the KBCC shall prepare a periodic report, not less frequently than every ten years, to evaluate overall progress in implementation of the programs under this Agreement, and specifically, progress towards achievement of the goals stated in Section 1.3 as well as the more specific objectives of the programs.

### **6. Dispute Resolution**

All disputes among the Parties regarding the implementation of this Agreement, including disputes regarding any Party's performance of Contractual or Regulatory Obligations, shall be subject to the Dispute Resolution Procedures stated in Section 6.5, except as otherwise provided in this Agreement. The Parties agree that each dispute shall be brought and resolved in a Timely manner.

#### **6.1. Cooperation**

Disputing Parties shall devote such resources as are needed and as can be reasonably provided to resolve the dispute expeditiously. Disputing Parties shall cooperate in good faith to promptly schedule, attend and participate in the Dispute Resolution Procedures.

## **6.2. Costs**

Unless otherwise agreed among the Disputing Parties, each Disputing Party shall bear its own costs for its participation in these Dispute Resolution Procedures.

## **6.3. Implementation**

Each Disputing Party shall promptly implement any resolution of the dispute.

## **6.4. Non-Exclusive Remedy**

These Dispute Resolution Procedures do not preclude any Party from Timely filing and pursuing an action to enforce a Contractual Obligation under this Agreement, or to appeal a Regulatory Approval inconsistent with the Agreement, or enforce a Regulatory Approval or Applicable Law; provided that such Party shall provide a Dispute Initiation Notice and, to the extent practicable, undertake and conclude these procedures before initiating such action. The Parties agree that litigation will be initiated as a last resort and only after careful consideration of the matters in dispute and the potential collateral consequences to this Agreement.

## **6.5. Dispute Resolution Procedures**

### **6.5.1. Dispute Initiation Notice**

A Party claiming a dispute shall give a Dispute Initiation Notice. Such Dispute Initiation Notice shall describe: (i) the matter(s) in dispute, (ii) the identity of any other Party alleged to have not performed a Contractual or Regulatory Obligation, and (iii) the specific relief sought. Collectively, the Party initiating the procedure, the Party complained against, and any other Party which provides Notice of its intent to participate in these procedures, are “Disputing Parties.”

### **6.5.2. Informal Meetings**

Disputing Parties shall hold at least two informal meetings to resolve the dispute, commencing within 30 days after the Dispute Initiation Notice.

### **6.5.3. Referral to Klamath Basin Coordinating Council**

In the absence of resolution and following the informal meetings described in Section 6.5.2, the Disputing Parties shall refer a dispute to the KBCC. The KBCC shall facilitate an attempt to resolve the dispute according to its internal procedures, within 60 days of such referral.

### **6.5.4. Mediation**

If the dispute is not resolved in the informal meetings or during the KBCC process, the Disputing Parties shall decide whether to use a neutral mediator. The decision whether to pursue mediation shall be made within 30 days after the

failure to resolve the dispute by referral to the KBCC. The Disputing Parties shall agree on an appropriate allocation of any costs of the mediator employed under this section. Mediation shall not occur if the Disputing Parties cannot agree on the allocation of costs. The Disputing Parties shall select a mediator within 30 days of the decision to pursue mediation, including the agreement of allocation of costs. The mediation process shall be concluded not later than 60 days after the mediator is selected. The above time periods may be shortened or lengthened upon mutual agreement of the Disputing Parties.

#### **6.5.5. Dispute Resolution Notice**

The Disputing Parties shall provide Notice of the results of the Dispute Resolution Procedures. The Notice shall: (i) restate the disputed matter, as initially described in the Dispute Initiation Notice; (ii) describe the alternatives which the Disputing Parties considered for resolution; and (iii) state whether resolution was achieved, in whole or part, and state the specific relief agreed to as part of the resolution.

### **7. Other General Provisions**

#### **7.1. Notice**

Any Notice required by this Agreement shall be written and distributed to all Parties. Notice shall be provided by electronic mail, unless the sending Party determines that first-class mail or an alternative form of delivery is more appropriate in a given circumstance. A Notice shall be effective upon receipt, but if provided by U.S. Mail, seven days after the date on which it is mailed. For the purpose of Notice, the list of authorized representatives of the Parties as of the Effective Date is attached as Appendix F. The KBCC shall maintain a current distribution list. The Parties agree that failure to provide the KBCC with current contact information will result in a waiver of that Party's right to Notice under this Agreement. The Party who has waived Notice may prospectively reinstate its right to Notice by providing current contact information to the KBCC.

#### **7.2. Amendment of the Agreement**

##### **7.2.1. General**

The Parties may amend this Agreement only by Consensus and in written form and only in the circumstances specified in (A) through (E) below.

##### **A. Untimely or Inadequate Performance of Obligation**

If a Party's performance of an obligation is delayed or impaired by Force Majeure, or other good cause established pursuant to Section 3.2.4.C, the other Parties shall seek to agree to a modification of the schedule or other element of the obligation to preserve the bargained-for benefits of this Agreement.

**B. Untimely or Inadequate Funding**

If, notwithstanding Best Efforts in seeking the funding as described in Appendix C-2, the Parties do not secure adequate funding on a Timely basis to perform a particular obligation, the Parties shall seek to agree to an alternative schedule and other appropriate remedies to permit the performance of that particular obligation. For any provision that provides a sequence for performance, any amendment will preserve that sequence.

**C. Severability**

After any provision is severed as provided in Section 7.3, the Parties who have not withdrawn pursuant to Section 7.5 determine that an alternative to such severed provision will preserve the bargained-for benefits of the Agreement.

**D. Material Inconsistency of Authorizing Legislation**

If any Party provides Timely Notice that Authorizing Legislation as enacted does not preserve the bargained-for benefits of this Agreement, the Parties shall seek to develop a resolution as provided in Section 3.2.4.B.vi.

**E. Other Changed Circumstances**

If a Party believes that any other event subsequent to the Effective Date impairs or threatens to impair the bargained-for benefits, the Parties shall consider whether to amend the Agreement.

**F. Procedures in Event of Unresolved Dispute Regarding Proposed Amendments**

The Parties shall follow the Dispute Resolution Procedures in response to an event in Section 7.2.1.A through E above. Any Party who objects that such an event impairs its bargained-for benefits under this Agreement shall provide Dispute Initiation Notice within 60 days of such event.

**7.2.2. New Party**

Excepting any Federal Agency Party as provided in Section 1.1.2, and consistent with Section 38, an entity who proposes to become a Party after 60 days after the Effective Date shall submit a written application which shall demonstrate that: (i) it supports both this Agreement and the Hydroelectric Settlement; and (ii) its participation will contribute to the effective implementation of the agreements. No Party shall unreasonably withhold agreement that the entity has made such a demonstration. Upon approval of such application, any such subsequent Party

shall execute both agreements concurrently. This provision applies to a proposed assignee or successor of a Party.

### **7.3. Severability**

This Agreement is made on the understanding that each provision is a necessary part of the entire Agreement. However, if any provision of this Agreement is held to be invalid, illegal, or unenforceable by a Regulatory Agency or a court of competent jurisdiction: (i) the validity, legality and enforceability of the remaining provisions of this Agreement are not affected or impaired in any way; and (ii) the Parties shall negotiate in good faith in an attempt to agree to another provision (instead of the provision held to be invalid, illegal, or unenforceable) that is valid, legal, and enforceable and carries out the Parties' intention to the greatest lawful extent under this Agreement.

### **7.4. Enforcement**

#### **7.4.1. Contractual Obligations**

A Party may bring an action to enforce any Contractual Obligation under this Agreement; *provided* that no Party may bring an action against a Federal Agency Party concerning this Agreement except as provided in Section 7.4.5, below.

##### **A. Dispute Resolution**

A Party may seek to enforce a Contractual Obligation only after compliance with the Dispute Resolution Procedures in Section 6.

##### **B. Remedy**

In such an action, a Disputing Party may only seek specific performance of the Contractual Obligation, or declaratory or other equitable relief, to the maximum extent permitted by Applicable Law. This Agreement does not establish a right to seek relief, or jurisdiction for such relief, against a Party if such relief or jurisdiction does not otherwise exist under Applicable Law.

##### **C. Venue**

The venue for an action to enforce a Contractual Obligation shall be as provided under Applicable Law for obligations of the type of the disputed Contractual Obligation.

#### **7.4.2. Regulatory Obligations**

A Party may bring an action to enforce any Regulatory Obligation, once approved as proposed under this Agreement, only to the extent otherwise provided by Applicable Law. Nothing in this Agreement establishes a right to enforce a



Regulatory Obligation, or jurisdiction for such enforcement, against a Party if such right or jurisdiction does not otherwise exist under Applicable Law.

**A. Dispute Resolution**

A Party may seek to enforce a Regulatory Obligation against another Party, only after compliance with the Dispute Resolution Procedures in Section 6.

**B. Remedy**

In such action, a Disputing Party may seek whatever remedies are ordinarily available for enforcement of obligations of the type of the disputed Regulatory Obligation. This Agreement does not establish any special remedy for such enforcement.

**C. Venue**

The venue to enforce a Regulatory Obligation shall be as provided under Applicable Law.

**7.4.3. Enforceability of Planning Obligations**

Consistent with Sections 2.2.6 and 3.2.5, no Party may assert that a Public Agency Party's obligation for a plan or policy under this Agreement is a pre-decisional commitment to any action.

**7.4.4. No Third Party Beneficiaries**

This Agreement does not create any right in the public, or any member thereof, as a non-Party beneficiary. It does not authorize any non-Party (including enrolled Participant) to maintain an action at law or equity pursuant to this Agreement. The rights and obligations of the Parties with respect to non-Parties shall remain under Applicable Law.

**7.4.5. Actions Against a Federal Agency Party**

A Party may bring an action against a Federal Agency Party only to the extent and in the manner provided by Applicable Law. Nothing in this Agreement establishes any jurisdiction or remedy against a Federal Agency Party if such jurisdiction or remedy does not otherwise exist under Applicable Law. A Party may bring an action against a Federal Agency Party only after compliance with the Dispute Resolution Procedures in Section 6.

**7.5. Withdrawal**

A Party may withdraw from the Agreement only if (i) a provision is severed pursuant to Section 7.3, or (ii) the Secretary publishes a notice pursuant to Section 15.3.4.C that there

is no reasonable likelihood that a notice under Section 15.3.4.A will occur, and in either event the Parties do not adopt an alternative provision that preserves the bargained-for benefits for the potentially withdrawing Party, after exhaustion of the procedures in Sections 3.2.4.B.iv through 3.2.4.B.v, 6, and 7.2 through 7.3.

## **7.6. Termination**

### **7.6.1. Termination**

This Agreement shall terminate before the date provided in Section 1.6 if either of the following events occur and a cure for that event is not achieved pursuant to Section 7.6.2:

- A. By December 31, 2012, federal Authorizing Legislation has not been enacted; or
- B. At any time, the Parties agree by Consensus to terminate the Agreement.

### **7.6.2. Cure for Potential Termination Event**

A Party who believes that the event described in Section 7.6.1.A has occurred, or for that or other reasons this Agreement should be terminated, shall provide a Dispute Initiation Notice under Section 6.5.1. The Parties shall use the Dispute Resolution Procedures specified in Section 6.5 to determine whether to deem the event to conform to this Agreement, or adopt a mutually agreeable amendment to the Agreement, including an amendment to the applicable deadline in Section 7.6.1.A. Such amendment shall require Consensus of the Parties. These procedures shall conclude within 90 days of the Dispute Initiation Notice.

### **7.6.3. Obligations Surviving Termination**

#### **A. Surviving Obligations**

The provisions of Sections 2.2.9, 15.3.2.B, and 15.4.5.A and C insofar as Section 15.4.5.C relates to Section 15.4.5.A, shall survive termination of this Agreement.

#### **B. Treatment of Communications Related to Agreement**

Upon termination, or withdrawal of a Party authorized by this Agreement, all documents and communications related to the development, execution, or submittal of this Agreement to any agency, court, or other entity, shall not be used as evidence, admission, or argument in any forum or proceeding for any purpose to the fullest extent allowed by Applicable Law. This provision does not apply to the results of studies or other technical information developed for use by a Public Agency Party. This provision does not apply to any

information that was in the public domain prior to the development of this Agreement or that became part of the public domain at some later time through no unauthorized act or omission by any Party. Notwithstanding the termination of this Agreement, all Parties shall continue to maintain the confidentiality of all settlement communications.

This provision does not prohibit the disclosure of: (i) any information held by a federal agency that is not protected from disclosure pursuant to the Freedom of Information Act or other Applicable Law; or (ii) any information held by a state or local agency that is not protected from disclosure pursuant to the California Public Records Act, the Oregon Public Records Law, or other applicable state or federal law.

**7.7. Successors and Assigns**

This Agreement shall be binding on and inure to the benefit of the Parties and their approved successors and assigns, unless otherwise specified in this Agreement.

**7.8. Joint Venture**

Except as expressly provided, this Agreement does not and shall not be deemed to make any Party the agent for, partner of, or joint venture with, any other Party.

**7.9. Governing Law**

**7.9.1. Contractual Obligation**

A Party's performance of a Contractual Obligation arising under this Agreement shall be governed by (i) applicable provisions of this Agreement and (ii) Applicable Law for obligations of that type.

**7.9.2. Regulatory Obligation**

A Party's performance of a Regulatory Obligation, once approved as proposed by this Agreement, shall be governed by Applicable Law for obligations of that type.

**7.9.3. Reference to Statutes or Regulation**

Any reference in this Agreement to any Applicable Law shall be deemed to be a reference to a statute or regulation, or successor, in existence as of the date of the action in question.

**7.10. Elected Officials not to Benefit**

This Agreement shall not provide any benefit for any elected official, other than the benefits provided to all Parties.

**7.11. Entire Understanding**

This Agreement constitutes the entire understanding among the Parties. This Agreement constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the subject matter of this Agreement. It supersedes all prior agreements and understandings, whether oral or written, concerning the subject matter hereof. Other than the Appendices to this Agreement, which are attached hereto and incorporated throughout this Agreement by reference, no other document, representation, agreement, understanding or promise, constitutes any part of this Agreement.

**PART II.  
KLAMATH HYDROELECTRIC PROJECT**

**8. General**

**8.1. Support for Hydroelectric Settlement**

The Parties shall support the Hydroelectric Settlement. The Parties acknowledge that the Hydroelectric Settlement is based on facts and circumstances unique to the Klamath Basin, and they do not intend to establish a precedent for other basins or hydroelectric generation generally.

**8.2. Relationship between Restoration Agreement and Hydroelectric Settlement**

**8.2.1. Concurrent Execution**

As provided in Sections 1.5.1 and 37, each Non-Federal Party shall execute this Agreement and the Hydroelectric Settlement concurrently.

**8.2.2. Coordinated Implementation**

The Parties shall implement this Agreement and the Hydroelectric Settlement in a coordinated and Timely manner, to the maximum extent reasonably practicable, recognizing that such performance is necessary to assure the bargained-for benefits. This Agreement contains certain provisions which on their face provide for performance in advance of the physical performance of Facilities Removal.

**PART III.  
FISHERIES PROGRAM**

**9. Overview of Klamath Basin Fisheries Restoration, Reintroduction, and Monitoring Program**

The Parties agree to the Klamath Basin Fisheries Restoration, Reintroduction, and Monitoring Program (Fisheries Program).

## **9.1. Recitals**

### **9.1.1. Blockage of Passage**

The Parties acknowledge that the Hydroelectric Project has excluded coho salmon, Chinook salmon, steelhead, and Pacific lamprey from the Klamath Basin upstream of Iron Gate Dam. The Parties also acknowledge that coho salmon, Lost River and shortnose suckers and bull trout are presently listed under the Federal Endangered Species Act.

### **9.1.2. Other Harmful Conditions**

Portions of the Klamath River and its tributaries currently present certain conditions harmful to fish. These conditions include degraded riparian habitat and stream channels, passage barriers, diversions resulting in entrainment, adverse water quality conditions, adverse hydraulic conditions, fluctuating water levels, and other impacts, known and unknown. These conditions may result in mortality or injury to fish, and reduce the viability of fish populations. These conditions will probably continue in the future unless reduced by cooperative and concerted efforts to resolve them.

### **9.1.3. Benefits of Reintroduction**

Notwithstanding the conditions described in Sections 9.1.1 through 9.1.2, the Parties expect that the availability of additional habitat and the introduction or reintroduction of Fish Species upstream of Iron Gate Dam are likely to result in significant net conservation benefits.

### **9.1.4. Benefits of Restoration**

The Parties agree to pursue restoration actions above, within, and below the Hydroelectric Project to substantially remove, reduce or mitigate the conditions described in Sections 9.1.1 through 9.1.2.

## **9.2. Program Elements**

### **9.2.1. Purposes**

The purposes of the Fisheries Program are to restore and sustain natural production of Fish Species throughout the Klamath River Basin, excluding the Trinity River. Specifically, this program:

- A. provides for reintroduction of anadromous Species throughout their historic range above Iron Gate Dam, including tributaries to Upper Klamath Lake but excluding the Lost River sub-basin, and for reestablishment and maintenance of the ecological functionality and connectivity of Fish habitat;

- B. otherwise establishes conditions that, combined with effective implementation of the Water Resources Program in Part IV, will provide for the natural sustainability and genetic diversity of Fish Species, their full utilization of restored and reconnected habitat, Full Participation in Harvest Opportunities, as well as the overall ecosystem health of the Klamath River Basin;
- C. assesses status and trends, and the factors that influence those trends, of Fish Species and their habitats as identified in Sections 9.1.1 and 9.1.2, and the effectiveness of actions under this Agreement to achieve this purpose; and
- D. provides for adaptive management and reporting as described in Section 5.4 and elsewhere in the Agreement.

### **9.2.2. Approaches**

Throughout the geographic scope of the Fisheries Program described in Section 9.2.3, the Fisheries Program shall use collaboration, incentives, and adaptive management as preferred approaches. The Fisheries Program shall also emphasize restoration and maintenance of properly functioning lake and riverine processes and conditions, and remediation of the conditions described in Section 9.1.2, while also striving to maintain or enhance economic stability of adjacent landowners. Further, the Fisheries Program shall prioritize habitat restoration and monitoring actions to ensure the greatest return on expenditures.

### **9.2.3. Geographic Scope**

The focus of reintroduction shall be the Upper Klamath Basin. The focus of habitat restoration and monitoring shall be the Klamath River Basin, excluding the Trinity River watershed above its confluence with the Klamath River. The Agreement is not intended and shall not be implemented to establish or introduce populations of salmon, steelhead, or Pacific lamprey in the Lost River or its tributaries or the Tule Lake Basin.

### **9.2.4. Plans**

The Parties agree to implement a Fisheries Restoration Plan, a Fisheries Reintroduction Plan, and a Fisheries Monitoring Plan (collectively, “Fisheries Plans”), along with measures in the Water Resources Program described in Part IV.

#### **A. Plan Coordination**

The Fisheries Plans shall include common as well as specific elements. They shall allow for Collaborative Management among Fish Managers and shall provide for coordinated performance, including adaptive management.

## **B. Mitigation of Adverse Impacts**

To the extent feasible and appropriate, the Fisheries Plans shall mitigate adverse effects from reintroduction upon other Fish Species. Such effects may include but are not limited to the potential for disease, predation, and competition. In addition, the Fisheries Plans shall include measures, to the extent practicable and lawful, to mitigate threats to species listed under the ESA or other adverse impacts to natural resources, so as to protect the species and avoid disruption of ongoing programs under this Agreement.

### **9.2.5. Use of Best Available Science**

The Fisheries Program shall be based on the best available scientific data and information. Fish Managers shall consider all relevant past and current scientific information.

### **9.2.6. Fisheries Program Goals**

The Fisheries Program shall include goals to evaluate the Fisheries Program's progress and evaluate effectiveness of implementation.

Consistent with the purposes stated in Section 9.2.1, the goals of the Fisheries Program are to (i) restore and maintain ecological functionality and connectivity of historic Fish habitats; (ii) re-establish and maintain naturally sustainable and viable populations of Fish to the full capacity of restored habitats; and (iii) provide for Full Participation in Harvest Opportunities for Fish Species.

The Fisheries Program will establish metrics to evaluate program progress.

The Fish Managers shall use best available science to establish the specific metrics for such goals for each phase of the Fisheries Program. These metrics shall consider and integrate the four parameters for evaluating population viability status, including: abundance, population growth rate, genetic diversity, and population spatial structure.

## **9.3. Funding**

The Non-Federal Parties shall support authorization and appropriation of funds in the amount of \$493.2 million, as estimated in Appendix C-2, to implement the Fisheries Program for the first ten years after the Effective Date.

**10. Fisheries Restoration Plan**

**10.1. Phase I of the Fisheries Restoration Plan**

**10.1.1. Preparation**

Within one year of the Effective Date, the Fish Managers shall co-author and distribute a draft of Phase I of the Klamath River Fisheries Restoration Plan.

- A. FWS and NMFS shall be co-Lead Parties for administrative tasks in the plan development process.
- B. The Fish Managers shall work with other Parties and seek their input during plan development, and shall also consider public input under Applicable Law.
- C. The Phase I Plan shall describe how the public comments and recommendations were incorporated. If the Fish Managers cannot agree as co-authors on the content of the Phase I Plan, FWS and NMFS shall author and distribute a Phase I Plan. The Fish Managers shall be responsible for revision of the Phase I Plan as appropriate pursuant to the same process used for the initial plan.
- D. NMFS and FWS shall use Best Efforts to complete any NEPA analysis for the Phase I Plan and the Fish Managers shall use Best Efforts to finalize the Phase I Plan by March 31, 2012.

**10.1.2. Plan Elements**

Based on best available science, Phase I of the Fisheries Restoration Plan shall establish restoration priorities and criteria for restoration project selection for the ten years following the Effective Date. Specific elements will include, but may not be limited to, restoration and permanent protection of riparian vegetation, water quality improvements, restoration of stream channel functions, measures to prevent and control excessive sediment inputs, remediation of Fish passage problems, and prevention of entrainment into diversions. Within these specific elements, the Phase I Plan will address, among other things: (i) coarse sediment management in the Klamath River between Keno Dam and the Shasta River confluence, where coarse sediment supply will be managed, in coordination with any plan for Facilities Removal, to replenish and sustain existing in-river sediment storage capacity, which may subsequently be increased after evaluating the attendant biological benefits; and, (ii) management and reduction of organic and nutrient loads in and above Keno Reservoir and in the Klamath River downstream. The Phase I Plan will identify high priority projects that either: (i) have direct benefits to existing Fish resources; or (ii) will significantly contribute to protecting and preparing habitats for use by anadromous Fish once passage is



restored. The Phase I Plan shall indicate how it will integrate the approaches described in Section 9.2.2.

## **10.2. Phase II of the Fisheries Restoration Plan**

### **10.2.1. Preparation and Adoption**

Within seven years of finalization of the Phase I Plan, the Fish Managers shall co-author and distribute a draft Phase II of the Klamath River Fisheries Restoration Plan.

- A.** The Fish Managers shall collaborate with other Parties, including the KBCC, and seek their input during plan development, and shall also consider public input under Applicable Law.
- B.** The Phase II Plan shall describe how these comments and recommendations were incorporated.
- C.** The FWS and NMFS shall be co-Lead Parties for administrative tasks in the plan development process. If the Fish Managers cannot agree as co-authors on the content of the Phase II Plan, FWS and NMFS shall author and distribute a Phase II Plan.
- D.** NMFS and FWS shall use Best Efforts to complete any NEPA analysis for the Phase II Plan, and the Fish Managers shall use Best Efforts to finalize the Phase II Plan by March 31, 2022.

### **10.2.2. Plan Elements**

Using the results of the effectiveness monitoring of Phase I actions, the Phase II Plan will establish elements, restoration priorities, and an adaptive management process, for the remaining term of the Agreement. The Phase II Plan will describe how it will integrate the approaches described in Section 9.2.2.

### **10.2.3. Plan Revision**

The Fish Managers shall be responsible for revision of the Phase II Plan as appropriate and pursuant to the same process used for the initial plan.

## **11. Fisheries Reintroduction and Management Plan**

Reintroduction of anadromous Fish into the Upper Klamath Basin by the Fish Managers will involve two planning and implementation phases. Phase I will address the near-term investigations, facilities, actions, monitoring, and decisions necessary to initiate and accomplish the reintroduction of anadromous Fish Species. Phase II will address the management of re-established Fish populations in presently un-occupied habitats and as part of the fisheries of the Klamath River Basin.

## **11.1. Oregon Wildlife Policy**

Because anadromous Fish Species were not part of fisheries management in the Klamath River Basin in Oregon, and in light of Parties' support of the January 15, 2008 public draft of the Agreement, ODFW presented an Amendment to the Klamath River Basin Fish Management Plan (1997) to the Oregon Fish and Wildlife Commission. The Commission adopted the Amendment on July 18, 2008. The 2008 Amendment to the 1997 Klamath River Basin Fish Management Plan (OAR 635-500-3890 *et seq.*) provides Policy direction for ODFW's participation in the implementation of this section.

### **11.1.1. General Policy**

Oregon's Wildlife Policy (ORS 496.012) recognizes that the Oregon Fish and Wildlife Commission represents "the public interest of the State of Oregon" and further will implement the goal "To develop and manage the lands and waters of the state in a manner that will enhance the production and public enjoyment of wildlife." By statutory definition, wildlife includes fish. Nothing in this Agreement modifies or abrogates the Oregon Fish and Wildlife Commission's statutory responsibilities.

### **11.1.2. Amended Klamath Policy**

The July 2008 Amendment to the Klamath River Basin Fish Management Plan (OAR 635-500-3890 *et seq.*) established Goals, Policies, and Objectives to direct ODFW in the development of the Phase I and Phase II Reintroduction and Management Plans.

#### **A. Goal: Self-Sustaining Populations of Anadromous Fish**

Oregon's goal is to re-establish in Oregon, self-sustaining, naturally-produced populations of Chinook, steelhead, coho, and lamprey that were historically present in the Upper Klamath Basin, into historic habitats currently vacant of anadromy.

#### **B. Fish Plans**

The 2008 Amendment to the Klamath River Basin Fish Management Plan (1997) directs ODFW to develop a Reintroduction Implementation Plan and an Anadromous Fish Conservation Plan for the Oregon portions of the Klamath River Basin. The Reintroduction Implementation Plan corresponds with the Phase I Plan described below. The Anadromous Fish Conservation Plan corresponds with the Phase II Plan described below.

#### **C. Policies**

The 2008 Amendment to the Klamath River Basin Fish Management Plan (1997) provides Policies that direct ODFW to: develop a

Reintroduction Implementation Plan prior to release of any Chinook above Upper Klamath Lake; monitor the volitional re-colonization of the Oregon portion of the Klamath River and tributaries by Chinook salmon, steelhead, coho salmon, and Pacific lamprey, and not release anadromous fish into the Oregon portion of the Klamath River and tributaries below Upper Klamath Lake unless re-colonization is proceeding too slowly according to criteria developed in the Reintroduction Plan; and develop a Reintroduction Implementation Plan prior to release of any Chinook above Upper Klamath Lake.

## **11.2. Oregon Fisheries Reintroduction and Management Plans**

### **11.2.1. Preparation and Adoption**

- A.** Upon receipt of funding to implement this Agreement, but no later than upon state concurrence with an Affirmative Determination under Section 3 of the Hydroelectric Settlement, ODFW and the Klamath Tribes shall prepare, collaboratively with other Fish Managers, the Phase I Reintroduction Plan for reintroduction of anadromous Fish Species into Oregon reaches of the Klamath River Basin. Plan development will include measures to implement early components of reintroduction. It will include participation from interested Parties and other entities capable of adding appropriate technical expertise to the process. ODFW and the Klamath Tribes will use Best Efforts to finalize the Phase I Reintroduction Plan within one year of state concurrence with an Affirmative Determination under Section 3 of the Hydroelectric Settlement.
- B.** The Phase I Reintroduction Plan will identify facilities and actions necessary to start the reintroduction, as well as monitoring, evaluation, and other investigations as appropriate to narrow uncertainties. The Phase I Plan will be adaptable in order to incorporate knowledge gained from monitoring and evaluation during the reintroduction. Additionally, the Fish Managers from the reaches of the Klamath River below Upper Klamath Lake will develop specific actions to be incorporated into the Fisheries Monitoring Plan to assess the volitional re-colonization of those reaches of river and tributaries by Fish currently blocked by Iron Gate Dam.
- C.** ODFW and the Klamath Tribes shall implement the reintroduction actions in Oregon. Reintroduction actions in California shall be implemented by the Fish Managers in California.

- D. Once the implementation of Phase I Reintroduction yields results to guide the management of anadromous Fish in Oregon as described in Section 11.3.2, Phase II Reintroduction will be initiated.
- E. ODFW, in close coordination with the Klamath Tribes, shall prepare for the Oregon Fish and Wildlife Commission an Anadromous Fish Conservation Plan to guide ODFW's management of established anadromous fish populations in the Oregon reaches of the Klamath River Basin. The Oregon Fish and Wildlife Commission's decision on this plan will provide policy guidance to ODFW for participation in development of a basinwide plan to manage reintroduced fish populations in the Klamath Basin.
- F. Following the Oregon Fish and Wildlife Commission's approval of ODFW's Anadromous Fish Conservation Plan for Oregon's reaches of the Klamath River Basin, ODFW and other Fish Managers shall prepare collaboratively the Phase II Reintroduction Plan to describe the management of new populations of anadromous Fish in the basin as integral components of Fisheries management of the entire Klamath River Basin. The Phase II Reintroduction Plan will be incorporated into a plan for the management of Klamath Fisheries that will fulfill the requirements of the Pacific Fisheries Management Council. This latter plan will be prepared by the Fish Managers and will be submitted to the respective policy decision bodies of the Fish Managers for their adoption. This planning effort will include participation from interested Parties or other entities capable of adding appropriate technical expertise to the process.

#### **11.2.2. Elements**

The Phase I Reintroduction and Phase II Reintroduction Plans will present specific management options for managing Chinook salmon, coho salmon, steelhead trout and Pacific lamprey in the Klamath River Basin, where anadromous Fish were historically present. The implementation plan will identify near-term and long-term actions necessary to address key uncertainties and develop specific strategies for achieving the goals of reintroduction.

#### **A. Schedule**

ODFW shall conduct activities necessary to prepare the Phase I Reintroduction Plan beginning as early as 2010. Key investigations that do not require Fish passage through the Hydroelectric Project (e.g.

stock selection, outmigrant behavior, and reintroduction methods) will begin as soon as funding is available.

**B. Lost River**

The Reintroduction Plan will not propose to introduce anadromous Fish into the Lost River and Tule Lake subbasin.

**11.3. Oregon Implementation**

The Fish Managers shall annually provide a report to the Klamath Basin Coordinating Council on the progress of implementing the Reintroduction Plan. During implementation of the plans, the Fish Managers shall include participation by interested Parties and other entities capable of adding technical expertise to the process.

**11.3.1. Implementation of Phase I Reintroduction**

**A. Above Upper Klamath Lake**

In Phase I Reintroduction, ODFW and the Klamath Tribes, in collaboration with the other Fish Managers, shall introduce Chinook salmon into Upper Klamath Lake and tributaries. This phase will require active intervention and movement of fish into habitats above Upper Klamath Lake. A variety of release and rearing strategies will be utilized to optimize opportunities for success. An adaptive management approach will be utilized to determine appropriate race(s) and life history of Chinook to release (spring and/or fall Chinook) with best opportunities for successful rearing, emigration to the ocean and return.

**B. Below Upper Klamath Lake**

During Phase I Reintroduction, the Fish Managers shall monitor and evaluate natural re-colonization of native Chinook and coho salmon, steelhead trout and Pacific lamprey into the Klamath River and tributaries below Upper Klamath Lake. No active intervention or movement of Fish will be immediately proposed to re-establish salmon, steelhead or lamprey in these stream areas during the initial portion of Phase I Reintroduction. However, if monitoring reveals that re-colonization is not occurring or is too slow, the Fish Managers may pursue active reintroduction of salmon and lamprey into habitats below Klamath Lake.

**C. Sport and Commercial Fisheries**

To the extent possible, adult salmon returning to Upper Klamath Lake and tributaries from Phase I Reintroduction efforts shall be protected

to minimize their harvest in sport, commercial and tribal fisheries until the Phase II Reintroduction Plan is adopted.

**D. Research**

Research investigations shall be undertaken during Phase I Reintroduction to determine appropriate stocks which meet strict disease criteria and migration ability, potential competition and interaction of re-introduced Fish with existing native stocks, and natural production potential for anadromous Fish in the upper basin. In addition, research will inform adaptive management of active reintroduction efforts in and above Upper Klamath Lake.

**11.3.2. Implementation of Phase II Reintroduction**

On a continuing basis, the Fish Managers shall ascertain the status of reintroduced or recolonized populations of anadromous Fish in the Klamath River and tributaries. The Fish Managers shall include participation by interested Parties and other entities capable of adding technical expertise to the process. Once self-sustaining populations of Chinook salmon and steelhead are established in the Upper Klamath Basin, at levels of population productivity consistently above replacement, Phase II will be initiated. As described in Section 11.2.1.E, ODFW will initiate Phase II by preparing Oregon's Anadromous Fish Conservation Plan for the Oregon Fish and Wildlife Commission's approval. Following the Oregon Fish and Wildlife Commission's approval of the Anadromous Fish Conservation Plan, the Fish Managers and interested parties will develop the Phase II Reintroduction Plan. In Phase II Reintroduction, Fish Managers will implement management actions to achieve objectives identified in the Phase II plan that will guide basinwide management of the re-established fish populations. The re-established populations in the Upper Klamath Basin will contribute to the Fisheries of the basin as a whole. Management actions will insure that tribal, commercial, and sport harvests are managed in a way that provides for escapement of salmon and steelhead into the Upper Klamath Basin at levels that sustain healthy populations.

**11.4. California Fisheries Reintroduction Plan**

**11.4.1. General**

Natural reintroduction of anadromous fish within the California portion of the Klamath Basin will commence immediately once fish passage is restored. The California Department of Fish and Game shall adopt a passive (wait and see) approach to reintroduction which shall include development of reintroduction goals, monitoring protocols, habitat assessments and other investigations as appropriate. The Plan shall also include development of guidelines for use of a conservation fish hatchery to more quickly establish naturally producing populations in the wild if deemed appropriate and necessary.

#### **11.4.2. Reintroduction Plan**

Upon an Affirmative Determination by the Secretary under Section 3 of the Hydroelectric Settlement, the California Department of Fish and Game shall begin a California Fisheries Reintroduction Plan. The Plan shall be developed in collaboration with the Tribes and other Fish Managers and will be developed in coordination with the Oregon Fisheries Reintroduction Plan as described in Sections 11.2 and 11.3. It will include participation from interested Parties and other entities capable of adding appropriate technical expertise to the process. CDFG will use Best Efforts to finalize its California Fisheries Reintroduction Plan within two years of the Secretarial Determination under Section 3 of the Hydroelectric Settlement.

#### **11.4.3. Adaptive Management**

The Plan shall include an adaptive management approach during reintroduction to allow for inclusion of new information as it becomes available and provide flexibility in the methods used to achieve established goals. For example, if monitoring reveals that re-colonization is not occurring or is too slow, the Fish Managers may pursue active reintroduction of native anadromous fish. Such reintroduction actions could include a variety of release and rearing strategies to optimize opportunities for success. The adaptive management approach would be utilized to determine appropriate race(s) and life history of Chinook to release (spring and/or fall Chinook) with best opportunities for successful rearing, emigration to the ocean and return. Research would inform any adaptive management of active reintroduction efforts. One such research priority would be to determine appropriate stocks for active reintroduction which meet strict disease criteria and migration ability. Research would also need to address, potential competition and interaction of reintroduced fish with existing native stocks, and natural production potential for anadromous fish.

#### **11.4.4. Conservation Hatchery**

In the context of this Agreement, a conservation hatchery is an artificial fish production facility with the primary objective of enabling naturally produced fishes to fully support re-establishing populations. Fishes produced in such a facility must fit within the ecological context of the Klamath River such that (i) artificially produced fishes demonstrate the range of life history characteristics representative of naturally produced fishes; (ii) the genetic structure of the artificially produced fishes matches that of the naturally produced fishes; (iii) the number of fishes produced in the hatchery does not overwhelm the naturally produced fishes as returning adults; and (iv) artificially produced fishes do not introduce new diseases or greater susceptibility to existing diseases to the naturally producing population(s). A successful conservation hatchery program will continually decrease the dependence on artificial production as naturally produced fishes become more abundant, successful, and dispersed among the range of available habitats. A successful conservation hatchery eventually stops

operating because natural production is capable of fully supporting the re-established populations.

## **12. Fisheries Monitoring Plan**

### **12.1. Preparation and Adoption**

Within one year of the Effective Date, the Fish Managers shall co-author a draft Fisheries Monitoring Plan. The Fisheries Monitoring Plan will be coordinated with the Fisheries Restoration and Reintroduction Plans described in Sections 10 and 11, respectively. The Fish Managers shall collaborate with, and seek comments and recommendations from, each of the Parties, and seek public input, in the development of the Fisheries Monitoring Plan. The Fish Managers shall describe how comments and recommendations are incorporated into the Fisheries Monitoring Plan. The FWS and NMFS shall be co-Lead Parties for administration of the Plan development process. If the Fish Managers cannot agree as co-authors, FWS and NMFS shall author the Fisheries Monitoring Plan. NMFS and the FWS shall use Best Efforts to complete any NEPA analysis appropriate for the Fisheries Monitoring Plan and the Fish Managers shall use Best Efforts to finalize the Fisheries Monitoring Plan by March 31, 2012. The Fish Managers shall be responsible for revision of the Fisheries Monitoring Plan, pursuant to the same process used for the initial plan.

### **12.2. Fisheries Monitoring Plan**

#### **12.2.1. Status and Trends**

The Fisheries Monitoring Plan will include, but not be limited to: (i) methods for stock identification; (ii) collecting information to assess the status and trends in abundance of fish populations and their habitats, including riparian areas; and (iii) providing information for restoration actions and for management of fisheries dependent on Klamath Basin fish populations. The Fish Species to be included in the plan are Chinook and coho salmon, steelhead trout, resident rainbow trout, lamprey, suckers, bull trout, sturgeon and eulachon.

#### **12.2.2. Data Related to Environmental Water**

The Fisheries Monitoring Plan will include, but not be limited to, the collection of data to: (i) monitor Klamath River instream flows and Upper Klamath Lake elevations to evaluate the water outcomes from implementation of the Water Resources Program; and (ii) assist the TAT in developing its Annual Water Management Plan and in providing in-season management recommendations as described in Appendix D-2. The type of water data will include water quantity data (e.g., instream flows and Upper Klamath Lake elevations at appropriate locations) and water quality data (e.g., temperature).



### **12.2.3. Effectiveness Monitoring**

The Fisheries Monitoring Plan will include effectiveness monitoring in order to assess the performance of restoration actions at both site-specific and broader scales. The results of the effectiveness monitoring will assist identification of restoration priorities and other adaptive management actions for subsequent planning phases as described in Section 10.2.2.

### **12.2.4. Limiting Factors**

The Fisheries Monitoring Plan will also include assessments to evaluate factors limiting recovery and restoration of Fish populations in order to identify measures to eliminate, reduce or mitigate such threats. The results of the limiting factors assessments will assist in the identification of restoration priorities and adaptive management actions for subsequent planning phases as described in Section 10.2.2.

### **12.2.5. Data System**

The Fisheries Monitoring Plan will describe a cohesive and integrated approach to the collection and storing of monitoring data and restoration information. The Plan will identify existing monitoring efforts and monitoring gaps to expand data collection efforts where necessary to promote a comprehensive, integrated, and efficient Fisheries Program.

### **12.2.6. Specification of Responsibilities**

The Fisheries Monitoring Plan will describe specific roles and responsibilities of the Fish Managers, and where appropriate, other Parties, in implementing the monitoring program.

### **12.2.7. Periodic Review Regarding Fisheries Outcomes**

In furtherance of Section 1.3, the Federal Agency Parties and the Tribes shall periodically meet and confer to review whether the intended fisheries outcomes of this Agreement are being realized for tribal trust as well as public benefits and to determine appropriate remedial actions (if any).

#### **A. Review**

By June 30, 2020 and June 30, 2030, and at other dates thereafter as agreed pursuant to Section 5.4, the TAT shall evaluate: (i) fishery habitat objectives consistent with Sections 1.3, 9.2.1, 12.2.1 and 12.2.4; and (ii) habitat outcomes of the actions taken by the Parties, including volumes of water available for Instream Use. The TAT shall evaluate appropriate documents considered by the Parties in reaching this Agreement, including but not limited to Simondet *et al.*, *Settlement Group Tech Team Assignment X Flow Report* (January 6,

2007), Dunsmoor, *Assumptions in Hydrological Modeling (KPSIM)* (May 2007), and Appendix E-5, as well as best available science undertaken thereafter through this Monitoring Plan or otherwise. If the TAT's evaluation is that the intended objectives or outcomes have not been met, the TAT shall provide a recommendation to the United States, the Tribes, and other Fisheries Managers regarding additional measures that should be taken. The TAT's recommendation shall be subject to peer review by an independent body to evaluate the methods, data, and calculations used for such recommendation.

**B. Responsive Actions**

If warranted after the peer review of the TAT's recommendation, the United States, affected Tribes and other Fish Managers, and other Parties shall develop and implement a functional response which preserves the bargained-for benefits of all Parties, in the form of supplemental terms of this Agreement consistent with Section 3.2.4.B, and subject to the Dispute Resolution Procedures in Section 6. In developing such response, the Parties shall consider the priorities established in the relevant programs to provide fisheries benefits.

**C. Further Extension of the Agreement**

In 2055, the Parties shall agree to consider an extension of the term of the Agreement as stated in Section 1.6, if warranted by the circumstances at that time.

**13. Funding and Implementation**

**13.1. Funding Program Planning in 2010**

Within 60 days after the Effective Date, the Fish Managers shall meet to determine budgets necessary for initial stages of development of their respective plans. Subject to Section 4.1, these Public Agency Parties, including Tribes, shall provide funds for these initial planning efforts. Each funding agency shall retain its authority and final approval to make funding decisions under Applicable Law.

**13.2. Annual Funding Review**

On an annual basis, or other appropriate interval to be determined by the Parties depending on appropriations, all Parties with funds or other resources (e.g., in-kind services) available for use in the implementation of the Fisheries Program shall meet and confer to identify all available funds appropriate for such uses within 180 days of the finalization of the Fisheries Restoration Plan and Fisheries Monitoring Plan and then annually thereafter. They shall also identify funding constraints. The FWS and NMFS shall be co-Lead Parties for managing the funding review process.

### **13.3. Program Funding Allocation Prior to Klamath Basin Advisory Council Charter**

#### **13.3.1. Funding Proposals from Planning Groups**

Within 30 days after the review of available funding described in Section 13.2, in coordination with other Parties and other entities with available resources, and consistent with Applicable Law, the Fish Managers shall incorporate the results of that funding review and develop an Annual Program of Work and associated budget for funding the implementation of the priorities set forth in the plans for the Fisheries Program. The Annual Program of Work will reconcile and balance the priorities among the Plans. If there is an unresolved dispute about priorities after exhaustion of Dispute Resolution Procedures under Section 6.5, each Party with available resources shall make its own decision. The FWS and NMFS shall be co-Lead Parties for administrative tasks of the development process for this Annual Program of Work.

#### **13.3.2. Implementation by Funding Entities**

Consistent with Applicable Law and subject to Section 4.1 as appropriate, funding entities, in coordination with other entities with available resources (e.g., in-kind services), will implement actions consistent with the Annual Program of Work developed under Section 13.3.1. Each funding entity shall retain its authority and final approval to make funding decisions. To the greatest extent feasible and appropriate under available authorities and programs, agreements with entities implementing elements of these plans will establish permanent protections and measures for adaptive management to reach desired conditions.

### **13.4. Annual Reporting**

Within 30 days before the annual funding review described in Section 13.2, the funding entities shall provide a report to the Klamath Basin Advisory Council on all activities funded and/or carried out in the previous year consistent with implementation of the Annual Program of Work and describe any substantial deviations from the previous year's Annual Program of Work.

### **13.5. Funding Process Subsequent to Council Charter**

The FWS and NMFS shall jointly deliver to the KBAC the Annual Program of Work and associated budget described in Section 13.3.1. The KBAC shall determine its process for review and developing recommendations. It shall incorporate the information provided under Section 13.3 and make recommendations to the funding entities regarding budget priorities consistent with the Fisheries Plans. The FWS and NMFS shall be co-Lead Parties for managing the process described above for the prioritized funding allocation. The funding entities shall perform expenditures as described in Section 13.3.2. Each funding entity shall retain its authority and final approval to make funding decisions under Applicable Law.

**PART IV.**  
**WATER RESOURCES PROGRAM**

**14. Overview of Water Resources Program**

The Parties agree to a Water Resources Program.

**14.1. Elements**

This program shall consist of the following discrete and consistent elements: (i) On-Project Water Users Program, including provisions related to Tribes and to National Wildlife Refuges; (ii) Off-Project Water Program; (iii) Power for Water Management Program; (iv) Additional Water Conservation and Storage; (v) Drought, Climate Change, and Emergency; and (vi) Environmental Water.

**14.2. Consistency with Applicable Law**

The Agreement shall be consistent with Applicable Law and the limits of applicable water rights. None of the terms of the Agreement affect either OWRD's authority to determine and administer water rights generally or specifically in the KBA, or the SWRCB's authority. Further, nothing in this Agreement alters or eliminates the existence or amount of any tribal water or fishing rights in the Klamath River Basin in California, including claims to tribal water or fishing rights that have not yet been determined or quantified.

**14.3. Funding**

The Non-Federal Parties shall support authorization and appropriation of funds in the amount of \$338 million, as estimated in Appendix C-2, to implement the Water Resources Program in the first ten years after the Effective Date.

The Non-Federal Parties shall support legislation that would establish the following funds within the Federal Treasury to implement the Water Resources Program, and administration of such funds consistent with Sections 14.3.1 through 14.3.3:

**14.3.1. On-Project Plan and Power for Water Management Fund**

Reclamation shall administer this fund for the purposes, plans and programs identified in Sections 15.2 and 17. To receive money from the fund, KWAPA and the Management Entity must submit upon at least an annual basis an expenditure plan for use of the fund for the purposes of Sections 15.2 and 17, respectively. Each expenditure plan may be in the form of a request for reimbursement of monies expended or a withdrawal for expenses anticipated within the next year. The United States may take all appropriate administrative or judicial actions to enforce the expenditure plan to ensure that monies expended or reimbursed from the fund under the plan are used in accordance with this Agreement. The United States has no liability arising from KWAPA or the Management Entity exercising its right to expend or be reimbursed monies from the fund. KWAPA and the

Management Entity shall provide an annual report that describes all expenditures or reimbursements from the fund during the year covered by the report.

The expenditure plans of KWAPA and the Management Entity may, on an annual spending basis, or a cumulative spending basis, give priority to implementing the program in Section 17, up to the then-cumulative amounts in Appendix C-2, line items 72 through 75. The Parties agree that if full funding for the implementation of both the On-Project Plan and Power for Water Management Program is not appropriated on the schedule in Appendix C-2, and KWAPA and the Management Entity give priority to implementing the Program in Section 17, the implementation of the On-Project Plan, and any deadlines associated with implementation of the On-Project Plan, would be delayed an amount of time agreed to by the Parties named in and using the process stated in Section 15.3.8.B and Section II.D of Appendix D-1.

#### **14.3.2. Water Use Retirement Fund and Off-Project Reliance Fund**

FWS shall administer this fund for the purposes, plans, and programs identified in Sections 16.2.2 and 19.5. The program under Section 19.5 does not begin until the program under Section 16.2.2 has been completed. To receive money from the fund, UBT and UKWUA must submit upon at least an annual basis an expenditure plan for use of the fund for the purposes of Sections 16.2.2 or 19.5, respectively. Each expenditure plan may be in the form of a request for reimbursement of monies expended or a withdrawal for expenses anticipated within the next year. The United States may take all appropriate administrative or judicial actions to enforce the expenditure plan to ensure that monies expended or reimbursed from the fund under the plan are used in accordance with this Agreement. The United States has no liability arising from UBT or UKWUA exercising its right to expend or be reimbursed monies from the fund. UBT and UKWUA shall provide an annual report to the FWS that describes all expenditures or reimbursements from the fund during the year covered by the report.

The Parties understand that if full funding for the Section 16.2.2 Water Use Retirement Program is not appropriated on the schedule in Appendix C-2, the schedule for completing the Water Use Retirement Program may be delayed.

#### **14.3.3. The Klamath Drought Fund**

The Secretary shall designate the National Fish and Wildlife Foundation as the administrator (Fund Administration Entity) of the Klamath Drought Fund for the purposes, plans, and programs identified in Section 19.2. To receive money from the fund, the Enforcement Entities identified in the Drought Plan required by Section 19.2 must submit upon at least an annual basis an expenditure plan for use of the fund consistent with Section 19.2. Each plan may be in the form of a request for reimbursement of monies expended or a withdrawal for expenses anticipated within the next year. The United States may take all appropriate

administrative or judicial actions to enforce the expenditure plan to ensure that monies expended or reimbursed from the fund under the plan are used in accordance with this Agreement. The United States has no liability arising from the Enforcement Entities exercising their rights to expend or be reimbursed monies from the fund. The Enforcement Entities shall provide an annual report to the Fund Administration Entity that describes all expenditures or reimbursements from the fund during the year covered by the report.

**15. On-Project Water Users Program**

**15.1. Water Diversions for Klamath Reclamation Project and Klamath Basin National Wildlife Refuges**

**15.1.1. Klamath Reclamation Project**

This Agreement provides for limitations on specific diversions for the Klamath Reclamation Project, as described in this Section 15.1.1 and as provided in Appendix E-1. The limitations are intended, particularly in drier years, to increase water availability for Fisheries purposes, while Section 15.1.2 provides terms for the allocation and delivery of water to National Wildlife Refuges. Section 15.2 establishes the program by which KWAPA will address the limitations on diversions. The DIVERSION quantity as specified in Appendix E-1 for the irrigation season will increase by 10,000 acre-feet in some years effective March 1 after the earlier of: (i) the physical removal of all or part of each of the Hydroelectric Facilities has occurred and achieved a free-flowing condition and volitional fish passage; (ii) 10,000 acre-feet of new storage has been developed under Section 18.3; or (iii) the KBCC, on or after February 1, 2020 and after receipt of recommendations from the TAT, determines the increase is appropriate. The KBCC shall provide appropriate notice to OWRD of when the increase is to occur based on the fulfillment of one of these conditions. The Parties acknowledge that: the preceding terms of this section and Attachment A to Appendix E-1 as related to the increase of 10,000 acre-feet were negotiated prior to the completion of Section 15.3.4.A; and, based on Sections 15.3.4.A.v and 15.3.1.A, at least one condition specified above triggering the increase of 10,000 acre-feet would occur prior to the filing of Appendix E-1. Accordingly, absent amendment of the relevant terms, KBCC's notice to OWRD would occur not later than the time of the filing of Appendix E-1.

**A. Collaboration on Irrigation Diversions and Environmental Water Management**

**i. Purpose and Scope**

The Parties acknowledge that historically, the Klamath Reclamation Project in some wet water years has diverted less than the applicable maximum DIVERSION provided in Appendix E-1, and that diversion of less than the maximum

DIVERSION may occur in some years in the future. The Parties concur that Fish Managers will benefit from ongoing information throughout the irrigation season as to irrigation operations. The Parties intend by these provisions that water not diverted shall be managed for the benefit of the fisheries in the Upper Klamath Lake and Klamath River, and that Fish Managers through collaboration with irrigation managers shall have ongoing information on the operation of irrigation systems.

**ii. Obligations**

To insure that water not needed by the Klamath Reclamation Project is managed for the benefit of the fisheries, and otherwise that fisheries management reflects a high degree of knowledge regarding ongoing and anticipated timing of water diversions, the Parties agree to the following:

- a. Within 12 months of the Effective Date, or as soon as practicable based on the availability of funds as identified in Appendix C-2, item 61, KWAPA (in coordination with TID, KID, KDD, Reclamation, FWS (TLNWR and LKNWR), and other interested Parties) shall complete an analysis of the relevant historical data including, but not limited to, Klamath Reclamation Project water diversions, climatic data, and agronomic data, to determine the circumstances which cause diversion of less than the applicable maximum DIVERSION as provided in Appendix E-1. The results of this analysis shall be provided to the TAT;
- b. Using the analysis, KWAPA (in coordination with TID, KID, KDD, Reclamation, FWS (TLNWR and LKNWR) and other interested Parties) and the TAT, shall develop and continuously refine predictive techniques for use by the TAT to anticipate, as early in the irrigation season as possible and periodically thereafter, those circumstances in which the Klamath Reclamation Project will likely divert less than the applicable maximum DIVERSION. The TAT will use all such information as part of its recommendations for management of the water resources for the benefit of the fisheries; and
- c. KWAPA shall participate fully in the activities of the TAT. Prior to the beginning of the irrigation season, KWAPA shall provide information to the TAT on

anticipated timing and amounts of diversion for the Klamath Reclamation Project. This prediction shall be refined by KWAPA and the TAT periodically throughout the irrigation season, and shall include statements of the degree of probability that specified amounts of water may not be diverted to meet irrigation requirements.

**B. DIVERSION and DIVERSION Limitations**

**i. DIVERSION**

The applicable limits in Appendix E-1 on defined DIVERSION of water from Upper Klamath Lake and the Klamath River from the Settlement Points of Diversion were developed by: establishing an applicable DIVERSION related to irrigation and any other uses to be addressed in the OPPA under the On-Project Plan identified in Section 15.2, including a range for the March to October period from 330,000 to 385,000 acre-feet, which would at some time increase to 340,000 to 385,000 acre-feet; then adding a quantity equal to the applicable Refuge Allocation described in Section 15.1.2. The Parties agree that the terms for distribution or management of water within the Klamath Reclamation Project to occur under this Agreement are provided in terms of this Agreement that follow. Details regarding the use of water following diversion are specified in other provisions, including Section 15.1.2, Section 15.2, and Appendix E-1.

**ii. No Creation of Rights**

Nothing in this Section 15 or Appendix E-1 is intended to, or should be construed to, create or establish any water rights or to create an entitlement or right to delivery of water not supported by a water right or a claim to a water right under Applicable Law. If the decree issued in the KBA under ORS 539.150(4) does not recognize water rights sufficient to support the full DIVERSION quantity as specified in Appendix E-1, or the Refuge Allocation included within the DIVERSION quantity, then the DIVERSION quantity will be reduced by the quantity of the unrecognized rights on which the limitation on DIVERSION within Appendix E-1 was based, and the Parties agree to meet and confer to determine the effect of that insufficient recognition on the Klamath Reclamation Project, the Refuge Allocation, and the full DIVERSION, and to seek to identify means to protect the interests of any affected Party. If a Party believes that the circumstances described in this



Section 15.1.1.B.ii have arisen, the Party shall provide Notice to the other Parties within sixty days of the adoption of the decree. In the absence of such Notice, this Section 15.1.1.B.ii shall be inapplicable. If rights are subsequently acquired or transferred to support the full DIVERSION or Refuge Allocation, as applicable, then the DIVERSION limitation will allow diversion under such rights as applicable.

**15.1.2. Water Diversions for Tule Lake and Lower Klamath National Wildlife Refuges**

**A. Recitals**

**i. National Wildlife Refuges Generally**

The lands within the LKNWR and TLNWR are owned by the United States and managed by FWS. These Refuges receive water through facilities of the Klamath Reclamation Project, administered by Reclamation. Klamath Reclamation Project and other facilities are used to deliver water to LKNWR's and TLNWR's wetlands (including seasonal wetlands, permanent vegetation, and open water areas), sumps, cooperative farming lands, and lease lands, and to walking wetlands within the Klamath Reclamation Project. For purposes of this Agreement, walking wetlands includes a Refuge-approved program that incorporates managed wetlands into agricultural crop rotations on the Refuge as well as on private lands in the Klamath Reclamation Project. Such wetlands support the diversity of waterbird species endemic to the Upper Klamath Basin. Walking wetlands returned to agricultural production enhance agricultural crop yields and reduce chemical inputs by enhancing soil fertility and reducing soil pests and diseases to crops.

**ii. TID Operations and the Refuges**

Pursuant to contract with the United States (Contract No. 14-06-200-5954 between TID and the United States), TID operates various Klamath Reclamation Project facilities owned by the United States, including D Plant. Operation of D Plant results in deliveries of water to the P Canal system and to LKNWR wetlands and cooperative farming lands. TID also operates Klamath Reclamation Project control infrastructure to maintain water surface elevations in Sumps 1A and 1B in TLNWR pursuant to Section 6 of the Kuchel Act (Public Law 88-567), Section 7(b) of Contract No. 14-06-200-5954, and other applicable laws, rules, regulations, and requirements, and

to provide water for TLNWR lease lands, cooperative farming lands, and walking wetlands.

**iii. KDD Operations and LKNWR**

KDD owns and operates certain facilities, including Ady Canal and North Canal. KDD provides delivery of water to LKNWR's wetlands, cooperative farming lands, and lease lands (known as Area K) pursuant to contract with the United States Contract No. Ilr-402, as amended and supplemented. As used in this Section 15.1.2, and solely for the convenience of reference, Klamath Reclamation Project facilities include facilities owned by and operated by KDD.

**iv. Delivery of Water to Wildlife Refuges**

This Agreement provides for a specific allocation of water for the Refuges, described in Section 15.1.2.E (Refuge Allocation), and certain related commitments. Otherwise, nothing in this Agreement modifies any current obligations of KDD with respect to delivery of water to LKNWR or TID with respect to TLNWR, but, rather, removes any ambiguity or resolves any differences of position as to certain delivery of water for Refuge purposes to LKNWR wetlands, TLNWR sumps, and walking wetlands under a Refuge-approved program. TID will continue to operate Klamath Reclamation Project water control infrastructure to maintain water surface elevations in Sumps 1A and 1B in accordance with Section 6 of the Kuchel Act, Article 7(b) of Contract No. 14-06-200-5964, applicable rules and regulations, and other applicable requirements (e.g., the Endangered Species Act), and terms herein.

**B. Purpose and Scope**

The purpose of this Section 15.1.2 is to describe the delivery of water to the LKNWR and TLNWR and to ensure reliable water deliveries for the exercise of the Refuges' water rights. Water deliveries for the exercise of the Wildlife Refuges' water rights and the Refuge Allocation described in this Section 15.1.2.E shall be made available from the Klamath Reclamation Project's DIVERSION, as provided in Appendix E-1 and Attachment A thereto, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities.

**i. TLNWR**

With respect to TLNWR, the terms in this Section 15.1.2 ensure continued delivery of water to the approximately 13,000

acres of wetlands and open water on TLNWR, TLNWR's cooperative farming lands, agricultural lease lands, and walking wetlands, subject to existing laws and applicable contracts. TLNWR will receive water from the Klamath Reclamation Project's DIVERSION, identified in Appendix E-1 to this Agreement, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities, and not from the Refuge Allocation, except as provided in Section 15.1.2.E.iii.b for refilling of the sumps after intentional draining by the Refuges, and Section 15.1.2.E.iii.a related to Refuge-approved walking wetlands.

ii. **LKNWR**

With respect to LKNWR, the terms in this Section 15.1.2 provide a specific allocation of water for LKNWR wetlands and cooperative farming lands and other uses identified in Section 15.1.2.E.iii. The Refuge Allocation ranges from 48,000 to 60,000 acre-feet of water in the summer period and 35,000 acre-feet in the winter period. In addition, the LKNWR lease lands will receive water from the Klamath Reclamation Project's DIVERSION, as provided in Appendix E-1, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities, and not from the Refuge Allocation.

C. **Date Section 15.1.2 Becomes Effective and Support for Agreement Terms**

The date that this Section 15.1.2 shall become effective shall be the date that Appendix E-1 becomes effective. Each of KPWU consents to this Section 15.1.2 and hereby releases the United States, TID, and KDD from all claims, damages, or losses resulting from performance under this section and under any new or amended contracts consistent with this Section 15.1.2.

D. **Klamath Reclamation Project Diversions**

Water for the LKNWR and TLNWR will be provided as part of the DIVERSION identified in Appendix E-1 as necessary to meet the commitments herein, but may be provided from other sources used in the Klamath Reclamation Project and delivered through Klamath Reclamation Project facilities. The water delivery commitments herein do not preclude the use of water for another purpose prior to the delivery to Wildlife Refuge lands and/or the Refuge Allocation

described in Section 15.1.2.E (e.g., delivery of return flows) so long as the delivery obligations and specific quantities are maintained.

**i. Water for TLNWR and LKNWR Lease Lands**

Water for LKNWR's lease lands and for TLNWR's lease lands, cooperative farming lands, and maintenance of the sumps, except for draining and refill of the sumps by the Refuges as provided in Section 15.1.2.E.iii.b, shall be provided from the DIVERSION, identified in Appendix E-1, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities, without any effect on the Refuge Allocation identified in Section 15.1.2.E.i. Also, delivery of water to LKNWR's (Area K) lease lands and to TLNWR shall be under applicable contracts and the On-Project Plan described in Section 15.2, *provided* that the portion of the On-Project Plan applicable to such Wildlife Refuge lands will be developed with and approved by the Refuge Manager, and the On-Project Plan as it relates to Refuge lands shall treat such Refuge lands equitably. Further, the portion of the On-Project Plan applicable to such National Wildlife Refuge lands shall be implemented and administered with the Refuge Manager and in a manner not inconsistent with the adopted On-Project Plan.

**ii. Refuge Water Allocations**

Water for the LKNWR wetlands, cooperative farming lands, and the uses in Section 15.1.2.E.iii (constituting the Refuge Allocation) shall be as provided below in Section 15.1.2.E.

**iii. Measurement Points**

DIVERSION under Appendix E-1 shall be measured at the points of diversion or control, as described in Appendix E-1. The points of measurement for the Refuge Allocation shall be the points of delivery as described at Section 15.1.2.E.iv.

**iv. Conveyance Losses**

Conveyance losses associated with delivery of water for the Refuge Allocation will not be charged to the Refuge Allocation, except as provided in Section 15.1.2.E.iii.c and 15.1.2.E.iii.d.

## **E. Refuge Allocation**

The Refuge Allocation shall be comprised of water for the following: LKNWR wetlands; LKNWR cooperative farming lands; refilling of TLNWR sumps after intentional draining by the Refuges (as identified in Section 15.1.2.E.iii.b); Refuge-approved walking wetlands (as identified in Section 15.1.2.E.iii.a); conveyance losses, if any, resulting from bypassing water at Anderson-Rose Dam solely for LKNWR wetlands, (as identified in Section 15.1.2.E.iii.c); and conveyance losses for any delivery to LKNWR via North Canal (as identified in Section 15.1.2.E.iii.d). The Refuge Allocation shall: be provided through water diverted under the DIVERSION, identified in Appendix E-1, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities, and shall be based on two periods: November through February (winter period Refuge Allocation) and March through October (summer period Refuge Allocation).

### **i. Summer Period**

Except as provided in Section 15.1.2.F.i (Shortages), the summer period Refuge Allocation (March 1 through October 31) shall be based on the Forecast used for DIVERSIONS, described in Appendix E-1 (i.e., the March 1 Natural Resource Conservation Service 50 percent exceedance forecast for net inflow to Upper Klamath Lake for April - September) and shall consist of the following:

- a. When the Forecast is 287,000 or less, 48,000 acre-feet;
- b. When the Forecast is more than 287,000 acre-feet but less than 569,000 acre-feet, the quantity in thousands of acre-feet resulting from the following equation:  $48 + (7.64 \times [(Forecast - 287) \div 282])$ ; and
- c. When the Forecast is 569,000 acre-feet or more, 60,000 acre-feet.

### **ii. Winter Period**

Subject to Section 15.1.2.F.ii, the winter period Refuge Allocation (November 1 through February 28 or February 29 in leap years) shall be 35,000 acre-feet, except, when additional water is available under Applicable Law and this Agreement, the November through February allocation may be increased up to 60,000 acre-feet, subject to any agreement for delivery of water, as needed. Any such additional amount (i.e. winter allocation above 35,000 acre-feet) shall be charged against the

summer period Refuge Allocation, except if such additional water is made available upon recommendation of the KBCC to provide for augmentation of the Refuge Summer Allocation pursuant to Section 18.3.2.B.v, but not including the 10,000 acre-feet identified in Section 15.1.1.

**iii. Other Refuge Uses**

The Refuge Allocation described above in Paragraphs (i) and (ii) applies to LKNWR wetlands and cooperative farming lands and the following uses, and delivery to the LKNWR Delivery Points described in Section 15.1.2.E.iv.a will be adjusted downward based on the following:

- a. One acre-foot per acre for each acre of walking wetlands where any such practice is part of a Klamath Basin Refuge-approved program or agreement in the following areas: TLNWR's lease lands and cooperative farming lands; LKNWR's Area K lease lands; and lands within the Klamath Reclamation Project outside of TLNWR and LKNWR, subject to any necessary approvals to such use of the Refuges' water rights;
- b. If Sump 1A or Sump 1B has been drained or lowered intentionally at the request or direction of the manager of the Klamath Basin Refuges Complex (Refuge Manager), by the quantity used to refill either such sump;
- c. If it is reasonably necessary to bypass water at Anderson-Rose Dam solely to meet delivery requirements for the LKNWR wetlands, or cooperative farming lands, by conveyance losses as agreed upon by the Refuge Manager and KPWU. The Refuge Manager and KPWU will agree on the amount of such conveyance losses within 18 months of the Effective Date.
- d. If the Refuge Manager and KDD agree to any delivery to LKNWR by diversion through North Canal, by conveyance losses as agreed upon by the Refuge and KPWU.
- e. If additional Klamath Reclamation Project surface water that is conveyed through Project facilities becomes available for LKNWR through a controlled means other than the LKNWR Delivery Points

identified below in Section 15.1.2.E.iv.a, and is delivered to the LKNWR, by that amount.

**iv. Points of Measurement for Refuge Allocation**

The points of measurement for the Refuge Allocation shall be as follows:

- a. For water comprising and charged to the Refuge Allocation for LKNWR wetlands, open water, and cooperative farming lands, the delivery points and measurement points shall include: Ady/South Canal at State Line; D Plant (minus use by private P-Canal water users); North Canal at State Line; and any location identified in Section 15.1.2.E.iii.e (collectively, “LKNWR Delivery Points”).
- b. For refill of Sumps 1A Sump 1B, if drained or lowered intentionally at the request or direction of the Refuge Manager, as provided in Section 15.1.2.E.iii.b, the measurement points shall be the points of delivery.
- c. For Refuge-approved walking wetlands the measurement shall be as provided above in Section 15.1.2.E.iii.a.
- d. For conveyance losses if any for deliveries with respect to Section 15.1.2.E.iii.c (bypass at Anderson Rose Dam as agreed upon in Section 15.1.2.E.iii.c); and with respect to Section 15.1.2.E.iii.d (extension of North Canal, as agreed upon in Section 15.1.2.E.iii.d).

**F. Shortages**

**i. Summer Period Shortages**

In any year that the applicable DIVERSION quantity for the summer period (March 1 through October 31) identified in Appendix E-1 is not available for diversion at the Settlement Points of Diversion for the Klamath Reclamation Project, the difference between the applicable DIVERSION quantity and the amount available for diversion at the Settlement Points of Diversion by the Klamath Reclamation Project (the deficit) shall be addressed as follows:

- a. For up to the first 10,000 acre-feet of deficit in the summer period DIVERSION during Phase 1, identified in Appendix E-1, and for up to 20,000 acre-feet of

deficit during Phase 2, identified in Appendix E-1, there shall be no effect on delivery of the summer period Refuge Allocation (at the LKNWR Delivery Points described in Section 15.1.2.E.iv) if forbearance agreements have been entered for the summer (March – October) period covering non-Refuge lands in the Klamath Reclamation Project sufficiently to reduce water demand by an amount equivalent to such deficit. Such forbearance agreements would be in addition to those existing and being exercised in the year under the On-Project Plan and may occur under Section 19.2.2.B.iii.a or otherwise. Drought relief funds under Section 19.2.2.A.viii shall be made available for this purpose; additionally, any other funds available to the Refuge may be used by it for this purpose. KWAPA will assist the Refuge in addressing any such agreements.

- b. After the application of step a, above, or to the extent that step a is not implemented, delivery for the summer period Refuge Allocation will be temporarily reduced at the LKNWR Delivery Points as necessary to cover the remaining deficit to the summer period Klamath Reclamation Project DIVERSION until delivery under the summer period Refuge Allocation to all uses described above at Section 15.1.2.D.ii, 15.1.2.E and 15.1.2.E.iii has been reduced to 24,000 acre-feet.
- c. After application of step b, above, if said summer period DIVERSION continues to have a deficit, the Refuge Allocation and delivery to the OPPA will proportionately share any additional deficits to the summer period DIVERSION. For example, if the remaining deficit is five percent of the applicable summer period DIVERSION, delivery to the Refuge Allocation calculated above in step b will be reduced by five percent and delivery to the OPPA from the Settlement Points of Diversion will also be reduced by five per cent.

**ii. Winter Period Shortage**

In any year that the applicable DIVERSION quantity for the winter period (November through February), identified in Appendix E-1, is not available for diversion by the Klamath Reclamation Project, shortage will be shared based on a plan to share shortages agreed upon by the Refuge Manager and



KPWU. The plan will be completed within one year of the Effective Date.

**G. Delivery Facilities**

**i. TID Water Deliveries**

The delivering entity, TID, its assigns, or Reclamation, shall provide or continue to provide water deliveries to the Wildlife Refuges as follows:

- a. Delivery of water, through D Pumping Plant, to LKNWR wetlands and cooperative farming lands, including delivery of at least 9,000 acre-feet of water through D Pumping Plant to LKNWR wetlands or cooperative farming lands during the period September through October, subject to any agreed variation by TID, or its assigns, and the Refuge Manager, and such amount in April through August as determined by the Refuge Manager in consultation with TID and Reclamation and subject to reasonable operational terms;
- b. Operation of Klamath Reclamation Project water control infrastructure to maintain water surface elevations in TLNWR's Sumps 1A and 1B per Section 6 of the Kuchel Act, section 7(b) of the TID contract, other applicable laws, rules, regulations, and any other applicable requirements (e.g., Endangered Species Act);
- c. Delivery of water to TLNWR lease lands pursuant to applicable contract(s), subject to Sections 15.1.2.G.i.d and 15.1.2.D.i; and
- d. Any additional specific obligations for delivery as agreed upon by TID, or its assigns, and the Refuge Manager.

**ii. KDD Water Deliveries**

The delivering entity, KDD or its assigns, shall continue to provide delivery of water to LKNWR as follows:

- a. Delivery of water diverted at Ady Channel and Ady Canal headgates through the South Canal to the LKNWR wetlands and cooperative farming lands, as provided in Contract No. Ilr-402 between KDD and the United States, as amended and supplemented, with the

point of measurement of deliveries being State Line;  
and

- b. Delivery of water to LKNWR's Area K lease, in accordance with the terms of Contract No. Ilr-402, as amended and supplemented, and the agreement of May 29, 1980 between KDD and the United States, as amended and supplemented, subject to Section 15.1.2.D.i.

**iii. North Canal Water Deliveries**

If agreed upon by KDD and the United States, KDD will provide for delivery of water diverted at North Canal, with the point of delivery and measurement being at State Line.

**iv. On-Project Plan and Refuge Lease Lands**

Water deliveries to LKNWR's Area K lease lands and TLNWR's lease lands may be limited pursuant to the On-Project Plan described at Section 15.2.

**v. Plan for General Parameters of Delivery of Refuge Allocation**

Not later than one year after the Effective Date, the Refuge Manager, Reclamation, TID, and KDD will agree to the general parameters of delivery of the Refuge Allocation.

**vi. Schedule for Deliveries of Refuge Allocation**

The Refuge Manager shall prepare, as needed, a schedule(s) of deliveries to LKNWR other than Area K, subject to concurrence by Reclamation, TID, and KDD or their assigns in light of operational needs or limitations. Such schedule will be flexible and may be adjusted by agreement of said entities according to climate or other conditions and Refuge needs, so long as consistent with the applicable Refuge Allocation and reasonably achievable through the operation of relevant works.

**vii. North Canal as Point of Diversion**

Subject to Section 15.1.2.G.iii, KPWU shall not oppose any action by the Refuge to establish North Canal as a point of diversion for any water rights associated with the LKNWR lands outside of the Refuge's Area K lease lands.

## **H. Other**

### **i. Pass-Through of Excess Water**

Water that becomes physically available at the LKNWR Delivery Points due to the operation of Klamath Reclamation Project works but that is in excess of the applicable Refuge Allocation shall be conveyed to the Klamath River, provided, that any such water in excess of an applicable delivery schedule that becomes available through the operation of Project works and is in fact used on the LKNWR lands outside of Area K lease lands shall be charged against the Refuge Allocation.

### **ii. Determination of Passed-Through Excess Water**

Such water that is available at P Canal through operation of D Pumping Plant that is passed through the LKNWR to the Klamath River will not be charged against the Refuge Allocation. The Refuge Manager and KPWU shall, within one year of the Effective Date, develop an agreed-upon system to determine whether water was passed through the LKNWR lands outside of Area K lease lands.

### **iii. LKNWR Acquisition of Lands**

If additional Klamath Reclamation Project lands are acquired by and included in LKNWR, the water rights or delivery rights, if any, associated with those lands at the time prior to acquisition will remain with those lands after acquisition and where there are associated Klamath Reclamation Project delivery rights, they will be incorporated and added into the Refuge Allocation.

## **I. Contracts**

TID, Reclamation, and FWS agree that the only costs to be charged to FWS by TID associated with the operation and maintenance of D Pumping Plant for LKNWR shall be those identified in Section 15.4.2, and no further charges or reimbursement to TID shall occur for delivery to LKNWR, whatever the amount and scheduling of said delivery shall be. This limitation shall not, however, preclude an agreement to additional terms related to any wheeling of groundwater.

## **J. Interim Agreement**

Although the terms of this Section 15.1.2 are not effective until Appendix E-1 is effective, as provided in Section 15.1.2.C, KPWU

and the FWS recognize that both agriculture in the Klamath Reclamation Project and the lands within the Wildlife Refuges need water to continue their operations. KPWU and FWS recognize that it is in their best interests and agree to continue to work together cooperatively to manage water for the benefit of agriculture and the Wildlife Refuges, under legal authorities and obligations existing prior to enactment of Authorizing Legislation or the effectiveness of Section 15.1.2. KPWU and FWS will seek to resolve outstanding issues related to water rights for the Refuges, with an emphasis on the federal reserved rights claims, prior to the commencement of proceedings under ORS 539.150(1) in the KBA, and will consider approaches similar to Section 15.3.2.B. In addition, prior to the effectiveness of this Section 15.1.2, certain actions will be completed that will become effective upon the effectiveness of Section 15.1.2, including the following: the Refuge Manager and KPWU will develop a plan consistent with Section 15.1.2.F.ii and a system consistent with Section 15.1.2.H.ii; and the Refuge Manager, Reclamation, TID, and KDD will agree to a plan consistent with Section 15.1.2.G.v.

**K. Term and Effect of Section 15.1.2**

Notwithstanding Section 1.6, this Section 15.1.2 shall remain in effect until modified by agreement of the FWS and KPWU.

**15.2. On-Project Plan**

**15.2.1. Purpose and Scope**

The purpose of the On-Project Plan for the Klamath Reclamation Project is to align water supply and demand for the areas that rely in whole or part on water diverted from the Settlement Points of Diversion identified in Appendix E-1, exclusive of all of LKNWR other than Area K lands (On-Project Plan Area or OPPA) consistent with the diversion limitations provided in Appendix E-1 and Section 15.3.1.A, the availability of supplies not affected by such limitations, and the terms of Section 15.1.2, on an annual and ongoing basis. The On-Project Plan shall be developed, implemented, and administered consistent with these provisions and Sections 15.2.3 and 15.2.4.

- A.** The On-Project Plan will include a specific objective that groundwater pumping as provided in the plan will not have an Adverse Impact as defined in Section 15.2.4.A.i.
- B.** The Parties understand that the development of the On-Project Plan will assume no significant change from historic availability of surface water supplies other than the limitations created by Section 15.3.1.A and Appendix E-1, and no significant change from historic timing or scheduling of diversions, recognizing the

variability in all of these parameters and applying appropriate judgment.

- C. If, during the implementation and administration of the On-Project Plan, KWAPA determines that the plan measures, including funding, are inadequate to meet the purpose of the plan described above, it shall notify Reclamation and the KBCC. The KBCC, in coordination with Reclamation, shall consider and report on the inadequacy not later than in the issuance of its next annual report under Section 5.4.2.B. If the KBCC identifies that additional funding is needed, the Parties shall support such funding; *Provided*, that this procedure does not limit KWAPA or other Parties from pursuing such additional funding or measures as they consider appropriate.
- D. Notwithstanding Section 15.1.2.C, the provision of Section 15.1.2.D.i concerning the development and approval of the On-Project Plan as it relates to National Wildlife Refuges shall be effective upon the Effective Date, and the remainder of said provision shall be applicable consistent with Sections 15.2.2.B.ii and iii.

**15.2.2. Development, Adoption, Implementation, and Administration**

KWAPA shall be the Lead Party to prepare the On-Project Plan. KWAPA shall have sole responsibility for developing, adopting, implementing and administering the plan, except as it pertains to National Wildlife Refuge lands as provided in and subject to Section 15.1.2.D.i, and subject to the terms of Sections 15.2.2.B and 15.2.4.B.iv.

**A. Funding**

The Non-Federal Parties shall support authorization and appropriation of funds in the amounts estimated by Appendix C-2 for the development, implementation, and administration of the On-Project Plan, including completion of any required environmental review. In addition, Reclamation shall consider whether funds made available for the Interim Flow and Lake Level Program that are not expended in a year should be made available for the On-Project Plan pursuant to Section 20.4.4 to accomplish the purpose of this Section 15.2. The Parties support utilization of funds appropriated or otherwise made available for the implementation of the On-Project Plan in a manner consistent with section 14.3.1, irrespective of the establishment or non-establishment of the fund described in that section. The Parties further agree that any funds used in the implementation of the program in Section 17 shall be deemed not to be available to KWAPA for

implementation of the On-Project Plan for purposes of Sections 15.2 and 15.3.

**B. Schedule**

**i. Development and Adoption**

Not later than 18 months after distribution to KWAPA of the On-Project Plan development funds estimated in Appendix C-2 (first entry in item 66), KWAPA shall complete the development of the On-Project Plan consistent with Section 15.1.2.D.i. Upon such completion, it shall submit the plan to Reclamation for approval. Reclamation shall evaluate and approve the plan within 60 days of completion of any required environmental review and determination that: (1) the plan reasonably meets the stated purpose of Section 15.2.1 and (2) the plan is consistent with the remaining provisions of this Agreement. Not later than 45 days after approval of the plan by Reclamation, KWAPA shall adopt the plan and provide Notice to the other Parties.

**ii. Implementation**

The Non-Federal Parties shall support the authorization and appropriation of funds, as estimated in Appendix C-2, for KWAPA to implement and administer the approved and adopted On-Project Plan. KWAPA shall complete the actions identified in the approved On-Project Plan necessary for the full implementation of the plan. Implementation includes making the necessary agreements, constructing facilities, coordination with the Refuge Manager under Section 15.1.2.D.i as applicable, or concluding other measures to be able to accomplish the purpose of the plan by the date selected by KWAPA pursuant to Section 15.3.8.A or as modified under Section 15.3.8.B if applicable. Thus, the Parties understand that implementation may include, for example, completion of measures to enhance water management and efficiency, or entering a long-term or permanent agreement with a landowner which would afford KWAPA the right to direct the landowner to forebear from use of water from Upper Klamath Lake or the Klamath River in specified future circumstances.

**iii. Administration**

Administration of the On-Project Plan consists of employing on a year-to-year basis, consistent with Section 15.1.2.D.i, any or all implementation measures determined by KWAPA to be

appropriate to reduce demand in the OPPA for water from Upper Klamath Lake and the Klamath River, as described in (a) through (c) below. Thus, the Parties understand that plan administration might include, for example, directing a landowner to refrain from use of water from Upper Klamath Lake and the Klamath River in a given year, pursuant to a contract entered as part of plan implementation. The Parties support the use of funds as identified in Section 15.2.2.A, to the extent not used in the implementation of the On-Project Plan, for the administration of the On-Project Plan by KWAPA.

- a. Upon the effectiveness of Appendix E-1, KWAPA, consistent with Section 15.1.2.D.i, shall administer the On-Project Plan consistent with the purpose of the plan in Section 15.2.1.
- b. In addition, the following applies during the period after the applicable deadline for the full implementation of the On-Project Plan in Section 15.3.8.A has passed but before Appendix E-1 is effective. On an annual basis, KWAPA shall administer the On-Project Plan to reduce demand for water from Upper Klamath Lake and Klamath River in the OPPA during March through October if it receives notification from the Secretary as provided here. The Secretary may provide a notification specifying a DIVERSION value in acre-feet. In determining that value, the Secretary shall consider the implications for the Refuges. KWAPA shall administer the On-Project Plan in the manner it would administer the On-Project Plan in order to align water supply and demand in the OPPA as if there were a limitation on DIVERSION equal to the DIVERSION value specified by the Secretary. Any such DIVERSION value may be equal to but shall be no less than the maximum DIVERSION that could occur in the given year if Appendix E-1 were in effect in that year. The Secretary's notification under this section does not create a limitation on DIVERSION and is not binding on the operators of the Settlement Points of Diversion, and serves only to trigger an obligation on the part of KWAPA to reduce demand as described herein. Nothing in this section authorizes the Secretary to determine or direct how administration of the On-project Plan will occur; administration shall be by KWAPA, consistent with Section 15.1.2.D.i; *provided* that, consistent with Section 15.1.2.J, KWAPA shall

coordinate with the Refuge Manager with respect to how administration activities will avoid disproportionate consequences for LKNWR.

The Secretary's notification to KWAPA shall create an obligation for KWAPA only if provided by March 15. In order to determine the nature of any notification to be provided to KWAPA, the Secretary shall Timely confer with, and receive recommendations from, the TAT with respect to the need for Environmental Water. The Secretary shall also Timely confer with KWAPA prior to any notification under this provision, including, to the extent practicable, providing information in advance of any notification in order to facilitate KWAPA's planning for administration. The Secretary shall consider the recommendations in light of the goals of this Agreement stated in Section 1.3 and the provision of funds to implement the On-Project Plan.

- c. Nothing in (a) or (b) above precludes the administration of the On-Project Plan in other circumstances, consistent with Section 15.1.2.D.i.

#### **iv. Periodic Amendment**

Consistent with an evolving understanding of appropriate management of the Klamath Reclamation Project and sound irrigation practice and annual experience in implementation and administration, KWAPA shall evaluate the On-Project Plan not less than every three years for refinement, or more often if required under the provisions of Section 15.2.4 below. Any amendment is subject to Section 15.1.2.D.i (Refuge Manager approval of the plan as to Refuge lands) and Section 15.2.2. B.i (Reclamation approval of plan).

#### **15.2.3. Elements**

In development of the On-Project Plan, KWAPA shall consider and evaluate the following measures for short-term, intermittent, long-term, and permanent application to meet the purpose of the plan: conservation easements, forbearance agreements, conjunctive use programs, efficiency measures, land acquisitions, water acquisitions, groundwater development, groundwater substitution, other voluntary transactions, water storage, and any other applicable measures.

#### **15.2.4. Measures Related to Groundwater**

For the purpose of the On-Project Plan and the Contractual Obligations of Sections 15.2.4.A through 15.2.4.D, the definitions of "Adverse Impact" and



responses to “Adverse Impact,” and other provisions related to groundwater are as follows.

**A. Objective of No Adverse Impact**

**i. Definition**

For the purpose of this provision, **Adverse Impact** shall mean: a 6% reduction in the flow of any of the following springs.

The definition applies to springs individually or collectively:

- a. Individual springs (Barkley Spring #1, Barkley Spring #2, Sucker Springs, Ouxy Spring) along the east shore of Upper Klamath Lake from Hagelstein Park to Modoc Point, both as to the named springs individually, and to other, unnamed springs in this geographic area collectively;
- b. The following springs associated with the northwest portion of Upper Klamath Lake: Harriman, Malone, Crystal, Fourmile, and Camporee Springs;
- c. Springs in the Wood River valley spring network, including springs feeding Wood River, Fort Creek, Crooked Creek, and Sevenmile Creek;
- d. Spring Creek, tributary to the Williamson River, and springs feeding the Williamson River from Spring Creek to Kirk Reef (the above limitation is applicable to an individual spring or the network collectively);
- e. The springs in the Klamath River in the J.C. Boyle bypass reach;
- f. The springs which enter Copco I Reservoir;
- g. The springs under Copco I Reservoir;
- h. The springs which enter Shovel Creek;
- i. The springs which enter Spencer Creek; or
- j. The springs under J.C. Boyle Reservoir.

Determination of Adverse Impact will be based on the most probable value for a specific location provided by USGS modeling and monitoring, regardless of associated confidence intervals or expressions of uncertainty or imprecision.

**ii. Baseline for Determination of Adverse Impact**

For purposes of the Contractual Obligations of Sections 15.2.4.A through 15.2.4.D, the baseline magnitude, frequency and duration of groundwater use in the OPPA, as well as groundwater use outside the OPPA, for determination of Adverse Impacts shall be the year 2000.

Use of models and monitoring to evaluate effects of groundwater use under the On-Project Plan will involve explicitly accounting for the effects of climate and hydrologic variability, as well as use and change of use of groundwater outside the OPPA, such that the characterization of effects of groundwater use under the On-Project Plan is limited to only such use as specifically occurs under the On-Project Plan.

**B. Technical Investigation**

**i. Purpose and Scope**

The Parties agree that further technical investigations and monitoring of hydrologic and geologic processes shall be conducted to evaluate whether groundwater pumping within the Klamath Reclamation Project under the On-Project Plan will have or has an Adverse Impact as defined and if so to provide a basis for remedial measures including Plan modification as described in Section 15.2.4.B.v and vi. The investigative and evaluative measures shall include modeling or other predictive tools, monitoring, test wells or other appropriate procedures. The Non-Federal Parties support the scope of work for technical investigations and monitoring attached as Appendix E-2 and shall pursue funding to accomplish the work.

**ii. Lead Agency**

The USGS, in cooperation with OWRD, shall be the Lead Agency to conduct the technical investigations and monitoring. The Parties shall fully cooperate with any technical investigations developed by the Lead Agency. All data and analysis generated by the Lead Agency shall be made available to all Parties in the same form and at the same time. The Lead Agency shall conduct the technical investigations described in Appendix E-2 as expeditiously as possible to inform the development and implementation of the On-Project Plan.

### **iii. Funding for Investigation**

The Non-Federal Parties shall support authorization and appropriation of funds, in the amounts estimated in Appendix C-2, for USGS and OWRD to complete the studies and provide the monitoring described in Appendix E-2 and further investigations necessary to fulfill the purpose stated in Section 15.2.4.B.i.

### **iv. Cooperation among Parties and Use of Results**

Although KWAPA has sole authority for development, adoption, implementation and administration of the On-Project Plan, except as provided in Sections 15.1.2.D.i and 15.2.2.B.i, KWAPA shall in the development of the Plan collaborate with OWRD and other interested Parties to develop approaches to groundwater use consistent with the objective of no Adverse Impact and the technical investigations.

- a. At a minimum, KWAPA will meet with OWRD and other interested Parties once during development of the On-Project Plan and once at least 30 days prior to completion of the On-Project Plan.
- b. In development of the initial On-Project Plan, KWAPA shall incorporate the work by USGS regarding groundwater use in existence at that time; adequately consider and utilize all other information provided by USGS or any Party regarding whether, how and when groundwater pumping under the On-Project Plan may cause an Adverse Impact; and make best efforts (including Dispute Resolution Procedures pursuant to Section 6.5) to reach Consensus with Parties on reasonable and appropriate treatment of groundwater pumping in the On-Project Plan to avoid Adverse Impact, as defined in this Section 15.2.4.A.i.

### **v. Periodic Amendment of Plan Based on Investigations and Monitoring**

- a. If investigations or monitoring by the Lead Agency identify an Adverse Impact caused by groundwater use under the On-Project Plan, or that groundwater use under the On-Project Plan is predicted to cause an Adverse Impact, KWAPA shall remedy the Adverse Impact or avoid the predicted Adverse Impact as quickly as practicable. KWAPA will use Best Efforts

to effect the remedy before the next irrigation season and other Parties shall render appropriate assistance in effecting such remedy, provided that, if the Lead Agency's work shows that groundwater pumping under the On-Project Plan is causing an Adverse Impact and immediate and serious harm to the fisheries, interested Parties will meet and confer immediately (notwithstanding any provision for additional time under Section 6.5) to provide a remedy during the current irrigation season. The remedy may include modification of the On-Project Plan as necessary, subject to Section 15.1.2.D.i; provided that any amendment shall be approved by Reclamation. However, actions to avoid or remedy an Adverse Impact under Sections 15.2.4.B.iv and v are not limited to modification of the On-Project Plan or actions within the OPPA. While KWAPA may take action outside of the OPPA to offset impacts of pumping under the On-Project Plan, nothing in this Agreement creates any regulatory authority over groundwater that does not currently exist; *provided* that the Contractual Obligations in Section 15.2.4 are enforceable.

- b. KWAPA, USGS, OWRD, and the TAT shall annually meet and confer before December 15 of each year regarding the long-term monitoring information, and specifically to evaluate annually whether the On-Project Plan is meeting the no Adverse Impact objective, whether the Plan may be leading to an Adverse Impact in future years or whether the Plan is causing or will cause an Adverse Impact in the upcoming irrigation season.

vi. **Costs Associated with Remedy for Adverse Impact or Other Modification of Plan**

To the extent funding realized pursuant to Section 15.2.2.A is inadequate, and consistent with Applicable Law, the Non-Federal Parties shall seek other funding to mitigate costs of remedying or avoiding Adverse Impacts provided that, seeking or securing such funding shall not be a prerequisite to the obligation for KWAPA to remedy or avoid an Adverse Impact.

**vii. Further Consideration of Results of Investigation and Monitoring**

If so determined by the KBCC, the frequency or degree of monitoring or consultation among Parties may be modified or terminated.

**C. Existing Wells**

The scope of work for the Lead Agency's investigation, attached as Appendix E-2, shall include monitoring of existing wells to determine whether Adverse Impacts from groundwater pumping in the OPPA are occurring. The scope of work shall also analyze mitigation scenarios for any effects of such existing wells. The Parties shall meet and confer in good faith to mitigate any Adverse Impacts during the USGS' analysis prior to adoption of the On-Project Plan.

**D. New Wells**

The On-Project Plan and funds to implement the Plan shall not be used to develop new wells unless KWAPA or other proponent of the well first shows no Adverse Impact as defined in Section 15.2.4.A.i to the satisfaction of the KBCC. The On-Project Plan, plan funds, and Participants in plan implementation shall not employ surface water forbearance agreements that allow new production irrigation wells on property subject to a forbearance agreement or similar encumbrance.

**E. Use of Further Investigations Related to Fisheries**

The Parties anticipate that future scientific investigations may further inform understanding of the relationship of flows in the springs identified in Section 15.2.4.A.i and fisheries of the Klamath River and Upper Klamath Lake.

- i.** If such further investigations demonstrate that an increase in the percentage value stated in Section 15.2.4.A.i would not be detrimental to the fisheries of Upper Klamath Lake or the Klamath River, with the recommendation of the TAT and approval by the KBCC, the Parties will amend this Agreement, and KWAPA shall modify the On-Project Plan to increase such value accordingly.
- ii.** If such investigations demonstrate that, notwithstanding the absence of an Adverse Impact as that term is defined in Section 15.2.4.A.i, groundwater use under the On-Project Plan results in material adverse effects on water quantity or quality of Upper Klamath Lake or the Klamath River, or to springs whether specifically listed or not listed in Section

15.2.4.A.i, in a manner of consequence to fisheries of Upper Klamath Lake or the Klamath River:

- a. Upon the recommendation of the TAT and with the approval of KBCC, KWAPA will reduce groundwater use under the On-Project Plan to avoid or reduce such material adverse consequence if additional water from new storage under Section 18.3.2.B.v is provided for use in the OPPA (beyond such amount as may become available as described in Sections 15.1 and 18.3.2.B.ii) in an amount equal to the amount of reduction of the groundwater use; or
- b. The Parties, with assistance of the USGS and OWRD, shall collaborate in identifying other measures that could reduce the adverse effects of other influences on the flow of the relevant springs. Identified measures will be implemented upon the recommendation of the TAT, approval of the KBCC, and with the agreement of affected Parties.
- iii. Evaluations of the effects of groundwater use under the On-Project Plan under this Section 15.2.4.E only will be based on the same stipulated baseline and consideration of other factors as identified in Section 15.2.4.A.ii. Nothing in Section 15.2.4.E.ii.a shall limit the quantity of water which may potentially be available to the OPPA under Section 18.3.2.

**15.3. Water Rights Assurances Related to Water Diversions to the Klamath Reclamation Project, the Klamath Basin Adjudication, The Klamath Tribes, the Three California Indian Tribes, and the United States as Trustee**

**15.3.1. Assurances by the Klamath Reclamation Project Regarding Project Water**

**A. Diversion Limitation**

Within twenty days after all of the conditions stated in (i) through (iv) below have occurred, the KPWU, Reclamation, and FWS shall file the document attached hereto as Appendix E-1 with the OWRD or the Circuit Court, as applicable, as part of the ongoing KBA. The filing shall recommend that the Adjudicator or Circuit Court adopt it as part of the Findings of Fact and Order of Determination or Decree, as applicable. If a Decree has been entered in the KBA prior to the time for the filing, the KPWU, Reclamation and FWS shall use such processes that are available under Applicable Law to cause the

diversion limitations of Appendix E-1 to be enforceable by OWRD. The conditions are:

- i. The Regulatory Approvals related to the Klamath Reclamation Project described in Sections 22.1.2 and 22.2 are issued, provided that Section 22.2 is a condition only if such application under a General Conservation Plan or a Habitat Conservation Plan is submitted to the relevant Regulatory Agency Parties by two years before the applicable deadline in Section 15.3.8.A for implementation of the On-Project Plan; and
- ii. The Klamath Project Water Entities have obtained final judgments from the state courts having jurisdiction confirming or validating this Agreement, as described in (B), below; and
- iii. The applicable deadline in Section 15.3.8.A for implementation of the On-Project Plan has passed; and
- iv. The Secretary has published the notice described in Section 15.3.4.A.

**B. Validation**

The Klamath Project Water Entities shall, within 120 days of the Effective Date of this Agreement, file actions in accordance with Applicable Law seeking validation or confirmation of this Agreement, and shall diligently prosecute such actions to final judgment. The Parties acknowledge that the Klamath Project Water Entities may request, or the courts may determine, that: judgment should be entered only after the enactment of federal Authorizing Legislation; or that the court retain jurisdiction over a judgment entered before enactment of federal Authorizing Legislation for the purpose of entering a supplemental order or judgment. If requested by the Klamath Project Water Entities, other Parties shall support the requested judgments as amicus curiae or other appropriate method.

**C. Dedication**

Within four years after completion of the events described in Section 15.3.1.A, the Secretary and KPWU shall provide Notice to the Parties of whether and to what extent they will seek to transfer to instream use water rights to the Klamath River and Upper Klamath Lake from the Settlement Points of Diversion identified in Appendix E-1 in amounts that are in excess of the applicable maximum DIVERSION quantities that can be diverted under Appendix E-1. Any such quantity or quantities transferred shall utilize the then current process to request a

transfer of water rights under Applicable Law and shall not exceed amounts allowed under Applicable Law.

**D. Enforceability of Diversion Limitations**

If Appendix E-1 has been filed with the OWRD or the Circuit Court as applicable pursuant to Section 15.3.1.A and the OWRD is unable to regulate diversion from the Settlement Points of Diversion based on the diversion limitations in Appendix E-1, because no Findings of Fact and Order of Determination has been issued pursuant to ORS section 539.130 or because a stay issued pursuant to ORS section 539.180 precludes such regulation, or because, prior to the entry of a decree by the Circuit Court, OWRD is required by Applicable Law to regulate based on a Findings of Fact and Order of Determination that does not incorporate the diversion limitations in Appendix E-1, any party may during such period or periods bring an action as necessary to enforce the diversion limitations in Appendix E-1 in any court having jurisdiction.

**E. No Evidence Supporting Loss of Water Right**

The Parties agree not to assert against any water right for use in the Klamath Reclamation Project a claim of partial or complete forfeiture based on the limitation on diversions provided in Appendix E-1. Further, the Parties agree not to assert that any provision in this Agreement, including Appendix E-1, constitutes evidence: (i) of intent to abandon a water right or a portion thereof; or (ii) supporting forfeiture of a water right or a portion thereof; *provided*, that this Section 15.3.1.E does not apply to OWRD to the extent that OWRD serves as a decision maker in a regulatory proceeding or acts to defend the decision made in such a proceeding.

**15.3.2. Assurances Regarding Tribal Water Rights**

**A. Certain Klamath Tribal Water Rights Unaffected**

KPWU agree that the water rights in California, whatever they may be, of the United States, acting in its capacity as trustee for the Klamath Tribes, and the Klamath Tribes, have not been quantified, resolved or determined in any way by this Agreement or any related documents and hereafter KPWU will take no inconsistent position in any administrative context or proceeding, or any judicial proceeding, or otherwise. KPWU also hereby provide interim Assurances, subject only to Section 15.3.8.B, that they will not protest, contest, object, or block any assertion of water rights by these governments that is not inconsistent with Sections 15.3.3 and 15.3.8.B in any future



administrative context or proceeding, or judicial proceedings, or otherwise. The interim Assurance in the preceding sentence will:

- i. Become permanent and unconditional upon the publication of the notice by the Secretary described in Section 15.3.4.A; or
- ii. Terminate if the Secretary publishes the notice described in Section 15.3.4.C, or if the Klamath Tribes withdraw pursuant to Section 33.2.

**B. Resolution of Adjudication Contests Related to Klamath Tribal Water Rights, and Related Commitments**

**i. Recitals**

In anticipation of the approval of this Agreement, KPWU, the Klamath Tribes, and the United States acting in its trustee capacity for the Klamath Tribes filed stipulations in the KBA through Oregon’s Office of Administrative Hearings (OAH), to implement commitments related to water right Claims 612, 671 and 672 consolidated within Case 282, and Claims 616 and 622 consolidated within Case 286. These claims are hereafter referred to in this Section 15.3.2.B as the “Claims,” and KPWU, the Klamath Tribes and United States are hereafter referred to in this Section 15.3.2.B as “These Parties.” The past filings, and the orders of the Administrative Law Judge (ALJ) in the KBA approving those stipulations, are collectively attached hereto as Appendix E-6. Based on the terms of this Agreement, upon the Effective Date, modified filings by These Parties and orders and judgments will be necessary. In this regard, These Parties recognize that: the judicial phase of the KBA will proceed before the anticipated date of a publication of notice under Section 15.3.4.A; it is undesirable for These Parties to be in adversarial proceedings, with attendant financial costs and community acrimony; and certain actions in the Circuit Court may be needed to achieve These Parties’ objectives, while ensuring KPWU’s interests are protected in the event a notice under Section 15.3.4.C is ultimately issued. In this regard, These Parties acknowledge that litigation between them that ultimately proves to have been unnecessary is possible, but agree to Best Efforts to prevent such.

**ii. Adjudication Filings and Related Activities Based on This Agreement**

**a. Filings to be Made in the KBA**

Not later than ninety days after the Effective Date, These Parties shall file amended stipulations and proposed orders in the KBA to implement the relevant commitments of this Agreement in Sections 15.3.3 and 15.3.8.B. The stipulations and implementing proposed orders will differ from those found in Appendix E-6 in that they will:

- (1) provide for the finality and permanency of the interim commitments in Section 15.3.3 upon the issuance of a notice under Section 15.3.4.A; (2) provide that limitations under Sections 15.3.3 and 15.3.8.B on the exercise of any water rights determined for the Claims will cease to be effective only if and after a notice has been issued under Section 15.3.4.C, KPWU have fully litigated all issues raised by These Parties in exceptions filed under ORS 539.150(1), and a judgment/decree or modified judgment/decree thereafter on the Claims has been issued under ORS 539.150(4) or 539.190 and is effective; and (3) to the extent possible before the OAH and the Adjudicator, preserve the flexibility of These Parties to avoid or minimize the need of These Parties to litigate against each other in the Circuit Court consistent with Section 15.3.2.B.ii.b below and the determinations of the Circuit Court or appellate court as applicable. These Parties shall Timely cooperate and make Best Efforts in development of the stipulations and implementing orders, and shall seek orders consistent with those filings.

**b. Actions to be Taken in Court by These Parties and Thereafter**

- (1) No later than thirty days after the filing of their respective exceptions under ORS 539.150(1), These Parties shall meet and confer, and consult with the Circuit Court as necessary under ORS 539.150(1), to determine the appropriate means to avoid or minimize, or defer to a subsequent proceeding, any need for These Parties to litigate against one another in the Circuit Court, based on the circumstances then-existing. In the absence of a mutually agreed upon alternative to that described below, These Parties will proceed as described in Section 15.3.2.B.ii.b.(2) through (8) below;
- (2) To allow for this Agreement and the Hydroelectric Settlement to progress to the greatest extent possible before a notice is published by the Secretary under Sections 15.3.4.A or 15.3.4.C,

These Parties shall at the commencement of the proceedings in the Circuit Court seek: (i) a scheduling order of any proceedings in the Circuit Court regarding These Parties' Exceptions to the findings and order for the Claims filed under ORS 539.150(1) (These Parties' Exceptions) and, if applicable, proceedings on other Tribal claims having common legal issues that allows these matters to be scheduled as late in the proceedings as possible; and (ii) a ruling by the Circuit Court that allows KPWU to not participate in litigation (or have limited participation) on the Claims from that point through the completion of the judgment, and any appeals thereto under ORS 539.150(4), and to have the right to commence litigation on These Parties' Exceptions under the circumstances described in (4), (6) and (7) below (referred to as the "reopener provision" in Section 15.3.2.B.ii.b (3) through (8)). If the proposed ruling is denied, These Parties will consider the filing of an interlocutory appeal under ORS 19.205(1) and ORCP 67B in order to obtain, or protect the ability to rely upon, the reopener provision;

- (3) If the relevant court does not provide for a reopener provision materially consistent with that described in (2) above, then These Parties shall engage in Dispute Resolution under Section 6 of this Agreement to seek another mutually agreeable means that would allow KPWU to not litigate These Parties' Exceptions pending completion of the events listed in Section 15.3.4.A, *provided* that if no such other means is mutually agreed upon, KPWU is not obligated to desist from litigation on These Parties' Exceptions;
- (4) If a final unappealable order providing for a reopener provision materially consistent with that submitted by These Parties is issued, KPWU agree to not litigate These Parties' Exceptions until: the Secretary publishes a notice under Section 15.3.4.C; or at such other time that KPWU determines the risk of an adverse decision on the Claims outweighs the benefits of continued non-participation in the proceedings at the Circuit Court on the Claims, and These Parties have engaged in Dispute Resolution under Section 6 to avoid if at all possible KPWU's

litigation of some or all of These Parties' Exceptions; *provided* that, in the circumstances of a final unappealable order providing for a reopener provision materially consistent with that submitted by These Parties, and KPWU is not fully participating in the proceedings in Circuit Court on the Claims, These Parties here agree that KPWU may litigate legal issues raised by other parties (including Claimants) regarding the Claims that would have preclusive effect on the determination of one of These Parties' Exceptions to the Claims even though the notice in Sections 15.3.4.A or 15.3.4.C has not been published;

- (5) If KPWU decide under (4) above to fully participate in the proceedings at the Circuit Court before the evidentiary hearing on exceptions related to the Claims, These Parties shall seek the necessary procedural protections to facilitate KPWU participating in the proceedings on both legal and evidentiary grounds;
- (6) Any amended or supplemental determination of the Claims during litigation of These Parties' Exceptions based on the reopener provision will not result in a greater amount of streamflow or lake level than previously determined for the Claims under ORS 539.150(4);
- (7) During any proceedings based on the reopener provision, any legal issues that KPWU may litigate will be limited to those that were not raised by non-KPWU Parties regarding the Claims in the course of the original determination of the Claims in the Circuit Court; and
- (8) These Parties agree that the reopener provision is consistent with the joinder of the United States and Klamath Tribes in the KBA pursuant to 43 U.S.C. section 666. The Parties agree not to argue otherwise in any current or future administrative or legal proceeding.

**iii. Non-Use of Findings and Judgment/Decree**

Unless and until KPWU have fully litigated all issues raised in These Parties' Exceptions filed under ORS

539.150(1) to the Claims and a judgment/decree under ORS 539.150(4) has thereafter been issued, the Tribes and the United States shall not, directly or indirectly assert in any manner, water rights recognized for the Claims in the findings and order issued pursuant to ORS 539.130(1) or a judgment/decree issued under ORS 539.150(4) including in water rights or other contexts, that interferes with the diversion, use, and reuse of water for the Klamath Reclamation Project.

**iv. Survival**

This Section 15.3.2.B shall survive termination of this Agreement under Section 7.6.

**C. Tribal Rights Unresolved-Unquantified**

KPWU agree that the water rights, whatever they may be, of the Hoopa Valley Tribe, Yurok Tribe, and Karuk Tribe and the United States, acting in its capacity as trustee for these federally-recognized Indian tribes of the Klamath Basin, have not been quantified, resolved or determined in any way by this Agreement or any related documents. KPWU also hereby provide interim Assurances, subject only to Section 15.3.8.B, that they will not protest, contest, object, or block any assertion of water rights by the Yurok Tribe, Karuk Tribe, or the United States in future judicial or administrative proceedings that are not inconsistent with Sections 15.3.6.A, 15.3.7.A, 15.3.8.B, and 15.3.9. The interim Assurance in the preceding sentence will:

- i. Become permanent and unconditional upon the publication of the notice by the Secretary described in Section 15.3.4.A; or
- ii. Terminate if the Secretary publishes the notice described in Section 15.3.4.C.

**15.3.3. Assurances of Non-Interference with Klamath Reclamation Project Diversions by the Klamath Tribes**

The Klamath Tribes hereby provide interim Assurances as stated in Section 15.3.8.B, and conditional permanent Assurances that the Klamath Tribes will not assert: (i) tribal water or fishing rights theories or tribal trust theories in a manner, or (ii) Klamath tribal water or trust rights in the State of California, whatever they may be, in a manner, that will interfere with the diversion, use or reuse of water for the Klamath Reclamation Project that is not precluded by the limitation on diversions of water as provided in Appendix E-1 in any administrative context or proceeding, or any judicial proceeding, or otherwise, *provided*, however, that these Assurances shall not include, and shall not be construed to extend to, rights

under statutes of general applicability, including the Endangered Species Act, consistent with and subject to Sections 21.3.1.B and 21.4.1. The conditional permanent Assurances will:

- A. Become permanent and unconditional upon publication of the notice by the Secretary as described in Section 15.3.4.A; or
- B. Terminate if the Secretary publishes the notice described in Section 15.3.4.C, as follows:
  - i. With respect to any Klamath tribal water or trust rights in California, termination of the Assurances shall occur immediately upon the publication of a notice under Section 15.3.4.C; and
  - ii. With respect to all other tribal water or fishing rights or trust theories, termination of the Assurances shall occur only in accordance with Section 15.3.2.B.

**15.3.4. Notice and Publication by the Secretary, and Related Actions**

**A. Publication of Notice Making Assurances Final and Permanent**

The Secretary shall publish a notice in the Federal Register within forty-five (45) days after all of the following events have occurred:

- i. The applicable deadline under Section 15.3.8.A for full implementation of the On-Project Plan has passed; and
- ii. The required environmental analysis regarding the proposed project to reconnect the Wood River Wetlands to Upper Klamath Lake as described in Section 18.2.3 is completed, and any necessary funding to implement the preferred alternative of the required environmental analysis is authorized by Congress or that funding is otherwise committed by state, local, tribal or private sources; and
- iii. The required environmental analysis regarding the proposed project to reconnect Agency Lake and Barnes Ranches to Upper Klamath Lake as described in Section 18.2.2.C is completed, and any necessary funding to implement the preferred alternative of the required environmental analysis is authorized by Congress or that funding is otherwise committed by state, local, tribal or private sources; and

- iv. Funding has been authorized for the Water Use Retirement Program described in Section 16.2.2; and
- v. The physical removal of all or part of each of the Hydroelectric Facilities has occurred and achieved a free-flowing condition and volitional fish passage.

**B. Modified Basis for Notice Under Section 15.3.4.A**

KPWU, the Tribes, and the United States may amend the conditions or events necessary for a notice to occur under Section 15.3.4.A. Any such amendment shall be transmitted to the Secretary, and the Secretary shall publish the notice under Section 15.3.4.A based on that section as so amended.

**C. Negative Notice and Prerequisites**

If the Hydroelectric Settlement terminates pursuant to Section 8.11 therein, the procedures in this Section 15.3.4.C apply. The Tribes, KPWU, and the Secretary shall meet and confer and shall evaluate the circumstances leading to the termination of the Hydroelectric Settlement, whether there is any reasonable likelihood that the events in Section 15.3.4.A will occur, and whether to agree to amendments to Section 15.3.4.A that would preserve the ability for a notice to occur under Section 15.3.4.A. The Tribes, KPWU, and the Secretary shall conclude this process within twelve months of the termination of the Hydroelectric Settlement. If, following this process, the Secretary determines that there is no reasonable likelihood that a notice under Section 15.3.4.A will occur, the Secretary shall publish a notice in the Federal Register finding that no notice will be published under Section 15.3.4.A.

**15.3.5. Relinquishment and Release of Claims Against the United States by the Klamath Tribes**

**A. Claims Relinquished and Released by the Klamath Tribes**

In return for benefits for the Klamath Tribes and their members, including the commitments made by the parties to this Agreement and the events beneficial for the Klamath Tribes enumerated in this Agreement, and without terminating or relinquishing the treaty rights underlying these claims, the Klamath Tribes, on behalf of themselves and their members, subject to the conditions stated in Section 15.3.5.C, relinquish and release the following claims against the United States, its agencies, or employees relating to actions in the Klamath River Basin, excluding the Williamson River drainage above Kirk, and the drainage above the Sycan Marsh, above the Oregon-California border that first accrued at any time up to and including the Effective Date:

- i. all claims resulting from (a) water management decisions, including the failure to act, or (b) the failure to protect, or to prevent interference with, the Tribes' water or water rights, that relate to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including damages, losses, or injuries to hunting, fishing, gathering rights or other activities, due to loss of water or water rights);
- ii. all claims relating to the litigation of the Klamath Tribes' water rights in the KBA in Oregon in Cases 282 and 286; and if the OPWAS under Section 16.2.1 is successful in resolving the contests in any other case in the KBA, all claims relating to the litigation of such other case; and
- iii. all claims relating to the negotiation, execution, or adoption of this Agreement and the Hydroelectric Settlement.

**B. Reservation of Rights and Retention of Claims by the Klamath Tribes**

Despite the relinquishment and release of claims in Section 15.3.5.A, the Klamath Tribes:

- i. retain all treaty rights upon which the claims relinquished and released in Section 15.3.5.A are premised, which rights shall remain unaffected except for the claims specifically relinquished and released in Section 15.3.5.A, and subject to the other terms of Section 15.3 and Section 16.2.1;
- ii. retain all claims relating to damages, losses, or injuries to land or natural resources (including but not limited to damages, losses, or injuries to hunting, fishing, gathering rights or other activities, due to loss of water or water rights) not caused by water management decisions or the failure to protect or to prevent interference with the Klamath Tribes' water or water rights above the Oregon-California border as described in (A) above;
- iii. retain all claims for enforcement of the Agreement through such legal and equitable remedies as may be available in the appropriate federal court or the state courts of Oregon for the KBA;
- iv. retain all claims for water rights in the States of California or Oregon that the Klamath Tribes, or the United States acting in its capacity as trustee for the Tribes, asserted, or could assert, in any proceeding, including but not limited to



the KBA and *United States v. Adair*, except to the extent that such rights are expressly limited by this Agreement;

- v. retain all rights to acquire water rights after the Effective Date of this Agreement;
- vi. retain all rights to use and protect water rights, including water rights acquired after the Effective Date of the Agreement, subject to the terms of this Agreement;
- vii. retain all claims relating to activities affecting the quality of water including any claims the Klamath Tribes might have under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 *et seq.*) (including but not limited to claims for damages to natural resources), the Safe Drinking Water Act (42 U.S.C. §§ 300f *et seq.*), the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*), and the regulations implementing those Acts, subject to the other terms of Section 15.3, and the terms of Section 21; and
- viii. retain all rights, remedies, privileges, immunities, and powers, and claims not specifically relinquished and released under, or limited by, the terms of the Agreement.

**C. Events that Must Occur Before the Klamath Tribes Relinquish and Release Claims**

The Klamath Tribes' relinquishment and release of claims set forth in Section 15.3.5.A shall not be in force or effect until the date on which the Secretary publishes a statement of findings in the Federal Register that certain conditions precedent that benefit the Klamath Tribes have been fulfilled. The Klamath Tribes' relinquishment and release shall be effective from the date of publication of this notice. These conditions precedent are as follows:

- i. Authorizing Legislation, which authorizes the relinquishments and releases above, and includes authorization for the United States and the Klamath Tribes to irrevocably make the Assurances stated in Section 15.3 and authorizes the United States to participate in the OPWAS process under Section 16.2.1, has been enacted into law;
- ii. The Secretary has published the notice provided for in Section 15.3.4.A concluding that the beneficial events enumerated there for the Klamath Tribes have been accomplished;

- iii. The total amount of funding identified for the elements of Appendix C-2 associated with the planning and implementation of Phase I and Phase II of the Fisheries Restoration Plan, Phase I of the Fisheries Reintroduction Plan, the Fisheries Monitoring Plan, the Water Use Retirement Program, the Interim Flow and Lake-level Program, and the Regulatory Assurances Programs, as specified in Sections 10, 11.3.1, 12, 16.2, 20.4, and 22.2 has been authorized and appropriated;
- iv. The total amount of funding identified for the elements of Appendix C-2 associated with Sections 32 and 33 has been authorized and appropriated, and funding has been Timely provided to the Klamath Tribes consistent with Section 33.2.1 to allow the Tribes to acquire the Mazama Forest;
- v. Facilities Removal as defined by the Hydroelectric Settlement has occurred; and
- vi. The petition described in Section 34 has been granted or rendered unnecessary to achieve the purpose of Section 34, or the equivalent benefits contemplated in Section 34.2 are in place and effective.

The Secretary's notice published under this section that the events in (i) through (vi) above have taken place is deemed a final agency action reviewable under 5 U.S.C. section 701.

**D. Tolling of Claims**

- i. Each applicable period of limitation and time-based equitable defense relating to a claim described in Section 15.3.5.A above shall be tolled for the period beginning on the date of enactment of Authorizing Legislation and ending on the earlier of the date the Secretary publishes the notice described in Section 15.3.5.C above or December 1, 2030.
- ii. Nothing in this subsection revives any claim or tolls any period of limitation or time-based equitable defense that expired before the date of enactment of the Authorizing Legislation.
- iii. Nothing in this section precludes the tolling of any period of limitations or any time-based equitable defense under any other Applicable Law.

**15.3.6. Assurances By and Between the Yurok Tribe and the United States**

**A. Assurances by the Yurok Tribe**

The Yurok Tribe hereby provides interim Assurances as stated in Section 15.3.8.B, and conditional permanent Assurances that the Tribe will not assert (1) tribal water or fishing rights theories or tribal trust theories in a manner, or (2) tribal or trust water rights, whatever they may be, in a manner, that will interfere with the diversion, use or reuse of water for the Klamath Reclamation Project that is not precluded by the limitation on diversions of water as provided in Appendix E-1 in any administrative context or proceeding, or any judicial proceeding, or otherwise; *provided*, however, that these Assurances shall not include, and shall not be construed to extend to, rights under statutes of general applicability, including the Endangered Species Act, consistent with and subject to Sections 21.3.1.B and 21.4.1. The conditional permanent Assurances will:

- i. Become permanent and unconditional upon publication of the notice by the Secretary as described in Section 15.3.4.A; or
- ii. Terminate if the Secretary publishes the notice described in Section 15.3.4.C.

**B. Relinquishment and Release of Claims Against the United States by the Yurok Tribe**

**i. Claims Relinquished and Released by the Yurok Tribe**

In return for benefits for the Yurok Tribe and its members, including the commitments made by the parties to this Settlement and the events beneficial for the Yurok Tribe enumerated in this Agreement, and without terminating or relinquishing the federal law rights underlying these claims, the Yurok Tribe, in the exercise of its sovereign authority on its behalf and on behalf of its members, subject to the conditions stated in (iii) below, relinquish and release the following claims against the United States, its agencies, or employees relating to actions in the Klamath River Basin, above the Oregon-California border that first accrued at any time up to and including the Effective Date:

- a. all claims resulting from (1) water management decisions, including the failure to act, or (2) the failure to protect, or to prevent interference with, the Tribes' water or water rights, that relate to damages, losses, or

injuries to water, water rights, land, or natural resources due to loss of water or water rights (including damages, losses, or injuries to hunting, fishing, gathering rights or other activities due to loss of water or water rights); and

- b. all claims relating to the negotiation, execution, or adoption of this Agreement and the Hydropower Settlement.

ii. **Reservation of Rights and Retention of Claims by the Yurok Tribe**

Notwithstanding the relinquishment and release of claims in (i) above, the Yurok Tribe:

- a. retains all rights under federal law held by a federally-recognized sovereign Indian nation upon which the claims relinquished and released in (i) above are premised, which rights shall remain unaffected except for the claims specifically relinquished and released in (i) above and subject to the other provisions of Section 15.3;
- b. retains any claims relating to damages, losses, or injuries to land or natural resources (including but not limited to damages, losses, or injuries to hunting, fishing, gathering rights or other activities, due to loss of water or water rights) not caused by water management decisions or the failure to protect or to prevent interference with the Yurok Tribe's water or water rights above the Oregon-California border as described in (i) above, to the extent they exist;
- c. retains all claims for enforcement of the Agreement through such legal and equitable remedies as may be available in the appropriate federal or state court;
- d. retains any claims for water rights, whatever they may be, or fishing rights that the Yurok Tribe, or the United States acting in its capacity as trustee for the Tribe, asserted, or could assert, in any proceeding, except to the extent that such rights or their exercise are expressly limited by this Agreement;
- e. retains all rights to confirm, quantify, or acquire water rights or fishing rights after the Effective Date of this Agreement;

- f. retains all rights to use and protect water rights, including water rights acquired after the Effective Date of the Agreement, subject to the terms of this Agreement;
- g. retains all claims relating to activities affecting the quality of water including any claims the Yurok Tribe might have under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 *et seq.*) (including but not limited to claims for damages to natural resources), the Safe Drinking Water Act (42 U.S.C. §§ 300f *et seq.*), the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*) (Clean Water Act), and the regulations implementing those Acts, subject to the other terms of Section 15.3 and Section 21;
- h. retains all rights, benefits and obligations arising from its agreement with the United States arising from Ninth Circuit Case Nos. 05-15856 and 05-16027, *Pacific Coast Federation of Fishermen's Assn., Yurok Tribe, et al, vs. U.S. Bureau of Reclamation*, entitled "Cooperative Agreement between the U.S. Department of the Interior and Yurok Tribe for the Cooperative Management of Tribal and Federal Lands and Resources in the Klamath River Basin of California" (June 12, 2006) providing for Tribal-Federal cooperative management of natural resources within the Yurok Reservation as well as "the related basin, upstream river, and Pacific Ocean resources subject to the jurisdiction or authorities of various DOI agencies and bureaus" that are not inconsistent with this Agreement; and
- i. retains all rights, remedies, privileges, immunities, and powers, and claims not specifically relinquished and released under, or limited by, the terms of the Agreement.

**iii. Events that Must Occur Before the Yurok Tribe Relinquishes and Releases Claims**

The Yurok Tribe's relinquishment and release of claims set forth in (i) above shall not be in force or effect until the date on which the Secretary publishes a statement of findings in the Federal Register that certain conditions precedent that benefit the Tribe have been fulfilled. The Tribe's relinquishment and

release shall be effective from the date of publication of this notice. These conditions precedent are as follows:

- a. Authorizing Legislation, which authorizes the relinquishments and releases above, and includes authorization for the United States and the Tribe to irrevocably make the Assurances stated in Section 15.3 has been enacted into law;
- b. The Secretary has published the notice provided for in Section 15.3.4.A concluding that the beneficial events enumerated there for the Tribe have been accomplished;
- c. The total amount of funding identified for the elements of Appendix C-2 associated with the planning and implementation of Phase I and Phase II of the Fisheries Restoration Plan, Phase I of the Fisheries Reintroduction Plan, the Fisheries Monitoring Plan, the Water Use Retirement Program, the Interim Flow and Lake-level Program, and the Regulatory Assurances Programs, as specified in Sections 10, 11.3.1, 12, 16.2, 20.4, and 22.2 has been authorized and appropriated;
- d. The total amount of funding identified for the elements of Appendix C-2 associated with those provisions of Sections 31 through 33 pertinent to the Yurok Tribe has been authorized and appropriated; and
- e. Facilities Removal as defined by the Klamath Hydroelectric Settlement Agreement has occurred.

The Secretary's notice published under this section that the events in (a) through (e) above have taken place is deemed a final agency action reviewable under 5 U.S.C. section 701.

#### **iv. Tolling of Claims**

- a. Each applicable period of limitation and time-based equitable defense relating to a claim described in Section 15.3.6.B.i above shall be tolled for the period beginning on the date of enactment of Authorizing Legislation and ending on the earlier of the date the Secretary publishes the notice described in Section 15.3.6.B.iii or December 1, 2030.
- b. Nothing in this Section 15.3.6.B.iv revives any claim or tolls any period of limitation or time-based equitable

defense that expired before the date of enactment of the Authorizing Legislation.

- c. Nothing in this Section 15.3.6.B.iv precludes the tolling of any period of limitations or any time-based equitable defense under any other applicable law.

**15.3.7. Assurances By and Between the Karuk Tribe and the United States**

**A. Assurances by the Karuk Tribe**

The Karuk Tribe hereby provides interim Assurances as stated in Section 15.3.8.B, and conditional permanent Assurances that the Tribe will not assert (1) tribal water or fishing rights theories or tribal trust theories in a manner, or (2) tribal or trust water rights, whatever they may be, in a manner, that will interfere with the diversion, use or reuse of water for the Klamath Reclamation Project that is not precluded by the limitation on diversions of water as provided in Appendix E-1 in any administrative context or proceeding, or any judicial proceeding, or otherwise; *provided*, however, that these Assurances shall not include, and shall not be construed to extend to, rights under statutes of general applicability, including the Endangered Species Act, consistent with and subject to Sections 21.3.1.B and 21.4.1. The conditional permanent Assurances will:

- i. Become permanent and unconditional upon publication of the notice by the Secretary as described in Section 15.3.4.A; or
- ii. Terminate if the Secretary publishes the notice described in Section 15.3.4.C.

**B. Relinquishment and Release of Claims Against the United States by the Karuk Tribe**

**i. Claims Relinquished and Released by the Karuk Tribe**

In return for benefits for the Karuk Tribe and its members, including the commitments made by the parties to this Settlement and the events beneficial for the Karuk Tribe enumerated in this Agreement, and without terminating or relinquishing the federal law rights underlying these claims, the Karuk Tribe, in the exercise of its sovereign authority on its behalf and on behalf of its members, subject to the conditions stated in (iii) below, relinquish and release the following claims against the United States, its agencies, or employees relating to actions in the Klamath River Basin, above the Oregon-

California border that first accrued at any time up to and including the Effective Date:

- a. all claims resulting from (1) water management decisions, including the failure to act, or (2) the failure to protect, or to prevent interference with, the Tribes' water or water rights, that relate to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including damages, losses, or injuries to hunting, fishing, gathering rights or other activities due to loss of water or water rights); and
- b. all claims relating to the negotiation, execution, or adoption of this Agreement and the Hydropower Settlement.

ii. **Reservation of Rights and Retention of Claims by the Karuk Tribe**

Notwithstanding the relinquishment and release of claims in (i) above, the Karuk Tribe:

- a. retains all rights under federal law held by a federally-recognized sovereign Indian nation upon which the claims relinquished and released in (i) above are premised, which rights shall remain unaffected except for the claims specifically relinquished and released in (i) above and subject to the other provisions of Section 15.3;
- b. retains any claims relating to damages, losses, or injuries to land or natural resources (including but not limited to damages, losses, or injuries to hunting, fishing, gathering rights or other activities, due to loss of water or water rights) not caused by water management decisions or the failure to protect or to prevent interference with the Karuk Tribe' water or water rights above the Oregon-California border as described in (i) above, to the extent they exist;
- c. retains all claims for enforcement of the Agreement through such legal and equitable remedies as may be available in the appropriate federal or state court;
- d. retains any claims for water rights or fishing rights, whatever they may be, that the Karuk Tribe, or the United States acting in its capacity as trustee for the Tribe, asserted, or could assert, in any proceeding,



except to the extent that such rights or their exercise are expressly limited by this Agreement;

- e. retains all rights to confirm, quantify or acquire, water rights or fishing rights, whatever they may be, after the Effective Date of this Agreement;
- f. retains all rights to use and protect water rights, including water rights acquired after the Effective Date of the Agreement, subject to the terms of this Agreement;
- g. retains all claims relating to activities affecting the quality of water including any claims the Karuk Tribe might have under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 *et seq.*) (including but not limited to claims for damages to natural resources), the Safe Drinking Water Act (42 U.S.C. §§300f *et seq.*), the Federal Water Pollution Control Act (33 U.S.C. §§1251 *et seq.*) (Clean Water Act), and the regulations implementing those Acts, subject to the other terms of Section 15.3 and Section 21; and
- h. retains all rights, remedies, privileges, immunities, and powers, and claims not specifically relinquished and released under, or limited by, the terms of the Agreement.

**iii. Events that Must Occur Before the Karuk Tribe Relinquishes and Releases Claims**

The Karuk Tribe's relinquishment and release of claims set forth in (i) above shall not be in force or effect until the date on which the Secretary publishes a statement of findings in the Federal Register that certain conditions precedent that benefit the Tribe have been fulfilled. The Tribe's relinquishment and release shall be effective from the date of publication of this notice. These conditions precedent are as follows:

- a. Authorizing Legislation, which authorizes the relinquishments and releases above, and includes authorization for the United States and the Tribe to irrevocably make the Assurances stated in Section 15.3 has been enacted into law;
- b. The Secretary has published the notice provided for in Section 15.3.4.A concluding that the beneficial events

enumerated there for the Tribe have been accomplished;

- c. The total amount of funding identified for the elements of Appendix C-2 associated with the planning and implementation of Phase I and Phase II of the Fisheries Restoration Plan, Phase I of the Fisheries Reintroduction Plan, the Fisheries Monitoring Plan, the Water Use Retirement Program, the Interim Flow and Lake-level Program, and the Regulatory Assurances Programs, as specified in Sections 10, 11.3.1, 12, 16.2, 20.4, and 22.2 has been authorized and appropriated;
- d. The total amount of funding identified for the elements of Appendix C-2 associated with those provisions of Sections 31 through 33 pertinent to the Karuk Tribe has been authorized and appropriated; and
- e. Facilities Removal as defined by the Klamath Hydroelectric Settlement Agreement has occurred.

The Secretary's notice published under this section that the events in (a) through (e) above have taken place is deemed a final agency action reviewable under 5 U.S.C. section 701.

**iv. Tolling of Claims**

- a. Each applicable period of limitation and time-based equitable defense relating to a claim described in Section 15.3.7.B.i shall be tolled for the period beginning on the date of enactment of Authorizing Legislation and ending on the earlier of the date the Secretary publishes the notice described in Section 15.3.7.B.iii or December 1, 2030.
- b. Nothing in Section 15.3.7.B.iv revives any claim or tolls any period of limitation or time-based equitable defense that expired before the date of enactment of the Authorizing Legislation.
- c. Nothing in Section 15.3.7.B.iv precludes the tolling of any period of limitations or any time-based equitable defense under any other applicable law.

**15.3.8. Interim Assurances by All of the Tribes and Schedule for Enforceability of Diversion Limitations**

- A. No later than March 1, 2017, KWAPA shall select a deadline by which time KWAPA could achieve the full and complete implementation of the On-Project Plan within five years thereafter, but in any event no later than March 1, 2022. Thereafter, the applicable deadline may only be modified under the circumstances identified in Section 15.3.8.B.
- B. In the period between the Effective Date and Publication of a Secretarial notice under either Section 15.3.4.A or Section 15.3.4.C, the following interim Assurances apply: from the Effective Date until the date selected by KWAPA in Section 15.3.8.A, the Tribes and United States' Assurances in this interim period are not limited by the applicable DIVERSION amount found in Appendix E-1, as referenced in Sections 15.3.3, 15.3.6.A, 15.3.7.A, and 15.3.9, and the Assurances of noninterference by the United States acting in its trustee capacity and the Tribes shall extend to all diversion, use and reuse of water for the Klamath Reclamation Project; *provided*, however, such interim Assurances shall not include, and shall not be construed to extend to, rights under statutes of general applicability, including the Endangered Species Act, consistent with and subject to Sections 21.3.1.B and 21.4.1. Thereafter, the Tribes and United States may assert or exercise tribal water rights or fishing rights or trust theories in a manner seeking to result in a limitation of DIVERSION equal to the maximum DIVERSION that could occur if Appendix E-1 were filed and in effect; exercise of water rights includes the right to make a call under any water right that has been determined in an adjudicatory proceeding. This capacity to exercise or assert water rights or fishing or trust rights or obligations is notwithstanding the possible non-fulfillment of the provisions of Section 15.3.1.A, but recognizes the need for substantial funding of the On-Project Plan during the period after the selection of a date under Section 15.3.8.A. In the case of an exercise or assertion of water rights or fishing or trust rights or obligations under this Section 15.3.8.B, KWAPA, KWUA, and KPWU may protest, contest, or seek to block any such assertion or exercise, subject to Section 15.3.2.B. In circumstances described in Sections 7.2.1.B and 7.2.1.C, KWAPA, the United States, and the Tribes will in good faith negotiate an alternative deadline and support expeditious funding for completion of full implementation of the On-Project Plan. If KWAPA believes that circumstances exist that justify modification of the date selected under section 15.3.8.A and the Tribes, the United States, and KWAPA do not, within 120 days

prior to the date that was selected under Section 15.3.8.A, agree to a modification, the KBCC pursuant to Section II.D in Appendix D-1 will determine whether a modification is justified and the new applicable deadline, if any, within 70 days. Any extension by the KBCC of the deadline selected under Section 15.3.8.A shall be limited to no more than 24 months; *provided*, that this limitation does not preclude subsequent extensions agreed-to by the Tribes, KWAPA, and United States, or by subsequent extensions by the KBCC pursuant to Section II.D of Appendix D-1. Any new deadline or deadlines established under this procedure shall displace the date selected by KWAPA and serve as the applicable deadline under Section 15.3.8.A. Development of any new deadline under this Section 15.3.8.B is not subject to the amendment procedures of Section 7.2.

### **15.3.9. Assurances by the United States**

It is the view of the United States that certain Federally-recognized tribes of the Klamath Basin have crucial interests affected by the implementation of this Agreement, which is intended to enhance fisheries throughout the Klamath River Basin. The United States, Karuk, Yurok, and Klamath Tribes agree that implementation of the terms of this Agreement is consistent with the United States' trust responsibility in the Klamath River Basin. The signatory Tribes further agree that the DIVERSION limitations described in Appendix E-1, the water supply augmentation provisions of this Agreement, the preservation of Applicable Law related to the implementation of the water programs and the collective purposes of both this Agreement and the Hydroelectric Settlement, serve to enhance fisheries.

The United States, acting in its capacity as trustee for these tribes, hereby provides interim Assurances as stated in Section 15.3.8.B, and conditional permanent Assurances that it will not assert: (i) tribal water or fishing right theories or tribal trust theories in a manner, or (ii) tribal water or trust rights, whatever they may be, in a manner that will interfere with the diversion, use or reuse of water for the Klamath Reclamation Project that is not precluded by the limitation on diversions of water as provided in Appendix E-1 in any administrative context or proceeding, or judicial proceeding, or otherwise. The conditional permanent Assurances will:

- A.** Become permanent and unconditional upon publication of the notice by the Secretary as described in Section 15.3.4.A; or
- B.** Terminate if the Secretary publishes the notice described in Section 15.3.4.C, as follows:
  - i.** With respect to any tribal water rights, fishing rights, or trust rights or theories in California, termination of the

Assurances shall occur immediately upon the publication of a notice under Section 15.3.4.C; and

- ii. With respect to all other tribal water rights, fishing rights, or trust rights or theories, termination of the Assurances shall occur in accordance with Section 15.3.2.B.

**15.3.10. Inapplicability of Section 1.6; Consistency**

Appendix E-1 when filed under Section 15.3.1 and effective, and the Assurances triggered by the Secretarial notice described in Section 15.3.4.A, are permanent and not subject to Section 1.6. The Assurances and other Contractual Obligations in Section 15.3 are not limited by the term of Sections 2.2.11 and 14.2.

**15.4. Other Terms Related to Wildlife Refuges, Klamath Reclamation Project Operations and Agriculture**

**15.4.1. Purpose**

The purpose of this Section 15.4 is to describe other terms regarding Klamath Reclamation Project operations related to the Wildlife Refuges and the relationship of the Wildlife Refuges and agriculture, and related matters.

**15.4.2. D Pumping Plant**

**A. D Pumping Plant Costs**

Reclamation shall reimburse TID for 37.5 percent of the costs of operation and maintenance of D Pumping Plant; such reimbursement shall be allocated among flood control, Refuge, fish and wildlife, or other purposes as determined by the Secretary, and shall be considered a nonreimbursable federal expenditure. The FWS shall reimburse TID for 31.25 percent of the costs of operation and maintenance of D Pumping Plant for the benefit of such to LKNWR, other than Area K lands. The remaining 31.25 percent of the cost of operation and maintenance of D Pumping Plant shall be allocated to TID irrigation and is to be paid by irrigation users within TID consistent with the then-existing allocation of D Plant costs within TID and Article 33(d) of the Contract No. 14-06-200-5954 between the United States and TID. Within one year of the Effective Date, the allocation of percentages of costs of operation and maintenance of D Pumping Plant will be reviewed and adjusted if supported by data regarding use of D Plant and if mutually agreed by Reclamation, the Refuge Manager, and TID.

**B. Nonpayment of D Pumping Plant Costs**

Notwithstanding Section 7.4.1.B, TID may seek money damages for nonpayment under this Section 15.4.2 in accordance with Applicable Law.

**C. Term and Effect of Section 15.4.2**

Notwithstanding Section 1.6, this Section 15.4.2 shall remain in effect until modified by agreement of TID and the United States.

**15.4.3. Wildlife and Agriculture on Wildlife Refuge Lease Lands and Other Klamath Reclamation Project Agricultural Lands**

**A. Refuge Lease Lands**

With respect to the Wildlife Refuge lands leased for agriculture under section 4 of the Kuchel Act, Public Law 88-567 (Refuge lease lands), the Non-Federal Parties (i) recognize the unique history and circumstances of the Wildlife Refuges' lease lands and their wildlife and agricultural values; (ii) recognize that in the conduct of the leasing of the Refuge lease lands, the Secretary, through collaborative efforts with growers and water delivery agencies, has made or may make use of practices, such as walking wetlands, lease incentives, and other programs, that enhance waterfowl management while optimizing agricultural use and maximizing lease revenues; and (iii) seek to further the beneficial partnerships that have developed between the growers and the Wildlife Refuges. Recognizing Applicable Law, the Non-Federal Parties support continued lease land farming on TLNWR and LKNWR managed as described above in (ii). As provided in Section 2.2, this Agreement does not alter the authorities or obligations of the Secretary, FWS, or Reclamation to administer Applicable Law.

**B. Non-Federal Lands**

The Parties support partnership agreements on private lands within the Klamath Reclamation Project, and funding for such agreements, for walking wetlands and other activities that promote wildlife, consider the interests of neighboring landowners, are developed in coordination with appropriate irrigation districts, and do not harm the local agricultural economy or interests of local public agencies.

**15.4.4. Disposition of Refuge Lease Land Revenues**

**A. Past Net Revenues from Leasing of Refuge Lands**

- i. Certain costs related to Reclamation Project facilities have accrued and are currently identified as an outstanding

balance for the Reclamation Project. The net lease revenues that are in the Reclamation Fund have not been applied to these costs due to uncertainty in the proper application of existing law. The contracts between the United States and the Klamath Reclamation Project water users do not address these costs. It is also uncertain whether the outstanding costs are equal to, less than, or greater than the current lease revenues in the Reclamation Fund, or whether past net lease revenues may be applied to the outstanding Klamath Reclamation Project costs. Accordingly, pursuant to the Act of August 1, 1956, 70 Stat. 799, and the Act of June 17, 1944, 58 Stat. 279, and other acts as applicable, after 10% of the net revenues from leasing of TLNWR lands within the boundaries of TID are provided to TID, as provided in article 4 of Contract No. 14-06-200-5954, and payment is made to counties from net revenues from the leasing of Refuge lands in TLNWR and LKNWR (Area K) in lieu of taxes, as provided in section 3 of Public Law 88-567, the Parties agree that remaining net revenues from the leasing of Refuge lands in TLNWR and LKNWR at the time of enactment of the Authorizing Legislation proposed in Appendix A and deposited in the Reclamation Fund shall apply as a credit to existing capital costs of Klamath Reclamation Project facilities.

- ii.** In order to resolve any and all disputes or outstanding issues regarding any debt or encumbrance of the Klamath Reclamation Project or Project contractors and the disposition and application of past net revenues from leasing of lands within the TLNWR or LKNWR, the United States and KPWU agree that the funds held in the Reclamation Fund from the Refuges' lease land revenues at the time of enactment of the Authorizing Legislation will be deemed to be equal to, and applied to liquidate, any and all debt or encumbrance of the Klamath Reclamation Project or Project contractors as of the date of enactment of that act. KPWU and the United States further agree that the disposition of net lease revenues thereafter shall be in accordance with Applicable Law, including the Authorizing Legislation.
- iii.** The provision in Section 15.4.4.A.ii that any past Klamath Reclamation Project debt or encumbrance is deemed satisfied and the provision in Section 15.4.4.B that future net lease revenues will be applied to future Klamath Reclamation Project capital costs, does not affect the title of Klamath Reclamation Project facilities that are currently

owned by the United States. Express Congressional approval is required to transfer title to any Klamath Reclamation Project facilities now owned by the United States, and nothing in this Agreement or the Authorizing Legislation shall affect any such title transfer. The Parties also acknowledge that the authorized purposes of the Klamath Reclamation Project, including as they may be stated in the Authorizing Legislation, are not determinative of whether Congress may subsequently approve such title transfer.

**B. Future Net Revenues from Leasing of Refuge Lands**

The Parties shall support federal legislation providing for the disposition of future net revenues from leasing of Refuge lands in the manner specified in Appendix A.

**C. Operation and Maintenance**

Subject to passage of the Authorizing Legislation consistent with Section 15.4.4.B and terms of transfer agreed-to by KDD and the United States, KDD will accept transfer of all Operation and Maintenance responsibility for the Reclamation water delivery and drainage facilities that are within the boundaries of both LKNWR and KDD (i.e., Area K), exclusive of the Klamath Straits Drain. After passage of such legislation, the United States and KDD will amend the April 28, 1943, Amendatory Contract between the United States and KDD (Contract No. 14-06-200-5954) to provide for transfer to KDD of all Operation and Maintenance responsibility for the Reclamation water delivery and drainage facilities that are within the boundaries of both LKNWR and KDD, exclusive of the Klamath Straits Drain, consistent with the terms in that legislation with regard to the disposition of lease revenues.

**D. Waivers**

Upon enactment of the Authorizing Legislation materially consistent with Appendix A, TID waives any and all past claims for damages for breach of contract against the United States arising under Article 4 of Contract No. 14-06-200-5954 between TID and the United States.



**15.4.5. Terms Regarding Operations of Certain Klamath Reclamation Project Facilities.**

**A. Facilities Historically Operated by PacifiCorp**

**i. Recitals**

As of the Effective Date, PacifiCorp owns and operates the Keno Facility, and PacifiCorp operates Link River Dam which is owned by the United States. PacifiCorp's operation of these facilities is subject to certain contracts with the United States and other parties and Applicable Law. The Parties anticipate that the United States may acquire title to the Keno Facility and place it under the jurisdiction of Reclamation. The Parties also anticipate the potential for changed operational responsibility for both of these facilities.

**ii. Link River Dam**

Upon assumption of operational responsibility for Link River Dam, Reclamation shall operate Link River Dam to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts between Klamath Reclamation Project contractors and Reclamation and subject to Applicable Law. Notwithstanding any existing contract, Klamath Reclamation Project contractors shall not bear any cost associated with Link River Dam or any related lands or facilities or dikes or levees around Upper Klamath Lake, whether cost of construction, operation, maintenance, rehabilitation, betterment, liabilities of any kind, or otherwise.

**iii. Keno Dam and Development**

Following transfer of the Keno Facility from PacifiCorp pursuant to the Hydroelectric Settlement, Reclamation shall operate such facility to maintain water levels upstream of Keno Dam to provide for diversion and canal maintenance consistent with Contract No. 14-06-200-3579A executed on January 4, 1968 between Reclamation and PacifiCorp (then Copco) and historic practice and subject to Applicable Law. Klamath Reclamation Project contractors shall not bear any cost associated with the Keno Facility, including any responsibilities to landowners upstream of Keno Dam, whether cost of construction, operations, maintenance, rehabilitation, betterment, liabilities of any kind, or otherwise.

**iv. Assignment**

If Reclamation transfers or assigns responsibility for operation of Link River Dam or the Keno Dam or Keno facility to a Party or non-party, such assignment or transfer shall include assignment of the obligations under Sections 15.4.5.A.ii and 15.4.5.A.iii.

**B. Conveyance**

Entities currently operating under contract with the United States for operation and maintenance of Klamath Reclamation Project facilities may use such facilities to convey non-Project water for any authorized purpose of the Klamath Reclamation Project; provided, that all such use shall be subject to other necessary permits, if any, and all such water delivered into and taken out of Klamath Reclamation Project facilities will be measured; and provided further, such use does not adversely affect the delivery of water to water users and lands within the Klamath Reclamation Project, or result in additional costs to the United States.

**C. Survival**

Notwithstanding Section 1.6, this Section 15.4.5 shall remain in effect until modified by agreement of the Secretary and KPWU.

**15.4.6. Provisions of Title II of Public Law 97-293**

KPWU and the Secretary agree that, section 213(a) of Public Law 97-293, 96 Stat. 1264 (43 U.S.C. § 390mm(a)) is applicable to KPWU and shall adhere to that agreement. KPWU and the Secretary further agree that this Agreement and any amendment of this Agreement or any other agreement contemplated by this Agreement is not a “contract” as defined in section 202(a) of Public Law 97-293 (43 U.S.C. § 390bb(1)), and shall adhere to that agreement.

**15.4.7. Consultation**

After consultation with the Klamath Reclamation Project contractors, the Secretary shall, within one year of the Effective Date, establish a transparent process for analyzing and determining costs associated with Klamath Reclamation Project operations for which repayment or reimbursement by such contractors may be required. Such process will meaningfully engage the contractors in consultation related to any costs associated with such operations.

## **16. Off-Project Water Program**

### **16.1. Scope and Purposes**

The purposes of the Off-Project Water Program are to: (i) develop an Off-Project Water Settlement (OPWAS) if possible that, upon approval, resolves water rights disputes between the Off-Project Irrigators, Klamath Tribes, and BIA; and (ii) through the OPWAS, or the Water Use Retirement Program (WURP) described in Section 16.2.2, provides for increased stream flow and inflow into Upper Klamath Lake through voluntary retirement of water rights or water uses, or other means as agreed to by the OPWAS Parties, or the UBT consistent with Section 16.2.2, to improve Fisheries habitat and also to provide for stability of irrigation water deliveries in the Off-Project Water Program. The area for the Off-Project Water Program (Off-Project Area) shall consist of the following sub-basins: the Wood River, Sprague River, Sycan River, and Williamson River sub-basins. The Parties who develop the OPWAS, referred to as the “OPWAS Parties,” shall be Klamath Tribes, Upper Klamath Water Users Association (UKWUA), and the BIA.

### **16.2. Resolving Off-Project Water Use Issues**

The Parties believe that the OPWAS offers the best opportunity for resolving long-standing water disputes and related issues in the Off-Project Area, and intend that the WURP be implemented through the OPWAS. In the absence of OPWAS, Section 16.2.2 provides for implementation of the WURP.

#### **16.2.1. Off-Project Water Settlement**

The Parties intend that the OPWAS will either include terms that (i) resolve the Off-Project Irrigators’ contests to claims in KBA Cases 277, 279, 280, 281, 282, 284, 285, and 286 (Tribal Cases), or, (ii) in the event that not all such contests are resolved, provide reciprocal assurances for maintenance of instream flows and reliable irrigation water deliveries consistent with Applicable Law, and, (iii) in all cases provide for a WURP.

##### **A. Support for OPWAS**

The OPWAS Parties shall seek to develop a settlement such that the Klamath Tribes, the BIA, and all of the Off-Project Irrigators who are contestants in the Tribal Cases will sign stipulated agreements necessary to resolve all of the Off-Project Irrigators’ contests in those cases.

##### **B. Reciprocal Assurances Approach to OPWAS**

In the event that not all of the Off-Project Irrigators who are contestants to the Tribal Cases sign stipulated agreements as provided in Section 16.2.1.A, then in order to increase certainty related to risks associated with unresolved Off-Project Irrigators’ contests in the

Tribal Cases, the OPWAS shall include reciprocal agreements in which the OPWAS Parties each provide assurances that water available for instream and consumptive use shall be maintained at jointly defined levels. OWRD will not be a party to reciprocal agreements executed pursuant to this Section 16.2.1.B. The Parties agree not to initiate any judicial proceeding seeking to require OWRD to enforce any reciprocal agreement executed pursuant to this Section 16.2.1.B, or seek to join OWRD involuntarily to any proceeding pertaining to any reciprocal agreement executed pursuant to this Section 16.2.1.B.

**C. Water Use Retirement Program within the OPWAS**

The OPWAS Parties will develop a WURP to be implemented as part of the OPWAS in a manner that is consistent with Section 16.2.2.

**D. Schedule for Negotiation**

Upon the Effective Date, and for a period not to exceed 24 months, without prior approval of the KBCC (negotiations period), the OPWAS Parties will undertake settlement negotiations to develop a proposed OPWAS. Any Off-Project Irrigator may, during the negotiations period, submit a written proposal of settlement to the Klamath Tribes, who will consider such written proposal.

**E. Participation by Parties**

- i. The Non-Federal Parties shall support authorization and appropriation of funds, in the amount of \$500,000, as estimated in Appendix C-2, for the period of 24 months to support development of the OPWAS. The Parties shall provide other appropriate support for OPWAS development.
- ii. The OPWAS Parties or the UBT, as appropriate, will provide the KBCC with the proposed WURP for review in advance of finalization, to determine whether the proposed WURP is consistent with the criteria described in Section 16.2.2. Disputes regarding the determination will be resolved pursuant to Dispute Resolution Procedures in Section 6.5.

**F. Procedures in the Klamath Basin Adjudication**

**i. Stay**

OWRD and the Parties that are claimants and contestants in the Tribal Cases will consider seeking a stay of the KBA

proceedings in the Tribal Cases for an appropriate period after the Effective Date in order to allow sufficient time to develop the OPWAS and execute stipulated agreements in those cases, consistent with Section 16.2.1.A.

**ii. Filing the OPWAS**

If all of the Off-Project Irrigators that are contestants to the Tribal Cases, the Tribes, and the BIA are signatories to the OPWAS, then they shall, as applicable, develop and file the KBA relevant parts of the OPWAS and stipulated agreements settling the Off-Project Irrigators' contests to the claims in those cases.

**iii. Failure or Incomplete Filing**

If not all of the Off-Project Irrigators that are contestants to the Tribal Cases are signatories to the OPWAS and to stipulated agreements in the Tribal Cases, then litigation of the Tribal Cases will continue or resume on a schedule established by OWRD, the Oregon Office of Administrative Hearings, or the Circuit Court, as applicable.

**16.2.2. Water Use Retirement Program**

The intent of this Section 16.2.2 is that the WURP be developed as part of a final OPWAS. The WURP shall be consistent with this Section 16.2.2, subject to Section 16.2.1.E.ii and approval by the Federal Lead Party. If the OPWAS is not Timely finalized, the WURP will be developed and implemented as provided in Section 16.2.2.A.i.

**A. Upper Basin Team**

**i. Upper Basin Team Function**

An Upper Basin Team (UBT) shall oversee the implementation of the WURP and, in coordination with OWRD pursuant to Section 16.2.2.F.iii, shall provide annual reports to the KBCC and through the KBAC to the Federal Lead Party on WURP implementation actions.

In addition, in the event the OPWAS, including the WURP, is not finalized, the UBT shall develop, within twelve months or less of the termination of the OPWAS negotiations period, a draft WURP consistent with this Section 16.2.2. The UBT will submit the completed draft WURP through the KBAC for approval by the Federal Lead Party.

**ii. UBT Membership**

As stated in Appendix D-2, the UBT shall be comprised of representatives from the Klamath Tribes and UKWUA.

A representative of the Federal Lead Party will be a non-voting member of the UBT.

**iii. Federal Lead Party**

The FWS shall be the Federal Lead Party for implementation of the WURP. The Federal Lead Party will administer the WURP in consultation with the UBT and provide oversight and approval of expenditure of federal funds. The Federal Lead Party also will review and provide final approval of the WURP, or identify terms in the WURP requiring modification for approval. The Federal Lead Party and the UBT will meet and attempt to resolve such terms requiring modification. In the event the Federal Lead Party and UBT cannot agree on such modifications, then the matter shall be resolved subject to the Dispute Resolution Procedures in Section 6.5.

**iv. Decision-Making and Oversight of UBT**

The UBT shall be a subcommittee of the KBAC as described in Appendix D-2. After formation, the UBT shall develop and adopt decision-making protocols for their process. If the UBT is deadlocked as to the terms or implementation of WURP, UBT may request that the Federal Lead Party facilitate resolution of the dispute. The UBT shall resolve a dispute pursuant to the Dispute Resolution Procedures in Section 6.5; alternatively, if such procedures do not resolve the dispute, the Federal Lead Party shall do so. The UBT also shall prepare recommendations, as applicable, to be provided to the KBAC for review and submittal to the Federal Lead Party as the KBAC determines to be appropriate.

**B. Water Use Retirement Program Purpose**

The WURP purpose shall be to permanently increase the inflow to Upper Klamath Lake by 30,000 acre-feet on an average annual basis. For the purposes of Section 16.2.2.F and Section 20.4.2, “average annual basis” shall mean the average of the annual increase in water volume flowing into Upper Klamath Lake estimated, subject to Section 16.2.2.F.ii, to result from implementing the WURP over the hydrologic conditions that existed in the years from 1980-2000, or over a different span of years and hydrologic conditions as determined by the UBT and OWRD, and approved by the KBCC. The UBT will

achieve the WURP purpose at locations in the WURP Program Area and in a manner that accommodates as practicable the socio-economic character of the Off-Project agricultural community and that is consistent with the water rights of other surface water users.

**C. WURP Program Area**

The WURP Program Area shall include: the Sprague River sub-basin; the Sycan River (excluding the drainage from the Sycan Marsh upstream); the Williamson River sub-basin (from the confluence with the Sprague River upstream to Kirk Reef); and the Wood River sub-basin.

**D. Term of the WURP**

The WURP purpose described in Section 16.2.2.B is to be accomplished within ten years of completion of the final OPWAS including the WURP, or completion of the WURP without the OPWAS, as applicable.

**E. Measures to Achieve WURP Purpose**

- i.** Measures that may be used to fulfill the WURP purpose will be described in the WURP. These measures may include, but shall not be required to include or be limited to, sale of valid surface water rights for irrigation, retirement of valid surface water use for irrigation, forbearance agreements, short-term water leasing, split season irrigation, effects of upland management and juniper removal, instream flow increases deriving from water efficiency projects, dryland crop alternatives in lieu of irrigation, effects of natural storage such as wetland or improved riparian area performance, and other similar measures.
- ii.** The Parties agree that measures, including but not limited to those listed in this section, may be included in the WURP in aid of achievement of the WURP purpose for the following reasons: (1) demonstration of the effectiveness of a measure as a means of achieving the WURP purpose; (2) encouragement of the use by Off-Project Irrigators of measures that will achieve the WURP purpose; or (3) to be implemented to achieve the WURP purpose.
- iii.** The Parties acknowledge that diversions foregone as a result of these or similar measures can only be protected by OWRD from further diversion to the extent of OWRD's authority under Applicable Law.

**F. Determination of Achievement of WURP Purpose**

- i.** OWRD shall determine when the WURP purpose has been achieved, in a manner consistent with Sections 16.2.2.B and 16.2.2.D, and shall provide notice of this determination to the KBCC.
- ii.** The year 2001 is the baseline for measuring progress towards achieving the WURP purpose. Acreage retired from surface water irrigation after 2001 will be counted toward the flows and water goals of the program. Acreage added to surface water irrigation after 2001 will be counted against the flow and water goals of the program. Retirement of lands associated with the projects listed in Sections 18.2.1 through 18.2.3 will not count towards the water use retirement amount. Site-specific estimates of the instream flow increase resulting from each retirement will provide the basis for evaluating progress toward and attainment of flow and water goals. Average consumptive use per acre of the crop grown on the land, not diversion amounts per acre, will provide the basis for determining instream contributions due to water use retirement.
- iii.** Following completion of the WURP pursuant to Section 16.2.2 or Section 16.2.2.A.i, as applicable, and until OWRD makes a determination that the WURP purpose has been achieved, OWRD shall coordinate with the UBT and issue an annual report to the KBCC describing progress toward achievement of the WURP purpose.

**G. Voluntary Participation**

Participation by Off-Project Irrigators in any of the measures to achieve the WURP purpose is voluntary.

**H. Compensation for Voluntary Participation**

- i.** Acquisition of water rights or uses to achieve the WURP purpose will be compensated, as applicable, through market mechanisms based upon values mutually agreed to by purchaser and seller, as informed by appraisals.
- ii.** Eminent domain will not be used under the WURP.
- iii.** Land will not be acquired under the WURP.



**I. Protection of Acquired Rights**

The WURP shall protect water rights acquired under this program from further consumptive uses by either: (i) transfer of the acquired water right to instream use with the priority date of the acquired right; (ii) cancellation of the water right; or (iii) such other mechanism as may be specified by the OPWAS or otherwise.

**J. OWRD Policy**

The Parties understand that based on the policies of the Oregon Water Resources Commission and OWRD, no new direct flow surface water rights are being issued, and that new groundwater withdrawals are also limited by current policy. If applicable policies change, the Parties shall meet and confer under the Dispute Resolution Procedures in Section 6.5.

**16.3. Fisheries Habitat Improvement Program**

**16.3.1. Purpose**

The purpose of this program is to improve fisheries habitat above Upper Klamath Lake in the geographic area delineated in Section 16.2.2.C, to provide federal regulatory Assurances to landowners in the affected areas, and to do so in a manner that seeks to maintain landowner economic stability.

**16.3.2. Program Elements**

This program will consist of implementing the Fisheries Program of Sections 9 through 11 and the General or Habitat Conservation Plans of Section 22.2. The Parties agree that, in the drainage above Upper Klamath Lake, collaborative approaches to habitat improvement and maintenance may include innovative mechanisms like restoration easements and grassbanks that simultaneously facilitate habitat improvement and landowner economic stability. The program will prioritize restoration approaches that promote vegetative response in riparian/wetland areas and enhance basic ecological function to support fisheries.

**17. Power for Water Management Program**

The Parties agree to these additional obligations to address electric power needs for irrigation in the Upper Klamath Basin.

**17.1. Purposes**

The purposes of this program are to provide affordable electricity to: (i) allow efficient use, distribution, and management of water within the Klamath Reclamation Project and the National Wildlife Refuges, and facilitate the return of water to the Klamath River as part of the implementation and administration of the On-Project Plan; (ii) implement the

WURP and OPWAS; (iii) realize objectives of the Fisheries Restoration Program; and (iv) provide power cost security to assist in maintaining sustainable agricultural communities in the Upper Klamath Basin. A general policy furthering low-cost power for irrigation use is consistent with provisions of the Klamath River Basin Compact. This Section 17 includes measures and commitments based on a delivered power cost target that will be at or below the average cost for similarly situated Reclamation irrigation and drainage projects in the surrounding area, for eligible power users as provided in Section 17.3. The Parties do not intend that this program constitute or result in rate discrimination within the meaning of Applicable Law.

### **17.2. Program Elements and Funding**

The Power for Water Management Program consists of three elements: (i) Interim Power Program; (ii) Federal Power; and (iii) Renewable Power Program. The combined benefits of these three program elements are intended to ensure power cost security for all eligible power users as provided in Section 17.3. The following provisions have been developed based on the power cost target in Section 17.1. The Parties are committed to full accomplishment of these provisions, while recognizing that the actual realization of the delivered power cost target depends on several factors and variables and is not guaranteed by the Agreement.

### **17.3. Eligibility**

Eligibility for the benefits of the Power for Water Management Program shall be as follows.

#### **17.3.1. On-Project Power Users**

##### **A. General**

On-Project Power Users shall be eligible for the benefits of the Power for Water Management Program and each of its elements, subject to B below and any limitations that may exist under Applicable Law for any user or class of users based on geography or other factors.

##### **B. Ineligibility**

Any individual landowner listed in Section 1.1.1 as among Parties related to the Klamath Reclamation Project who does not enter into this Agreement shall not be an eligible Power User. In addition, with respect to any entity listed in Section 1.1.1 as among Parties related to the Klamath Reclamation Project which is a Klamath Project Water Entity, any such entity which does enter into this Agreement shall not be an eligible Power User with respect to pumps owned by such entity, and any Power User within such entity shall not be an eligible Power User; *provided*, that the KBCC will create a mechanism by which a Power User within any such entity may become eligible by supporting this Agreement and the Hydroelectric Settlement.

### **17.3.2. Off-Project Power Users**

Subject to any limitations that may exist under Applicable Law for any user or class of users based on geography or other factors, Off-Project Power Users shall be eligible to receive the benefits of the Power for Water Management Program subject to the following.

- A.** The Off-Project Power User shall support this Agreement and the Hydroelectric Settlement. For this purpose, within three months of the Effective Date, the KBCC shall adopt procedures for the Off-Project Power User to provide written support of these agreements and specification of such obligations.
- B.** Until the WURP pursuant to Section 16.2.2, Restoration implementation pursuant to Section 16.3.2, and the Regulatory Assurances Program pursuant to Section 22.2 are underway, each Off-Project Power User, whether ground or surface water user, shall be eligible to receive the benefits of the Power for Water Management Program, *provided* such Off-Project Power User has complied with (A) above, and enrolled in the Power for Water Management Program, as appropriate. For this purpose, within three months of the Effective Date, the KBCC shall adopt procedures for enrollment.
- C.** After the WURP pursuant to Section 16.2.2, Restoration implementation pursuant to Section 16.3.2, and the Regulatory Assurances Program pursuant to Section 22.2 are underway, any Off-Project Power User, who is a surface water irrigator or has riparian lands that qualify for the Restoration Program, shall be eligible to receive the benefits of Power for Water Management Program, *provided* such Off-Project Power User is participating in the WURP, in Restoration implementation, or the regulatory Assurance program. For the purpose of determining eligibility for these benefits through such participation, the KBCC shall within one year of the Effective Date, adopt a process for developing and applying criteria for eligibility, in coordination with the Lead Agencies of the respective programs.
- D.** After the WURP pursuant to Section 16.2.2, Restoration implementation pursuant to Section 16.3.2, and the regulatory Assurances program pursuant to Section 22.2 are underway, any Off-Project Power User who is a groundwater irrigator and is not eligible for such programs shall be eligible to receive the benefits of the Power for Water Management Program; *provided* that that such Off-Project Power User has achieved conservation criteria, or has a conservation plan which will result in achieving conservation criteria, which shall be developed by the KBCC, in

consultation with the Natural Resources Conservation Service (NRCS) or other relevant federal, state, or local partner, and which shall attempt to utilize existing NRCS conservation standards to the extent applicable. The KBCC, in consultation with the NRCS or other federal, state, and or local partner, as applicable, shall develop procedures to evaluate and certify whether the Off-Project Power User's land meets the conservation criteria, or whether the Off-Project Power User is actively implementing the conservation plan. Such procedures also will provide for reasonable access, with notice, to the Off-Project Power User's land for purposes of monitoring implementation of a conservation plan. If the Off-Project Power User has not achieved the required conservation criteria, or is not actively implementing their conservation plan, then such Off-Project Power User's enrollment in the Power for Water Management Program shall be terminated, pursuant to procedures which shall be developed by the KBCC prior to commencement of the WURP, Restoration implementation, and the Regulatory Assurances Programs, described in this Section 17.3.2.D, being underway.

### **17.3.3. Notification**

Subject to the availability of such information, KWAPA and UKWUA shall provide necessary notifications and other information to PacifiCorp, Bonneville Power Administration, Reclamation, and other parties as necessary with respect to those Power Users who are eligible for benefits of the Power for Water Management Program and its elements, consistent with the eligibility criteria in this section.

## **17.4. Program Management**

### **17.4.1. Management Entity**

KWAPA and UKWUA, and KOPWU if a Party to this Agreement and the Hydroelectric Settlement, shall Timely form an organization to administer benefits of the Power for Water Management Program and its elements, known for purposes of this Agreement as the "Management Entity." The Parties hereby consent to the Management Entity, if a distinct legal entity, becoming a Party to this Agreement and the Hydroelectric Settlement, *provided* that the Management Entity supports both agreements. The Management Entity will develop its bylaws or other operating protocols, including decision-making protocol, by December 1, 2010, and may amend the protocols from time to time.

The governing board of the Management Entity shall consist of the following: (i) one person designated by UKWUA and one person designated by KOPWU, each of whom shall be a member of their respective boards; *provided* that if either of

these entities is not a party to this Agreement and the Hydroelectric Settlement, then the other entity shall designate both persons; (ii) two persons designated by KWAPA who are members of governing bodies of Klamath Project Water Entities in Oregon and KWAPA; and (iii) two persons designated by KWAPA who are members of the governing bodies of Klamath Project Water Entities in California, at least one of whom will be a member of the KWAPA Board. The governing board of the Management Entity shall seek consensus, but in the absence of consensus will act by majority vote; *provided*, the majority vote must have at least one vote from the Off-Project Irrigators representatives described in (i), one vote from the On-Project Oregon representatives described in (ii), and one vote from the On-Project California representatives described in (iii).

#### **17.4.2. Authorities**

The Management Entity shall have the authority to spend available moneys under the Power for Water Management Program according to the Guidelines described below, and may hire consultants, staff, and advisors and may authorize feasibility and related studies and analyses. The Management Entity may enter into agreements with an appropriate entity or entities to act as the agent of the Management Entity in carrying out an activity or project, or to provide administrative or other services. The existence of the Management Entity and the Power for Water Management Program will not preclude KWAPA or KOPWU, UKWUA, or other Parties from pursuing separate efforts related to power using funds other than the funds made available under this Agreement.

#### **17.4.3. Guidelines for Power for Water Management Program**

On or before January 15, 2011, the Management Entity shall develop and approve Guidelines. The Guidelines shall include the following:

- A. The criteria and standards for all expenditures under the Power for Water Management Program;
- B. Appropriate means to ensure that the revenues generated by any investments are used for proper purposes;
- C. Financial accounting standards to track expenditures that are standard in the electric industry; and
- D. Methods to identify and provide information to On and Off Project Power Users related to the Power for Water Management Program, and methods to obtain necessary information from eligible On and Off-Project Power Users to enable their realization of benefits of the Power Programs.

The guidelines may be amended from time to time as the Management Entity determines.

**17.4.4. Administration**

**A. Methods for Distributing Funds to Eligible Power Users**

The Parties shall support any feasible administrative means for distributing funds that become available through the Power for Water Management Program and its elements to achieve the power cost targets for individual eligible Power Users. Specifically, the Parties shall support reasonable mechanisms and any necessary Regulatory Approvals that would enable PacifiCorp to apply credits to the bills of eligible Power Users consistent with the directions provided by KWAPA, UKWUA, or the Management Entity.

**B. Independent Entity**

If KWAPA, UKWUA, or the Management Entity are not able to enter into an acceptable arrangement with PacifiCorp, they may contract with an independent entity to hold and disperse the funds in the Power for Water Management Program to meet the power cost target.

**17.4.5. Reporting**

The Management Entity shall create an annual financial report on the progress and the financial condition of the Power for Water Management Program. The reports shall be submitted to the Secretary and Reclamation and shall be made available to any other Party on request.

**17.4.6. Regulatory Approvals**

The Parties shall use their Best Efforts to support whatever Regulatory Approvals may be required to implement, administer, and otherwise maximize the efficiency of the Power for Water Management Program.

**17.4.7. Net Metering**

The Parties anticipate that net metering arrangements, including aggregation of loads for net metering, may be required as part of the Power for Water Management Program (including but not limited to solar photovoltaic systems). Consistent with the general provisions of Section 3, the Parties agree to cooperate in the development of net metering arrangements with PacifiCorp and to support any Regulatory Approvals that may be required for such arrangements.

**17.5. Interim Power Program**

**17.5.1. Purpose**

The purpose of the Interim Power Program element is to maintain the power cost target for the eligible power users as provided in Section 17.1, while the remaining program elements are implemented.

**17.5.2. Duration**

The Interim Power Program shall terminate upon expenditure of funds in the amount identified in Appendix C-2, line item 72.

**17.5.3. Implementation**

The Management Entity shall implement the Interim Power Program consistent with Sections 14.3.1 and 17.4.

**17.6. Federal Power**

The purpose of the Federal power element is to obtain and provide for the cost-effective transmission and delivery of Federal preference power to serve all eligible On-Project Power Users and Off-Project Power Users meters as authorized by Applicable Law. The Parties will support efforts by Reclamation to Timely obtain an allocation of power from the Bonneville Power Administration for eligible Power Users in Oregon, and to obtain other allocations of Federal power that may be requested.

**17.7. Renewable Power Program**

**17.7.1. Program Purpose**

The purpose of the Renewable Power Program element is to: (i) increase power efficiency of the On-Project Power Users and Off-Project Power Users; and (ii) generate renewable energy to directly or indirectly reduce net power costs for eligible Power Users. These actions will be designed to maintain the power cost target for eligible On Project and Off-Project Power Users. The Non-Federal Parties will support the funding in Appendix C-2 to fund investment in renewable resources or energy efficiency measures to meet the power cost target. Federal funds estimated in Appendix C-2 to implement this Energy Efficiency and Renewable Resource Generation element may be used as cost-share requirements for any funds not provided through Appendix C-2 obtained to implement this element. The plan in Section 17.7.2 will address application of power sale revenues as provided in Section 17.7.3.

## **17.7.2. Financial and Engineering Plan**

### **A. General**

The Management Entity will develop a financial and engineering plan for the use of the funds identified in Appendix C-2 and Section 14.3. The plan will identify specific renewable energy resources and energy efficiency measures to be developed or invested in under this section. The plan will be submitted to the Secretary for approval. In evaluating the plan, the Secretary shall consider: (i) whether the plan reasonably meets the stated purposes of Sections 17.1 and 17.7.1, and addresses the disbursement and use of funds as described in Section 17.7.3; and (ii) whether the plan is consistent with the remaining provisions of this Agreement.

The Management Entity shall adopt the plan within 45 days of approval by the Secretary. Upon adoption, the Management Entity shall implement the plan. Any amendments shall be approved by the Secretary.

### **B. Cooperative Evaluation**

As one of the projects to be considered in the financial and engineering plan, the Klamath Tribes and KWAPA with the Management Entity will analyze acting as the developers of a biomass project or projects. The development plan will be presented and supported by reasonable pro forma estimates of costs and returns as well as the allocation of revenues between the Klamath Tribes and KWAPA. The plan will also address matters such as the number of jobs that will be produced through implementation of the plan, benefits to the Klamath Tribes, benefits for water efficiency, moving water through the Reclamation Project and returning it to the Klamath River, and other benefits to the Agreement, the physical location of the project, inter-connection arrangements and power sale and purchase programs or preliminary commitments as well as an estimated date when excess revenues, not applied to the purpose of the Power for Water Management Program or necessary for the power cost target under this program, will be available to the Federal Government. Upon presentation of a viable development plan for such project or projects, the Secretary and the Chief of the Forest Service will consider whether additional Federal programs or assistance are available to implement the development plan and assist in meeting the objectives of this Agreement.



**17.7.3. Funds for Investments in Renewable Energy; Use of Project Revenues**

Funds shall be provided in accordance with Section 14.3.1. for renewable energy projects and activities identified by the Management Entity which meet the following criteria: (i) the projects are for renewable resources under Applicable Law of the state where the project is located; (ii) the projects are commercially reasonable in that they are estimated to produce power given the project development plan and pro forma assumptions at or below short and long term power price projections for similar renewable projects; and (iii) the projects have been or can be sited and permitted in the opinion of experienced consultants and legal counsel.

- A. Such funds will be used to pay expenses related to developing the renewable resources projects, and constructing or otherwise investing in such projects, in accordance with the approved project pro forma.
- B. The Management Entity will deposit such funds to, and withdraw funds from, an investment account approved in accordance with Section 17.7.2. Upon commercial operation of a renewable energy generating project, the Management Entity shall deposit all power sale revenues into a Project Operating Trust Account, to be applied by an independent trustee on a priority basis as follows: first, to pay all applicable operating, fuel, and maintenance costs of the project; second, to pay any then-due debt service costs related to the project; third, to fund or refill any project reserve accounts; fourth, all remaining project revenues shall be transferred by a trustee in a Power Cost Reduction Fund established by the Management Entity to meet the power cost target in Section 17.1.
- C. Upon a finding by the Management Entity that no further investments from the investment account will be necessary to meet the power cost target, then any funds remaining in the investment account shall be released and provided to the grant funding sources on a pro-rata basis. In such case, any excess revenues from projects developed using funds from the investment account shall also be paid to the grant funding sources on a pro-rata basis rather than being returned to the investment account. In the event that the grant funding sources have received the return of funds equaling the funds originally provided by them under this Agreement and deposited into the investment account, then no further payments are required to be made to such entities.

- D. Aside from the use of excess project revenues as set forth in this section, neither the Management Entity nor any other Party shall have any affirmative obligation to repay funds originally transferred into the investment account. In no case shall the availability of funds provided under this Agreement preclude the Management Entity or any other Party from applying for or receiving grants, credits, or other financial incentives as may be available for the development of renewable power or conservation projects.

#### **17.7.4. Conservation and Efficiency**

The Non-Federal Parties will support applications for energy-based economic development, federal and state renewable energy generation, and conservation and efficiency, funding and technical assistance programs to assist in realizing energy efficiency and renewable energy generation consistent with the Purposes of the Power for Water Management Program and its elements. The Management Entity shall periodically make recommendations to entities providing funding for conservation.

### **18. Additional Water Conservation and Storage**

The Parties agree to these additional obligations to enhance water conservation and provide for further water storage.

#### **18.1. General**

This Agreement does not limit any authority under Applicable Law to implement additional water conservation measures that are consistent with the terms of this Agreement.

#### **18.2. Measures to Restore Upper Klamath Lake Water Storage and Reconnect Historic Lake Bed**

##### **18.2.1. Williamson River Delta**

In accordance with the preferred alternative described in the Environmental Impact Statement and with funding provided by Reclamation, Natural Resource Conservation Service and the FWS, The Nature Conservancy (TNC) completed the breaching of the levies in November 2008 to restore approximately 28,800 acre-feet (gross) of lake storage capacity when Upper Klamath Lake elevations are between 4143.3 and 4136.0 feet. The Parties agree to support efforts to monitor the effects on fish populations and water quality associated with this restoration project.

### **18.2.2. Agency Lake Ranch and Barnes Ranch**

To achieve water management outcomes consistent with this Agreement, the diked and drained areas of Agency Lake and Barnes Ranches that once were part of Agency Lake will be operated as pumped storage within existing dikes subject to Section 18.2.2.D, with the goal of reconnecting to Agency Lake by breaching existing dikes.

#### **A. Recital**

Reclamation, FWS, and TNC entered into a Memorandum of Understanding (MOU) on March 2, 2007, to, among other things, provide for transfer of the remaining areas of the Agency Lake Ranch and Barnes Ranch (collectively, the land) to FWS and for pumped storage operations. The MOU also provides that upon transfer of the land, FWS will manage the land as part of the Upper Klamath NWR (UKNWR) with the goal of breaching the existing lakeshore levee system. Under this Agreement, the Parties shall investigate and seek to secure additional water storage in the Upper Klamath Basin, including reconnecting the land to Agency Lake to provide approximately 63,770 acre-feet (gross) of restored storage between elevations 4143.3 and 4136.0, subject to availability of funds.

#### **B. Transfer of Lands**

Reclamation shall transfer, subject to Section 18.2.2.C, the land to FWS upon written mutual agreement between Reclamation and FWS (transfer agreement) within one year of the Effective Date. Upon transfer to FWS, FWS will manage the transferred lands as part of the UKNWR subject to Section 18.2.2.C so long as it is in effect.

#### **C. Reconnection**

The FWS, with technical assistance from Reclamation, will make Best Efforts to reconnect the land to Agency Lake as described in Section 18.2.2.A. Such reconnection is intended to provide restoration, wildlife, fisheries, and water management benefits.

The FWS will complete a study, by March 31, 2012, that evaluates options for enhancing water management flexibility in providing benefits for water storage, fish, wildlife, and wetlands habitat, including the construction of a dike along the northern border of the property, from the Effective Date until the date on which the On-Project Plan is fully implemented pursuant to Section 15.2.2.B.ii. FWS shall commence its environmental analysis of the options considered in the above study within 60 days of an Affirmative Determination by the Secretary under Section 3 of the Hydroelectric Settlement. It shall undertake to complete such analysis within two

years of commencement. FWS shall implement the selected alternative in a Timely manner provided adequate funding is available. FWS will provide a progress report to the Parties every 6 months after the Effective Date.

**D. Pumped Storage Operations**

Reclamation will continue the pumped storage operations on the land consistent with such operations since 1998, in accordance with Applicable Law, and pursuant to this Agreement and the transfer agreement between Reclamation and FWS, for the period from the Effective Date until one of the following events occurs (“pumped storage period”): (i) the date of reconnection of the land to Agency Lake; or (ii) the date on which the On-Project Plan is fully implemented pursuant to Section 15.2; or (iii) when an additional 30,000 acre-feet of inflow is being provided in UKL on an average annual basis, as determined by OWRD pursuant to Section 16.2.2.F; or (iv) until such time that pumped storage ceases, based on a determination by the Secretary, in consultation with the Parties, that pumped storage is no longer feasible or cost-effective. Further, Reclamation shall be responsible during the pumped storage period for all operations and maintenance for such pumped storage operations, consistent with the transfer agreement and pursuant to this Agreement.

**E. Management After Cessation of Pumped Storage**

After cessation of the pumped storage period, FWS shall manage the land as part of the UKNWR no longer subject to the requirement of Section 18.2.2.D.

**18.2.3. Wood River Wetland Restoration Project**

To achieve water management outcomes consistent with this Agreement, the Parties’ ultimate goal is to reconnect Wood River Wetland to Agency Lake when physical and biotic conditions are sufficient to provide the wetland restoration benefits for which the property was acquired.

BLM currently manages the Wood River Wetland to restore wetlands adjacent to Agency Lake. In furtherance of this Agreement and the ultimate goal, BLM, in collaboration with the KBAC and TAT will complete a study, by March 31, 2012, that evaluates options for enhancing water management flexibility in providing benefits for water storage, fish, wildlife and wetlands habitat from the Effective Date until the date on which the On-Project Plan is fully implemented pursuant to Section 15.2.2.B.ii, or an additional 30,000 acre-feet of water inflow is being provided in UKL on an average annual basis as determined by OWRD pursuant to Section 16.2.2.F. This study will consider options, among others, whether diked and drained areas of Wood River Wetland that once comprised Agency Lake

should be operated as pumped storage within existing dikes, or fully reconnected to Agency Lake by breaching dikes. Either option would result in a total water volume of approximately 16,000 acre-feet of gross storage between elevations 4143.3 and 4136.0 feet, but would provide differing arrays of water management opportunities and ecosystem benefits.

The BLM shall commence its environmental analysis of the options considered in the above study within 60 days of an Affirmative Determination by the Secretary, as described in Section 3.3 of the Hydroelectric Settlement. It shall undertake to complete such review within 2 years after commencement. BLM shall implement the selected alternative in a Timely manner. All actions described in this section are contingent upon adequate funding.

**18.2.4. Off-Project Water Use Retirements above Upper Klamath Lake**

As provided in Section 16, a WURP will be implemented to generate, on an average annual basis, an additional 30,000 acre-feet of inflow to Upper Klamath Lake.

**18.2.5. Alternatives**

If any of the obligations in Sections 18.2.2 through 18.2.4 cannot be met or become technically infeasible or legally impossible, the Parties shall pursue amendment of this Agreement pursuant to Section 7.2 to achieve comparable storage and/or inflows into Upper Klamath Lake.

**18.2.6. Additional Conservation**

The Parties shall support continued investigations of methods to achieve conservation of Klamath Basin water.

**18.3. Future Storage Opportunities**

**18.3.1. Technical Investigation**

Pursuant to the Klamath Basin Water Supply Enhancement Act of 2000 (P.L. 106-498), and given sufficient appropriations identified in Appendix C-2, Reclamation shall work diligently to complete appropriate studies for off-stream storage projects. Reclamation will provide a progress report to the Parties every six months after the Effective Date. The Parties shall continue to support ongoing investigations and acquisition of additional storage.

**18.3.2. Use of Additional Storage**

**A. Reservations**

Consistent with Reclamation planning directives, policies and standards, and NEPA, Reclamation shall not determine the specific

design, beneficiaries, etc. of such projects before completion of a NEPA decision document. Reclamation shall identify the range of alternatives identified in the Feasibility Study to enhance water management flexibility in providing for irrigation, fish and wildlife purposes, as well as the furtherance of Reclamation's tribal trust responsibilities.

**B. Support**

Subject to Reclamation's and OWRD's reservations of responsibilities and obligations, the Parties shall support use of water from these facilities in accordance with this paragraph.

- i. Such water will be a resource to be employed as needed to achieve the objectives of this Agreement as related to fisheries.
- ii. When first available, such water will be used to realize the increase in diversions to the Klamath Reclamation Project as described in Section 15.1.1 and provided in Appendix E-1, if that increase has not otherwise occurred.
- iii. Water will be used to implement the provisions of Section 19.2.2.B.ii.
- iv. Water may otherwise be used in accordance with recommendations of the TAT and decisions of the Klamath Basin Coordinating Council.
- v. In addition, the TAT may recommend the use of any such water for Klamath Reclamation Project irrigation and/or Wildlife Refuges if circumstances so warrant. In that circumstance, an increase in water diversion as a result of such storage could not occur merely because additional storage has become available and there would be transparent public processes prior to any increase.

**19. Drought, Climate Change, and Emergency**

**19.1. Purpose and Scope**

The Parties intend that the obligations and the bargained-for benefits of this Agreement are fulfilled and realized in all circumstances, including Drought and Extreme Drought, Emergency circumstances, or long-term climatic conditions which cannot now be foreseen. In the instances of Drought and Extreme Drought, Emergency, or climatic changes, the Parties intend that water and resource management actions be taken such that no Klamath Basin interest shall bear an unreasonable portion of burdens imposed or

the risk of loss or injury. Nothing here is intended to limit the applicability or effect of the Endangered Species Act or other Applicable Law.

## **19.2. Drought**

### **19.2.1. Lead Entity to Develop Drought Plan**

The Parties hereby designate, as lead entity responsible for the development of the Drought Plan (“Lead Entity”), a group composed of the following: Klamath Tribes, Karuk Tribe and Yurok Tribe, Upper Klamath Water Users Association, the Klamath Water and Power Agency, the Klamath Basin National Wildlife Refuges, Oregon Water Resources Department, California Department of Fish and Game, and an additional Party from among those listed as “Other Organizations” in Section 1.1.1, if designated by consensus of such Parties within 30 days of the Effective Date. In developing the Drought Plan, the Lead Entity shall consult with and seek the advice of the TAT or interim TAT, and shall consult with and invite participation of other Parties.

### **19.2.2. Content of the Plan**

- A.** The Drought Plan will include:
  - i.** Definitions of Extreme Drought and Drought;
    - a.** The Parties intend that an Extreme Drought shall be declared only in exceptional conditions. Water years 1992 and 1994 are the Extreme Drought years in the period 1961 to 2000.
    - b.** The Parties intend that Drought shall mean: a drought condition lesser in scale than an Extreme Drought as determined by the Drought Plan.
    - c.** The definitions of Drought and Extreme Drought have no effect on the definitions of drought under Applicable Law. Declarations of Drought or Extreme Drought by the entity responsible for such declarations and any actions resulting from that declaration do not affect the rights or obligations under Applicable Law or require the exercise of Public Agency Party discretion under Applicable Law; and
    - d.** To the maximum extent practicable and appropriate, the definitions will be based on objective criteria in order to facilitate future declarations of Drought and Extreme Drought.

- ii.** A process to evaluate and adapt water and resource management strategies, consistent with this Agreement, for agricultural, National Wildlife Refuges, and in-Lake and in-River fishery purposes in dry years in anticipation of, and in preparation for the potential of a Drought or Extreme Drought so as to avoid or minimize adverse impacts to Klamath Basin communities and natural resources in response to Drought or Extreme Drought;
- iii.** A specification of the manner in which available water will be quantified, and responses to Drought and Extreme Drought will be implemented;
- iv.** The identity of the entity responsible for declaration of Drought and Extreme Drought (referred to here as the “Declaration Entity”);
- v.** A description of the processes for declaration of Drought and Extreme Drought and the revocation of such declaration, if necessary. Processes to provide periodic advance notice to affected Klamath Basin communities of the potential for occurrence of a Drought or Extreme Drought, and, when issuing a declaration of Extreme Drought, to do so as early as practicable and to the extent possible in advance of the irrigation growing season;
- vi.** A description of responses to Drought and Extreme Drought, including but not limited to Section 19.2.2.B;
- vii.** The identity of the entity(ies) responsible for implementation and enforcement (referred to here as “Enforcement Entity(ies)”) of the Drought Plan;
- viii.** Provisions authorizing, encouraging, or providing for the use of available Drought relief funds including funds in the Klamath Drought Fund in the discretion of the funding entities to compensate Parties, parties in the Klamath Reclamation Project, or Participants who suffer injury as a consequence of performance of Extreme Drought measures under this Agreement. To the extent that funds are not available to compensate such parties, the Non-Federal Parties shall cooperate in seeking federal and state funds to mitigate impacts of the Drought or Extreme Drought and the response measures;



- ix.** Recommendations for funding the implementation of the Drought Plan, and identification of mechanisms for disbursement of funds in the Klamath Drought Fund;
- x.** A description of the manner in which the Drought Plan will be implemented, provisions of the Drought Plan will be enforced, and the extent that additional authority if any is required for any entity with implementation or enforcement responsibility under the Drought Plan;
- xi.** Provisions for adaptive management, periodic review, and amendment consistent with this Section 19.2; and
- xii.** Such other provisions as the TAT may recommend and the Lead Entity incorporates into its Drought Plan.

**B.** The Drought Plan will require that Enforcement Entity(ies), with the recommendations of the TAT, determine which among the following measures, alone or in combination, shall be employed. The Drought Plan will require that the responses be employed in order of priority set forth below in response to Drought conditions of increasing severity. The Enforcement Entity(ies) shall use diligent efforts to exploit each measure before moving to the next measure, in light of the urgency of the situation, but are not required to demonstrate exhaustion of all possible applications of any particular measure before moving to the next. To the maximum extent feasible, the Drought Plan will protect Klamath Basin communities, and provide sufficient quantities of water to meet the biologically essential River flows and lake elevations in periods of Drought or Extreme Drought. The response measures to be included in the Drought Plan will be:

- i.** Voluntary water conservation measures;
- ii.** The use of stored water available under Section 18.3;
- iii.** Both of the following:
  - a.** The lease of water on a willing seller basis which would otherwise be diverted for irrigation purposes. For any leasing within the Klamath Reclamation Project, applicable DIVERSION at the Settlement Points of Diversion in Appendix E-1 will be reduced by the foregone consumptive use of water; and
  - b.** Use of groundwater, either for irrigation purposes to replace that which would otherwise have been diverted or, where lawful and upon the recommendation of the

TAT, as a supplement to river flows and lake levels. Upon the advice and with the approval of the TAT, the “no adverse impact” criteria of the On-Project Plan related to groundwater (Section 15.2.4.A) may be waived in response to Extreme Drought.

- iv. Other measures, as available, to reduce water diversion by exercise of water right priorities within the Klamath Basin in Oregon and California, consistent with this Agreement and Applicable Law. These measures include the fact that Parties with water rights will make water rights calls to bring additional water to Upper Klamath Lake as early as practicable in years of Drought or Extreme Drought; and
- v. If there is an Extreme Drought, and the measures identified above are insufficient, the reduction in diversions to a level below the applicable DIVERSION in Appendix E-1, as modified by Section 19.2.2.B.iii.a, following notice as set forth in Section 19.2.2.A.v. Measures may be taken in the circumstances under this sub-section, notwithstanding the DIVERSION limitation for Klamath Reclamation Project as found in Appendix E-1.

### **19.2.3. Preparation, Adoption, and Approval of the Drought Plan**

The Parties agree to the following procedures and schedule to ensure that preparation, adoption, and approval of the Drought Plan will be Timely completed on the following schedule.

- A. The Lead Entity shall develop a draft Drought Plan by September 30, 2010. It shall provide an opportunity for the Parties to comment on that draft Plan. The draft Plan may include alternatives. The Lead Entity shall also consult with the funding entity during the review by the Parties.
- B. The Lead Entity shall consider comments from Parties, the Fund Administration Entity, other funding entities, and other entities as appropriate in the course of finalizing the Drought Plan. The members of the Lead Entity shall act by consensus to adopt a Plan. If consensus exists, the Lead Entity shall adopt a Drought Plan and provide Notice by November 30, 2010.
- C. In the event of such adoption, any Party may issue a Dispute Initiation Notice with respect to such Plan within 30 days of Notice. Dispute Resolution Procedures under Section 6.5 shall be completed within 60 days of such initiation.

- D.** The Lead Entity shall submit the adopted Drought Plan to the Fund Administration Entity: (i) within 30 days of its Notice of adoption, and not later than January 7, 2011, if it does not receive a Dispute Initiation Notice; or (ii) by March 31, 2011 following the completion of the Dispute Resolution Procedures if consensus among its members exists.
- E.** Following receipt of a Drought Plan submittal pursuant to paragraph D, the Fund Administration Entity shall: (1) ensure completion of any environmental compliance procedures under Applicable Law, (2) review the plan to determine that it includes the elements required by Section 19.2.2, and (3) make a decision on funding Plan implementation, by March 31, 2012.
- F.** A Drought Panel shall be convened (i) by December 31, 2010, if the Lead Entity has not adopted a Drought Plan by November 30, 2010 pursuant to the procedures in paragraph (B); or (ii) by April 30, 2011, if the Lead Entity adopts a Drought Plan by November 30, 2010, but does not submit the adopted Plan to the Fund Administration Entity by March 31, 2011 pursuant to the procedures described in paragraphs (C) and (D.ii) above. The Drought Panel shall be composed of: a representative of the Secretary of the California Natural Resources Agency, a representative of the Natural Resources Director to the governor of Oregon, and a representative of the Secretary. It shall consult with the Fund Administration Entity in the course of preparing the Drought Plan. The Drought Panel shall seek consensus to adopt a Drought Plan. If consensus is not achieved, it will adopt the Plan by majority vote.
- G.** If convened pursuant to paragraph (F), the Drought Panel shall adopt the Drought Plan, provide Notice to the Parties, and submit the Plan to the funding entity, by July 31, 2011. This Drought Plan (or any predicate decision of the Drought Panel) shall not be subject to the Dispute Resolution Procedures of Section 6.5.
- H.** Following receipt of a Drought Plan submittal pursuant to paragraph (G), the Fund Administration Entity shall: (1) ensure completion of any environmental compliance procedures under Applicable Law, (2) review the plan to determine that it includes the elements required by Section 19.2.2, and (3) make a decision on funding Plan implementation, by July 31, 2012.
- I.** If the Fund Administration Entity does not approve funding of a Drought Plan adopted by the Lead Entity pursuant to paragraph (D), the Lead Entity shall develop a revised Drought Plan by June 30, 2012. Any Dispute Resolution shall be completed by

August 30, 2012. If the Lead Entity does not submit the revised Drought Plan to the Fund Administration Entity by September 30, 2012, because consensus among its members does not exist to adopt the revised Drought Plan or submit it, the Drought Panel shall be convened. It shall prepare and adopt a revised Drought Plan and submit it to the Fund Administration Entity by December 31, 2012.

- J.** If the Fund Administration Entity does not approve funding on the Drought Plan submitted by the Drought Panel pursuant to paragraph G, the Drought Panel shall prepare and adopt a revised Drought Plan and submit it to the funding entity by October 31, 2012.
- K.** The Fund Administration Entity shall make a decision on the revised Drought Plan adopted under paragraphs (H) or (I), by April 30, 2013.
- L.** Approval of the Drought Plan submittal by the Fund Administration Entity, including regulatory review, shall be the final action in this process established by this Section 19.2.3. The Drought Plan shall be effective upon such approval.
- M.** Following approval, the Drought Plan may be amended as appropriate pursuant to the applicable procedures in Section 19.2.3.

#### **19.2.4. Drought or Extreme Drought Declaration**

The Plan shall require that the Declaration Entity, acting on the recommendation of the TAT and in accordance with the Drought Plan, shall declare that a Drought or Extreme Drought condition exists as defined by the Plan. Within fifteen days of the declaration, the Enforcement Entity(ies), with the assistance of the TAT and the Declaration Entity, shall determine the scope of the Drought, including the amount and sources of water reasonably likely to be available within the Klamath Basin, and identify potential responses consistent with the obligation to insure that available water is managed consistent with Section 19.1.

#### **19.2.5. Implementation and Enforcement**

As soon as practicable as dictated by the circumstances, and no later than 30 days following the declaration of Drought or Extreme Drought, the Enforcement Entity(ies) shall take all steps necessary to facilitate compliance with the identified measures, including actions in state or federal venues as necessary. The Parties agree to reasonable use of all existing authority to implement the Drought Plan. Parties will consider seeking additional authority, as needed, to insure the implementation of, and compliance with, provisions of the Drought Plan.

### **19.3. Emergency**

#### **19.3.1. Definition of Emergency**

For the purpose of this section, **Emergency** shall mean: a major failure of Klamath Reclamation Project facilities or dikes on Upper Klamath Lake or Lake Ewauna that affects the storage and delivery of water necessary to meet the commitments of this Agreement.

#### **19.3.2. Lead Agencies**

Reclamation, in coordination with KWAPA, shall be the Lead Parties for the development and implementation of the Emergency Response Plan as described in Section 19.3.3.

#### **19.3.3. Content of the Plan**

The Emergency Response Plan shall include: (i) a process to anticipate and prepare for the potential of an Emergency; (ii) the funding sources; (iii) the priority of funding responses to an Emergency; (iv) identification of the measures that may be taken in response to an Emergency; (v) the process to be used to implement such measures; and (vi) any other provisions the Lead Parties deem necessary to properly respond to an Emergency. The Plan shall be reviewed and amended as necessary every three calendar years after the Plan is adopted pursuant to Section 19.3.4.

#### **19.3.4. Schedule**

The Lead Parties shall complete all actions necessary to produce the Emergency Response Plan within one year from the Effective Date. The Parties shall review the Emergency Response Plan and provide comments to the Lead Parties within 90 days after production of the Plan. Within 90 days after comments are received by the Lead Parties, Reclamation shall adopt the Plan. Each of these deadlines may be extended upon a determination by the Lead Parties that additional time is reasonably necessary for completion of the Plan, or that good cause otherwise exists to extend the deadline.

#### **19.3.5. Response Procedures**

In the event of an Emergency, the Parties shall take the following actions:

##### **A. Notice**

Except as provided in Section 19.3.5.B below, within three days of discovery of the event, Reclamation shall publish on its website and otherwise provide Notice to appropriate Parties a description of the Emergency and its likely effects on the storage and delivery of water necessary to meet the commitments of this Agreement. Affected

Parties and others will be provided a period of three additional days in which to consult with Reclamation and KWAPA or relevant KPWU entities as to appropriate responses to the Emergency.

**B. Emergency Requiring Immediate Response**

In the event that a response to an Emergency requires immediate action, notice, as provided in Section 19.3.5.A above, will be given within 24 hours after the initial response is complete or earlier if feasible under the circumstances of the Emergency. Emergencies requiring an immediate response for which the notice provision in Section 19.3.5.A above is not required include any Emergency for which a delay in the response to that Emergency will result in (i) injury to persons or property, including loss of life, (ii) a significant loss of water from its intended use, or (iii) a significant increase in the cost of any subsequent repair or replacement.

**C. Response**

After completion of the notice provisions in Section 19.3.5.A above, except as provided in Section 19.3.5.B above, Reclamation, KWAPA, and any appropriate KPWU entity shall determine appropriate measures to respond to the Emergency as provided in Section 19.3.6 below.

**D. Dispute Resolution**

Disputes regarding the propriety of the response selected by Reclamation, KWAPA, or a KPWU entity shall be resolved expeditiously in accordance with the Dispute Resolution Procedures in Section 6. The Parties shall use Notice to meet all deadlines within this section. Each communication by the Parties shall include any associated data or reports relied upon. Any dispute resolution process shall not unreasonably interfere with the response necessary to respond to any Emergency.

**19.3.6. Permissible Responses**

Reclamation, KWAPA, and appropriate KPWU entities may respond to any Emergency in the manner they deem necessary to reduce to the extent possible any damages to property, injuries to persons, including loss of life, or the loss of water from its intended use. In the shortest time possible, consistent with sound engineering and economic principles, the Lead Agencies shall restore to its intended use any diversion or release of water that was interrupted as a result of the Emergency.

## **19.4. Climate Change**

The Parties will determine as early as practicable how long-term climate change may affect the fisheries and communities of the Klamath Basin. The Parties will re-convene to negotiate in good faith any supplemental terms to this Agreement which may be made necessary by changes in the climate in order to achieve the Parties' goal of maintaining sustainable fisheries and communities.

### **19.4.1. Purpose**

The Parties intend by this section to insure that: long-term climate change in the Klamath Basin is assessed early and continuously; the Parties collaboratively respond to climatic change in a manner that is intended to protect basin interests from the adverse affects of climatic change for as long as practicable; and the resources of the basin are managed in the future on the basis of the best available science.

### **19.4.2. Technical Assessment**

On the Effective Date, OWRD and CDFG, in coordination with other Water Managers and Fish Managers, will become the initial co-Lead Parties responsible for overseeing an ongoing assessment of the risks and potential impacts of climate change on the management of the Klamath Basin resources. The Parties will support the California Resources Agency assuming the role of the California co-lead. The co-Lead Parties shall seek input from interested Parties and other entities capable of adding appropriate technical expertise to this process.

### **19.4.3. Schedule**

Within two years of the Effective Date, Lead Parties shall initiate the assessment process. The assessment will be ongoing and will be intended to provide Klamath Basin stakeholders and resources managers with qualitative and quantitative information on climate change impacts.

### **19.4.4. Use of Results**

The results of the OWRD and CDFG's assessments will be provided on a regular basis to the Klamath Basin Coordinating Council such that climate change science will be incorporated into management of Basin resources. Their assessments will be incorporated into Regulatory Agency Parties' regulatory review and approval process as described in Sections 21 through 25 as applicable.

### **19.4.5. Response**

The Parties agree to reconvene and to negotiate in good faith to develop supplemental terms of this Agreement consistent with the goals of sustainable communities in light of climatic change when either or both of the following criteria are satisfied:

- A. Substantial effects of climate change are determined by the Klamath Basin Coordinating Council to be manifest or reasonably likely to occur; or
- B. Adaptive management of water resources consistent with the obligations of this Agreement is deemed by the Klamath Basin Coordinating Council to be insufficient to address the impacts of climatic change.

## **19.5. Off-Project Reliance Program**

### **19.5.1. Purpose**

In this Agreement, the Parties representing irrigation interests and communities have set aside historic differences with other Parties as to needs for water for instream uses, and in exchange for reliable water supplies have supported programs to provide instream flows. The programs in this Agreement, including Section 16, are intended to achieve a water balance that will avoid further reductions in surface water availability to the irrigation communities in the Upper Klamath Basin, subject to the exceptions in Section 19.2. However, the Parties recognize the possibility that an unexpected circumstance affecting water availability below Upper Klamath Lake could arise that could affect the amount of water available for irrigation in the Off-Project Area which is not otherwise addressed in this Agreement. To provide a temporary bridge to avoid or mitigate the immediate effects of this unexpected circumstance on the Off-Project Irrigators, the Parties support the development of a focused Off-Project Reliance Program, described in Section 19.5.2. Further, in the event of such an unexpected circumstance, the Parties will meet and confer to seek a cure.

### **19.5.2. Elements of the Off-Project Reliance Program**

The Off-Project Reliance Program shall be applicable after implementation of the WURP and OWRD has made the determination in Section 16.2.2.F, and Appendix E-1 has become effective.

The Off-Project Reliance Program shall be consistent with the WURP developed as provided in Section 16, and will be developed by UKWUA, in consultation with other Off-Project Irrigators, and with technical assistance from Reclamation, the FWS, or other Federal agencies with expertise necessary to assist in development of the Off-Project Reliance Program. The Off-Project Reliance Program shall be developed prior to the date on which OWRD makes the determination required by Section 16.2.2.F. The Off-Project Reliance Program shall be approved and administered by the FWS.

The Non-Federal Parties shall support funding of the Off-Project Reliance Program in the amounts estimated in Appendix C-2 for the Off-Project Reliance Program. Sources of funding for the Off-Project Reliance Program shall include:



- A.** Interest earned on WURP funds to be invested, subject to its agreement, by the National Fish and Wildlife Foundation (NFWF) or similar entity as follows:
  - i.** NFWF shall invest the WURP funds in interest-bearing obligations of the United States. For purposes of such investment, NFWF may—
    - a.** acquire obligations at the issue price and purchase outstanding obligations at the market price; and
    - b.** sell obligations held in the fund at the market price.
  - ii.** The interest on obligations held in the fund—
    - a.** shall be credited to the fund;
    - b.** constitute the sums available for allocation for use in the Off-Project Reliance Program; and
    - c.** shall become available for allocation as provided in this Section 19.5.2.
- B.** Any unexpended WURP funds after WURP has been implemented shall be available for the Off-Project Reliance Program.
- C.** The Off-Project Reliance Program shall be eligible for reallocated funds, if any.

Off-Project Reliance Program funds shall be used to avoid or mitigate the immediate effects of such unexpected circumstances on Off-Project Irrigators. Activities under the Off-Project Reliance Program may include: funding water leasing to increase water availability for irrigation in the Upper Klamath Basin or mitigating the economic impacts of lost agricultural production by Off-Project Irrigators. The Parties shall support the funding under the Off-Project Reliance Program to remain available until expended or through the Term of this Agreement, whichever occurs earlier.

The duties of the FWS in administering the Off-Project Reliance Program shall be in accordance with Section 14.3.2 and shall include: upon a request by UKWUA, a determination of whether an unexpected circumstance has occurred or is likely to occur and the availability and use of the Off-Project Reliance Program funds to mitigate or avoid the effects of the unexpected circumstance; and approval and oversight of the Off-Project Reliance Program and the expenditure of federal funds.

### **19.5.3. Eligibility**

Off-Project Irrigators eligible for participation in the Off-Project Reliance Program shall include only those water users who:

- (i) as of one year after the Effective Date, are not contestants to the water right claims in KBA case numbers 003, 274, or 275, identified in paragraphs 1 and 2 of the Recitals in Appendix E-1;
- (ii) do not file exceptions to the Findings of Fact and Order of Determination in the KBA under ORS 539.150 with respect to such claims; and
- (iii) have enrolled in one of the following programs when that program is available. These programs are: the OPWAS or the WURP pursuant to Section 16.2.2, the Fisheries Restoration Program pursuant to Section 10, or the applicable regulatory Assurances under Section 22.2.

Klamath Tribal allottees who are also eligible Off-Project Irrigators will be eligible to participate fully in the Off-Project Reliance Program, and shall be given the option of priority participation when doing so is compatible with the structure and goals of the program.

## **20. Environmental Water**

### **20.1. Purpose and Scope**

Consistent with Section 9.2.6, the Parties intend that this Agreement restore and sustain natural production of Fish Species throughout the Klamath River Basin. The Parties intend to achieve this benefit by reintroducing Fish Species, establishing conditions that will contribute to the natural sustainability of fisheries and Full Participation in Harvest Opportunities, improving water quality, increasing the quantity of water to benefit fisheries and other aquatic resources, and providing adaptive and, where practicable, real-time management of water quantity to benefit fisheries and other aquatic resources. This section addresses the management, protection, and monitoring of Environmental Water.

### **20.2. Measures to Produce Environmental Water**

In this Agreement, the Parties have made the following obligations (among others) related to Environmental Water.

- 20.2.1.** Pursuant to Section 8, the Parties shall support the Hydroelectric Settlement which includes, among other provisions, a process for potential Facilities Removal

- 20.2.2.** Section 15 will result in, and provide limitations on diversions from the Klamath River and Upper Klamath Lake associated with the Klamath Reclamation Project.
- 20.2.3.** Pursuant to Section 16, water uses above Upper Klamath Lake will be retired.
- 20.2.4.** Pursuant to Section 18, the Parties shall investigate and seek to secure additional water storage in the Basin.
- 20.2.5.** Pursuant to Sections 10 and 11, the Parties shall implement the Fisheries Restoration and Reintroduction Plans.
- 20.2.6.** The Parties shall support realization of the obligations in Sections 20.2.1 through 20.2.5 pertaining to producing Environmental Water, in the following manner.
- A.** Consistent with Sections 1 through 4 and other provisions of this Agreement, the Parties shall support this Agreement, including proposed legislation in Appendices A and B, and they shall seek funding for the Agreement.
  - B.** Consistent with Sections 21, 22, 23, 24, and 25 Regulatory Agency Parties shall meet their obligations under the Agreement. The Parties confirm that nothing in this Agreement is intended to alter the existing federal and state statutory obligations for the protection of fish, wildlife and water.
  - C.** Federal Agency Parties commit, for themselves and in their capacity as trustee for the Tribes, that unless otherwise required by Applicable Law they will not take actions inconsistent with this Agreement, and where appropriate, shall act to promote compliance with the Agreement.
  - D.** CDFG and ODEQ, ODFW, and OWRD commit that, unless otherwise required by law, in all matters pertaining to the Klamath Basin they will not take actions inconsistent with this Agreement and, where appropriate, shall act to promote compliance with this Agreement.
  - E.** The Tribes commit to exercise their authority as sovereign nations to achieve compliance with the terms of this Agreement. To the maximum extent permitted by their respective Tribal law and to the maximum extent of each Tribe's jurisdiction, the Tribes shall exercise their authority to impose conditions as part of Tribal Agency action which will require the completion of specific identifiable tasks within specified time periods necessary

to insure compliance with the obligations set forth in Sections 20.2.1 through 20.2.6.

### **20.3. Managed Environmental Water**

#### **20.3.1. Water Rights and other Legal Requirements**

Management of Managed Environmental Water will be consistent with: (i) Applicable Law, including obligations of Reclamation and other Parties under the ESA; (ii) any related secondary rights to use the stored water, as well as consistent with senior water rights; and (iii) this Agreement.

#### **20.3.2. Coordination and Oversight**

The Secretary shall make management decisions regarding Managed Environmental Water, so as to maximize benefits for the Klamath Basin's fish and wildlife and to achieve the water management goals of this Agreement. Once subject to its Charter, the TAT shall provide recommendations to the Secretary on how best to distribute and use this Managed Environmental Water for this purpose. In carrying out this function, the TAT shall ensure broad technical and public participation, use the best available and most current technical and scientific information, and encourage Consensus in recommendations on water operations that affect either Upper Klamath Lake or lower Klamath Basin ecosystems. Appendix D-2 describes the scope of TAT responsibilities and operating procedures.

#### **20.3.3. Real-Time Management**

Except as limited by other provisions of this Agreement, the processes used to determine whether to store or not store Managed Environmental Water, for the purpose of conservation and recovery of Fish Species, shall be open, transparent, real-time, consistent with the principles of Collaborative Management, and also consistent with Section 15.4.5.A and the limits of existing water rights and other Applicable Law.

### **20.4. Interim Flow and Lake Level Program Pending Implementation of Irrigation Plans**

#### **20.4.1. Purpose**

Section 20.4 addresses the interim period as defined in Section 20.4.2. To further the goals of the Fisheries Program in Part III, the Parties intend during this interim period to implement a water leasing and purchase program to reduce surface water diversions from the Klamath River and from its tributaries above Upper Klamath Lake and to apply the water obtained toward improving the status of anadromous and resident Fish Species. During the interim period, the Parties intend that this program will be administered to increase, to the extent technically feasible, the amount of water in the Klamath River and Upper Klamath Lake

toward the amounts which will result from the permanent instream water supply enhancement actions in Sections 15, 16, and 18.

**20.4.2. Definition**

For the purpose of this Section 20.4, the “interim period” is the time period between the Effective Date and (i) the date on which the On-Project Plan is fully implemented pursuant to Section 15.2.2.B.ii, or the applicable deadline under 15.3.8.A, whichever is earlier; (ii) an additional 30,000 acre-feet of water inflow is being provided in Upper Klamath Lake on an average annual basis as determined by OWRD pursuant to Section 16.2.2.F; and (iii) the events in Section 15.3.4.A.ii, and iii have occurred.

**20.4.3. Interim Program**

The Secretary shall, pursuant to Applicable Law, implement a water leasing and purchase program to achieve the purposes of this Section 20.4 interim program. Although the interim program may rely on long-term agreements, any agreements contemplated in the Klamath Reclamation Project or Off-Project that have a term greater than the Interim Period in Section 20.4.2 shall be consistent with the applicable On-Project Plan in Section 15.2 or the Off-Project Water Program in Section 16. KWAPA and the Secretary shall evaluate whether and how long-term agreements or other measures pursued under Section 15.2.2.B.ii could serve, or be adapted to serve, the purposes of the interim program. The Secretary’s implementation of the interim program shall take into account the recommendations of the TAT. Leases and purchases of water under this interim program shall be from willing sellers, at prices that are economically feasible.

**A. The Role of Technical Advisory Team**

- i.** The Secretary shall provide the Parties and other stakeholders with regularly updated information concerning the interim program status and operations.
- ii.** Using the process outlined in Appendix D-2, the TAT shall recommend to the Secretary no later than March 15 of each year the amount of water and times at which water would be most useful to meet the purposes of Section 20.4. In making its recommendations, the TAT shall use the best available science and information in its recommendation on the distribution of additional water for the benefit of resident and anadromous fish in Upper Klamath Lake and the Klamath River. In preparing these recommendations, the TAT shall consider the guidance principles, among others, described below. The Parties acknowledge that these guidance principles are not intended to be used as mandatory standards but are only guidelines for use by the

TAT in making its recommendations. Upon convening, the TAT shall review, amend, and supplement these guidance principles. The guidance principles are:

- a. Replicating the natural hydrologic regime under which the Fish Species evolved likely represents the best flow regime to conserve and recover Klamath River anadromous fish stocks and listed suckers in Upper Klamath Lake;
- b. Flow and lake level management should strive to achieve existing habitat-based flow and lake elevation recommendations that would likely increase survival of salmonids and suckers, and potentially improve other important ecological, chemical, physical and biological processes; and
- c. Flow and lake level management should strive to meet lake level and flow outputs from simulations presented in Appendix E-5, recognizing that such simulations do not necessarily reflect either overall water availability at any given time, or the actual water management strategy that will be employed in the future.

#### **20.4.4. Expenditures**

The Non-Federal Parties shall support authorizations and appropriations for the interim program, in the amounts estimated in Appendix C-2. The Secretary shall determine whether any funds that are not needed for the implementation of the interim program should be used to implement the On-Project Plan in Section 15.2, subject to Sections 15.2.2.A and 14.3.1, or for other purposes identified in Parts III or IV of the Agreement.

#### **20.4.5. Integration of Programs and Reduction and Termination of Expenditures**

##### **A. Integration of Planning and Implementation**

To achieve the purposes of the Interim Program in this section and the On-Project Plan described in Section 15.2, the Secretary shall coordinate with KWAPA, and each shall use Best Efforts to minimize areas of overlap of functions, avoid confusion or misunderstanding in the affected communities and limit overall costs. The Secretary may, after consultation with the TAT and KBAC, enter into agreements with KWAPA to carry out any action necessary to implement the purposes of the interim program in Section 20.4 under terms and conditions the Secretary deems necessary.

**B. Termination of Interim Program**

To the extent consistent with the purpose of this section, the Secretary shall proportionally reduce expenditures for the water leasing and purchase program incrementally, as measures to increase Environmental Water are realized. When the obligations to implement the On-Project Plan under Section 15.2.2.B.ii, increase annual average Upper Klamath Lake inflow pursuant to Section 16, and the events in Section 15.3.4.A.ii and iii have occurred, expenditures for this Program will terminate accordingly. If the funds identified in Appendix C-2 for this interim program have been fully expended prior to meeting the above obligations, the Parties will meet and confer to determine the source of future funding for this interim program.

**20.5. Protection of Environmental Water**

**20.5.1. Not Available for Consumptive Use**

The Parties shall support requests to regulatory agencies to protect Environmental Water to the maximum extent permitted by Applicable Law. These legal protections shall include, but not be limited to: (i) performance under Sections 15.3.1.C, 16.2.2.I, and 18.3; and (ii) the state-specific measures listed below.

**20.5.2. Oregon Protections**

**A. Existing Instream Water Right Applications**

The Parties, except the OWRD, which must make independent decisions that cannot be predisposed by this Agreement, shall not oppose the existing Instream Water Right applications filed by the ODFW, or the Oregon State Parks and Recreation Department for all Klamath Basin streams and water bodies; and any protests previously filed by Parties to these claims shall be withdrawn. The OWRD shall move these applications forward for certification of the instream water right requests as soon as feasible pursuant to Applicable Law. A summary of the outstanding Instream Water Right applications and protests for the Klamath Basin is set forth in Appendix E-3 and incorporated herein. It is acknowledged that not all protests to these existing Instream Water Rights are within the control of or filed by Parties themselves, and that no Party shall have any obligation to secure any such commitments from its individual members who may have filed such protests individually. Also, settlement of some of these protests shall require the consent of PacifiCorp, and those protests within the control of PacifiCorp will be resolved as elements of the Hydroelectric Settlement.

**B. New Instream Water Right Applications**

Any appropriate Party may apply for a permit to store Managed Environmental Water consistent with Applicable Law. If a permit to store water is issued, the ODFW may apply for an instream water right to be supplied from the stored water if the ODFW determines that such application would be consistent with Applicable Law.

**C. Existing Instream Water Right Claims of Various Federal Agencies**

The Parties shall not file exceptions in Klamath County Circuit Court opposing issuance or proposing to diminish the federal instream water right claims listed in Appendix E-4, which were filed by the BLM, Forest Service, or National Park Service.

**D. Conversion of Existing PacifiCorp Water Rights to Instream Water Rights**

The Parties, excluding the OWRD and Water Resources Commission which reserve their authorities, shall not oppose the conversion, at the earliest opportunity after dam decommissioning, of PacifiCorp's existing hydroelectric or other mainstem Klamath or Link River water rights within the Klamath Hydroelectric Project to instream water rights, as provided in the Hydroelectric Settlement and subject to any conditions necessary to avoid injury to existing upstream users. Such protections shall include the preclusion of any water rights calls for water downstream of existing points of diversion. Provisions for implementing this conversion are set forth in the Hydroelectric Settlement.

**E. Identification of Needs and Priorities for Stream Flow Restoration for the Klamath Basin in Oregon**

Within five years of the Effective Date, the ODFW, in cooperation with the OWRD Field Services Division, shall update its *Streamflow Restoration Needs and Priorities Identification* work list done originally under the Oregon Plan for Salmon and Watersheds in 2000 that prioritizes individual water availability sub-basins for streamflow restoration activities in the Klamath Basin based on fishery concerns, along with opportunities to restore instream water for individual water availability basins. This prioritization list shall be used to target future opportunities to restore instream water within the Klamath Basin consistent with and to implement this Agreement.



**20.5.3. California Protections**

**A. Dedication of Instream Flows**

Appropriate Parties shall support a petition by PacifiCorp to the SWRCB, as provided in the Hydroelectric Settlement and pursuant to Water Code section 1707, to dedicate Environmental Water to instream use in California waters for the purpose of preserving or enhancing wetlands habitat, fish and wildlife resources, consistent with the terms of this Agreement.

**20.5.4. Additional Measures to Protect Environmental Benefits of Flows**

**A. Water Quality Generally**

No waiver of federal Clean Water Act requirements or of comparable state water quality standards or implementation mechanisms is intended by any provision of this Agreement. The Agreement proactively addresses a significant number of water quality issues in the Klamath Basin.

**B. State TMDLs**

The Parties commit, subject to Applicable Law, to support the development and implementation of appropriate TMDLs and other water quality improvement programs adopted by the states within the Klamath Basin.

**C. Out-of-Basin Water Transfers**

The Parties (except state agencies with direct decisional authority over such transfers) shall make all reasonable efforts to oppose any additional out-of-basin water transfers from the Klamath River Basin.

**PART V.  
REGULATORY ASSURANCES**

**21. Overview of Regulatory Assurances for Fisheries and Water Resources Programs**

**21.1. Consequences of Reintroduction**

**21.1.1. Recitals**

**A. Consequences on Land and Water Users**

Reintroduction of salmon and other aquatic Species above Iron Gate Dam, as provided in Section 11, will be a unique circumstance that

could have potential regulatory or other legal consequences for users of water and land upstream of the current site of Iron Gate Dam under various statutory and common laws. Specifically, the Parties recognize that such reintroduction could result in new or modified Regulatory Obligations that could affect the ability to divert or use or dispose of water or the ability to utilize land productively.

**B. Interests of Land and Water Users**

The Parties make the commitments in Section 21.1.2 with full awareness of the recitals in Section 9.1.2. Further, the Parties affirm that interests in the Upper Klamath Basin with potential exposure to Regulatory Obligations have in good faith over a period of time preceding this Agreement played a substantial role in bringing about the circumstances that make reintroduction possible; the other Parties through such period have confirmed the need to provide such Assurances; and, if there were to be adverse consequences for regulated parties due to reintroduction, it would reflect poorly on the Agreement as well as on the general goal that regulated parties promote and facilitate environmental restoration.

**C. Resulting Commitments**

The Parties make the following commitments related to reintroduction. Nothing in the commitments contained in Sections 21 – 25 is intended to relieve pre-existing regulatory obligations.

**21.1.2. Avoidance or Minimization of Adverse Impact**

The Parties commit to take every reasonable and legally-permissible step to avoid or minimize any adverse impact, in the form of new regulation or other legal or funding obligation that might occur to users of water or land upstream of Iron Gate Dam from introduction or reintroduction of aquatic Species to currently unoccupied habitats or areas. The Parties shall implement the measures and binding commitments set out below in Sections 21 through 25 to meet this commitment.

In addition to the objective of avoiding new or modified Regulatory Obligations for landowners, Parties agree, without creating new obligations beyond Applicable Law, that the processes set forth in Sections 21 through 25 below are also intended to be consistent with the purposes of Section 9.2.1. Further, the Parties agree that the best way to achieve these results is through collaborative approaches to restoration, which will be facilitated by the processes in Sections 21 through 25.

**21.1.3. Fish Entrainment Alleviation at Klamath Reclamation Project Diversions and Related Actions**

**A. Fish Entrainment Alleviation**

One objective related to reintroduction is to prevent to the greatest extent feasible entry of reintroduced salmon and other aquatic Species into Klamath Reclamation Project diversions. Based on this objective, and in consultation with NMFS, FWS, ODFW, KWAPA and the affected Project districts and Project water users, Reclamation shall evaluate appropriate methods and locations to address entrainment at Klamath Reclamation Project diversions, including: (i) Lost River diversion channel or associated diversion points; (ii) North Canal; (iii) ADY Canal; and (iv) other diversions from Reclamation or Reclamation contractor-owned facilities diverting water from the Klamath River/Lake Ewauna. Subject to Section 2.2, the Non-Federal Parties shall support funding for construction, replacement, additions and extraordinary maintenance of entrainment reduction facilities at these diversions on a nonreimbursable basis to the Klamath Reclamation Project contractors. Upon receipt of such funding, and subject to Applicable Law, Reclamation shall construct entrainment alleviation facilities at these diversions in accordance with the results of these evaluations. Each appropriate irrigation district or other contractor entity or individual as determined by Reclamation will be responsible for routine maintenance and cleaning of facilities at these diversions, to be specified under agreements with Reclamation.

**B. Related Actions**

Reclamation shall also evaluate whether measures may be necessary to prevent adverse effects to reintroduced salmon and other Fish that may enter into Klamath Straits Drain. As appropriate based on the results of this evaluation, the Non-Federal Parties shall support, and subject to Section 4.1, Reclamation shall seek funding for construction, replacement, additions and extraordinary maintenance of facilities to prevent any such adverse effects from entry into Straits Drain on a nonreimbursable basis to the Klamath Reclamation Project contractors. Upon receipt of such funding, and subject to Applicable Law, Reclamation shall construct such facilities. Reclamation and affected contractors will agree on responsibility for routine maintenance and cleaning of such facilities.

**C. Coordination with Fisheries Program**

Evaluation and implementation of any actions pursuant to Sections 21.1.3.A and B will be conducted in full coordination with the Fisheries Program.

#### **21.1.4. Unforeseen Circumstances**

##### **A. Unforeseen Circumstances Affecting Commitments**

The Parties make these commitments and those in Sections 21 through 25 below related to reintroduction based in good faith on the reasonably anticipated consequences of reintroduction. If unforeseen consequences result from reintroduction during the course of this Agreement, the Parties agree to meet and confer in light of these commitments to determine any necessary future actions, including, but not limited to, consideration of whether narrowly tailored regulations or legislation is necessary to ensure the realization of commitments in the first sentence of Section 21.1.2. The Parties further acknowledge the potential for changes in regulatory programs and potential uncertainties as to the precise mechanisms by which the basic commitments stated herein will be achieved. If unforeseen changes in regulatory programs occur or uncertainties result as to the precise mechanisms by which the basic commitments stated herein will be achieved during the course of this Agreement the Parties agree to meet and confer in light of these commitments to determine any necessary future actions, including, but not limited to, consideration of whether narrowly tailored regulations or legislation is necessary to ensure the realization of these commitments.

##### **B. Meet and Confer Procedure**

The Parties intend for a flexible process by which any Party may request that any other Party(ies) meet to attempt in good faith to determine mutually agreeable actions based on such unforeseen circumstances and commitments described herein, and report the results of such process to the other Parties, prior to resorting to Dispute Resolution Procedures under Section 6.5 or other remedies as provided in this Agreement. If no Party requests to meet and confer or if Parties meet and confer, but cannot in good faith determine mutually agreeable actions through this process, then the Parties may resort to Dispute Resolution Procedures or other remedies as provided in this Agreement.

#### **21.2. Consequences of Restoration**

Restoration of habitat of salmon and other Fish Species as provided in Section 10 could have potential regulatory or other legal consequences for users of land and water, as well as any different entities performing the restoration measures, under various statutory and common laws. For waters and lands above the current location of Iron Gate Dam, the Parties intend that any consequences of restoration measures by Parties or Participants pursuant to this Agreement shall be addressed in the Assurances for reintroduction described in Section 21.1.

### **21.3. Consequences of Water Deliveries**

The limitations related to Klamath Reclamation Project diversions identified in Section 15.3.1.A and provided in Appendix E-1, and any other applicable provisions of this Agreement, are intended in part to ensure durable and effective compliance with the Endangered Species Act or other Applicable Law related to the quantity of water for diversion, use and reuse in the Klamath Reclamation Project. Therefore, the Parties agree that they shall not seek further limitations on the quantity of water diverted, used or reused in the Klamath Reclamation Project beyond these limitations, subject to (i) for Regulatory Agency Parties, Sections 21.3.1.A, 22.4, 22.5, 22.6, 24.1.1, 24.3, and 25, or if otherwise required of them by other Applicable Law; and (ii) for Parties other than Regulatory Agency Parties, Section 21.3.1.B. Appendix E-1 is not effective on the Effective Date, and this Agreement neither precludes nor states a position of support by any Party with respect to diversion of water in greater amounts than would result under the application of Appendix E-1. However, the Parties will seek to preserve the goals and objectives of this Agreement, consistent with their interests and obligations.

Sections 21.3 and 21.4 of this Agreement relate generally to Assurances with respect to Applicable Law. Sections 22 through 25 relate to specific statutes.

#### **21.3.1. Changed Circumstances**

This section generally addresses the consequences for these Assurances in the event of changed or unforeseen circumstances following the Effective Date.

##### **A. Obligation of Federal and State Public Agency Parties**

The Federal and State Public Agency Parties agree that, subject to Section 2.2 and 4.1.4, they will make Best Efforts to implement their respective obligations of the Agreement in a manner consistent with the schedule and other conditions for KPWU and KWAPA's performance of their obligations under and related to Section 15.3.1.A.

##### **i. Widest Reasonable Scope of Evaluations for Purpose of Regulatory Approvals of Diversion Limitations**

The Regulatory Agency Parties agree that, in the course of the proceedings to provide evaluations and Regulatory Approvals for diversion of water for the Klamath Reclamation Project subject to the diversion limitations in Appendix E-1, they will use Best Efforts to consider and analyze all reasonably foreseeable changed circumstances related to the sufficiency of such diversion limitations in compliance with Applicable Law.

**ii. Considerations in Regulatory Approvals of Diversion Limitations**

The Regulatory Agency Parties further intend that, to the maximum extent consistent with Applicable Law, before taking or seeking any action that would result in further limitations to such diversions in any Regulatory Approval or potential reconsideration or reopener of any Regulatory Approval for diversion of water for the Klamath Reclamation Project subject to such diversion limitations, they will consider whether: (i) measures to increase water supply in Upper Klamath Lake as provided in Section 18 are implemented as provided therein; (ii) the appropriate Parties have implemented or are implementing all other relevant obligations and measures under this Agreement for the protection of the affected resources; and (iii) there are any reasonably available alternatives, outside of the Klamath Reclamation Project, to achieve the Fisheries benefits of the diversion limitations. This provision does not supersede the limitations on reopening or reconsideration that may apply under Applicable Law or any permit or Regulatory Approval, or implementing agreement entered into in connection with a permit or Regulatory Approval.

**iii. Applicable Law for Regulatory Approvals of Diversion Limitations**

The preceding subsections provide general guidance to Regulatory Agency Parties responsible for Regulatory Approvals related to diversion subject to the diversion limitations provided in Appendix E-1, other than approvals of Appendix E-1 itself by the Adjudicator in the KBA or the Circuit Court as applicable. Sections 22 through 25, including specifically Section 22.4, state further requirements specific to the Endangered Species Act and other Applicable Law for the diversion limitations.

**B. Obligations of Other Parties**

Each Party, other than Federal and State Public Agency Parties, agrees as follows.

**i. Recital**

The Parties have negotiated this Agreement to achieve peace on the river and end conflict that has persisted related to the Klamath Reclamation Project.

**ii. Support for Regulatory Approvals of Diversion Limitations**

- a. Each such Party shall support the issuance of Regulatory Approvals for diversion of water for the Klamath Reclamation Project subject to the diversion limitations identified in Appendix E-1, including the obligations of Federal and State Agency Parties stated in Section 21.3.1.A.
- b. This Agreement is intended to establish a package of obligations and Timely implementation thereof, resulting in actions that address instream resources that are or may be protected under Applicable Law and that are intended to achieve the Fisheries purposes set forth in Section 9.2.1.
- c. The Parties' objective is that any action that would potentially reduce the quantity of water for diversion, use and reuse in the Klamath Reclamation Project, beyond the limitations provided in Appendix E-1, will be a last and temporary resort to prevent jeopardy under the Endangered Species Act or other prohibited impact under other Applicable Law.

**iii. Assurances Before Diversion Limitations Are In Effect**

Before Appendix E-1 is in effect as provided in Section 15.3.1.A or the applicable deadline in Section 15.3.8.A for implementation of the On-Project Plan, whichever is earlier, a Party other than Federal and State Public Agency Parties shall not seek to enforce Applicable Law to impose limitations on the water quantity for diversion, use, and reuse in the Klamath Reclamation Project, unless:

- a. The Party has certified that the diversion of water is greater than would result from the limitations under Appendix E-1, or is not consistent with the goals and other provisions of this Agreement;
- b. The Party has certified that Applicable Lead Parties are Timely implementing the actions in the Off-Project Water Use Retirement Program under Section 16.2.2, the Interim Flow and Lake Level Program under Section 20.4, the Phase I Restoration Plan under Section 10.1, and other related actions contemplated under this Agreement; or in the event of non-

performance, such Party has made Best Efforts to correct such non-performance;

- c. The Party has accounted for any evaluation the TAT has completed pursuant to Section 12.2.1 through 12.2.3 on the effects of any actions under this Agreement that have been implemented;
- d. The Party has considered reasonably available alternatives within its ability to enforce Applicable Law, outside of the Klamath Reclamation Project, where such enforcement would benefit the Fisheries or other aquatic resource of interest, and has concluded that such alternatives are not reasonably likely to provide timely or effective relief;
- e. The Party believes that the quantity of water diverted for use and reuse in the Klamath Reclamation Project may result in jeopardy of listed Species under the Endangered Species Act or other prohibited impact to the natural resources of the Klamath Basin under Applicable law;
- f. Such Party provides Notice to all other Parties of its belief under (e) and of its compliance with (a) through (d) above, and completes the Dispute Resolution Procedures of Section 6 including the continuing obligation (notwithstanding the prior efforts described in this subsection) to consider reasonable alternatives to such enforcement. The Dispute Resolution Procedures, in addition to other requirements of this Agreement, shall include the Party's certification that it has complied with paragraphs (a) through (d) above; and
- g. In the event the Party files an action, the Party complies with all obligations as set forth in Section 3.2.4.

**iv. Assurances Once Diversions Limitations Are In Effect**

After Appendix E-1 is in effect as provided in Section 15.3.1.A or after the applicable deadline in Section 15.3.8.A for implementation of the On-Project Plan, whichever is earlier, a Party other than Federal and State Public Agency Parties shall not seek to enforce Applicable Law to impose further limitations on the water quantity for diversion, use, and reuse in the Klamath Reclamation Project, beyond the limitations that result from the application of Appendix E-1, unless:



- a.** The Party has certified that the applicable parties are timely implementing the actions in the Off-Project Water Use Retirement Program under Section 16.2.2, wetlands reconnection under Section 18.2, additional storage under Section 18.3, Interim Flow and Lake Level Program under Section 20.4, the Restoration Plan under Sections 10.1 through 10.2, and related actions contemplated under this Agreement; or, in the event of non-performance, such Party has made Best Efforts to correct any nonperformance;
- b.** Applicable after the issuance of the Findings of Fact and Order of Determination in the KBA, the Party has requested that the Klamath Tribes and United States, individually and severally, make water right calls under water rights that they hold for instream use not affecting diversion, use, or reuse of water by the Klamath Reclamation Project;
- c.** The Party has taken into account any evaluation the TAT has completed pursuant to Sections 12.2.1 through 12.2.3 on the effects of any actions contemplated by this Agreement that have been implemented;
- d.** The Party has considered reasonably available actions within its ability to enforce Applicable Law, outside of the Klamath Reclamation Project, where such enforcement would benefit the Fisheries or other aquatic resource of interest, and has concluded that such alternatives are not reasonably likely to provide timely or effective relief;
- e.** Notwithstanding the representations on Effective Date in Section 21.3.1.B.ii, and after consideration of the effects of any such actions that have been implemented, the Party then believes that the water quantity of diversion, use and reuse in the Klamath Reclamation Project may result in jeopardy of listed Species under the Endangered Species Act or other prohibited impact to the natural resources of the Klamath Basin under other Applicable Law;
- f.** Such Party provides Notice to all Parties of its belief under (e) above and of its compliance with (a) through (d) above, and completes the Dispute Resolution Procedures of Section 6, including the continuing obligation (notwithstanding the prior efforts described

above) to consider reasonable alternatives to such enforcement. The Dispute Resolution Process, in addition to other requirements of this Agreement, shall include a Party's certification that it has complied with (a) through (d) above; and

- g. In the event the Party files an action, the Party complies with all obligations to cure as set forth in Section 3.2.4.

**v. Concurrent Process in Emergencies**

This provision shall not be interpreted as prohibiting any statutory notice, nor shall it prohibit any filing needed to protect against a statute of limitations. If necessary to meet filing deadlines or respond to an emergency situation, these filings may be done concurrently with the Notice and Dispute Resolution described above.

**vi. Limitations**

Nothing in this (B) shall be construed to establish a right to seek limitation on diversion and use and reuse of water that does not exist under Applicable Law.

**21.4. Reservations**

**21.4.1. Reservation of Rights by the Tribes**

The Tribes hereby reserve their rights to enforce any Regulatory Approval, including biological opinions under the Endangered Species Act, contemplated by and consistent with this Agreement under Applicable Law. The obligations of Section 21.3.1.B.iii.a through d, and Section 21.3.1.B.iv.a through d, do not apply to such enforcement; *provided* that Section 7.4.2 is applicable.

Further, nothing in this Agreement shall preclude any Tribe from pursuing or obtaining authority under 33 U.S.C. section 1377(e) nor limit its obligations under any such authority.

**21.4.2. Water Rights**

None of the terms of Sections 21 through 25 apply to the OWRD's authority to determine and administer water rights or relate to determinations to be made in the KBA, or SWRCB's authority to determine and administer water rights.

**21.4.3. No Implied Existence of Regulatory Authority**

Nothing in Sections 21 through 25 is intended to imply the existence of regulatory authority or obligations, or rights to enforce Applicable Law or Regulatory Approvals, that do not currently exist.

**21.5. Funding**

The Non-Federal Parties shall support authorizations and appropriations of funds, in the amount of \$47.5 million, as estimated in Appendix C-2, to implement the Regulatory Assurances Program for the first ten years after the Effective Date.

**22. Federal Endangered Species Act**

**22.1. Section 7 Consultation**

**22.1.1. Measures to Increase Water Storage in Upper Klamath Lake**

Federal agencies responsible for the following measures to increase water storage in Upper Klamath Lake as provided in Section 18 shall consult with FWS or NMFS as applicable under ESA section 7 and implementing regulations (50 C.F.R. Part 402):

- A. Barnes Ranch/Agency Lake Project as provided in Section 18.2.2;
- B. Wood River Wetlands Restoration Project as provided in Section 18.2.3; and
- C. Off-Project Water Use Retirement Program as provided in Sections 16.2 and 18.2.4.

**22.1.2. Water Deliveries to Klamath Reclamation Project**

At an appropriate time determined with consultation with KWAPA prior to KWAPA's completion of all actions identified in the On-Project Plan necessary for the implementation of the Plan as provided in Section 15.2.2.B.ii, Reclamation shall submit to NMFS and FWS a request for reinitiation of formal consultation and any other information necessary under ESA section 7 and implementing regulations (50 C.F.R. Part 402) for Reclamation's proposed action of operation of the Klamath Reclamation Project consistent with the limitations on diversion of water from Upper Klamath Lake and the Klamath River as provided in Appendix E-1 and any other applicable provisions of this Agreement, unless the effects of such action have already been adequately considered in a biological opinion. Reclamation's requests to NMFS and FWS for reinitiation of formal consultation are intended to seek a decision on whether to issue a biological opinion and incidental take statement for such Klamath Reclamation Project operations for the period until a decision on whether to issue an incidental take statement under ESA

section 7 for Reclamation and an incidental take permit under ESA section 10 for non-federal entities associated with the Klamath Reclamation Project as provided in Sections 22.2 and 22.3; *provided* that consultations under Section 22.1.2 may, if appropriate, occur concurrently with consideration of an Incidental Take Permit under Section 22.2.

**22.1.3. NMFS and FWS Biological Opinions**

After receipt of the request for reinitiation of formal consultation and necessary information as described in Section 22.1.2, NMFS and FWS shall each prepare and issue a biological opinion on the proposed action as provided under ESA section 7 and implementing regulations. In preparing such biological opinions, NMFS and FWS shall give appropriate consideration to the measures listed in Section 22.1.1 as they relate to Reclamation's proposed action and consistent with ESA section 7 and implementing regulations at the time and to other programs and actions taken under this Agreement or otherwise.

**22.2. Section 10 Incidental Take Permit**

**22.2.1. Section 10(a)(1)(B) Permit for Listed and Unlisted Species**

Party applicants shall include KWAPA and any other Non-Federal Parties who may incidentally take ESA listed Species and/or who seek regulatory Assurances under this Agreement and the ESA for incidental take of currently unlisted Species based on effects of actions that result from implementation of this Agreement. Party applicants shall either (i) use a General Conservation Plan(s) as provided below, or (ii) develop a Habitat Conservation Plan(s) as provided below, and provide any other information and documents necessary to apply to NMFS and FWS for an incidental take permit(s) under ESA section 10(a)(1)(B) and implementing regulations for such listed and unlisted Species. The proposed action for purposes of the application by KWAPA or others reliant on the Settlement Points of Diversion shall include operation of the Klamath Reclamation Project and the Settlement Points of Diversion consistent with the limitations on diversion of water from Upper Klamath Lake and the Klamath River as provided in Section 15.3.1.A and Appendix E-1 and any other applicable provisions of this Agreement, and will include other measures as described in Section 22.2.6. Such applications for incidental take permits using either a General Conservation Plan(s) or Habitat Conservation Plan(s) will be limited to addressing the non-Federal applicants' actions that occur in that portion of the Klamath River and its tributaries above the current site of Iron Gate Dam. Because effects of such actions may cause incidental take both above and below the current site of Iron Gate Dam, these applications shall address any effects of such actions on such listed and unlisted Species both above and below the current site of Iron Gate Dam. The Parties understand that an application by KWAPA and/or other Klamath Reclamation Project interests for a Section 10 permit based on a Habitat Conservation Plan shall embrace a period substantially beyond the term of the Agreement under Section 1.6.

**22.2.2. General Conservation Plan for Use in Application for Section 10(a)(1)(B) Permit**

**A. Development of a General Conservation Plan**

- i.** NMFS and FWS shall lead the development of a General Conservation Plan(s) under ESA section 10(a)(1)(B), consistent with NMFS and FWS' implementing regulations and policy, including the "Five Point Policy" (65 Fed. Reg. 35242) (June 1, 2000).
- ii.** The General Conservation Plan(s) will include: (1) a conservation strategy with biological goals and objectives; (2) use of adaptive management as a tool to address uncertainty in the conservation of covered Species; (3) a monitoring program and reports to provide necessary information to assess compliance, project impacts, progress toward biological goals and objectives, and information for adaptive management; and (4) opportunity for applicant and public participation.
- iii.** For purposes of eligibility of Off-Project Power Users for the Power for Water Management Program, as provided in Section 17.3.2, the Parties shall support provision that the geographic scope of the General Conservation Plan(s) will be at least co-extensive with the scope of Agreement dated 1956, between the California Oregon Power Company, predecessor in interest of PacifiCorp, and Klamath Basin Water Users Protective Association, as the predecessor in interest of the Klamath Off-Project Water Users Association. To the extent that it sufficiently covers actions on individual properties, this General Conservation Plan(s) will be available for the use of any applicant to include with any other information and documents necessary to apply for an incidental take permit(s) under ESA section 10(a)(1)(B) and implementing regulations.
- iv.** In development of the General Conservation Plan(s), NMFS and FWS shall collaborate with interested Tribes, and NMFS and FWS shall coordinate with other interested Parties, applicants, and other stakeholders.

**B. Standards for the General Conservation Plan**

In addition to standards in ESA section 10 and NMFS and FWS' implementing regulations and policy, including use of best scientific and commercial data available, NMFS and FWS' development and

implementation of the General Conservation Plan(s), and decision(s) on whether to issue incidental take permits, shall be done in coordination with the Fisheries Restoration and Reintroduction Plans specified in Sections 10 and 11 of this Agreement.

**C. Covered Activities and Potential Measures for the General Conservation Plan**

Activities covered under the General Conservation Plan(s) may include, but not be limited to, diversion and application of water, agricultural operations, grazing, road construction and maintenance, vegetation management, timber management, and actions associated with restoration, management, and maintenance of the riparian corridor. Measures for minimization and mitigation of incidental take under the General Conservation Plan(s) will be based on NMFS and FWS' evaluation, in cooperation with applicants, of site-specific conditions, and may include, but not be limited to, screening of diversions, management of livestock access, protection and enhancement of riparian vegetation, fish passage improvement, culvert replacement, and reduction of erosion and sedimentation from streambanks and roads.

**22.2.3. Alternative to Develop Habitat Conservation Plans for Use in Application for Section 10(a)(1)(B) Permit**

As an alternative to the General Conservation Plan(s) described above, Party applicants may develop Habitat Conservation Plan(s) for use with other information and documents necessary to apply for an incidental take permit(s) under ESA section 10(a)(1)(B) and implementing regulations for such listed and unlisted Species. In that case, NMFS and FWS shall assist in the development of any such Habitat Conservation Plan(s) and related documents by providing outreach and guidance about statutory, regulatory, and policy standards and by facilitating development of associated application packages that meets applicable standards. In addition, NMFS and FWS shall, without creating new obligations beyond Applicable Law, encourage applicants to develop any such Habitat Conservation Plan(s) consistent with the Fisheries Plans specified in Sections 10, 11, and 12, as applicable.

**22.2.4. Alternative to Apply for Section 10(a)(1)(A) Permit**

As an alternative to the previous subsections regarding application for an ESA section 10(a)(1)(B) Permit for listed and unlisted Species, if NMFS or FWS, in coordination with CDFG and ODFW, determine that a permit(s) under ESA section 10(a)(1)(A) and related processes is available under the circumstances and could provide such parties with comparable regulatory Assurances under the ESA, Party applicants may apply for a permit(s) under ESA section 10(a)(1)(A) and related processes. Under this alternative, all obligations listed in this Section

22.2, as applicable, shall apply to development of an application for and the decision on a permit(s) under ESA section 10(a)(1)(A) and related processes.

**22.2.5. Participation of Other Parties and the Public**

Party applicants shall support reasonable opportunities for participation of other Parties to this Agreement in development of the General Conservation Plan(s) and any Habitat Conservation Plan(s). In addition to public notice and comment required by ESA section 10(c) and NMFS and FWS implementing regulations (50 C.F.R. §§ 222.303 and 17.22, respectively) for a decision(s) on whether to issue any incidental take permit(s), NMFS and FWS shall provide reasonable opportunities for public participation in development of the General Conservation Plan(s) and encourage applicants to include participation by interested Tribes and provide reasonable opportunities for public participation in development of any Habitat Conservation Plan(s) consistent with NMFS and FWS' policy, including the "Five Point Policy" (65 Fed. Reg. 35242, June 1, 2000). Before reaching a decision on whether to issue an incidental take permit as described in Section 22.2, NMFS and FWS shall seek and consider input from interested Tribes on each application.

**22.2.6. Changed Circumstances**

The General Conservation Plan and any Habitat Conservation Plan(s) shall include conservation and mitigation measures consistent with this Agreement to respond to reasonably foreseeable changed circumstances to the maximum extent practicable and consistent with the ESA and NMFS and FWS' implementing regulations.

**22.2.7. Funding**

The Non-Federal Parties shall support authorizations and appropriations of funding, in the amount estimated in Appendix C-2, for development of the General Conservation Plan; actions necessary for review of incidental take permit applications; actions necessary for issuance of incidental take permits; and measures for satisfaction of the incidental take permit issuance criteria that are not funded under other provisions of this Agreement, including measures as described in Section 22.2 for minimization and mitigation of incidental take, and including monitoring programs required for incidental take permits. NMFS and FWS shall coordinate with other Parties to determine any other sources of funding available for the actions described above in this subsection.

**22.2.8. Duty to Support**

All Parties shall support efforts to seek such incidental take permit(s) and related processes with the goal of a decision(s) on whether to issue such permit(s) as soon as practicable but not later than one year before reintroduction of anadromous fish above Iron Gate Dam.

#### **22.2.9. Dispute Resolution**

Parties participating in the development of the General Conservation Plan or any Habitat Conservation Plan(s) shall attempt to resolve any disputes pursuant to the Dispute Resolution Procedures in Section 6.5. NMFS and FWS shall report to the Parties annually or otherwise as necessary pursuant to Section 6.5 regarding any unresolved disputes or delays in development of the General Conservation Plan or any Habitat Conservation Plan(s) or delays in subsequent procedures necessary to reach a decision(s) on issuance of the incidental take permit(s) that may result in failure to meet the goal of a decision(s) on whether to issue such permits not later than one year before reintroduction of anadromous fish above Iron Gate Dam.

#### **22.3. Integration of Section 7 and Section 10 Processes**

Consistent with NMFS and FWS' implementing regulations and guidance, NMFS and FWS shall include analysis of Reclamation's operation of facilities of the Klamath Reclamation Project and other Federal agency actions as described in Section 22.1.1 as an element of the intra-Service ESA section 7 consultation on the decision(s) on whether to issue any such incidental take permit(s) as described in Section 22.2 and Reclamation and other Federal action agencies shall provide information as necessary to accommodate this analysis. This consultation is intended to result in decisions on whether to issue an incidental take permit(s) for KWAPA and any other non-federal entity.

#### **22.4. Reconsideration of Limitations on Diversions**

This section applies if NMFS or FWS determine or preliminarily determine based on Applicable Law that Reclamation's action related to operation of the Klamath Reclamation Project, or diversion and use of water from the Settlement Points of Diversion, as described in Sections 22.1.2 and 22.2, will result in the following:

- (i) The actions are insufficient to minimize incidental take of Species considered under Sections 22.1.2, 22.1.3, and 22.2;
- (ii) The actions are likely to jeopardize the continued existence of listed Species or result in destruction or adverse modification of critical habitat;  
or
- (iii) Reinitiation of formal consultation on any biological opinion, or reopening or cancellation of any permit, on the actions may be necessary.

In that event, before seeking any further limitations on diversion, use and reuse of water related to the Klamath Reclamation Project beyond the limitations provided in Appendix E-1 and any other applicable provisions of this Agreement, NMFS and FWS will consider, to the maximum extent consistent with the ESA and any other Applicable Law, whether:

- (i) measures to increase water supply in Upper Klamath Lake as provided in Section 18 are implemented as provided therein;



- (ii) the Parties have implemented all other relevant obligations under this Agreement for the protection of the affected resources; and
- (iii) there are any reasonably available alternative or additional habitat restoration actions or alternative sources of water.

### **22.5. Reservation**

By entering into this Agreement, NMFS and FWS are not prejudging the outcome of any process under the ESA and NMFS and FWS implementing regulations, and NMFS and FWS expressly reserve the right to make determinations and take actions as necessary to meet the requirements of the ESA and implementing regulations.

### **22.6. Integration of Essential Fish Habitat Consultations**

Information prepared by a Federal agency for consultation under the ESA as provided in 50 C.F.R. § 402.14 may also serve as the Essential Fish Habitat (EFH) assessment under the requirements of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations, provided it is clearly labeled as such and includes all of the required components of an EFH assessment under 50 C.F.R. § 600.920(e). In that case, NMFS shall integrate the results of the ESA and EFH consultations in a single transmittal from NMFS to the Federal agency. The Federal agency shall respond as provided in 50 C.F.R. § 600.920(k) to any EFH conservation recommendations provided by NMFS. The response must include a description of proposed measures for avoiding, mitigating, or offsetting the impact of the proposed activity on EFH and an explanation of reasons if the Federal agency does not follow any of NMFS' EFH conservation recommendations. In addition, NMFS shall integrate EFH issues in its development of the General Conservation Plan described in Section 22.2. By entering into this Agreement, NMFS is not prejudging the outcome of any EFH consultation, and NMFS expressly reserves the right to make determinations and take actions as necessary to meet the requirements of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations.

## **23. Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act**

### **23.1. Applicants**

Parties or Participants expecting that their actions implementing the Agreement may "take" bald eagles may continue to include bald eagles as "unlisted covered Species" in HCPs developed for multiple Species as described in Section 22.2.

### **23.2. Actions by FWS**

The FWS shall continue to defer prosecution under the Eagle Act and MBTA for incidental take of bald eagles if such take is in compliance with the terms and conditions of an incidental take permit issued under the authority of ESA section 10(a)(1)(B). The Service shall work closely with Parties or Participants who are uncertain of project impacts to bald eagles to determine if the proposed project adheres to the Service's

National Bald Eagle Management Guidelines, which contain recommendations for avoiding bald eagle disturbances, and thus to determine if take authorization will be required. For actions that may result in “take” of bald eagles, for which development of an HCP is inappropriate (actions with a federal nexus or actions for which the bald eagle is the only affected Species), compliance with the Service’s authorization process for take under the Eagle Act shall be required.

### **23.3. Reservation of Authority**

By entering into this Agreement, FWS is not prejudging the outcome of any process under the Eagle Act, MBTA, and its implementing regulations. FWS expressly reserves the right to make determinations and take actions as necessary to meet the requirements of the Eagle Act, MBTA, and its implementing regulations.

## **24. California Laws**

### **24.1. California Endangered Species Act**

#### **24.1.1. Application**

Parties and Participants seeking coverage under the California Endangered Species Act (CESA) (Fish and Game Code sections 2050 *et seq.*), for incidental take of CESA listed Species within the Geographic Scope as defined in Section 24.1.3 may:

- A. Apply to the CDFG for an incidental take permit pursuant to Fish and Game Code section 2081;
- B. Request a consistency determination pursuant to Fish and Game Code section 2080.1, with an incidental take statement pursuant to ESA section 7(a) or an incidental take permit pursuant to ESA section 10; or
- C. Apply for incidental take authorization pursuant to a Natural Community Conservation Plan as provided in Fish and Game Code sections 2800 *et seq.*

#### **24.1.2. Coordination**

A Party or Participant who intends to request a consistency determination pursuant to Fish and Game Code section 2080.1 shall notify the CDFG when a request for initiation or reinitiation of formal consultation is made or an application for a HCP is filed. In such event, NMFS, FWS and CDFG shall coordinate and communicate during the development of the HCP so as to better assure that any HCP will also meet the criteria listed under CESA.

**24.1.3. Geographic Scope**

The Geographic Scope of the California regulatory Assurances is limited to the Klamath River above the current location of Iron Gate Dam.

**24.2. California Fully Protected Species**

**24.2.1. Recital**

The Lost River sucker, shortnose sucker, golden eagle, southern bald eagle, greater sandhill crane, and American peregrine falcon are listed as fully protected under Fish and Game Code section 5515(b) and Fish and Game Code section 3511(b). Under such law, these species may not be taken or possessed at any time. The Parties acknowledge that implementation of this Agreement may create the possibility for the incidental take of these species.

**24.2.2. New Legislation**

Within sixty days of concurrence by the Governor of California with an Affirmative Determination by the Secretary under Section 3.3 of the Hydroelectric Settlement, CDFG will provide the draft legislation to the Parties regarding a limited authorization to take incidentally Lost River suckers, shortnose sucker, golden eagles, southern bald eagles, greater sandhill cranes, or American peregrine falcon contingent upon the fulfillment of certain conditions, if such authorization is necessary for implementation of the Agreement.

**24.3. Reservation of Authority**

No California agency, by virtue of execution of this Agreement, is pre-determining the outcome of any process under state law, and all rights are expressly reserved for any state agency to make determinations and take actions as necessary to meet the requirements of state law. Nothing in this section implies the existence of regulatory authority that does not currently exist.

**25. Oregon Laws**

**25.1. Water Quality**

**25.1.1. New Designated Use**

Before proposing any new designated use due to Reintroduction or earlier if determined appropriate for a water body, ODEQ shall give good faith consideration to any request that it exercise its discretion to perform a Use Attainability Analysis (UAA) consistent with 40 C.F.R. Part 131 Subpart B, ODEQ's *Use Attainability Analysis and Site Specific Criteria Internal Management Directive* (April 3, 2007) and any then-applicable regulation or guidance. ODEQ shall provide public notice and opportunity to comment on any

proposed new designated use in accordance with then-applicable Oregon Administrative Rules.

**25.1.2. Agriculture**

Agricultural operations complying with agricultural water quality area management plans and rules administered by the Oregon Department of Agriculture, and with rule amendments, if any, adopted to implement the Fisheries Program, shall not be subject to further water quality requirements under Oregon Revised Statutes chapter 468B or 568, if any, arising solely from reintroduction and the designation or presence of new fish beneficial uses.

**25.1.3. Forestry**

Private forestry operations complying with water protection rules administered by the Oregon Department of Forestry, and with rule amendments, if any, adopted to implement the Fisheries Program, shall not be subject to further water quality requirements under Oregon Revised Statutes chapter 468B or 527, if any, arising solely from reintroduction and the designation or presence of new fish beneficial uses.

**25.1.4. Alternative Measures**

The Parties shall support all reasonably available alternative or additional water quality measures before considering any action for the purpose of water quality compliance that would reduce water supplies beyond the limitations provided in this Agreement.

**25.1.5. Existing Obligations**

Nothing in this section is intended to affect existing or pending regulatory obligations not arising from reintroduction, including but not limited to implementation of load and waste load allocations identified in the pending Klamath River TMDL.

**25.2. Fish Passage and Screening**

Parties performing necessary obligations under this Agreement, or Participants who commit in an enforceable form to cooperate in the implementation of measures or obligations of the Fisheries Program or Section 16.3, shall not be required to fund any further fish passage or screening requirements under Oregon Revised Statutes chapter 498 or 509 arising solely from reintroduction. Nothing in this section is intended to affect existing or pending regulatory obligations not arising from reintroduction.

**25.3. Reservations**

No state agency of the State of Oregon, by virtue of execution of this Agreement, is predetermining the outcome of any process under state law, and all rights are expressly

reserved for any state agency to make determinations and take actions as necessary to meet the requirements of state law. Nothing in this Section 25 shall imply the existence of regulatory authority that does not currently exist.

**PART VI.**  
**COUNTIES' MITIGATION AND BENEFITS PROGRAM**

**26. Overview of Counties' Impacts Mitigation and Benefits Program**

**26.1. Recitals**

**26.1.1.** Facilities Removal (including all preparatory and other activities related to the removal of the physical works of the dams) will be an unprecedented effort that may have impacts to Klamath County, Oregon, and Del Norte, Humboldt and Siskiyou Counties, California, and their residents.

**26.1.2.** Physical impacts caused by Facilities Removal may include: movement or discharge of sediment currently stored behind the hydropower dams, and changes in the volume and timing of flow resulting from the cessation of flow regulation by the Hydroelectric Project.

**26.1.3.** Economic impacts of Facilities Removal may include: reduction in property tax payments upon retirement of the Hydroelectric Project from utility service, other changes in property taxes and values, and changes in business activities and opportunities as a result of the cessation of hydropower flow regulation.

**26.2. General Obligations**

**26.2.1.** As provided in Sections 1.5, 8.2.1, and 37, the Non-Federal Parties are concurrently executing the Hydroelectric Settlement, which contains provisions acceptable to the Parties regarding public notice, insurance, performance bonding, downstream monitoring, roadway use and maintenance, downstream rehabilitation and maintenance, property rights protection, the City of Yreka's water system and regulatory agency conduct.

**26.2.2.** The Parties intend and agree that the Agreement and the Hydroelectric Settlement, together and separately, do not, except as expressly set forth herein and therein, establish, waive, or limit any right of any person to seek remedies for damages or other losses which are (i) cognizable under Applicable Law and (ii) are caused by the operation of the Hydroelectric Project or by Facilities Removal.

### **26.3. Purposes**

The purposes of the program are to avoid or mitigate certain impacts the Counties and their residents may incur as a result of Facilities Removal and to allow the Counties to address impacts, promote economic development and provide additional opportunities within each county for the benefit of their residents.

### **26.4. Funding**

The Non-Federal and non-State Parties shall support authorizations and appropriations of funding, in the amount determined after adjustment to the estimates in Appendix C-2, to implement the Counties Program for the first ten years after the Effective Date.

## **27. Klamath County**

The Parties hereby agree to a Klamath County Program.

### **27.1. Recitals**

Klamath County acknowledges and supports the objectives sought by the Klamath Water Users Association and the Off-Project Irrigators for agriculture within Klamath County, including (i) certainty of water delivery to the agricultural community; (ii) a favorable power cost for the irrigators; and (iii) regulatory Assurances as provided in Sections 21 through 25.

### **27.2. Adoption**

**27.2.1.** Klamath County shall develop and adopt a Klamath County Program and a written plan to implement the Program by June 30, 2012.

**27.2.2.** A Program Team shall administer the program and plan. The team shall be comprised of representatives from Klamath County, the Klamath Tribes and Lake County. It shall adopt all necessary protocols and procedures to discharge these responsibilities.

### **27.3. Approach**

The Klamath County Program shall use the following approach.

#### **27.3.1. Economic Development**

By July 1, 2012, the Non-Federal Parties shall seek to secure \$500,000, in addition to the amount estimated in Appendix C-2 for this program, to undertake a study and projects for economic development associated with the restoration of the Klamath River and reintroduction of anadromous fisheries into Klamath County and the headwaters of the Klamath River in Lake County, Oregon. As part of this approach, Klamath County will seek funds from the Oregon Business

Development Department to support the studies and/or project directed toward economic development.

- A. The Klamath County Program Team shall select independent consultants and develop a study plan.
- B. The study described in Section 27.3.1.A shall use appropriate methods to determine economic development opportunities associated with fisheries enhancement, tourism and recreational development, agricultural development, alternative energy development, and the Klamath Tribes' economic development.

**27.3.2. Property Taxes**

The Non-Federal Parties shall support authorizations and appropriations, in the amount shown in Appendix C-2, to compensate Klamath County for the loss of property tax revenues associated with: (i) reduced agricultural land values in the Klamath Reclamation Project due to a reduction of water deliveries; and, (ii) reduced agricultural land values in the areas above Upper Klamath Lake due to the surrender of significant water rights. The funds shall be dispersed to the Klamath County Treasurer no later than July 1, 2016.

**27.3.3. Other**

Klamath County agrees not to file a claim in federal or state court, or before any administrative agency, against the State of Oregon, the State of California, any state agency, department, division or subdivision thereof, or the United States, arising from any decrease in property tax revenue or alleged business or economic losses, including property values, due to Facilities Removal.

**28. Siskiyou County**

The Parties agree to a Siskiyou County Impacts Mitigation and Benefits Program.

**28.1. Funding**

- 28.1.1. California legislation enacted in November 2009 proposes a bond measure (as re-stated in Appendix B-2) for a public vote. The bond measure includes: (i) \$20 million for Siskiyou County for the purpose of economic development and (ii) up to \$250 million for Facilities Removal. The latter includes remediation and restoration of affected sites including previously submerged lands, as well as measures to avoid or minimize adverse downstream impacts, as adopted in findings made as part of the environmental review process required by Section 3.2.5.B of the Hydroelectric Settlement or pursuant to subsequent environmental review. Any funds remaining from the \$250 million after (i) Facilities Removal including mitigation for CEQA impacts and (ii) any actions required to assure the City of Yreka water supply,

may be used, jointly by California, through CDFG, and Siskiyou County, consistent with the Fisheries Restoration Plan, to plan and implement additional fisheries restoration projects in Siskiyou County. Such projects may include local fisheries restoration programs including removal or improvement of bridges, culverts, diversions or other obstructions to fish passage.

- 28.1.2.** If the legislation specified in Section 28.1.1 has not been approved by the time of the Secretarial Determination pursuant to Section 3.3 of the Hydroelectric Settlement, Siskiyou County may, at its sole discretion, immediately withdraw from this agreement or request the Parties reconvene pursuant to Sections 6 and 7.2, which shall be Siskiyou County's sole and exclusive remedy for any breach or failure of the provisions of this Section 28.

**28.2. Consultation**

If a CEQA lead agency determines that Facilities Removal will cause a significant environmental impact related to Siskiyou County roads, infrastructure or other property and those impacts are not mitigated, then representatives of Siskiyou County and CDFG will meet and work within the public process to develop joint recommendations to address those impacts.

**28.3. Fishing Closure**

If Facilities Removal results in the suspension or closure of fishing opportunities (including commercial and tribal) or in-river sports, representatives of Siskiyou County and CDFG will also meet to develop joint recommendations to address those impacts.

**28.4. Water Right Claim.**

Nothing in this Agreement affects Siskiyou County's right to pursue a water right under Application 016958 (1956) before the State Water Resources Control Board.

**28.5. Implementation Generally**

As provided in Section 2.2, Siskiyou County affirms that it reserves its rights, authorities, and obligations under local ordinances or other Applicable Law, including regulatory authorities, related to the implementation of this Agreement. As provided in Section 3.2.1 (second sentence), Siskiyou County affirms that it does not have an obligation to implement or participate in the Fisheries, Water Resources, and Tribal Programs as set forth respectively in Parts III, IV, and VII of this Agreement, other than its participation in the collaborative procedures established therein. With respect to the Regulatory Assurances Program under Part V, Siskiyou County affirms that it will not file legal action to challenge such Assurances, while reserving its rights to comment in any related proceedings as provided in Section 3.1.3.B.

**28.6. Certain Claims**



- 28.6.1.** Siskiyou County agrees not to file a claim in federal or state court, or before the California Board of Control or any other administrative agency, against the State of California, the State of Oregon, any state agency, department, division or subdivision thereof, or the United States, arising from any decrease in property tax revenue or alleged business or economic losses, including property values, due to Facilities Removal.
- 28.6.2.** Siskiyou County shall obtain a release from any entity or individual, consistent with Section 28.1.1, that receives any portion of the funds for economic development or other purposes.

**29. Humboldt County**

The Parties agree to a Humboldt County Program.

**29.1. Funding**

California Legislation enacted in November 2009, proposes a bond measure (as re-stated in Appendix B-2) for a public vote. That bond measure includes: (i) \$20 million for Siskiyou County for the purpose of economic development and (ii) up to \$250 million for Facilities Removal. The latter includes remediation and restoration of affected sites including previously submerged lands, as well as measures to avoid or minimize adverse downstream impacts, as adopted in findings made as part of the environmental review process determined under the CEQA document required by Section 3.2.5.B of the Hydroelectric Settlement, or pursuant to subsequent environmental review. Any funds remaining from the \$250 million after (i) Facilities Removal, including mitigation for CEQA impacts, and (ii) any actions required to assure the City of Yreka water supply, may be used, jointly by California, through the CDFG, and Humboldt County, consistent with the Fisheries Restoration Plan, to plan and implement additional fisheries restoration projects in Humboldt County. Such projects may include local fisheries restoration programs including removal or improvement of bridges, culverts, diversions or other obstructions to fish passage.

In recognition of the potential benefits resulting from restoration of the Klamath River, Humboldt County does not request any compensatory or economic claims in advance of the decommissioning and deconstruction activity.

**29.2. Consultation**

If a CEQA lead agency determines that Facilities Removal will cause a significant physical environmental impact to Humboldt County roads or infrastructure and those impacts are not mitigated, then representatives of Humboldt County and CDFG will meet to develop recommendations to address those impacts.

**29.3. Fishing Closure**

If Facilities Removal results in the suspension or closure of fishing opportunities (including commercial and tribal) or in-river sports, representatives of Humboldt County as appropriate and CDFG will meet to develop joint recommendations to address those impacts.

#### **29.4. Certain Claims**

Humboldt County agrees not to file a claim in federal or state court, or before the California Board of Control or any other administrative agency, against the State of California, the State of Oregon, any state agency, department, division or subdivision thereof, or the United States, arising from any decrease in property tax revenue or alleged business or economic losses, including property values, due to Facilities Removal.

### **30. Del Norte County**

The Parties agree to a Del Norte County Program.

#### **30.1. Funding**

California Legislation enacted in November 2009, proposes a bond measure (as re-stated in Appendix B-2) for a public vote. That bond measure includes: (i) \$20 million for Siskiyou County for the purpose of economic development and (ii) up to \$250 million for Facilities Removal. The latter includes remediation and restoration of affected sites including previously submerged lands, as well as measures to avoid or minimize adverse downstream impacts, as adopted in findings made as part of the environmental review process determined under the CEQA document required by Section 3.2.5.B of the Hydroelectric Settlement, or pursuant to subsequent environmental review. Any funds remaining from the \$250 million after (i) Facilities Removal, including mitigation for CEQA impacts, and (ii) any actions required to assure the City of Yreka water supply, may be used, jointly by California, through CDFG, and Del Norte County, consistent with the Fisheries Restoration Plan, to plan and implement additional fisheries restoration projects in Del Norte County. Such projects may include local fisheries restoration programs including removal or improvement of bridges, culverts, diversions or other obstructions to fish passage.

#### **30.2. Consultation**

If a CEQA lead agency determines that Facilities Removal will cause a significant physical environmental impact to Del Norte County roads or infrastructure and those impacts are not mitigated, then representatives of Del Norte County and CDFG will meet to develop recommendations to address those impacts.

#### **30.3. Fishing Closure**

If Facilities Removal results in the suspension or closure of fishing opportunities (including commercial and tribal) or in-river sports, representatives of Del Norte County and CDFG will meet to develop recommendations to address those impacts.

### **30.4. Certain Claims**

Del Norte County agrees not to file a claim in federal or state court, or before the California Board of Control or any other administrative agency, against the State of California, the State of Oregon, any state agency, department, division or subdivision thereof, or the United States, arising from any decrease in property tax revenue or alleged business or economic losses, including property values, due to Facilities Removal.

## **PART VII.** **TRIBAL PROGRAM**

### **31. Overview of Tribal Program**

#### **31.1. Recitals**

- 31.1.1.** As the original stewards of the natural resources of the Klamath River Basin, the Karuk Tribe, Klamath Tribes, and Yurok Tribe hold special positions in the Basin. The Parties are mindful of the Tribes' interests in, and relation to the Basin ecosystem and its fisheries.
- 31.1.2.** The Parties acknowledge that the Tribes' economic, cultural, and spiritual dependence upon the natural resources of the Klamath Basin have caused the Tribes to be particularly vulnerable as those resources have become scarce. Over the past century, traditional tribal subsistence and related economies have suffered.
- 31.1.3.** The Tribes have a sound and long standing history of competent resource management that provides the Tribes with special understanding of natural resource science and restoration.
- 31.1.4.** Accordingly, the Tribes, Public Agency Parties, and other Parties acknowledge the Tribes' essential role in the Collaborative Management necessary to implement the provisions of this Agreement.

#### **31.2. Purposes**

The Parties support the goals of each Tribe to achieve the revitalization of tribal subsistence and related economies during the period immediately following this Agreement. The Parties support the Tribes as they strive to meet a reasonable standard of living, a standard recognized in the reservation of tribal fishing and other related rights, until the fisheries are restored such that Full Participation in Harvest Opportunities are achieved. Funding provided in these sections is, among other purposes, intended to be used to assist the Tribes in developing the capacity to participate as grantees and in the Collaborative Management of the Fisheries Program described in Sections 9 through 13 above.

### **31.3. Funding**

The Non-Federal Parties shall support authorizations and appropriations in addition to existing funds, in the amount of \$65 million as estimated in Appendix C-2, to implement the Tribal Program for the first ten years following the Effective Date.

## **32. Tribal Participation in Fisheries and Other Programs**

### **32.1. Purpose**

The Parties support tribal participation in the Fisheries and other programs under this Agreement. Specifically, funding provided for this purpose shall be used in each Tribe's discretion for the purposes of: (i) building each Tribe's internal capacity to participate in the Collaborative Management and restoration of the fisheries; (ii) administration of each Tribe's fisheries-related programs; and (iii) participation in conservation management programs for habitat above Upper Klamath Lake and on the Klamath River.

### **32.2. Term of Funding**

The Non-Federal Parties shall support authorization and appropriation of funds, as estimated in Appendix C-2 for the first ten years after the Effective Date.

### **32.3. Other Funding**

In the Collaborative Management of the Environmental Water and resources of the Klamath Basin, and as consistent with Applicable Law, the Tribes shall be priority recipients of federal grants and funds for Fisheries Program described in Part III. The Tribes will remain eligible for funding associated with fisheries restoration and reintroduction programs outside the scope of this Agreement.

## **33. Long-term Economic Revitalization Projects**

### **33.1. Other Funds**

The Parties acknowledge that this Agreement addresses primarily tribal fishing and water matters, and accordingly agree that they will also support efforts by the Tribes to secure economic revitalization programs and funds such that the Tribes may achieve long-term economic self-sufficiency. Funding provided for Long-Term Economic Revitalization Projects will be used at each Tribe's discretion for development and planning of long-term economic revitalization projects.

### **33.2. Mazama Project**

#### **33.2.1. Acquisition**

The Non-Federal Parties shall support the authorization and appropriation of, or otherwise Timely provision to, the Klamath Tribes of \$21,000,000 toward the acquisition of the Mazama Forest Project in Klamath County, Oregon. The Parties

agree that nothing in the development of the Mazama Forest Project, including but not limited to the Klamath Tribes' purchase of property, or the United States' designation of property as having federal trust status, will alter existing law regarding the applicability of state water law. The Parties agree that, notwithstanding the first sentence in Section 6, any disputes about the applicability of state water law shall be resolved in a court of competent jurisdiction.

### **33.2.2. Withdrawal**

In the event that the funding described in Section 33.2.1 is not Timely provided, the Klamath Tribes shall have the right to withdraw from this Agreement. Section 7.5 shall not apply to such withdrawal. Prior to exercising the right of withdrawal, the Klamath Tribes shall Timely provide the Parties with a Notice of impending failure which shall set out the relevant circumstances. Following such Notice, the Parties shall meet and confer in an effort to remedy the failure or to amend this Agreement as provided for in Section 7.2.1.B, provided that the referral to the Dispute Resolution Procedures in Section 7.2.1.F shall not apply. If, after 30 days, the failure is not remedied or the Agreement is not amended, then the Klamath Tribes may withdraw from this Agreement by providing a Notice of withdrawal to the Parties, and the Klamath Tribes shall thereafter have no obligation under this Agreement to provide Assurances, waivers, or relinquishments of any kind, and any Assurances, waivers, or relinquishments of any kind they have provided shall terminate.

### **33.2.3. Sections Surviving Withdrawal**

Notwithstanding the withdrawal of the Klamath Tribes pursuant to this Section 33.2, Section 15.3.2.B shall continue in force and effect.

## **34. Klamath Tribes' Interim Fishing Site**

### **34.1. Petition**

Within three months of the Effective Date, the CDFG, Klamath Tribes, and relevant agencies of the United States will jointly petition the California Fish and Game Commission to establish an interim fishing site in the reach of the Klamath River between Iron Gate Dam and the I-5 Bridge. The petition will provide that Chinook salmon fishing in this reach of the river will be open to the Klamath Tribes each salmon season immediately after the hatchery at Iron Gate Dam achieves egg take goals. The provisions regulating this interim fishing site, including the definition of the interim period for this purpose, will be set forth in this joint petition. The Parties will support the petition. The interim fishing regulations will become effective as soon as practicable.

### **34.2. Alternative Procedure**

If the petition is not granted, the United States, the Klamath Tribes, and other interested Parties agree to meet and confer to develop equivalent benefits for the Klamath Tribes.

**34.3. No Adverse Impact**

Any outcome under this Section 34 will not have any adverse impact upon existing harvest allocation issues among other Tribes and non-Indian interests.

**PART VIII.  
EXECUTION OF AGREEMENT**

**35. Authority**

**35.1. General**

Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents. As of the Effective Date, this binding effect applies to all obligations which legally may be performed under existing authorities. This binding effect applies to other obligations arising from new authorities arising pursuant to the Authorizing Legislation as provided in Section 3.1.1.

**35.2. Public Agency Parties**

In signing this Agreement, a Public Agency Party expresses its support for the Agreement and the policies that apply to its exercise of its authorities. By such signing and as provided in Sections 2.2.7 and 7.4.3, no Public Agency Party has taken an action.

**36. Counterparts**

This Agreement may be executed in counterparts. Each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all of the counterparts had signed the same document.

**37. Concurrent Execution**

Each Non-Federal Party shall execute this Agreement and the Hydroelectric Settlement concurrently.

**38. New Parties**

Any entity listed in Section 1.1.1 of this Agreement that does not execute this Agreement on the Effective Date will become a Party, subject to Section 37, by signing the Agreement within 60 days of the Effective Date, without amendment of this Agreement or other action by existing Parties. After 60 days from the Effective Date, any such entity, or any other entity, may become a Party, subject to Section 37, through an amendment of this Agreement in accordance with Section 7.2.2. Federal Agency Parties shall become Parties pursuant to Section 1.1.2. The Hoopa Valley Tribe may become a Party under Sections 7.2.2. and 37 within 60 days of the Effective Date or otherwise on the following conditions: (a) the Hoopa Valley Tribe agrees to this Agreement and the Hydroelectric Settlement and agrees to insertion of provisions into this

Agreement that are equivalent in nature, content and geographic scope as that of the signatory Tribes, including (i) Assurances to water users of the Klamath Reclamation Project and Reclamation and FWS, (ii) relinquishment and release of claims to the United States, and (iii) restriction of the scope of the Agreement to the Klamath River Basin outside of the Trinity River Basin; and (b) the Parties, including specifically the United States, Tribes and KPWU, agree to the amended provisions related specifically to the Hoopa Valley Tribe. In the event that the Hoopa Valley Tribe becomes a Party, the Parties shall amend Appendix C-2 to allocate funding to the Hoopa Valley Tribe in amounts equivalent to funding allocated to each of the signatory tribes in Appendix C-2 line items 99 through 110, and the Hoopa Valley Tribe shall become a Party representative of the KBCC, KBAC, and TAT.

**State of California**

**California Department of Fish and Game**

\_\_\_\_\_

Date: \_\_\_\_\_

by: John McCamman, Director

**California Natural Resources Agency**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Arnold Schwarzenegger, Governor

**State of Oregon**

**Governor of Oregon**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Theodore R. Kulongoski, Governor

**Oregon Department of Environmental Quality**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Dick Pedersen, Director

**Oregon Department of Fish and Wildlife**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Roy Elicker, Director

**Oregon Water Resources Department**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Phillip C. Ward, Director



**Tribes**

**Karuk Tribe**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Arch Super, Chairman

**Klamath Tribes**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Joseph Kirk, Chairman

**Yurok Tribe**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Thomas O'Rourke, Chairperson

**Counties**

**Del Norte, California**

\_\_\_\_\_ Date: \_\_\_\_\_

by: Gerry Hemmingsen, Chairman, Board of Supervisors

**Humboldt County, California**

\_\_\_\_\_ Date: \_\_\_\_\_

by: Either the Chair or Jill K. Duffy

**Klamath County, Oregon**

\_\_\_\_\_ Date: \_\_\_\_\_

by: John Elliott, Commissioner

**Siskiyou County, California**

\_\_\_\_\_ Date: \_\_\_\_\_

by: Chairman, Board of Supervisors

**Parties Related to Klamath Reclamation Project**

**Tulelake Irrigation District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: John Crawford, President

**Klamath Irrigation District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: David Cacka, President

**Klamath Drainage District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Luther Horsley, President

**Klamath Basin Improvement District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Warren Haught, Chairman

**Ady District Improvement Company**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Robert Flowers, President

**Enterprise Irrigation District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Michael Beeson, President

**Malin Irrigation District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Harold Hartman, President

**Midland District Improvement Company**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Frank Anderson, President

**Pine Grove Irrigation District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Doug McCabe, President

**Pioneer District Improvement Company**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Lyle Logan, President

**Poe Valley Improvement District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: William Kennedy, President

**Shasta View Irrigation District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Claude Hagerty, President

**Sunnyside Irrigation District**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Charles Kerr, President

**Westside Improvement District #4**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Steven L. Kandra, President

**Don Johnston & Son**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Donald Scott Johnston, Owner

**Modoc Lumber Company**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Thomas J. Shaw, President

**Bradley S. Luscombe**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Bradley S. Luscombe

**Randolph Walthall and Jane Walthall as trustees under declaration of trust dated November 28, 1995**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Jane Walthall

**Inter-County Properties Co., which acquired title as Inter-County Title Co.**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Darrel E. Pierce

**Reames Golf and Country Club**

\_\_\_\_\_

Date: \_\_\_\_\_

by: L.H. Woodward, President

**Winema Hunting Lodge, Inc.**

\_\_\_\_\_

Date: \_\_\_\_\_

by: R. David Bolls, III

**Van Brimmer Ditch Company**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Gary Orem, President

**Collins Products, LLC**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Steve Metz, President

**Plevna District Improvement Company**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Steve Metz, President

**Klamath Water Users Association**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Luther Horsley, President

**Klamath Water and Power Agency**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Edward T. Bair, Chairman of the Board

**Upper Klamath Irrigators**

**Klamath Off-Project Water Users Association**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Tom Mallams, President

**Upper Klamath Water Users Association**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Karl Scronce, President

**Other Organizations**

**American Rivers**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Rebecca Wodder, President

**California Trout**

\_\_\_\_\_

Date: \_\_\_\_\_

by: George Shillinger, Executive Director

**Friends of the River**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Kelly Catlett

**Pacific Coast Federation of Fishermen's Associations**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Glen Spain, Northwest Regional Director

**Institute for Fisheries Resources**

\_\_\_\_\_

Date: \_\_\_\_\_

by: Glen Spain, Northwest Regional Director

**National Center for Conservation Science and Policy**

\_\_\_\_\_

Date: \_\_\_\_\_

By: Dominick A. DellaSala, President and Chief Scientist



**Northern California Council, Federation of Fly Fishers**

\_\_\_\_\_ Date: \_\_\_\_\_

by: Mark Rockwell, Vice-President, Conservation

**Salmon River Restoration Council**

\_\_\_\_\_ Date: \_\_\_\_\_

by: Petey Brucker, President

**Trout Unlimited**

\_\_\_\_\_ Date: \_\_\_\_\_

by: Charlton H. Bonham, California Director

**Individual Non-Party Signatory**

**Arthur G. Baggett, Jr.<sup>1</sup>**

\_\_\_\_\_

Date: \_\_\_\_\_

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<sup>1</sup> Mr. Baggett is signing this Agreement as a recommendation to the California State Water Resources Control Board, and not as a Party.

**Appendix A**  
**Elements for the Proposed Federal Legislation**

**Elements Related to the Klamath Basin Restoration Agreement**

- A. Confirm, ratify or approve as necessary to ensure the effectiveness of the Klamath Basin Restoration Agreement (KBRA), including any amendments approved by the Parties prior to enactment. Authorize and direct the Secretary of the Interior, Secretary of Commerce, and the Secretary of Agriculture or their designees to execute and implement the KBRA.
- B. Confirm that execution of the KBRA by the Secretary of the Interior, Secretary of Commerce, and the Secretary of Agriculture or their designees is not a major federal action for purposes of the National Environmental Policy Act, 42 U.S.C. § 4321, and direct all Federal Agency Parties to comply with all applicable environmental laws in consideration and approval of actions in implementation of the KBRA following its execution.
- C. Authorize Federal Agency Parties to enter into contracts, cooperative agreements, and other agreements in implementation of the KBRA; and authorize the acceptance and expenditure of non-federal funds or in-kind services for KBRA implementation.
- D. Notwithstanding any other provision of law, enactment of the KBRA title of this legislation and implementation of KBRA will not restrict the Tribes' or other Parties' eligibility for or receipt of funds, or be construed as an offset against any obligations or existing funds, under any federal or state laws.
- E. Establish in the Treasury the type and number of funds necessary for the deposit of appropriations and other monies, including donated funds, for implementation of the KBRA. Management of funds shall be in accordance with the KBRA. Monies donated by non-federal entities for specific purposes to implement the KBRA shall be expended for those purposes only and shall not be subject to appropriation.
- F. Authorize appropriation of such sums as are necessary to carry out the programs, projects, and plans of the KBRA. Costs associated with any actions taken pursuant to this Agreement shall be non-reimbursable to Reclamation Project contractors.
- G. Provide that the purposes of the Klamath Reclamation Project include irrigation, reclamation, domestic, flood control, municipal, industrial, power (as necessary to implement the KBRA), National Wildlife Refuge, and fish and wildlife. Nothing in the project purposes section of the legislation shall be deemed to create a water right or affect existing water rights or water right claims. The fish and wildlife and National Wildlife Refuge purposes of the Klamath Reclamation Project shall

not adversely affect the irrigation purpose of the Project, *provided* that the provisions regarding water allocations and delivery to the National Wildlife Refuges agreed upon in Section 15.1.2, including any additional water made available under Sections 15.1.2.E.ii and 18.3.2.B.v, of the Klamath River Basin Restoration Agreement are hereby deemed not to constitute an adverse effect upon the Klamath Reclamation Project's irrigation purpose. For purposes of the determination of water rights in the KBA, the purpose or purposes of the Klamath Reclamation Project shall be as existed prior to the enactment of this legislation; this provision shall be inapplicable upon the filing of Appendix E-1 to the KBRA.

- H. Provide that: notwithstanding any other provision of law, the disposition of net revenues from the leasing of refuge lands within the Tule Lake National Wildlife Refuge and Lower Klamath National Wildlife Refuge, under section 4 of Public Law 88-567, 78 Stat. 850 (Sept. 2, 1964) (Kuchel Act) shall hereafter be:
1. Ten percent of said net revenues to Tule Lake Irrigation District, as provided in article 4 of Contract No. 14-06-200-5954 and section 2(a) of the Act of August 1, 1956;
  2. Payment to Counties in lieu of taxes as provided in section 3 of Public Law 88-567;
  3. Twenty percent of said net revenues directly, without further authorization, to the U.S. Fish and Wildlife Service, Klamath Basin Refuges, for wildlife management purposes on the Tule Lake National Wildlife Refuge and Lower Klamath National Wildlife Refuge;
  4. Ten percent of said net revenues directly, without further authorization to Klamath Drainage District for operation and maintenance responsibility for the Reclamation water delivery and drainage facilities within the boundaries of both Klamath Drainage District and Lower Klamath National Wildlife Refuge exclusive of the Klamath Straits Drain, subject to Klamath Drainage District's assuming the U.S. Bureau of Reclamation's Operation and Maintenance duties for Klamath Drainage District (Area K) lease lands; and
  5. The remainder shall be covered to the Reclamation fund to be applied as follows:
    - (a) to operation and maintenance costs of Link River and Keno Dams; and
    - (b) in any year where the remainder exceeds the actual costs in (a), for the Renewable Power Program in Section 17.7 of the KBRA or future capital costs of the Klamath Reclamation Project, pursuant to an expenditure plan submitted to and approved by the Secretary.

- I. As applicable for the United States and the signatory Tribes:
  - 1. Confirm the commitments made in the KBRA, including the Assurances in Section 15.3 of the KBRA, and that such commitments are effective and binding according to their terms.
  - 2. Authorize the Tribes to issue the voluntary relinquishment and release of claims against the United States as provided in Section 15.3 of the KBRA.
  - 3. Establish terms limiting the effect of the commitments of the United States and Tribes to only those provided in the KBRA.
  - 4. Authorize and direct the Secretary to publish the notice identified in KBRA Sections 15.3.4.A or 15.3.4.C as applicable.
- J. Provide for judicial review of a decision by the Secretary affecting rights or obligations created in Sections 15.3.5.C, 15.3.6.B.iii, 15.3.7.B.iii, 15.3.8.B, and 15.3.9 under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.
- K. Authorize the United States and the Klamath Tribes to enter into agreements consistent with Section 16.2 of the KBRA.
- L. Provide that nothing in the KBRA title of the legislation shall: determine existing water rights, affect existing water rights beyond what is stated in the KBRA, create any private cause of action, expand the jurisdiction of state courts to review federal agency actions or determine federal rights, provide any benefit to a federal official or member of Congress, amend or affect application or implementation of the Clean Water Act, Endangered Species Act, Federal Land Management Policy Act, Kuchel Act (Public Law 88-567), National Wildlife Refuge System Improvement Act of 1997 (Public Law 105-57), or supersede otherwise applicable federal law, except as expressly provided in the federal legislation.
- M. The KBRA title of the legislation shall provide that the provisions of the KBRA are deemed consistent with 43 U.S.C. § 666.
- N. Require that if the KBRA terminates, any federal funds provided to Parties that are unexpended must be returned to the United States, and any federal funds expended for the benefit of a Party shall be treated as an offset against any claim for damages by such Party arising from the Agreement.

## **Elements Related to the Klamath Hydroelectric Settlement Agreement**

- A. Authorize and direct the Secretary of the Interior (Secretary), Secretary of Commerce, and Federal Energy Regulatory Commission (FERC) to implement the Klamath Hydroelectric Settlement Agreement (KHSA).
- B. Authorize and direct the Secretary to make the determination by March 31, 2012 as set forth in Section 3 of the KHSA: whether facilities removal will advance restoration of the salmonid fisheries of the Klamath Basin and is in the public interest, which includes but is not limited to consideration of potential impacts on affected local communities and Tribes.
- C. Prohibit the Secretary from making the determination set forth in Section 3 of the KHSA if the conditions specified in Section 3.3.4 of the KHSA have not been satisfied.
- D. Authorize and direct the Secretary, if the Secretarial determination provides for facilities removal, to designate as part of that determination a dam removal entity (DRE) with the capabilities and responsibilities set forth in Section 7 of the KHSA; the Secretary may designate either the Department of the Interior or a non-federal entity as the DRE, consistent with the requirements of Section 3.3.4.E of the KHSA.
- E. Direct the Secretary to publish notification of the Secretarial Determination in the Federal Register.
- F. Provide jurisdiction for judicial review of the Secretarial determination in the U.S. Court of Appeals for the 9th Circuit or the D.C. Circuit.
- G. Authorize the DRE: to accept, expend and manage non-federal funds for facilities removal; to enter into appropriate agreements with the States of California and Oregon, Tribes, other public agencies, or others to assist in implementation of the KHSA; to develop a definite plan for facilities removal; to accept from PacifiCorp all rights, title, and other interests in the facilities upon providing notice that it is ready to commence with facilities removal; and to perform such removal, all as provided in Sections 4 and 7 of the KHSA.
- H. Authorize and direct the DRE to seek and obtain necessary permits, certifications, and other authorizations to implement facilities removal, including but not limited to a permit under 33 U.S.C. § 1344.
- I. Provide that Facilities Removal shall be subject to applicable requirements of State and local laws respecting permits, certifications and other authorizations, to the extent such requirements are consistent with the Secretarial determination and the Definite Plan, including the schedules for Facilities Removal.

- J. Direct the Department of the Interior or the Non-Federal DRE to enter into a contract with PacifiCorp that provides that: upon transfer of title to the facilities, and until notified by the DRE to cease generation of electric power, PacifiCorp shall continue such generation, retain title to any and all power so generated by the facilities, and continue to use the output for the benefit of its retail customers under the jurisdiction of relevant state public utility commissions.
- K. Authorize and direct the Secretary of the Interior, upon notice that the DRE is ready to perform removal of the J.C. Boyle development, to accept transfer of the Keno Dam from PacifiCorp, to be managed as a part of the Klamath Reclamation Project, as provided in Section 3.3.4.B and Section 7.5 of the KHSA.
- L. Provide PacifiCorp with protection from liability as follows: “Notwithstanding any other federal, state, local law or common law, PacifiCorp shall not be liable for any harm to persons, property, or the environment, or damages resulting from either Facilities Removal or Facility operation arising from, relating to, or triggered by actions associated with Facilities removal, including but not limited to any damage caused by the release of any material or substance, including but not limited to hazardous substances.”
- M. Further provide: “Notwithstanding any other federal, state, local law or common law, no person or entity contributing funds for facilities removal pursuant to the KHSA shall be held liable, solely by virtue of that funding, for any harm to persons, property, or the environment, or damages arising from either facilities removal or facility operation arising from, relating to, or triggered by actions associated with facilities removal, including any damage caused by the release of any material or substance, including hazardous substances.”
- N. Further provide that: “Notwithstanding Section 10(c) of the Federal Power Act, this protection from liability preempts the laws of any State to the extent such laws are inconsistent with this Act, except that this Act shall not be construed to limit any otherwise available immunity, privilege, or defense under any other provision of law.”
- O. Further provide that the liability protections in Paragraphs L through N, above, shall take effect as they relate to any particular facility only upon transfer of title to that facility from PacifiCorp to the DRE.
- P. Direct FERC to issue annual licenses authorizing PacifiCorp to continue to operate Project No. 2082 until PacifiCorp transfers title to the DRE, and provide that FERC’s jurisdiction under the Federal Power Act shall terminate with respect to a given facility upon PacifiCorp’s transfer of title for such facility to the DRE; if the facilities are removed in a staged manner, annual FERC license conditions applying to the facility being removed shall no longer be in effect, and PacifiCorp shall continue to comply with license conditions pertaining to any facility still in

place to the extent such compliance is not prevented by the removal of any other facility.

- Q. Direct FERC to stay its proceeding on PacifiCorp's pending license application for Project No. 2082 as long as the KHSA remains in effect, and resume such proceeding, and take final action on the license application, only if the KHSA terminates; except that FERC will resume timely consideration of the pending FERC license application for the Fall Creek development within 60 days of the transfer of the Iron Gate Facility to the DRE.
- R. Provide that if the KHSA terminates, the Secretarial Determination and findings of fact shall not be admissible or otherwise relied upon in FERC's proceedings on the license application.
- S. Provide that on PacifiCorp's filing of an application for surrender of the Eastside and Westside developments of Project No. 2082 pursuant to Section 6.4.1 of the KHSA, FERC shall issue an appropriate order regarding partial surrender of the license specific to the Eastside and Westside developments, including any reasonable and appropriate conditions.
- T. Provide that nothing in the KHSA title of the legislation shall: modify existing water rights; affect the rights of any Tribe; or supersede otherwise applicable federal law, except as expressly provided in the legislation.



**Appendix B**  
**Proposed California and Oregon State Legislation**

**Appendix B-1**  
**Proposed CEQA Legislation Language**

Uncodified Statute

Application of Division 13 of the Public Resources Code to activities and approvals related to the Klamath Basin, as more particularly described in two agreements between the United States, the State of California, the State of Oregon and other Klamath Basin Stakeholders, shall be limited as follows:

(a) The following activities related to restoration of the Klamath Basin are not a "project" as defined in Public Resources Code section 21065:

(1) Execution of the Klamath Hydroelectric Settlement Agreement;

(2) Execution of the Klamath Basin Restoration Agreement;

(3) A request to the California Public Utilities Commission to establish a surcharge to fund dam removal activities pursuant to the Klamath Hydroelectric Settlement Agreement, or the California Public Utilities Commission's action on such request.

(b) Division 13 of the Public Resources Code shall apply to the decision of whether to concur with the determination by the United States to remove any or all of the dams described in the Klamath Hydroelectric Settlement Agreement, whether to approve any projects that are proposed for approval pursuant to such determination and whether to approve any projects that are proposed pursuant to the Klamath Basin Restoration Agreement after its execution. Environmental review prepared pursuant to this subdivision shall focus on the issues that are ripe for decision at the time of the concurrence and/or proposal, and from which later environmental review may tier. The Department of Fish and Game may be the lead agency for the environmental review of the decision of whether to concur in the determination by the United States described in this subdivision.

**Appendix B-2**  
**California Water Bond Legislation**

*The section references are from the California water bond legislation as enacted in November 2009.*

79757. Of the funds provided in Section 79750, not more than two hundred fifty million dollars (\$250,000,000) shall be available for dam removal and related measures in the Klamath River watershed if the secretary finds that all of the following conditions have been met:

(a) The State of California, the State of Oregon, the United States, and PacifiCorp have executed a dam removal agreement.

(b) The State of California, the State of Oregon, and the United States have made the determinations required under the agreement to effect dam removal.

(c) Ratepayer funds required by the agreement have been authorized and will be timely provided.

(d) All other conditions required in the agreement have been met.

79758. Of the funds provided in Section 79750, not less than twenty million dollars (\$20,000,000) shall be allocated to Siskiyou County for the purpose of economic development as defined in Section 13997.2 of the Government Code.

**Appendix B-3**  
**Proposed Oregon Legislation for 2011 Legislation Session**

The proposed legislation:

1. Establishes an Oregon Klamath Basin Restoration Agreement Fund, relating to the Klamath River Basin Restoration Agreement of 2010, to provide for the provision of funds to execute Oregon's commitments to the Klamath River Basin Restoration Agreement and further economic development in Oregon's portion of the Klamath River Basin.
2. Authorizes and directs the Department of Administration to issue lottery bonds, direct net proceeds of the bonds to be deposited in the fund, and appropriate money.
3. Establishes in the State Treasury, separate and distinct from the General Fund, an Oregon Klamath River Basin Restoration Agreement Fund. Moneys in the Fund may be invested as provided in ORS 293.701 to 293.820. Interest earned by the Fund shall be credited to the Fund.
4. The use of lottery bond proceeds is authorized based on the following findings:
  - a. That water right retirements and reduced water delivery in the Klamath River Basin in Oregon through the Klamath Basin Restoration Agreement will negatively affect land values and the agricultural land base in Oregon's Klamath River Basin and that the use of the lottery bond proceeds will further economic development by mitigating the negative impact of such water right retirements and reduced water delivery on the economy of the region.
5. At the request of the Department of Administrative Services, the State Treasurer may issue lottery bonds up to a principal amount of \$3.4 million, plus an additional amount estimated by the State Treasurer to be necessary to pay bond-related costs.
6. Oregon's Klamath Basin Restoration Agreement Fund will consist of
  - a. Net proceeds from the sale of lottery bonds issued under this 2011 legislation;
  - b. Interest earnings of the Fund; and,
  - c. Any other moneys that may be transferred to the fund by the Legislative Assembly or paid into the Fund under the Klamath Basin Restoration Agreement.
7. Moneys in the Oregon Klamath Basin Restoration Agreement Fund are continuously appropriated to the Department of Administrative Services for the following purposes:
  - a. Providing grants for projects to foster and incentivize development of renewable energy, energy efficiency, and conservation projects targeted at serving

agricultural users in Klamath County to support agricultural development and economic vitality;

- b. Providing funds to Klamath County to compensate for loss of tax revenue as a result of the Klamath Basin Restoration Agreement; and
  - c. Paying the direct and indirect costs of the Department of Administrative Services in administering the fund and in administering and maintaining, if applicable, the interest payments on the bonds as exempt from federal income tax.
8. Moneys in the Oregon Klamath Basin Restoration Agreement Fund are expressly for use as stipulated in this legislation as it relates to the Klamath Basin Restoration Agreement. No moneys from this Fund will be applied toward any activity or cost associated with the Klamath Hydroelectric Settlement Agreement.

**Appendix C**  
**Schedule and Budget for Implementation of Agreement**

## **Appendix C-1** **Schedule for Implementation of Agreement**

Appendix C-1 describes the schedule of certain activities in the Klamath Basin Restoration Agreement. It lists specific actions in the Agreement and annual activities. The budget estimates in Appendix C-2 are for 2012 through 2021. Many of the actions will begin in 2010 and 2011. Federal Agency Parties have indicated their willingness to implement certain of the programs identified in the KBRA for which authorization currently exists. Federal Agency Parties have also committed to begin, as soon as possible, the necessary study, planning, and environmental review processes described in the KBRA that will get certain programs off the ground. These activities will be consistent with existing statutory authorities and available appropriations. This Appendix does not supersede the specific terms of the Agreement. In the event of conflict or inconsistency, the terms of the Agreement are controlling.

### **Specific Actions**

#### **2010**

##### General

- Execution of the Agreements

##### Legislation

- Assist legislative offices and committees in the introduction and passage of legislation (Section 3.1.1).

##### Coordination and Oversight

- Form Klamath Basin Coordinating Council and develop protocols (Section 5, 6, 7, and Appendix D).
- Form interim Klamath Basin Advisory Council, TAT, UBT, and other subgroups (Section 16, Appendix D)
- File for approval of Klamath Basin Advisory Council, and TAT Charter (Appendix D).
- Adopt procedures to report on the status of performance of each obligation under the Agreement (Section 5.4).

##### Fisheries Program

- Determine funding needs (Section 13.1 and 13.3).

##### Water Resources

- Collaboration to benefit agriculture and Wildlife Refuges (Section 15.1.2.J)
- Initiate development of On-Project Plan upon availability of funds (Section 15.2.2).
- Initiate groundwater investigations (Section 15.2.4.B)
- File validation actions (Section 15.3.1.B).
- File adjudication documents (Section 15.3.2.B).
- Initiate OPWAS negotiations (Section 16.2.1.D).
- Initiate development of Water Use Retirement Program (Section 16.2.2).
- Develop the Drought Plan (Section 19.2).
- Prepare Emergency Response Plan (Section 19.3).
- Form Management Entity (Section 17.4.1).
- Adopt guidelines by January 15, 2011 (Section 17.4.3).
- Develop system to distribute funds to eligible Power Users (Section 17.4.4).

- Implement Interim Power Program (Section 17.5).
- Implement Federal Power provisions (Section 17.6).
- Initiate financial and engineering plan (Section 17.7.2).

#### Counties Program

- Develop and adopt Klamath County Program (Section 27.2).

#### Tribal Program

- Initiate fisheries capacity building and conservation management programs (Section 32.).
- File petition for interim fishing site in California for Klamath Tribes (Section 34.1).

### **2011**

#### General

- Establish Restoration Agreement Fund (Section 4.2).

#### Fisheries

- Complete draft Fisheries Restoration Phase I Plan by February 2011 (Section 10.1).
- Prepare and adopt Phase I Fisheries Reintroduction Plan (Section 11.2.1).
- Conduct reintroduction activities (Section 11.2).
- Complete draft Fisheries Monitoring Plan by February 2011 (Section 12.1).

#### Water Resources

- Analysis of historical data by February 2011 (Section 15.1.1.A.ii.a).
- Commence development and refinement of predictive techniques (Section 15.1.1.A.ii.b).
- Complete analysis, general parameters, and agreements on Refuge deliveries (Section 15.1.2.G.v and H.ii).
- Review D Pumping Plant (Section 15.4.2.A).
- Adopt Emergency Response Plan (Section 19.3).
- Implement Interim Power Program (Section 17.5), Federal Power provisions (Section 17.6) and Efficiency and Renewable Resource Program (Section 17.7).

### **2012**

#### General

- Deadline for federal legislation (Section 7.6).
- For reference purposes, the target date for Secretarial Determination pursuant to the Hydroelectric Settlement (Section 3 of KHSA); this event affects timing of certain KBRA actions.

#### Water Resources

- Complete and adopt On-Project Plan—18 months after funding is available (Section 15.2.2.B.i).
- Complete OPWAS (Section 16.2.1.D).
- Complete Barnes Ranch/Agency Lake study (Section 18.2.2).
- Commence environmental review on Wood River Wetlands (Section 18.2.3)
- Initiate climate change assessment (Section 19.4.3).
- Implement Interim Power Program (Section 17.5), Federal Power provisions (Section 17.6) and Efficiency and Renewable Resource Program (Section 17.7).



**2013**

- Complete Water Use Retirement Plan—within 12 months of the termination of OPWAS (Section 16.2.2).
- Adopt the Drought Plan (Section 19.2.3).
- Funding complete for Klamath Tribes Mazama Economic Development Project (Section 32.2).

**2017**

- KWAPA identifies date for full implementation of On-Project Plan (Section 15.3.8.A)

**2018**

- Distribute Phase II of the Klamath River Fisheries Restoration Plan (Section 10.2).

**2020**

- Prepare a periodic report, not less frequently than every ten years, to evaluate the overall progress in implementation on the Agreement and the results of such implementation (Section 5.4).
- TAT review of fisheries outcomes (Section 12.2.7) by June 30, 2020.

**2022**

- Complete implementation of On-Project Plan, subject to Sections 14.3.1 and 15.3.8.B.

**2030**

- TAT review of fisheries outcomes (Section 12.2.7) by June 30, 2030.

**2055**

- Parties consider an extension of the term of the Agreement (Section 12.2.7.C).

**Annual and Dependent Implementation Activities****Coordination and Oversight**

- Prepare an annual workplan and schedule for decisions, recommendations, oversight and coordination. The workplan will include a public information and involvement program.
- Work with federal and state governments on appropriation of funds.
- Implement procedures to report on the status of performance of each obligation under this Agreement (Section 5.4)

**Fisheries**

- Annual report on the progress of implementing the Reintroduction Plan (Section 11.3)
- FWS and NMFS deliver to the Klamath Basin Advisory Council the Annual Program of Work and associated budget described in Section 13.3.1 for review and recommendations.
- Funding process subsequent to Council Charter (Section 13.5)
- Annual Report (Section 13.4) within 30 days before the annual funding review.

**Water Resources**

- Implement On-Project Plan after Plan adoption through complete implementation (Section 15.2.2.B.ii).
- Administer On-Project Plan pursuant to Section 15.2.2.B.iii.
- Implement Off-Project Plan (Section 16).
- TAT recommendations by March 15<sup>th</sup> (Section 20.4).
- Implement Interim Lake Level and River Flows Program (Section 20.4).
- Secretary publishes finding under Section 15.3.4.A upon realization of specific events.
- Appendix E-1 filed upon occurrence of events in 15.3.1.A (including finding under 15.3.4.A)
- Section 15.1.2 and Refuge Allocation effective upon effectiveness of Appendix E-1 (Section 15.1.2.C)
- Implement Power Program (Section 17).

#### Tribal Program

- Fisheries capacity building and conservation management programs (Section 32)

### **Regulatory Assurances**

The schedules for these activities are dependent on other actions.

- The fish entrainment alleviation program in Section 21.1.3 is dependent on budget (assume for FY 2019 and FY 2020).
- ESA consultations may occur in Section 22.1.2 or Section 22 when appropriate.
- ESA review in Sections 22.1.2 and 22.1.3. can occur prior to KWAPA's completion of all actions identified in the On-Project Plan necessary for the implementation of the Plan as provided in Section 15.2.2.B.ii.

**Appendix C-2**  
**Budget for Implementation of Agreement**

**COST ESTIMATES FOR SETTLEMENT MEASURES AND COMMITMENTS**  
**(\$ 2007 Thousands)**

| <b>Program</b>               | <b>2012</b>      | <b>2013</b>       | <b>2014</b>       | <b>2015</b>      | <b>2016</b>      | <b>2017</b>      | <b>2018</b>       | <b>2019</b>       | <b>2020</b>       | <b>2021</b>      | <b>Total</b>      |
|------------------------------|------------------|-------------------|-------------------|------------------|------------------|------------------|-------------------|-------------------|-------------------|------------------|-------------------|
| <b>Coordination</b>          | \$ -             | \$ 298            | \$ 315            | \$ 329           | \$ 345           | \$ 362           | \$ 380            | \$ 405            | \$ 426            | \$ 447           | \$ 3,307          |
| <b>Fisheries</b>             |                  |                   |                   |                  |                  |                  |                   |                   |                   |                  |                   |
| Restoration                  | \$ 6,300         | \$ 17,730         | \$ 33,360         | \$ 29,605        | \$ 31,605        | \$ 41,296        | \$ 40,066         | \$ 42,896         | \$ 51,886         | \$ 27,751        | \$ 322,495        |
| Reintroduction               | \$ 385           | \$ 4,444          | \$ 12,974         | \$ 3,568         | \$ 4,068         | \$ 4,068         | \$ 8,676          | \$ 4,993          | \$ 4,993          | \$ 4,993         | \$ 53,159         |
| Monitoring                   | \$ 3,850         | \$ 9,943          | \$ 11,666         | \$ 12,586        | \$ 12,866        | \$ 13,266        | \$ 13,266         | \$ 13,566         | \$ 13,266         | \$ 13,266        | \$ 117,541        |
| <b>Water Resources</b>       | \$ 17,891        | \$ 51,632         | \$ 51,270         | \$ 40,866        | \$ 33,614        | \$ 27,848        | \$ 27,848         | \$ 27,845         | \$ 29,345         | \$ 29,845        | \$ 338,001        |
| <b>Regulatory Assurances</b> | \$ -             | \$ 2,500          | \$ 2,500          | \$ 2,500         | \$ 2,500         | \$ 2,500         | \$ 2,500          | \$ 12,500         | \$ 17,500         | \$ 2,500         | \$ 47,500         |
| <b>Counties</b>              | \$ -             | \$ -              | \$ -              | \$ -             | \$ 3,200         | \$ -             | \$ 20,000         | \$ -              | \$ -              | \$ -             | \$ 23,200         |
| <b>Tribes</b>                | \$ 13,000        | \$ 16,250         | \$ 4,500          | \$ 4,500         | \$ 4,500         | \$ 4,500         | \$ 4,500          | \$ 4,500          | \$ 4,500          | \$ 4,500         | \$ 65,250         |
| <b>TOTAL</b>                 | <b>\$ 41,426</b> | <b>\$ 102,796</b> | <b>\$ 116,584</b> | <b>\$ 93,953</b> | <b>\$ 92,698</b> | <b>\$ 93,840</b> | <b>\$ 117,235</b> | <b>\$ 106,705</b> | <b>\$ 121,915</b> | <b>\$ 83,301</b> | <b>\$ 970,452</b> |

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**COST ESTIMATES FOR SETTLEMENT MEASURES AND COMMITMENTS**  
 (\$2007 Thousands)

| #  | Section | Program        | Project  | 2012  | 2013  | 2014  | 2015  | 2016  | 2017  | 2018  | 2019   | 2020   | 2021  | SUM    |
|----|---------|----------------|--|-------|-------|-------|-------|-------|-------|-------|--------|--------|-------|--------|
| 1  | 5.3     | Coordination   | Coordination and Oversight   | -     | 298   | 315   | 329   | 345   | 362   | 380   | 405    | 426    | 447   | 3,307  |
| 2  | 9.3     | Restoration    | Planning & Impl. -- Ph. I and Ph. II Restoration Plans                   | 700   | 200   | -     | -     | -     | -     | 1,000 | 600    | -      | -     | 2,500  |
| 3  | 9.3     | Restoration    | Williamson R. aquatic habitat restoration                                | -     | 500   | 500   | 1,000 | 1,000 | 1,000 | 1,000 | 1,000  | 1,000  | 1,000 | 8,000  |
| 4  | 9.3     | Restoration    | Sprague R. aquatic habitat restoration                                   | -     | 1,000 | 4,000 | 5,445 | 5,445 | 9,536 | 9,536 | 9,536  | 9,536  | 9,536 | 63,570 |
| 5  | 9.3     | Restoration    | Wood R. Valley aquatic habitat restoration                               | -     | 700   | 1,000 | 1,000 | 1,000 | 2,000 | 2,000 | 2,000  | 2,000  | 2,000 | 13,700 |
| 6  | 9.3     | Restoration    | Williamson Sprague Wood Screening Diversion (n=100)                      | 500   | 1,000 | 1,500 | -     | -     | -     | -     | -      | -      | -     | 3,000  |
| 7  | 9.3     | Restoration    | Williamson & Sprague USFS uplands  | -     | 500   | 1,610 | 1,610 | 1,610 | 1,610 | 1,610 | 1,610  | 1,610  | 1,610 | 13,380 |
| 8  | 9.3     | Restoration    | Upper Klamath Lake aquatic habitat restoration                           | -     | 700   | 1,000 | 1,000 | 1,000 | 1,000 | 2,000 | 2,000  | 2,000  | 2,000 | 12,700 |
| 9  | 9.3     | Restoration    | Screening of UKL pumps (underway)  | 100   | 200   | 200   | -     | -     | -     | -     | -      | -      | -     | 500    |
| 10 | 9.3     | Restoration    | UKL watershed USFS uplands   | -     | 220   | 1,000 | 1,000 | 1,000 | -     | -     | -      | -      | -     | 3,220  |
| 11 | 9.3     | Restoration    | Keno Res. water quality studies & remediation actions                    | -     | 1,000 | 3,000 | 3,000 | 3,000 | 5,000 | 5,000 | 10,000 | 20,000 | -     | 50,000 |
| 12 | 9.3     | Restoration    | Keno Res. wetlands restoration   | -     | 500   | 500   | 1,000 | 1,000 | 2,000 | -     | -      | -      | -     | 5,000  |
| 13 | 9.3     | Restoration    | Keno to Iron Gate upland private & BLM                                   | -     | 50    | 50    | 100   | 100   | 100   | 100   | 100    | 140    | -     | 740    |
| 14 | 9.3     | Restoration    | Keno to Iron Gate upland USFS (Gooseneat)                                | -     | 100   | 250   | 300   | 50    | 150   | 100   | 150    | 50     | 250   | 1,400  |
| 15 | 9.3     | Restoration    | Keno to Iron Gate mainstem restoration                                   | -     | 100   | 100   | 100   | 350   | 200   | 200   | 200    | 200    | 200   | 1,650  |
| 16 | 9.3     | Restoration    | Keno to Iron Gate tributaries - diversions & riparian                    | -     | -     | -     | -     | 500   | 500   | 500   | -      | -      | -     | 1,500  |
| 17 | 9.3     | Restoration    | Shasta River aquatic habitat restoration                                 | 2,000 | 3,000 | 6,000 | 2,000 | 2,000 | 2,000 | 2,000 | 2,000  | 2,000  | 625   | 23,625 |
| 18 | 9.3     | Restoration    | Shasta R. USFS uplands   | -     | 100   | 250   | 300   | 100   | 150   | 200   | 200    | 200    | 180   | 1,680  |
| 19 | 9.3     | Restoration    | Scott River aquatic habitat restoration                                  | 3,000 | 3,000 | 6,000 | 2,000 | 2,000 | 2,000 | 2,000 | 1,000  | 750    | -     | 21,750 |
| 20 | 9.3     | Restoration    | Scott R. USFS uplands  | -     | 260   | 300   | 300   | 300   | 300   | 300   | 300    | 300    | 300   | 2,660  |
| 21 | 9.3     | Restoration    | Scott R. private uplands   | -     | 100   | 100   | 100   | 100   | 150   | 100   | 100    | -      | -     | 750    |
| 22 | 9.3     | Restoration    | Mid Klamath R. & tribs (Iron Gate to Weitchpec) aquatic hab restoration. | -     | 500   | 1,000 | 1,500 | 2,000 | 2,000 | 1,000 | 1,000  | 1,000  | 950   | 10,950 |
| 23 | 9.3     | Restoration    | Mid Klamath tribs USFS upland  | -     | 1,000 | 1,000 | 1,500 | 1,000 | 1,000 | 1,500 | 1,000  | 1,000  | 1,000 | 10,000 |
| 24 | 9.3     | Restoration    | Mid Klamath tribs private upland   | -     | 500   | 500   | 650   | 1,000 | 1,000 | 1,000 | 1,000  | 1,000  | 1,000 | 7,650  |
| 25 | 9.3     | Restoration    | Lower Klamath R. & tribs (Weitchpec to mouth) aquatic hab restoration    | -     | 500   | 500   | 1,000 | 1,190 | 2,000 | 2,000 | 2,500  | 2,500  | 3,000 | 15,190 |
| 26 | 9.3     | Restoration    | Lower Klamath private uplands  | -     | 1,000 | 2,000 | 3,000 | 4,000 | 6,000 | 6,000 | 6,000  | 6,000  | 3,500 | 37,500 |
| 27 | 9.3     | Restoration    | Salmon River aquatic hab restoration                                     | -     | 500   | 500   | 1,000 | 1,000 | 1,000 | 320   | -      | -      | -     | 4,320  |
| 28 | 9.3     | Restoration    | Salmon R. USFS upland  | -     | 500   | 500   | 700   | 860   | 600   | 600   | 600    | 600    | 600   | 5,560  |
| 29 | 9.3     | Reintroduction | Reintroduction Plan  | 100   | 100   | 100   | 100   | 100   | 100   | 100   | 100    | 100    | 100   | 1,000  |
| 30 | 9.3     | Reintroduction | Collection Facility  | -     | 988   | 4,238 | 238   | 238   | 238   | 238   | 238    | 238    | 238   | 6,889  |
| 31 | 9.3     | Reintroduction | Production Facility  | -     | 750   | 4,285 | 285   | 285   | 285   | 285   | 285    | 285    | 285   | 7,030  |
| 32 | 9.3     | Reintroduction | Acclimation Facility   | -     | 850   | 2,285 | 285   | 285   | 285   | 285   | 285    | 285    | 285   | 5,130  |
| 33 | 9.3     | Reintroduction | Transport  | -     | -     | -     | 95    | 95    | 95    | 95    | 95     | 95     | 95    | 665    |
| 34 | 9.3     | Reintroduction | Monitoring and Evaluation  | 190   | 1,233 | 1,733 | 2,233 | 2,733 | 2,733 | 2,733 | 2,850  | 2,850  | 2,850 | 22,138 |
| 35 | 9.3     | Reintroduction | Monitoring and Evaluation  | 95    | 190   | 190   | 190   | 190   | 190   | 190   | 190    | 190    | 190   | 1,805  |
| 36 | 9.3     | Reintroduction | New Hatchery (IGD or Fall Creek)   | -     | 333   | 143   | 143   | 143   | 143   | 4,750 | 950    | 950    | 950   | 8,503  |
| 37 | 9.3     | Monitoring     | Adult Salmonids  | -     | 607   | 1,107 | 1,607 | 2,107 | 2,107 | 2,107 | 2,107  | 2,107  | 2,107 | 15,963 |
| 38 | 9.3     | Monitoring     | Juvenile Salmonids   | -     | 471   | 1,471 | 1,971 | 1,971 | 2,471 | 2,471 | 2,471  | 2,471  | 2,471 | 18,240 |
| 39 | 9.3     | Monitoring     | Genetics Otololith   | -     | 80    | 100   | 120   | 200   | 200   | 200   | 200    | 200    | 200   | 1,500  |
| 40 | 9.3     | Monitoring     | Hatchery Tagging   | -     | 597   | 662   | 662   | 162   | 162   | 162   | 162    | 162    | 162   | 2,890  |
| 41 | 9.3     | Monitoring     | Disease  | -     | 808   | 808   | 808   | 808   | 808   | 808   | 808    | 808    | 808   | 7,268  |
| 42 | 9.3     | Monitoring     | Green Sturgeon   | -     | 394   | 233   | 233   | 233   | 233   | 233   | 233    | 233    | 233   | 2,256  |
| 43 | 9.3     | Monitoring     | Lamprey  | -     | 238   | 238   | 238   | 238   | 238   | 238   | 238    | 238    | 238   | 2,138  |

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**COST ESTIMATES FOR SETTLEMENT MEASURES AND COMMITMENTS  
(\$2007 Thousands)**

| #  | Section          | Program         | Project   | 2012  | 2013   | 2014   | 2015   | 2016   | 2017   | 2018   | 2019   | 2020   | 2021   | SUM     |
|----|------------------|-----------------|---|-------|--------|--------|--------|--------|--------|--------|--------|--------|--------|---------|
| 44 | 9.3              | Monitoring      | Geomorphology   | -     | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 2,700   |
| 45 | 9.3              | Monitoring      | Habitat Monitoring  | -     | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 2,700   |
| 46 | 9.3              | Monitoring      | Water Quality   | -     | 1,149  | 1,149  | 1,149  | 1,149  | 1,149  | 1,149  | 1,149  | 1,149  | 1,149  | 10,337  |
| 47 | 9.3              | Monitoring      | UKL bloom dynamics  | -     | -      | 200    | 200    | 200    | 200    | 200    | 200    | 200    | 200    | 1,600   |
| 48 | 9.3              | Monitoring      | UKL water quality/phytoplankton/zooplankton                   | 750   | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 7,500   |
| 49 | 9.3              | Monitoring      | UKL internal load/bloom dynamics                              | -     | -      | 200    | 200    | 200    | 200    | 200    | 200    | 200    | 200    | 1,600   |
| 50 | 9.3              | Monitoring      | UKL external nutrient loading                                 | 100   | 100    | 100    | 100    | 100    | 100    | 100    | 100    | 100    | 100    | 1,000   |
| 51 | 9.3              | Monitoring      | UKL analysis of long-term data sets                           | -     | -      | 100    | -      | -      | -      | -      | 100    | -      | -      | 200     |
| 52 | 9.3              | Monitoring      | UKL listed suckers  | 1,250 | 1,250  | 1,250  | 1,250  | 1,250  | 1,250  | 1,250  | 1,250  | 1,250  | 1,250  | 12,500  |
| 53 | 9.3              | Monitoring      | Tributaries water quality/nutrients/sediment                  | 750   | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 7,500   |
| 54 | 9.3              | Monitoring      | Tributaries geomorphology/riparian vegetation                 | 100   | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 300    | 2,800   |
| 55 | 9.3              | Monitoring      | Tributaries physical habitat                                  | 50    | 50     | 50     | 50     | 50     | 150    | 150    | 150    | 150    | 150    | 1,000   |
| 56 | 9.3              | Monitoring      | Tributaries listed suckers                                    | -     | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 6,750   |
| 57 | 9.3              | Monitoring      | Keno Reservoir water quality/algae/nutrients                  | 750   | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 750    | 7,500   |
| 58 | 9.3              | Monitoring      | Keno Reservoir to Tributaries: Meteorology (weather stations) | 100   | 100    | 100    | 100    | 100    | 100    | 100    | 100    | 100    | 100    | 1,000   |
| 59 | 9.3              | Monitoring      | Remote Sensing acquisition and analysis                       | -     | 200    | -      | -      | 200    | -      | -      | 200    | -      | -      | 600     |
| 60 | 15.4.5           | Water Resources | Keno Dam fish passage   | -     | -      | -      | -      | -      | -      | -      | -      | 1,500  | 2,000  | 3,500   |
| 61 | 15.1.1A(ii)(a)   | Water Resources | Data Analysis and evaluation for provision to TAT             | -     | 100    | 8      | 8      | 8      | 8      | 8      | 5      | 5      | 5      | 153     |
| 62 | 15.1.1A(ii)(b)   | Water Resources | Development of predictive techniques                          | -     | -      | 200    | 20     | 20     | 20     | 20     | 20     | 20     | 20     | 340     |
| 63 | 15.1.2           | Water Resources | Klamath Basin Wildlife Refuges: O&M North and P Canals        | -     | -      | 100    | -      | -      | -      | -      | -      | -      | -      | 100     |
| 64 | 15.1.2           | Water Resources | Klamath Basin Wildlife Refuges: Walking Wetland Construction  | -     | 250    | 250    | 250    | 250    | 250    | 250    | 250    | 250    | 250    | 2,250   |
| 65 | 15.1.2           | Water Resources | Klamath Basin Wildlife Refuges: Big Pond Dike Construction    | -     | -      | 500    | -      | -      | -      | -      | -      | -      | -      | 500     |
| 66 | 15.2/14.3.1      | Water Resources | On Project water plan   | 2,500 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 92,500  |
| 67 | 15.2.4B          | Water Resources | Groundwater Technical Investigation                           | 111   | 285    | 245    | -      | -      | -      | -      | -      | -      | -      | 641     |
| 68 | 15.2.4B(vi)      | Water Resources | Costs Associated with Remedy for Adverse Impact               | -     | -      | -      | -      | -      | -      | -      | -      | -      | -      | -       |
| 69 | 15.4.2           | Water Resources | D Pumping Plant   | -     | 170    | 170    | 170    | 170    | 170    | 170    | 170    | 170    | 170    | 1,530   |
| 70 | 16.2.2 & 16.2.1  | Water Resources | Water Use Retirement Plan                                     | 250   | 250    | 500    | 500    | 500    | -      | -      | -      | -      | -      | 2,000   |
| 71 | 16.2.2/14.3.2/16 | Water Resources | Off Project Plan and Program: Use of 30K ac ft above UKL      | -     | 5,000  | 5,000  | 5,000  | 5,000  | 5,000  | 5,000  | 5,000  | 5,000  | 5,000  | 45,000  |
| 72 | 17.5/14.3.1      | Water Resources | Interim Power Sustainability                                  | 1,730 | 2,241  | 3,719  | -      | -      | -      | -      | -      | -      | -      | 7,690   |
| 73 | 17.6             | Water Resources | Federal Power   | 250   | 250    | 250    | 250    | -      | -      | -      | -      | -      | -      | 1,000   |
| 74 | 17.7/14.3.1      | Water Resources | Energy Efficiency and Renewable Resources                     | -     | 13,886 | 12,378 | 9,368  | 4,866  | -      | -      | -      | -      | -      | 40,498  |
| 75 | 17.7.2/14.3.1    | Water Resources | Renewable Power Program Financial and Engineering Plan        | 1,000 | -      | -      | -      | -      | -      | -      | -      | -      | -      | 1,000   |
| 76 | 18.2.2           | Water Resources | UKL Wetlands Restoration: Agency/Barnes                       | -     | 1,000  | 1,000  | 500    | -      | -      | -      | -      | -      | -      | 2,500   |
| 77 | 18.2.3           | Water Resources | UKL Wetlands Restoration: Wood River                          | -     | 2,000  | 1,000  | 2,000  | -      | -      | -      | -      | -      | -      | 5,000   |
| 78 | 19.2.3           | Water Resources | Drought Plan Development                                      | 250   | -      | -      | -      | -      | -      | -      | -      | -      | -      | 250     |
| 79 | 19.2/14.3.3      | Water Resources | Drought Plan Restoration Agreement Fund                       | -     | 3,000  | 3,000  | -      | -      | -      | -      | -      | -      | -      | 6,000   |
| 80 | 19.3.3           | Water Resources | Emergency Response Plan                                       | 100   | -      | -      | -      | -      | -      | -      | -      | -      | -      | 100     |
| 81 | 19.3             | Water Resources | Emergency Response Fund                                       | -     | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 9,000   |
| 82 | 19.4.2           | Water Resources | Technical Assessment of Climate Change                        | -     | 500    | -      | -      | -      | -      | -      | -      | -      | -      | 500     |
| 83 | 19.5             | Water Resources | Off-Project Reliance Program                                  | -     | -      | -      | -      | -      | -      | -      | -      | -      | -      | 12,000* |
| 84 | 20.3             | Water Resources | Real Time Water Management                                    | 200   | 200    | 200    | 200    | 200    | 200    | 200    | 200    | 200    | 200    | 2,000   |
| 85 | 20.3             | Water Resources | Real Time Water Management: Water Flow Monitoring and Gauges  | 500   | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 5,000   |
| 86 | 20.3             | Water Resources | Snowpack Gauges   | 250   | 250    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 4,500   |

*Confidential and Privileged Settlement Communication*

**COST ESTIMATES FOR SETTLEMENT MEASURES AND COMMITMENTS  
(\$2007 Thousands)**

| #   | Section | Program               | Project   | 2012   | 2013   | 2014   | 2015   | 2016   | 2017   | 2018   | 2019   | 2020   | 2021   | SUM     |
|-----|---------|-----------------------|---|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|---------|
| 87  | 20.3    | Water Resources       | Adaptive Management: Science and Analysis   | 500    | 500    | 500    | 500    | 500    | 150    | 150    | 150    | 150    | 150    | 3,250   |
| 88  | 20.3    | Water Resources       | Real Time Management: Calibration and improvements to KLAMSIM or other modeling and predictions | 250    | 250    | 250    | 100    | 100    | 50     | 50     | 50     | 50     | 50     | 1,200   |
| 89  | 20.4.3  | Water Resources       | Interim Flow and Lake Level Program   | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 10,000 | 100,000 |
| 90  | 21.1.3  | Regulatory Assurances | Keno Reservoir KIP Screening  | -      | -      | -      | -      | -      | -      | -      | 10,000 | 15,000 | -      | 25,000  |
| 91  | 22      | Regulatory Assurances | Federal GCP/HCP   | -      | 1,500  | 1,500  | 1,500  | 1,500  | 1,500  | 1,500  | 1,500  | 1,500  | 1,500  | 13,500  |
| 92  | 24      | Regulatory Assurances | California Laws   | -      | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 4,500   |
| 93  | 25      | Regulatory Assurances | Oregon Laws   | -      | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 4,500   |
| 94  | 27.3.1  | Counties              | Klamath County Study  | -      | -      | -      | -      | -      | -      | -      | -      | -      | -      | -       |
| 95  | 27.3.2  | Counties              | Klamath County  | -      | -      | -      | -      | 3,200  | -      | -      | -      | -      | -      | 3,200   |
| 96  | 28.1    | Counties              | Siskiyou County   | -      | -      | -      | -      | -      | -      | 20,000 | -      | -      | -      | 20,000  |
| 97  | 29.1    | Counties              | Humboldt County   | -      | -      | -      | -      | -      | -      | -      | -      | -      | -      | -       |
| 98  | 30.1    | Counties              | Del Norte County  | -      | -      | -      | -      | -      | -      | -      | -      | -      | -      | -       |
| 99  | 32.2    | Tribes                | Fisheries Management HVT  |        |        |        |        |        |        |        |        |        |        | -       |
| 100 | 32.2    | Tribes                | Fisheries Management Karuk  | 500    | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 9,500   |
| 101 | 32.2    | Tribes                | Fisheries Management Klamath  | 500    | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 9,500   |
| 102 | 32.2    | Tribes                | Fisheries Management Yurok  | 500    | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 1,000  | 9,500   |
| 103 | 32.2    | Tribes                | Conservation Management HVT   |        |        |        |        |        |        |        |        |        |        | -       |
| 104 | 32.2    | Tribes                | Conservation Management Karuk   | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 5,000   |
| 105 | 32.2    | Tribes                | Conservation Management Klamath   | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 5,000   |
| 106 | 32.2    | Tribes                | Conservation Management Yurok   | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 500    | 5,000   |
| 107 | 33.1    | Tribes                | Economic Development Study HVT  | -      |        | -      | -      | -      | -      | -      | -      | -      | -      | -       |
| 108 | 33.1    | Tribes                | Economic Development Study Karuk  | -      | 250    | -      | -      | -      | -      | -      | -      | -      | -      | 250     |
| 109 | 33.1    | Tribes                | Economic Development Study Klamath  | -      | 250    | -      | -      | -      | -      | -      | -      | -      | -      | 250     |
| 110 | 33.1    | Tribes                | Economic Development Study Yurok  | -      | 250    | -      | -      | -      | -      | -      | -      | -      | -      | 250     |
| 111 | 33.2    | Tribes                | Klamath Tribes: Mazama Forest Project   | 10,000 | 11,000 |        |        |        | -      | -      | -      | -      | -      | 21,000  |
| 112 | 34      | Tribes                | Fishing Sites   |        |        |        |        |        |        |        |        |        |        | -       |

\* Recognizes there is further discussion of additional funding potentially available within the total budget. This amount may be funded using reallocated funds.

\*\* Upon become a Party to the KBRA in accordance with Section 38, the Hoopa Valley Tribe will be eligible for funding in categories and amounts for the other three tribes in line items 99 through 110.

970,452

**Appendix D**  
**Coordination and Oversight of the Klamath Basin Restoration Agreement**

**Appendix D-1**  
**Klamath Basin Coordinating and Advisory Councils and Subgroups**

**I.**  
**Purpose and Scope of Coordination and Oversight of Klamath Basin Restoration Agreement**

Coordination and oversight of the Klamath Basin Restoration Agreement is intended to provide and facilitate coordination, cooperation, collaboration, decision-making, and accountability by Parties to the Agreement to assure elements of the Agreement are carried out effectively and at the appropriate scales to forward sustainable restoration and renewal of the Klamath River Basin. The coordination and oversight framework will be the mechanism by which state and federal agencies, local governments, tribes, conservation groups and community members work together to collaboratively develop and implement long-term solutions for the Klamath River Basin. Coordination and oversight of the Agreement embodies a multi-party and agency effort, and is reliant on Agreement Parties and partners, and their respective authorities and abilities, to facilitate implementation. Coordination and oversight does not provide for new decision-making authorities or change existing local, state and/or federal law. This coordination and oversight structure is not intended to direct other restoration entities and efforts existing within the Klamath River Basin that are outside the Agreement, but instead it will strive to coordinate and integrate with existing entities and ongoing efforts to help support and further the Agreement and Klamath River Basin goals.

Coordination and oversight groups/subgroups are defined based on whether or not they provide advice or recommendations to Federal Agency Parties. The Klamath Basin Advisory Council (KBAC) and the Technical Advisory Team (TAT) are a group and subgroup, respectively, that will provide recommendations to Federal Agency Parties, consistent with their Charters established pursuant to the Federal Advisory Committee Act (FACA). These recommendations are relevant to implementation of the Agreement (KBAC) and to management of Environmental Water (TAT). An Upper Basin Team (UBT) will also provide oversight on water use retirements and recommendations on water retirements to the Federal Lead Party, through the structure of the KBAC. A Klamath Basin Coordinating Council (KBCC) will provide coordination and oversight of various elements of the Agreement not requiring recommendations for Federal Agency Parties. Because the KBCC will not require a Charter pursuant to FACA, details of this group will be addressed in its protocols and operating procedures.

The coordination and oversight framework will provide opportunities for public involvement to help guide implementation of the Agreement, as well as the respective public processes of local government, and state and federal agencies as they implement their statutory authorities.

Changes to the coordination and oversight structure will likely occur over time as the Agreement is implemented. Changes to the structure may be in the form of an amendment to the Agreement and/or the Charters.

Initially, fiscal support for coordination and oversight will rely on existing resources at the federal and state level. Fiscal and human resources support will be obtained and provided



through the separate authorities of each Party, but prioritized and coordinated where possible and applicable.

**II.**  
**Klamath Basin Coordinating Council**

**A. Purpose and Function.**

The KBCC is the coordinating body for all Parties of the Agreement that does not provide advice or recommendations to Federal Agency Parties, and therefore shall not be subject to FACA requirements. Its purpose is to promote continued collaboration, cooperation, coordination, and consultation among Parties and others as elements of the Agreement are implemented. The KBCC will provide for general oversight and administration, including activity and program coordination, information sharing, priority setting, fund seeking, and dispute resolution related to implementation of the Agreement. The KBCC will make decisions and establish protocols to implement elements of the Agreement. The KBCC will serve as a primary forum for public involvement in implementation of the Agreement.

**B. Organization/Membership.**

All Parties are members of the KBCC. All Parties may participate in KBCC meetings; however, only designated representatives of the Parties shall be voting members (Appendix Table D-1). Designated representatives shall seek the individual views of their member Parties to ensure effective representation in voting matters. Designated representatives of the Parties for the KBCC (and the KBAC) shall include representation from the Federal Agency Parties; the State of Oregon; the State of California; the Counties of Klamath (OR), Del Norte, Siskiyou and Humboldt (CA); the Tribal governments of the Klamath Tribes of Oregon, and the Yurok Tribe and the Karuk Tribe of California; Parties Related to the Klamath Reclamation Project (KRP) as identified in Section 1.1 of the Agreement; UKWUA; the commercial fishing industry; and conservation and restoration organizations (Appendix Table D-1). Parties shall form their own rules for selection of representatives. If Parties are not able to select representatives, the KBCC shall develop a procedure. The KBCC shall determine appropriate representation for any additional entities that may become Parties after the Effective Date as provided in Section 7.2.2. Membership makeup and Party representation are the same for both the KBCC and the KBAC.

**Appendix Table D-1. Party Representation for the KBCC and KBAC\***

| <b>Parties</b>      | <b>Representation</b> | <b>Members</b>     |
|---------------------|-----------------------|--------------------|
| Dept of Interior    | 1                     | FWS, BLM, BOR, BIA |
| Dept of Agriculture | 1                     | USFS               |
| Dept of Commerce    | 1                     | NOAA/NMFS          |
| State of Oregon     | 1                     | ODEQ, ODFW, OWRD   |
| State of California | 1                     | CDFG               |
| Klamath Tribes      | 1                     |                    |
| Yurok Tribe         | 1                     |                    |
| Karuk Tribe         | 1                     |                    |
| Del Norte County    | 1                     |                    |
| Klamath County      | 1                     |                    |
| Siskiyou County     | 1                     |                    |

|                                  |           |  |
|----------------------------------|-----------|--|
| Humboldt County                  | 1         |  |
| Parties related to KRP**         | 2         |  |
| Off-Project Representative***    | 1         |  |
| Conservation /Restoration Groups | 2         |  |
| Commercial Fishing Industry      | 1         |  |
| <b>Total</b>                     | <b>18</b> |  |

\* Final representation will be revised to include only Parties to the Agreement.

\*\* Klamath Reclamation Project: one representative from KWAPA and one from KWUA or such other Party related to the Klamath Reclamation Project as KWUA may designate. The Klamath Reclamation Project designation may be changed by a majority of the Parties who are Parties related to the Klamath Reclamation Project as identified in Section 1.1.1 of the Agreement.

\*\*\*Off-Project Signatory Parties will select one representative. If these Parties are not able to agree, the KBCC or KBAC, as applicable, will select a representative from nominees from each Off-Project signatory Party.

### **C. Roles and Responsibilities.**

The KBCC shall serve as an oversight forum to foster efficient and effective implementation of the Agreement, including tracking and reporting action progress, solving problems, establishing protocols and procedures, providing approvals, making decisions, resolving general issues within and among programs, promoting collaboration and coordination among groups and Klamath Basin partners, providing input to assist with prioritization of program projects, concertedly and cooperatively seeking grants and other funding for priority projects, reporting program expenditures, and developing an annual workplan. The KBCC (of which all members shall be deemed to be Disputing Parties) shall provide the forum for dispute resolution as described in Section 6 of the Agreement when issues cannot be resolved at lower scales within programs, subgroups, or among Disputing Parties.

The KBCC shall have the flexibility to establish additional subgroups as necessary and appropriate to address specific issues and needs on a periodic, ad hoc, temporary, or long-term basis, and to implement provisions of the Agreement, including the separate but related Hydroelectric Settlement. KBCC subgroups shall not be subject to FACA requirements, as their advice and recommendations will not be for Federal Agency Parties. These subgroups shall provide advice or recommendations to the KBCC. Subgroups may establish their own operating protocols.

The KBCC shall ensure public engagement is afforded through facilitated participation in KBCC and subgroup meetings, and shall consider public input when making decisions.

The KBCC shall provide for a basin-wide perspective for holistic solutions and approaches, without superseding the authorities of respective entities, for determining program administration at appropriate scales. The KBCC will function to link and coordinate Agreement programs and actions with other actions and programs required through the federal ESA (Biological Opinions and Recovery Plans) and with other watershed working groups within the entire Klamath River Basin in Oregon and California (e.g., Trinity River Working Group, Upper Klamath Basin Working Group, subbasin watershed organizations and resource conservation districts).

With respect to any matter on which these coordination and oversight provisions or other protocols established by the KBCC provide for participation by all Parties, any Party may

delegate to another Party the authority to act on its behalf. Any such delegation shall be in writing and will remain in effect according to its terms or until revoked.

#### **D. Operations.**

The KBCC shall vote through designated Party representation as described in (B). The KBCC shall provide for participation of all Parties and the public during meetings pursuant to Applicable Law and reasonable operating procedures. In addition, the KBCC shall hold periodic or episodic meetings of all Parties as necessary to provide participation in and discussion of coordination and oversight functions that do not require a vote (such as reviewing progress in implementation of the Agreement) or functions vested in all Parties (such as Amendment of the Agreement under Section 7.2 or Dispute Resolution under Section 6), as provided in its internal protocols. The KBCC shall operate under Applicable Law and provide full disclosure to Parties of information, actions, and decisions, adequate notice of meetings, and record keeping.

The KBCC and subgroups shall establish the necessary operating procedures, including meeting frequency, meeting location, coordination with other Klamath Basin and subbasin working groups, and internal reporting mechanisms and requirements. KBCC operations may use the support of a facilitator, if funding is obtained.

Except in the case of KBCC decisions under Section 14.3.1 and 15.3.8.B. of the Agreement, decision-making by the KBCC voting members shall be by super-majority (at least a  $\frac{3}{4}$  vote of the representatives that are present). Parties that do not support a KBCC recommendation to a Non-Federal Party may prepare a minority report. All reports shall become part of the record. A quorum for decision-making by a super-majority shall be defined within the KBCC's protocols, or if not so defined, shall be a majority of the voting members.

With respect to any decision to be made by the KBCC under the terms of Section 14.3.1 and 15.3.8.B of the Agreement, the decision process and rule shall be as follows:

The KBCC representative from KWAPA, the Klamath Tribes (after meeting and conferring with the other signatory Tribes), the state of California, and the state of Oregon shall convene within fourteen days of the passing of the due dates in Sections 14.3.1 (extension of the deadline of the On-Project Plan) and 15.3.8.B (120 days before the date selected by KWAPA under section 15.3.8.A) and review the dispute among KWAPA, the Tribes, and the United States Bureau of Indian Affairs. This group of four shall be known as the decision panel. The decision panel has twenty-one additional days to resolve the dispute, by no less than a majority vote of 3-1 (with the Klamath Tribes representing the majority view of the three signatory tribes), and provide its decision in writing to the KBCC.

If the decision panel is unable to resolve the dispute within thirty-five days of the due date in Section 15.3.8.B, it has seven days to select a fifth member from among the Parties to the KBCC and to form the final decision panel. The decision panel shall select the fifth member by one of the following means, in order of preference: first by consensus; second, if there is no consensus choice, by a majority vote; and third, if there

is no majority choice, by a consensus of the two states, California and Oregon. The final decision panel shall immediately provide notice to the KBCC of its formation.

The final decision panel shall have no more than thirty-five days to resolve the dispute, by a simple majority vote. Notice of the written decision by the final decision panel shall be immediately provided to the KBCC.

The decision of the decision panel or final panel, as applicable, shall constitute the decision of the KBCC and is not reviewable in any way.

No discovery is allowed before the decision panel or final decision panel. Each panel shall set appropriate deadlines for the submission of letter briefs and documentary evidence and for an oral explanation of the position of the United States Bureau of Indian Affairs, Klamath Tribes, and KWAPA.

**E. Funding.**

As provided in Section 5.3, the Non-Federal Parties shall support authorizations and appropriations in the amount estimated in Appendix C-2 to fund the coordination and oversight structure for the first ten years after the Effective Date. Funds shall support a facilitator.

**III.**

**Klamath Basin Advisory Council and Interim Advisory Council**

**A. Purpose and Function.**

The Klamath Basin Advisory Council (KBAC) is the body comprised of all Parties to the Agreement that will provide advice and recommendations for Federal Agency Parties after execution of a Charter pursuant to FACA. Prior to execution of a Charter, advice and recommendations for Federal Agency Parties shall be provided by an Interim Advisory Council. Recommendations of the KBAC and the Interim Advisory Council shall not be binding on Federal Agency Parties.

**B. Organization/Membership**

All Parties will be provided an opportunity to participate in meetings of the Chartered KBAC consistent with Applicable Law. The KBAC Charter is to be modeled on the structure and representation outlined herein and shall establish the organization and membership of the KBAC. Voting members of the KBAC shall be the designated Party representatives as specified for the KBCC (Appendix Table D-1). The Interim Advisory Council shall consist of state, federal, and local government and tribal Parties as provided under the Unfunded Mandates Reform Act of 1995. Voting members within the Interim Advisory Council shall be designated Party representatives from state, federal, local government, and tribal Parties. With respect to the Parties related to the Klamath Reclamation Project, the two voting members of the Interim

Advisory Council shall be KWAPA and KID. This designation may be changed by the majority of Parties related to the Klamath Reclamation Project who are local governments.

### **C. Roles and Responsibilities**

The KBAC and Interim Advisory Council primarily serve to develop and provide advice and recommendations for Federal Agency Parties as necessary for implementing the Agreement.

The KBAC shall establish additional subgroups as necessary and appropriate to address specific issues and needs on a periodic, ad hoc, temporary, or long-term basis. Unless separately Chartered, subgroups of the KBAC that develop advice or recommendations for the Federal Agency Parties shall provide such advice or recommendations only to the KBAC (e.g., Upper Basin Team). Subgroups that provide advice or recommendations directly to Federal Agency Parties shall be Chartered pursuant to FACA and these Charters shall be linked to the KBAC Charter as appropriate (e.g., Technical Advisory Team).

### **D. Operations**

Upon the Effective Date of the Agreement, the Parties shall initiate the Interim Advisory Council for the purpose of developing and providing advice and recommendations for the Federal Agency Parties. Parties who are not members of the Interim Advisory Council shall be given maximum practicable opportunity under Applicable Law to provide input on an individual basis to the Interim Advisory Council in preparation of federal recommendations. Interim Advisory Council operations shall be as transparent as possible and practicable under Applicable Law and provide full disclosure of information, actions, and decisions to the Parties.

The appropriate Federal Agency Party will immediately undertake the formal steps to obtain Charters for the KBAC and necessary subgroups, such as the Technical Advisory Team. The KBAC Charter will specify the relationship between the KBCC and chartered and non-chartered subgroups.

Voting within the KBAC and Interim Advisory Council shall be through designated Party representatives as described for the KBCC (Appendix Table D-1). When recommendations are developed for specific Federal Agency Parties, representatives for those specific Parties shall be non-voting members. Otherwise representatives for Federal Agency Parties shall be voting members. In addition to requirements under FACA for public involvement, the designated KBAC representatives shall seek the input of their member Parties to ensure effective representation in voting matters. The Interim Advisory Council shall seek input from the public, and from non-member Parties on an individual basis, in development of such advice or recommendations as practicable and consistent with Applicable Law. The Interim Advisory Council shall be disbanded once the KBAC is Chartered.

Decision-making by the KBAC and Interim Advisory Council voting members shall be by consensus of a quorum. If consensus is not achieved, majority and minority reports shall be developed and provided to the Federal Agency Parties (and/or to State Agency Parties). A quorum for decision-making shall be defined within the KBAC Charter and Interim Advisory

Council protocols, or if not so defined, shall be a majority of the voting representatives. Only advice and recommendations for Federal Agency Parties will be decided within the KBAC; all other decisions and deliberations will be performed within the KBCC.

At all times, the KBAC and Chartered subgroups shall operate in accordance with Applicable Law and their respective Charters. To the extent not defined in the Charter, the KBAC and subgroups shall establish the necessary operating procedures, including meeting frequency, meeting location, coordination with other Klamath Basin and subbasin working groups, and internal reporting mechanisms and requirements. Meetings of the KBAC shall be set at common dates and places as the KBCC to the maximum extent practicable, except that meetings set at common dates and places will have separate times and agendas. A Designated Federal Official shall preside over KBAC meetings.

**Appendix D-2**  
**Technical Advisory Team, Managed Environmental Water, and Upper Basin Team**

**I.**  
**Introduction**

The Agreement provides that implementation of certain of its sections will be informed through the activities of a Technical Advisory Team (TAT) and an Upper Basin Team (UBT). The TAT, a Chartered subgroup of the KBAC, shall provide recommendations for the identified Federal Agency Lead Parties, or other Parties, and to the KBAC or KBCC, as provided in the Agreement and pursuant to this Appendix D-2. In carrying out its purpose, the TAT will be compliant with its Charter established pursuant to the FACA. The UBT shall provide recommendations to the KBAC and thus will not be independently chartered.

For its specific purposes, the TAT shall seek broad technical participation, the best and most current technical information, and consensus in recommendations. This Appendix establishes and identifies the TAT and its purpose, membership, and operation and the specific procedures to be followed by the TAT concerning Managed Environmental Water.

This Appendix also establishes and identifies the UBT and its general purpose, membership, and roles concerning the Water Use Retirement Program.

**II.**  
**Technical Advisory Team and Interim Technical Team**

**A. Purpose and Function.**

The Technical Advisory Team's purpose is to utilize the technical expertise of the Parties and others with interest and expertise in water management and fisheries to inform the implementation of the Agreement as it relates to Managed Environmental Water and other aquatic resource issues. As defined in the Agreement, the TAT is assigned a number of tasks, including the provision of recommendations to the KBCC, KBAC, and to Lead Agency Parties, which includes recommendations to the Secretary of the Interior regarding Managed Environmental Water in the Agreement. TAT recommendations will not supersede Applicable Law or the terms of the Agreement or the Hydroelectric Settlement.

**B. Organization and Membership.**

The TAT shall consist of the Parties with interest, expertise or authority in water management, water quality, or fish management and with the ability to contribute to restoring and maintaining the health of the waters of the Klamath Basin and the Fish Species. Prior to execution of the TAT Charter, the members of the TAT shall only perform those TAT functions outlined in the Agreement that do not involve recommendations for the Federal Agency Parties.

During the period prior to execution of the TAT Charter, development and submittal of recommendations or advice for Federal Agency Parties will be by an Interim Technical Team consisting of state, federal and local government and tribal Parties with expertise as described above, in compliance with the Unfunded Mandates Reform Act of 1995. The TAT Charter shall establish the organization and membership of the TAT, as modeled on the structure outlined herein.

**C. Roles and Responsibilities.**

The roles and responsibilities of the TAT are set out in the Agreement, and as described in specific detail below with respect to Managed Environmental Water. Generally, the TAT shall review and evaluate data gathered under and outside the Agreement, make recommendations for management of resources, provide technical expertise, and evaluate implementation of the Agreement as it relates to management of Environmental Water that affects Upper Klamath Lake and the lower Klamath River mainstem ecosystems in the period before, during and after Facilities Removal. The TAT will make technical recommendations to the KBCC and/or KBAC, the Federal Agency Lead Party (Secretary) or other Parties as provided in the Agreement, and shall provide opportunities for public input. The TAT will coordinate with Fish Managers responsible for developing and implementing the restoration, reintroduction and monitoring plans for Fish Species and their habitats.

**D. Operations.**

Upon the Effective Date of the Agreement, the Parties will initiate an Interim Technical Team, consisting of federal, state and local government and tribal Parties, for the purpose of providing recommendations for Federal Agency Lead Parties. Otherwise, all Parties to the TAT will fulfill other technical advisory functions under the Agreement that do not involve recommendations for Federal Agency Parties.

The appropriate Federal Agency Party shall immediately undertake the formal steps to obtain an independent FACA Charter for the TAT. The TAT Charter will specify the relationship between the TAT and the KBCC and/or KBAC, and specify the Designated Federal Official to oversee TAT meetings.

During the period prior to execution of the TAT Charter, the Interim Technical Team will perform any of the roles, responsibilities, operations and other functions established in the Agreement that involve recommendations for the Federal Agency Parties. The Interim Technical Team will seek input from the public, and from non-member Parties on an individual basis, in development of such advice or recommendations. Following execution of the TAT Charter pursuant to FACA, the TAT shall assume all functions outlined under the Agreement, and the Interim Technical Team shall be disbanded.

Voting members of the TAT and the Interim Technical Team shall be designated representatives of member Parties, (except that representatives for Federal Agency Parties, to which recommendations are directed, shall not be voting members for purposes of developing recommendations for Federal Agency Parties) (Appendix Table D-2). The designated TAT



representatives shall seek the input of their member Parties to ensure effective representation in voting matters. Parties shall form their own rules for selection of representatives. If Parties are not able to select representatives, a procedure for selection shall be defined within the KBAC or TAT Charter (whichever is more appropriate).

**Appendix Table D-2. Party Representation for TAT\***

| <b>Parties</b>                  | <b>Representation</b> | <b>Members</b>   |
|---------------------------------|-----------------------|------------------|
| Dept. of Interior               | 3                     | FWS, BOR, BIA    |
| Dept. of Commerce               | 1                     | NOAA/NMFS        |
| Dept. of Agriculture            | 1                     | FS               |
| State of Oregon                 | 3                     | ODEQ, ODFW, OWRD |
| State of California             | 1                     | CDFG             |
| Klamath Tribes                  | 1                     |                  |
| Yurok Tribes                    | 1                     |                  |
| Karuk Tribes                    | 1                     |                  |
| Humboldt County                 | 1                     |                  |
| Siskiyou County                 | 1                     |                  |
| Parties related to KRP**        | 1                     |                  |
| Off-Project representative***   | 1                     |                  |
| Conservation/Restoration Groups | 1                     |                  |
| Commercial Fishing              | 1                     |                  |
| <b>Total</b>                    | <b>17</b>             |                  |

\* Final representation will be revised to include only Parties to the Agreement.

\*\* Klamath Reclamation Project. This Party shall be KWAPA unless a majority of the Parties related to the Klamath Reclamation Project as identified in Section 1.1.1 of the Agreement designate another Party from among these Parties.

\*\*\* Off-Project Signatory Parties will select one representative. If these Parties are not able to agree, the TAT will select a representative from nominees from each Off-Project signatory party.

At all times, the TAT shall operate in accordance with Applicable Law, including providing public notice of meetings and access to meetings, meeting minutes, and other TAT documents. Prior to issuance of the FACA Charter, Parties who are not members of the Interim Technical Team shall be given the maximum practicable opportunity under Applicable Law for input to the Interim Technical Team in preparation of recommendations for Federal Agency Parties. In carrying out its purposes, the TAT will seek public participation and the best and most current technical information. Meetings shall typically be on a twice-monthly basis during the water delivery and use period. The TAT shall report to the KBCC and/or KBAC on a scheduled basis.

The TAT shall use its discretion to establish subcommittees for various purposes. Subcommittees shall report directly to the TAT.

**E. Decisions and Dispute Resolution.**

The TAT shall strive for consensus in developing advice and recommendations for Federal Agency Parties. If consensus is not achieved, a minority report, or alternative recommendation, may be provided to the Federal Agency Party for its consideration by those who do not support the majority decision. Only policy disagreements (i.e., those that relate to terms within the

Agreement) should be referred to the KBCC for further discussion and resolution. The KBCC will respond to the dispute in accordance with the dispute resolution procedures set forth in Section 6. It is not intended that the KBCC resolve or mediate technical issues related to TAT recommendations. Disputes involving a recommendation for a Federal Lead Agency Party may be referred to the KBAC for further discussion and resolution.

**F. Public Participation.**

The public may provide input on an issue at scheduled TAT meetings or outside the TAT process as provided under the Charter for the TAT and its public processes. However, general public participation may be limited when phone conferencing is necessitated during in-season operations.

**G. Emergency Meetings.**

Any voting member of the TAT may call a meeting when an emergency situation requires action of the TAT, as provided in the Agreement. Such a meeting must comply with the public notice provisions that may be required under the Charter. Otherwise, emergencies may be addressed by federal, state, local government and tribal Party TAT representatives only (Appendix Table D-2), without public notice, if critical action is time sensitive.

**III.  
Managed Environmental Water**

Once chartered, the TAT shall provide recommendations to the Secretary of the Interior concerning Managed Environmental Water in accordance with Sections 20.3 of the Agreement and Applicable Law.

The TAT is a year-round technical body. Winter activities (November through February) will consist of development of recommendations for use of Managed Environmental Water in an Annual Water Management Plan, and recommending actions on management of winter lake and river operations, especially pertaining to storage and release rates at Link River Dam in light of changing forecasts. In-season (March through October), the TAT will ensure that timely recommendations are forwarded to the Secretary of the Interior (Secretary) to accomplish the purposes of Sections 20, consistent with recommendations in the Annual Water Management Plan as adjusted on the basis of continuous information and analysis. A significant task will be balancing releases from Link River Dam with irrigation diversions and return flows to achieve desired fishery conservation objectives. Post-season activities will consist of a review of the previous year's analyses and performances, and updating TAT operating procedures as needed. The TAT will report to the KBCC on a scheduled basis and upload information on the Internet regularly.

**Operating Procedures for Managed Environmental Water**

**A. Annual Water Management Plan and Environmental Water Management Recommendations.**

No later than March 15 each year, the TAT shall recommend to the Secretary the preferred timing of Managed Environmental Water to optimize benefits for fish and wildlife resources. This will be done through recommendations in an Annual Water Management Plan based on the run-off forecast and other factors specific to that year and the guidance principles as provided in the Agreement. This plan will set recommendations for “default operations” for the year, subject to alteration due to hydrologic or other changes in circumstance. All interested Parties may participate in plan development and the public will be given an opportunity to review and comment on the draft plan. The plan will be subject to continuous adjustment based upon comments from Basin stakeholders and real-time hydrological and biological data on conditions within the Basin.

In-season, the TAT will provide to the Secretary technical recommendations on Managed Environmental Water for the succeeding two weeks based on available information and pending recommendations. These recommendations should state flow or lake level objectives (e.g., keep flows at a location X in a W-Z range, or keep Upper Klamath Lake at level A through time period B), the biological or other basis for the recommendation, the biological risks and benefits associated with implementing the proposed recommendation, and information on how well the recommendation comports with regulatory requirements. Expected Klamath Reclamation Project operations will be evaluated and taken into account consistent with Section 15.1.1.A of the Agreement.

The recommendations should state the identity of those TAT voting members who have reviewed and support the recommendation. The TAT will strive for consensus in developing recommendations. In the absence of consensus, majority and minority reports (or alternative recommendations) may be produced, with minority reports prepared by those who do not support the majority recommendation. Parties shall have the option of pursuing the disputes as described in the Decision and Dispute Resolution Section (II E).

When a recommendation has been properly submitted, the Secretary should be prepared to timely describe for the record the operational options and implications of meeting the recommendation. If the decision by the Secretary is to adopt and implement the recommendation, the recommendation and decision will be documented for the minutes. If the Secretary does not agree to implement the recommendation, the Secretary will describe for the minutes both the intended operation and the basis for that decision. If the Secretary believes the best available biological information supports a position that differs from that of the recommendation, the explanation should acknowledge this difference and should include whatever information is necessary to support the alternative view.

**B. In-Season Management Data.**

Consistent with the Agreement and in particular with Appendix E-1, the TAT will use the Natural Resource Conservation Service (NRCS) 50% exceedance forecast for inflow to Upper Klamath Lake as the basis for its recommendations, but may develop or use other short-term

forecasts to better inform its recommendations. The types of forecasts employed and the specific protocols for those forecasts are expected to be developed by the TAT and to evolve in response to adaptive management operations.

During critical times of year for Fish Species, TAT members will produce and distribute biological information on those Species. TAT members will provide relevant information on other wildlife resources. Information will be posted on a website.

### **C. Meetings**

Between the last week of February, and up to at least September 30 of each year, the TAT will meet twice monthly, or more often if necessary, to facilitate in-season operations related to Managed Environmental Water. The principal purpose of the meetings will be to review the status of the preceding week's recommendations and operations, project operating data, biological data, and to make new recommendations on management of Environmental Water for Klamath River flows and lake levels for the following week(s). Consistent with Section 19, equal consideration will be given to Upper Klamath Lake and Klamath River flow issues, as they are part of the same ecosystem.

A Designated Federal Official shall facilitate the meetings and be the responsible party for operational logistics.

## **IV. Upper Basin Team**

### **A. Purpose and Function**

The Upper Basin Team's (UBT) purpose shall be to oversee the planning and implementation of the Water Use Retirement Program (WURP), as described in Section 16.2.2, including preparation of a plan to accomplish Section 16.2.2 principles. Recommendations by the UBT for the Federal Lead Party shall be provided directly to the KBAC, and therefore the UBT will not require a Charter pursuant to FACA. As such, the UBT shall be a subcommittee of the KBAC.

### **B. Organization and Membership**

The four voting members of the UBT shall be comprised of two representatives from the Klamath Tribes and two representatives from UKWUA. A representative of the Federal Lead Party shall be a non-voting member.

### **C. Roles and Responsibilities**

The role of the UBT shall be to: (i) oversee the implementation of the WURP; (ii) prepare the draft WURP, if not developed in the Off-Project Water Settlement, for approval by the Federal Lead Party; (iii) in coordination with ORWD pursuant to Section 16.2.2.F.iii, provide annual reports on WURP implementation actions to the KBCC, and through the KBAC to the Federal

Lead Party; and (iv) prepare, as applicable, recommendations for implementation of the WUPR, and provide them to the KBAC for review and submittal to the Federal Lead Party as the KBAC determines is appropriate.

**D. Operations**

After formation, the UBT shall develop and adopt procedures and protocols for its processes. Upon request by the UBT, the FWS will attempt to facilitate any disputes among UBT members. Any unresolved dispute among the UBT, concerning the terms of the WURP or other applicable matters, shall be resolved pursuant to Section 6.5 Dispute Resolution Procedures; alternatively, if such procedures do not resolve the dispute, the Federal Lead Party shall do so.

**Appendix E**  
**Implementing Documents Related to Klamath Reclamation Project and other Water**  
**Resource Matters**

**Appendix E-1**  
**Klamath Reclamation Project Diversion Limitations**

(Filing to Establish Limitation on Specified Diversion Associated  
with the Klamath Reclamation Project)

*Preface: The form of Appendix E-1 as follows reflects the current state of the Klamath River Adjudication being conducted in the State of Oregon. It is likely that the deadline established under the Klamath Basin Restoration Agreement for filing Appendix E-1 will occur after the issuance of the Findings of Fact and Order of Determination in the Adjudication. As appropriate, the caption and other terms not affecting the substantive consequence of the following will be revised based on the forum and context in which the filing occurs.*

BEFORE THE ADJUDICATOR  
WATER RESOURCES DEPARTMENT  
FOR THE  
STATE OF OREGON

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

Edward & Marilyn Livingston, Sylvia G. Bruce,  
~~WaterWatch of Oregon, Inc.~~, Horsefly Irrigation District,  
Langell Valley Irrigation District, Rogue River Valley  
Irrigation District, Medford Irrigation District, Roger  
Nicholson, Richard Nicholson, AgriWater, 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;  
Wm. S. Nicholson, John B. Owens, Kenneth Owens, Wm.  
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, Harlowe Ranch,  
Terry M. Bengard, Tom Bengard, Dwight T. Mebane,  
Helen Mebane, ~~Sevenmile Creek Ranch, LLC~~; James  
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, ~~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, Peter M. Bourdet, Vincent Briggs, J.T.

**Lead Case No. 003**

Consolidated Cases: 003, 118,  
119, 120, 129, 137, 148, ~~149~~, and  
~~150~~

Claims: 142, 143, 144, 186, 194,  
205, 211, 285, 286, ~~287<sup>2</sup>, 288<sup>3</sup>,~~  
289, 290, 291, 292, 293, 294,  
295, 296, 297, 298, 299, 312,  
317, 321, 322, 323, and 324

Contests: 0005, 0006, 0007,  
0008, 0033, 0039, 0040, 0047,  
0281, 0516, 0986, 1221, 1455,  
1804, 2044, 2048, 2049, 2050,  
2051, 2052, ~~2256~~, 2491,  
~~2492, 2761, 2778, 2788, 2789,~~  
~~2851<sup>4</sup>, 2854, 2856<sup>5</sup>, 2858, 2859,~~  
~~2860, 2861, 2862, 2863, 2864,~~  
~~2865, 2871, 2876, 2880, 2881,~~  
~~2882, 2883<sup>6</sup>, 3136<sup>7</sup>, 3137<sup>8</sup>,~~

<sup>2</sup> Claim 287 was voluntarily withdrawn by Oregon Department of Fish and Wildlife on September 26, 2003. *See* Notice of Withdrawal of Claim.

<sup>3</sup> Claim 288 was voluntarily withdrawn by David P. Henzel on July 1, 2003. *See* Notice Of Withdrawal Of Claim.

<sup>4</sup> WaterWatch of Oregon, Inc. voluntarily withdrew from Contest 2851 on February 19, 2003. *See* WaterWatch's Voluntary Withdrawal of Contest 2851.

<sup>5</sup> By an Order dated May 20, 2003, WaterWatch of Oregon, Inc. was dismissed as a party contestant from all proceedings in the Klamath Basin Adjudication. *See* Order Dismissing WaterWatch Of Oregon, Inc.'s Contest Nos. 2820 et al.

<sup>6</sup> Klamath Project Water Users' Renewed Motion to Strike Contest Nos. 2858, 2859-2865, 2871, 2876, and 2880-2883, and Dismiss WaterWatch as a Party was Granted on 4/03/03. *See* Order on Renewed Motion to Strike Contests and Dismiss WaterWatch as a Party and Motion to Reconsider.

<sup>7</sup> Langell Valley Irrigation District and Horsefly Irrigation District voluntarily withdrew from Contest 3136 on May 28, 2002. *See* Voluntary Withdrawal of Contest by Langell Valley Irrigation District and Horsefly Irrigation District.

<sup>8</sup> Langell Valley Irrigation District and Horsefly Irrigation District voluntarily withdrew from Contest 3137 on August 21, 2002. *See* Voluntary Withdrawal Of Contest By Langell Valley Irrigation District And Horsefly Irrigation District.



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<sup>9</sup> Langell Valley Irrigation District and Horsefly Irrigation District voluntarily withdrew from Contest 3138 on March 21, 2003. *See* Voluntary Withdrawal Of Contest By Langell Valley Irrigation District And Horsefly Irrigation District.

<sup>10</sup> Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew from Contest 3176 on December 5, 2002. *See* Voluntary Withdrawal Of Contest By Medford And Rogue River Valley Irrigation Districts.

<sup>11</sup> Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew, without prejudice, from Contests 3184 and 3197 on February 25, 2003. *See* Voluntary Withdrawal Of Contests 3197 And 3215 [*sic*] By Horsefly And Langell Valley Irrigation Districts. Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew, without prejudice, from Contest 3184 and 3197 on September 30, 2002. *See* Voluntary Withdrawal Of Contest By Medford And Rogue River Valley Irrigation Districts.

<sup>12</sup> Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew, without prejudice, from Contest 3191 on May 1, 2003. *See* Voluntary Withdrawal Of Contest By Medford And Rogue River Valley Irrigation Districts.

<sup>13</sup> Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew, without prejudice, from Contest 3208 on February 25, 2003. *See* Voluntary Withdrawal Of Contest 3208 By Horsefly And Langell Valley Irrigation Districts. Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew, without prejudice, from Contest 3208 on September 30, 2002. *See* Voluntary Withdrawal Of Contest By Medford And Rogue River Valley Irrigation Districts.

<sup>14</sup> Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew from Contest 3209. *See* Voluntary Withdrawal of Contest 3209 by Medford Irrigation District and Rogue River Valley Irrigation District (Nov. 17, 2005).

<sup>15</sup> Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew, without prejudice, from Contest 3214 on February 25, 2003. *See* Voluntary Withdrawal Of Contest 3214 By Horsefly And Langell Valley Irrigation Districts. Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew, without prejudice, from Contest 3214 on September 30, 2002. *See* Voluntary Withdrawal Of Contest By Medford And Rogue River Valley Irrigation Districts.

<sup>16</sup> Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew, without prejudice, from Contests 3212, 3213, 3215-3222, 3227, 3232, and 3237-3240 on September 30, 2002. *See* Voluntary Withdrawal Of Contest By Medford And Rogue River Valley Irrigation Districts.

<sup>17</sup> William Bryant voluntarily withdrew from Contests 3282-3288, 3301, 3306, and 3310-3313 (Claims 293-299, 312, 317, and 321-324) on October 31, 2003. Dave Wood voluntarily withdrew from Contests 3282-3288, 3301, 3306, and 3310-3313 (Claims 293-299, 312, 317, and 321-324) on October 26, 2004. Change of Title Interest for Contests 3282-3288, 3301, 3306, and 3310-3313 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3282-3288, 3301, 3306, and 3310-3313 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3282-3288, 3301, 3306, and 3310-3313 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3282-3288, 3301, 3306, and 3310-3313 from Walter Seput to James Wayne, Jr. (5/2/05). Change of Title Interest for Contests 3282-3288, 3301, 3306, and 3310-3313 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3282-3288, 3301, 3306, and 3310-3313 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3282-3288, 3301, 3306, and 3310-3313 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3282-3288, 3301, 3306, and 3310-3313 (Claims 293-299, 312, 317, and 321-324) on September 2, 2005. Kenneth Zamzow voluntarily withdrew from Contests 3282-3288, 3301, 3306, and 3310-3313 (Claims 293-299, 312, 317, and 321-324) on September 2, 2005. William C. Knudtsen voluntarily withdrew from Contests 3282-3288, 3301, 3306, and 3310-3313 (Claims 293-299, 312, 317, and 321-324) on September 13, 2005. Sevenmile Creek Ranch, LLC voluntarily withdrew from Contests 3282-3288, 3301, 3306, and 3310-3313 (Claims 293-299, 312, 317, and 321-324) on March 1, 2007. Franklin Lockwood Barnes, Jr., and Jane M. Barnes voluntarily withdrew from Contests 3282-3288, 3301, 3306, and 3310-3313 (Claims 293-299, 312, 317, and 321-324) on April 6, 2007.

<sup>18</sup> Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland

Ranch Co., Tom Bentley, Thomas Stephens, John Briggs, ~~Wm. Bryant~~, Klamath Irrigation District, Klamath Drainage District, Tulalake Irrigation District; Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement District, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Thomas J. Shaw/Modoc Lumber Co., Bradley S. Luscombe, Randy Walthal and Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Company, Travis Huntly/Collins Products, LLC, The Klamath Tribes, Leland Woods Trust, Gary Griffith, Marjorie Divine, Victor Divine, David Griffith, Nora Griffith, John V. Lilly, Edna B. Lilly, Earl Martin Kerns, Shirley F. Kerns, Phyllis Vincent, Don Buffington, Ralph Sterns, Rich Flink/Reams Golf and Country Club, Inc.; Leonard Baio; Gary Strong,

Contestants,

v.

Marta C. Carpenter; Flowers Bros. Inc.; Robert Flowers; Klamath Sprig and Honker Club, Inc.; Martin Scull; Karen Tucker; Sandral Tucker,

Claimants,

and

United States of America, Bureau of Reclamation; Geary Bros. Caledonia Ranch, a Co-Tenancy; Jeld-Wen, Inc.

3138<sup>9</sup>, 3176<sup>10</sup>, 3184<sup>11</sup>, 3191<sup>12</sup>,  
~~3197, 3208<sup>13</sup>, 3209<sup>14</sup>, 3210,~~  
~~3211, 3212, 3213, 3214<sup>15</sup>, 3215,~~  
3216, 3217, 3218, 3219, 3220,  
3221, 3222, 3227, 3232, 3237,  
3238, 3239, 3240<sup>16</sup>, 3282, 3283,  
3284, 3285, 3286, 3287, 3288,  
3301, 3306, 3310, 3311, 3312,  
3313<sup>17</sup>, 3377, 3378, 3400, 3407,  
~~3408, 3417, 3424, 3425, 3426,~~  
~~3427, 3428, 3429, 3624, 3625,~~  
3626, 3627, 3628, ~~3629<sup>18</sup>~~, 3630,  
3635, 3640<sup>19</sup>, 3826, 3827, 3828,  
3837, 3839, 3843, 3846, 3851,  
3858, 3859, ~~3860, 3861~~, 3862,  
3863, 3864, 3865, 3866, 3867,  
3868, 3869, 3870, 3871, 3872,  
3873, 3874, 3875, 3876, 3995,  
3998, ~~4167, 4168, 4169<sup>20</sup>,~~  
~~4179<sup>21</sup>~~, 4181, 4188, 4193, 4210,  
4211, ~~4212, 4213,~~ 4214, 4215,  
4216, 4217, 4218, 4219, 4220,  
4221, 4222, 4223, 4224, 4225,  
4230<sup>22</sup>, 4234, 4235, 4236, 4237,  
4951, and ~~4952~~

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District Improvement Co.; 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; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; and Collins Products, LLC voluntarily withdrew from Contests 3408, 3417, 3424, 3428 and 3629 on April 7, 2004. *See* Notice of Withdrawal of Contest Nos. 3408, 3417, 3424, 3428 and 3629.

<sup>19</sup> Don Vincent voluntarily withdrew from Contests 2048, 2050, 2051, 3400, 3407, 3408, 3417, 3424-3429, 3624-3630, 3635, and 3640 on November 28, 2000. *See* Notice Of Withdrawal Of Claimants. Berlva Pritchard voluntarily withdrew from Contests 3400, 3407, 3408, 3412, 3417, 3424-3429, 3624-3630, 3635, and 3640 on June 24, 2002. *See* Notice Of Withdrawal Of Claimant. Klamath Hills District Improvement Company voluntarily withdrew, without prejudice, from Contests 2048, 2050, 2051, 3400, 3407, 3408, 3417, 3424-3429, and 3624-3630 on January 16, 2004. *See* Voluntary Withdrawal Of Contest By Klamath Hills District Improvement Company.

<sup>20</sup> The Klamath Tribes withdrew from Contests 4167, 4168, and 4169 on August 14, 2006, after Consolidation of Cases 118, 119 and 120 was reversed by the Interim Order issued in this Case 003. *See* Klamath Tribes' Withdrawal of Contests dated August 14, 2006.

<sup>21</sup> The Klamath Tribes voluntarily withdrew, without prejudice, Contest 4179. *See* Klamath Tribes' Withdrawal of Contest dated September 28, 2006.

<sup>22</sup> The Klamath Tribes withdrew from Contests 4218, 4219, 4220, 4221, 4222, 4223, 4224, 4225, and 4230 on December 3, 2002. *See* 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.

(Running Y Ranch);  
Claimants/Contestants.

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~~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; Anita Nicholson; William S. Nicholson; John B. 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; Harlowe 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 Trust; 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; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District~~

**Case No. 274**

Claim Nos. 313, 314, 315 and 316

Contest Nos. ~~2872, 2873, 2874, 2875~~<sup>23</sup>, ~~3228, 3229, 3230, 3231~~<sup>24</sup>, 3302, 3303, 3304, 3305<sup>25</sup>, 3636, 3637, 3638, 3639<sup>26</sup>, 3996, 3997, ~~4226, 4227, 4228 and 4229~~<sup>27</sup>

<sup>23</sup> WaterWatch of Oregon, Inc.'s Contests 2872, 2873, 2874 and 2875 were dismissed. See Order Dismissing WaterWatch of Oregon, Inc.'s Contests, May 20, 2003.

<sup>24</sup> Medford and Rogue River Valley Irrigation Districts voluntarily withdrew from Contests 3228, 3229, 3230 and 3231 on March 3, 2003. Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3228, 3229, 3230 and 3231 on April 22, 2005.

<sup>25</sup> Dave Wood voluntarily withdrew from Contests 3302-3305 on October 26, 2004. Change of Title Interest for Contests 3302-3305 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3302-3305 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3302-3305 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3302-3305 from Walter Seput to Wayne James, Jr. (5/2/05). Change of Title Interest for Contests 3302-3305 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3302-3305 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3302-3305 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3302-3305 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3302-3305 on September 13, 2005. A Change of Ownership was filed on June 15, 2006, reflecting that William V. Hill is deceased and ownership of his rights transferred to Lillian M. Hill. Sevenmile Creek Ranch, LLC voluntarily withdrew from Contests 3302-3305 on March 1, 2007. Jane M. Barnes and Franklin Lockwood Barnes, Jr. voluntarily withdrew from Contests 3302-3305 on April 6, 2007.

<sup>26</sup> Don Vincent voluntarily withdrew from Contests 3636, 3637, 3638 and 3639 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3636, 3637, 3638 and 3639 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3636, 3637, 3638 and 3639 on January 16, 2004.

<sup>27</sup> The Klamath Tribes voluntarily withdrew from Contests 4226, 4227, 4228 and 4229 on February 13, 2003.

Improvement Company; Enterprise Irrigation District; ~~Klamath Hills District Improvement Company~~; 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.; Reames Gold and Country Club; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC,

Contestants,

vs.

United States Department of Interior, Fish and Wildlife Service,

**Claimant/Contestant.**

John M. Mosby; Marilyn Mosby; Boyd P. Braren; Boyd P. Braren Trust; 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; Nicholson; William S. Nicholson; John B. Owens; William L. Brewer; Mary Jane Danforth; ~~Jane M. Barnes~~; ~~Franklin Lockwood Barnes, Jr.~~;

**Case No. 275**

Claim Nos. 318, 319 and 320

Contest Nos. ~~2877, 2878, 2879~~<sup>28</sup>, ~~3233, 3234, 3235, 3236~~<sup>29</sup>, 3307, 3308, 3309<sup>30</sup>, 3641, 3642, 3643<sup>31</sup>, 3999, 4000, 4231, 4232, and 4233<sup>32</sup>

<sup>28</sup> WaterWatch of Oregon, Inc.'s Contests 2877, 2878, and 2879 were dismissed. See Order Dismissing Waterwatch of Oregon, Inc.'s Contests, May 20, 2003.

<sup>29</sup> Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew from Contests 3233, 3234, 3235, and 3236 on March 3, 2003. Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3233, 3234, 3235, and 3236 on April 22, 2005.

<sup>30</sup> Dave Wood voluntarily withdrew from Contests 3307-3309 on October 26, 2004. Change of Title Interest for Contests 3307-3309 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3307-3309 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3307-3309 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3307-3309 from Walter Seput to Wayne James, Jr. (5/2/05). Change of Title Interest for Contests 3307-3309 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3307-3309 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3307-3309 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3307-3309 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3307-3309 on September 13, 2005. Sevenmile Creek Ranch, LLC voluntarily withdrew from Contests 3307-3309 on March 1, 2007. Jane M. Barnes and Franklin Lockwood Barnes, Jr. voluntarily withdrew from Contests 33307-3309 on April 6, 2007.

<sup>31</sup> Don Vincent voluntarily withdrew from Contests 3641, 3642, and 3643 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3641, 3642, and 3643 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3641, 3642, and 3643 on January 16, 2004.

<sup>32</sup> The Klamath Tribes voluntarily withdrew Contests 4231, 4232, and 4233 on February 13, 2003.

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, Pierra A. Kern Trust, William V. Hill, Lillian M. Hill, Carolyn Obenchain; Lon Brooks; Newman Enterprise; ~~William C. Knudsen~~; 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; 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; Bradley S Luscombe; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Reames Golf and Country Club; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC,

Contestants,

vs.

United States Department of Interior, Fish and Wildlife Service,

Claimant/Contestant.

**STIPULATION IN  
IMPLEMENTATION OF THE  
KLAMATH BASIN  
RESTORATION AGREEMENT  
AND ORDER THEREON**

Claimants and Contestants, the United States on behalf of the Bureau of Reclamation (Reclamation) and Fish and Wildlife Service, and Klamath Irrigation District (KID), Tulelake Irrigation District (TID), Klamath Drainage District (KDD), Klamath Basin Improvement District (KBID), Ady District Improvement Company (ADIC), Enterprise Irrigation District (EID), Malin Irrigation District (MID), Midland District Improvement Company (MDIC), Pine Grove Irrigation District (PGID), Pioneer District Improvement Company (PDIC), Poe Valley Improvement District (PVID), Shasta View Irrigation District (SVID), Sunnyside Irrigation

District (SID), Don Johnston & Son (Johnston), Modoc Lumber Co. (Modoc), Bradley S. Luscombe (Luscombe), Randy Walthall and Inter-County Title Co. (Walthall and Inter-County Title), Reames Golf and Country Club (Reames), Winema Hunting Lodge, Inc. (Winema), and Van Brimmer Ditch Co. (VBDC) (collectively, the Claimants or Parties) hereby agree and stipulate as follows.

#### RECITALS

1. The United States on behalf of the Bureau of Reclamation and Fish and Wildlife Service has filed Claims 293-299, 312, 317, 313, 314, 315, 316, 318, 319, and 320.

2. KID, TID, KDD, KBID, ADIC, EID, MID, MDIC, PGID, PDIC, PVID, SVID, SID, Johnston, Modoc, Luscombe, Walthall and Inter-County Title, Reames, Winema, and VBDC are claimants under Claims 321-324, including the sub-claims 321-1 through 321-18, 322-1 through 322-3, 323-1 through 323-3, and 324. In addition, KDD holds Permit No. 43334.

3. The parties described in paragraphs 1 and 2 of the Recitals are known collectively as “Claimants.”

4. The claims described in Paragraphs 1 and 2 of the Recitals include among their points of diversion the following locations: A Canal, Station 48, Number 1 Drain Gate, Miller Hill Pumping Plant, KID Pumping Plants 1-10, North Canal (having point of rediversion and control at North Canal Control Structure), Ady Intake Channel (having point of rediversion and control at Ady Intake Control Structure for the Ady Canal System and Ady ##6 and 7 for the ADIC system), Ady District ##1-5, Johnston Intake Channel (having point of rediversion and control at Johnston Pumping Plant), Modoc Culvert, Pioneer Intake Channel (having point of rediversion and control at Pioneer Pumping Facility), and Reames Pumping Plant. Other points

of diversion associated with any claims identified in Paragraphs 1 and 2 of the Recitals are not affected by this Stipulation or the Order thereon.

5. The Claimants have entered into the Klamath Basin Restoration Agreement (KBRA). Pursuant to the KBRA, the Claimants identified in Paragraphs 1 and 2 of the Recitals have agreed to limit diversions from the points of diversion listed in Paragraph 4 of the Recitals as determined by the terms herein, to the amounts stated in Attachment A to this Stipulation and Order. The limitations as expressed were developed in a settlement context and for the purposes of settlement. This Stipulation, including Attachments A, B, and C attached hereto and incorporated by reference, substantively constitutes Appendix E-1 of the KBRA.

6. Section 15.1.2 of the KBRA, attached hereto as Attachment B, identifies and defines the “Refuge Allocation” and provides terms and conditions related to the Refuge Allocation and related to water deliveries for Tule Lake and Lower Klamath National Wildlife Refuges. The Refuge Allocation is provided in Section 15.1.2.E-H of Attachment B.

7. Deliveries of water diverted from the Settlement Points of Diversion to the area identified as the “On-Project Plan Area,” as defined in Section 1.7 of the KBRA will continue, subject to Attachment A and the On-Project Plan identified in Section 15.2 of the KBRA.

#### TERMS OF THE AGREEMENT

1. Definitions. The following terms have the following meanings for the purposes of this Stipulation and any Order thereon and for purposes of the KBRA:

a. “Settlement Points of Diversion” means: A Canal, Station 48, Number 1 Drain Gate, Miller Hill Pumping Plant, KID Pumping Plants 1-10, North Canal (having point of rediversion and control at North Canal Control Structure), Ady Intake Channel (having point of



rediversion and control at Ady Intake Control Structure for the Ady Canal System and Ady ##6 and 7 for the ADIC system), Ady District ##1-5, Johnston Intake Channel (having point of rediversion and control at Johnston Pumping Plant), Modoc Culvert, Pioneer Intake Channel (having point of rediversion and control at Pioneer Pumping Facility), and Reames Pumping Plant.

b. “DIVERSION” for the purposes of this Stipulation means the sum of the quantity of:

- (1) diversion at A Canal;
- (2) diversion for North Canal, measured at North Canal Control Structure;
- (3) diversion for Ady Canal system, measured at Ady Intake Control Structure;
- (4) combined diversion from KID Pumping Plants 1-10;
- (5) combined diversion for ADIC system, at ADIC ##1-7;
- (6) diversion for Johnston system, at Johnston Pumping Plant;
- (7) diversion for Pioneer system, at Pioneer Pumping Facility;
- (8) diversion at Modoc Culvert;
- (9) diversion at Reames Pumping Plant; and
- (10) Klamath Diversion via Lost River Diversion Channel.

Locations of Settlement Points of Diversion and points of control are as specified in Attachment C attached hereto.

c. “Klamath Diversion via Lost River Diversion Channel” means the result of the following: Station 48 Diversions plus Miller Hill Pumping Plant diversions, minus Miller Hill spill returns, minus releases from Wilson Dam to the Lost River Diversion Channel.

d. “Refuge Allocation” means the quantity of water identified in Attachment A and Section 15.1.2.E-H of Attachment B for water uses for the Lower Klamath National Wildlife Refuge other than Area K lands and for other uses described in Section 15.1.2.E of Attachment B. The Refuge Allocation shall be provided through water diverted under the DIVERSION identified in Attachment A or from sources used by or available to the Klamath Reclamation Project and delivered through Klamath Reclamation Project facilities as provided in Sections 15.1.2.E-H of Attachment B.

e. “Refuge Points of Delivery” shall be the points of measurement as provided in Section 15.1.2.E.iv. of Attachment B and means: Ady/South Canal at State Line, D Plant (minus use by private P-Canal water users), North Canal at State Line, and any location identified in Section 15.2.E.(iii)(5) of Attachment B; Sumps 1A and 1B when refilled after draining or lowering at the direction of the refuge manager; refuge-approved “walking wetlands,” as further described in Section 15.1.2.A(i) of Attachment B; and conveyance losses as described in Section 15.1.2.E(iv)(4).

f. “Station 48 Diversions” means combined diversions at Station 48 and Number 1 Drain Gate.

2. Limitation on DIVERSION. The DIVERSION as defined herein at the Settlement Points of Diversion under all claimed or permitted water rights identified in Paragraphs 1 and 2 of the Recitals shall not exceed the values in Attachment A.

In addition, diversion of water for the purpose of the Refuge Allocation is restricted to those points of diversion as claimed in Klamath Basin Adjudication Claims 293, 312, 317, 313, 314, 315, 316, 318, 319, and 320, 321, and 323.

The Claimants shall monitor the DIVERSION as defined herein at the Settlement Points of Diversion, during any period when diversions are occurring at the Settlement Points of Diversion, and report such quantities to the Oregon Water Resources Department (OWRD) in accordance with any valid Order of Determination or Decree upon which such diversions are based. Consistent with applicable law, the OWRD shall regulate the points of diversion or control based on DIVERSION as defined herein for the purpose of enforcing this Stipulation and any Order thereon, and otherwise on the basis of water rights of record.

3. For purposes of this Stipulation and any Order thereon, the diversion at each of the following facilities shall be presumed to equal the following amounts during the period March – October unless it is demonstrated to the OWRD that a lesser amount is diverted during such period:

| <u>Facility</u>                  | <u>Presumed diversion Mar – Oct (AF)</u> |
|----------------------------------|--|
| KID Pumping Plants 1-10 Combined | 2600                                     |
| Ady ##1-7 Combined               | 2031                                     |
| Johnston Pumping Plant           | 678                                      |
| Pioneer Pumping Facility         | 1495                                     |
| Modoc Culvert                    | 217                                      |
| Reames Pumping Plant             | 417                                      |

4. If new monitoring devices are installed at any of the Settlement Points of Diversion that currently have monitoring devices, a correlation will be developed between the historical measurement and the newer measurement device. The Claimants agree that the methodology used to develop this correlation will follow USGS protocol for surface water data

collection. The quantities in Attachment A will thereafter be adjusted, up or down, such that use of the new device does not change the actual volume of water that can be diverted.

5. This Stipulation, and any Order thereon, shall not be construed as an admission or determination on any issue of fact or law, including, without limitation, the legal characterization of water as to source; *provided*, that for purposes of the KBRA, water diverted at Station 48 Diversions or Miller Hill Pumping Plant not within the definition of Klamath Diversion via Lost River Diversion Channel shall not be considered water of Upper Klamath Lake or the Klamath River, and diversion of any such water is not limited by the terms of this Stipulation or any Order thereon. Nor shall the Stipulation or any Order thereon limit diversion or use from any location or source not identified herein.

6. By this Stipulation, the Claimants do not intend to abandon any water right or portion thereof.

7. The applicable DIVERSION in Attachment A reflects the Refuge Allocation as provided in the KBRA and Attachment B. DIVERSION quantities in Attachment A will provide the applicable Refuge Allocation, measured at the Refuge Points of Delivery, as provided in Section 15.1.2 of Attachment B, subject to and consistent with the provisions in Sections 15.1.2.E-H, including but not limited to the first paragraph of section 15.1.2.E, and Sections 15.1.2.D, 15.1.2.E(ii), and 15.1.2.F, of Attachment B. Consistent with Section 15.1.2, nothing in this Stipulation or any Order thereon precludes the use of any water diverted within the total applicable DIVERSION quantity in Attachment A for any authorized Klamath Reclamation Project purpose, so long as the total quantity of water equal to the applicable Refuge Allocation is delivered to the Refuge Points of Delivery, consistent with Sections 15.1.2.G(v) and (vi) and H(i) and (ii) of Attachment B. Enforcement by OWRD of the water rights related to the

DIVERSION including the water rights related to the Refuge Allocation shall be consistent with applicable law

8. By entering and filing of this Stipulation, the Claimants identified in the Recitals are not foregoing any rights to seek changes, consistent with applicable law, in such water rights as exist under the claimed or permitted water rights described in paragraphs 1 and 2 of the Recitals,, including modification or relocation of the points of diversion or change in place of use, so long as the change does not result in an increase in the quantity of water diverted from Upper Klamath Lake and the Klamath River under such permitted or claimed rights as limited by Attachment A; any Order on this Stipulation will be construed to be consistent with this condition.

9. Each signatory to this Stipulation represents that he or she is authorized to execute this Stipulation and to legally bind the Claimant he or she represents.

[CASE 3 SIGNATURE BLOCKS]

**RONALD R. TENPAS**  
**Assistant Attorney General**

**DATE:** \_\_\_\_\_

**By** \_\_\_\_\_  
**STEPHEN R. PALMER**  
**Special Attorney, U.S. Department of Justice**  
**Office of the Regional Solicitor**  
**U.S. Department of the Interior**  
**2800 Cottage Way, Room E-1712**  
**Sacramento, California 95825**  
**Telephone: (916) 978-5683**  
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DATE: \_\_\_\_\_

By \_\_\_\_\_

**BARBARA SCOTT-BRIER**  
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500 N.E. Multnomah Street, Suite 607  
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By \_\_\_\_\_

**BRUCE D. BERNARD**  
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**ATTORNEYS FOR THE UNITED STATES OF  
AMERICA**

**SOMACH, SIMMONS & DUNN  
A Professional Corporation**

**DATE:** \_\_\_\_\_

**By** \_\_\_\_\_

**Paul S. Simmons, OSB 97138  
Daniel Kelly (*Pro Hac Vice*; Cal. Bar No. 215051)  
Attorneys for Tulelake Irrigation District**

**DATE:** \_\_\_\_\_

**By** \_\_\_\_\_

**William M. Ganong, OSB 78213  
Attorney for Klamath Irrigation District,  
Malin Irrigation District, Reames Golf and  
Country Club, and Modoc Lumber Company**

**DATE:** \_\_\_\_\_

**By** \_\_\_\_\_

**Justin E. Throne, OSB 02003  
Attorney for Ady District Improvement  
Company, Klamath Drainage District,  
Klamath Basin Improvement District,  
Midland District Improvement Company,  
Poe Valley Improvement District, Sunnyside  
Irrigation District, Enterprise Irrigation  
District, and Pine Grove Irrigation District**

**DATE:** \_\_\_\_\_

**By** \_\_\_\_\_

**B.J. Matzen, OSB 70091  
Attorney for Pioneer District Improvement  
Company, Don Johnston & Son, Winema  
Hunting Lodge, Inc., Bradley S. Luscombe,  
Randy Walthall, and Inter-County Title  
Company**

**RATLIFF & RATLIFF, P.C.**

**DATE:** \_\_\_\_\_

**By** \_\_\_\_\_  
**Nathan Ratliff, OSB 03426**  
**Attorneys for Van Brimmer Ditch Co.**

**DATE:** \_\_\_\_\_

**By** \_\_\_\_\_  
**Claude Hagerty**  
**President, Shasta View Irrigation District**



[CASE 274 SIGNATURE BLOCKS ]

**RONALD R. TENPAS**  
Assistant Attorney General

DATE: \_\_\_\_\_

By \_\_\_\_\_  
**BRUCE D. BERNARD**  
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DATE: \_\_\_\_\_

By \_\_\_\_\_  
**BARBARA SCOTT-BRIER**  
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**ATTORNEYS FOR THE UNITED STATES OF  
AMERICA, ON BEHALF OF THE FISH AND  
WILDLIFE SERVICE**

**SOMACH, SIMMONS & DUNN**  
A Professional Corporation

DATE: \_\_\_\_\_

By \_\_\_\_\_  
**Paul S. Simmons, OSB 97138**  
**Daniel Kelly (*Pro Hac Vice*; Cal. Bar No. 215051)**  
Attorneys for Tulelake Irrigation District

DATE: \_\_\_\_\_

By \_\_\_\_\_

**William M. Ganong, OSB 78213  
Attorney for Klamath Irrigation District,  
Malin Irrigation District, Reames Golf and  
Country Club, and Modoc Lumber Company**

DATE: \_\_\_\_\_

By \_\_\_\_\_

**Justin E. Throne, OSB 02003  
Attorney for Ady District Improvement  
Company, Klamath Drainage District,  
Klamath Basin Improvement District,  
Midland District Improvement Company,  
Poe Valley Improvement District, Sunnyside  
Irrigation District, Enterprise Irrigation  
District, and Pine Grove Irrigation District**

DATE: \_\_\_\_\_

By \_\_\_\_\_

**B.J. Matzen, OSB 70091  
Attorney for Pioneer District Improvement  
Company, Don Johnston & Son, Winema  
Hunting Lodge, Inc., Bradley S. Luscombe,  
Randy Walthall, and Inter-County Title  
Company**

**RATLIFF & RATLIFF, P.C.**

DATE: \_\_\_\_\_

By \_\_\_\_\_

**Nathan Ratliff, OSB 03426  
Attorneys for Van Brimmer Ditch Co.**

DATE: \_\_\_\_\_

By \_\_\_\_\_

**Claude Hagerty  
President, Shasta View Irrigation District**

[CASE 275 SIGNATURE BLOCKS ]

**RONALD R. TENPAS**  
Acting Assistant Attorney General

DATE: \_\_\_\_\_

By \_\_\_\_\_  
**BRUCE D. BERNARD**  
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By \_\_\_\_\_  
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**ATTORNEYS FOR THE UNITED STATES OF  
AMERICA, ON BEHALF OF THE FISH AND  
WILDLIFE SERVICE**

**SOMACH, SIMMONS & DUNN**  
A Professional Corporation

DATE: \_\_\_\_\_

By \_\_\_\_\_  
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By \_\_\_\_\_  
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**Attorneys for Van Brimmer Ditch Co.**

DATE: \_\_\_\_\_

By \_\_\_\_\_  
**Claude Hagerty**  
**President, Shasta View Irrigation District**

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

## ATTACHMENT A

As used herein, “Forecast” means the March 1 Natural Resources Conservation Service 50 percent exceedance forecast for net inflow to Upper Klamath Lake during the period April 1 – September 30. The limitations identified in this Attachment apply to the claimed or permitted rights identified in paragraphs 1 and 2 of the Recitals of the Stipulation in Implementation of the Klamath Basin Restoration Agreement and Order Thereon (Stipulation of the Claimants).

### PHASE 1

The following limitations on DIVERSION, as defined in the Stipulation of the Claimants, shall be applicable immediately upon issuance of Order on Stipulation in Implementation of the Klamath River Basin Restoration Agreement and until the commencement of Phase 2. The Refuge Allocation as identified in section 15.1.2.E-H of Attachment B, which is within each applicable DIVERSION quantity, is reflected below, and is to be subject to and consistent with section 15.1.2.E-H of Attachment B.

A. During the Period March – October:

1. If the Forecast is 287,000 acre-feet or less: 378,000 acre-feet, including Refuge Allocation of 48,000 acre-feet.
2. If the Forecast is more than 287,000 acre-feet but less than 569,000 acre-feet, the quantity in thousands of acre-feet resulting from application of the following equation:  $378 + \{42.64 \times [(Forecast - 287) \div 282]\}$ , including Refuge Allocation that results from application of the following equation:  $48 + (7.64 \times [(Forecast - 287) \div 282])$ .
3. If the Forecast is 569,000 acre-feet or more: 445,000 acre-feet, including Refuge Allocation of 60,000 acre-feet.

B. During the Period November – February: 80,000 acre-feet, including Refuge Allocation of 35,000 acre-feet, *provided*, that if the OWRD receives notice from the Klamath Basin Coordinating Council that additional diversion is acceptable, the quantity may increase as specified in such notice as long as within the water rights.

## **PHASE 2**

The following limitations on DIVERSION, as defined in the Stipulation of the Claimants, shall become applicable when the OWRD receives appropriate notice from the Klamath Basin Coordinating Council. The Refuge Allocation as identified in section 15.1.2.E-H of Attachment B, which is within each applicable DIVERSION quantity, is reflected below, and is to be subject to and consistent with Section 15.1.2.E-H of Attachment B.

A. During the Period March – October:

1. If the Forecast is 287,000 acre-feet or less, 388,000 acre-feet, including Refuge Allocation of 48,000 acre-feet.

2. If the Forecast is more than 287,000 acre-feet but less than 569,000 acre-feet, the quantity in thousands of acre-feet resulting from application of the following equation:  $388 + \{42.64 \times [(Forecast - 287) \div 282]\}$ , including Refuge Allocation that results from application of the following equation:  $48 + (7.64 \times [(Forecast - 287) \div 282])$ .

3. If the Forecast is 569,000 acre-feet or more, 445,000 acre-feet, including Refuge Allocation of 60,000 acre-feet.

B. During the Period November – February: 80,000 acre-feet, including Refuge Allocation of 35,000 acre-feet, *provided*, that if the OWRD receives notice from the Klamath Basin Coordinating Council that additional diversion is acceptable, the quantity may increase as specified in such notice as long as within the water rights.

## **ATTACHMENT B**

### **15.1.2 Water Diversions for Tule Lake and Lower Klamath National Wildlife Refuges**

#### **A. Recitals**

##### **i. National Wildlife Refuges Generally**

The lands within the LKNWR and TLNWR are owned by the United States and managed by FWS. These Refuges receive water through facilities of the Klamath Reclamation Project, administered by Reclamation. Klamath Reclamation Project and other facilities are used to deliver water to LKNWR's and TLNWR's wetlands (including seasonal wetlands, permanent vegetation, and open water areas), sumps, cooperative farming lands, and lease lands, and to walking wetlands within the Klamath Reclamation Project. For purposes of this Agreement, walking wetlands includes a Refuge-approved program that incorporates managed wetlands into agricultural crop rotations on the Refuge as well as on private lands in the Klamath Reclamation Project. Such wetlands support the diversity of waterbird species endemic to the Upper Klamath Basin. Walking wetlands returned to agricultural production enhance agricultural crop yields and reduce chemical inputs by enhancing soil fertility and reducing soil pests and diseases to crops.

##### **ii. TID Operations and the Refuges**

Pursuant to contract with the United States (Contract No.14-06-200-5954 between TID and the United States), TID operates various Klamath Reclamation Project facilities owned by the United States, including D Plant. Operation of D Plant results in deliveries of water to the P Canal system and to LKNWR wetlands and cooperative farming lands. TID also operates Klamath Reclamation Project control infrastructure to maintain water surface elevations in Sumps 1A and 1B in TLNWR pursuant to Section 6 of the Kuchel Act (Public Law 88-567), Section 7(b) of Contract No. 14-06-200-5954, and other applicable laws, rules, regulations, and requirements, and to provide water for TLNWR lease lands, cooperative farming lands, and walking wetlands.



### **iii. KDD Operations and LKNWR**

KDD owns and operates certain facilities, including Ady Canal and North Canal. KDD provides delivery of water to LKNWR's wetlands, cooperative farming lands, and lease lands (known as Area K) pursuant to contract with the United States Contract No. Ilr-402, as amended and supplemented. As used in this Section 15.1.2, and solely for the convenience of reference, Klamath Reclamation Project facilities include facilities owned by and operated by KDD.

### **iv. Delivery of Water to Wildlife Refuges**

This Agreement provides for a specific allocation of water for the Refuges, described in Section 15.1.2.15.1.2.E (Refuge Allocation), and certain related commitments. Otherwise, nothing in this Agreement modifies any current obligations of KDD with respect to delivery of water to LKNWR or TID with respect to TLNWR, but, rather, removes any ambiguity or resolves any differences of position as to certain delivery of water for Refuge purposes to LKNWR wetlands, TLNWR sumps, and walking wetlands under a Refuge-approved program. TID will continue to operate Klamath Reclamation Project water control infrastructure to maintain water surface elevations in Sumps 1A and 1B in accordance with Section 6 of the Kuchel Act, Article 7(b) of Contract No. 14-06-200-5964, applicable rules and regulations, and other applicable requirements (e.g., the Endangered Species Act), and terms herein.

## **B. Purpose and Scope**

The purpose of this Section 15.1.2 is to describe the delivery of water to the LKNWR and TLNWR and to ensure reliable water deliveries for the exercise of the Refuges' water rights. Water deliveries for the exercise of the Wildlife Refuges' water rights and the Refuge Allocation described in this Section 15.1.2.E shall be made available from the Klamath Reclamation Project's DIVERSION, as provided in Appendix E-1 and Attachment A thereto, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities.

### **i. TLNWR**

With respect to TLNWR, the terms in this Section 15.1.2 ensure continued delivery of water to the approximately 13,000 acres of wetlands and open water on TLNWR, TLNWR's

cooperative farming lands, agricultural lease lands, and walking wetlands, subject to existing laws and applicable contracts. TLNWR will receive water from the Klamath Reclamation Project's DIVERSION, identified in Appendix E-1 to this Agreement, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities, and not from the Refuge Allocation, except as provided in Section 15.1.2.E.iii.b for refilling of the sumps after intentional draining by the Refuges, and Section 15.1.2.E.iii.a related to Refuge-approved walking wetlands.

**ii. LKNWR**

With respect to LKNWR, the terms in this Section 15.1.2 provide a specific allocation of water for LKNWR wetlands and cooperative farming lands and other uses identified in Section 15.1.2.E.iii. The Refuge Allocation ranges from 48,000 to 60,000 acre-feet of water in the summer period and 35,000 acre-feet in the winter period. In addition, the LKNWR lease lands will receive water from the Klamath Reclamation Project's DIVERSION, as provided in Appendix E-1, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities, and not from the Refuge Allocation.

**C. Date Section 15.1.2 Becomes Effective and Support for Agreement Terms**

The date that this Section 15.1.2 shall become effective shall be the date that Appendix E-1 becomes effective. Each of KPWU consents to this Section 15.1.2 and hereby releases the United States, TID, and KDD from all claims, damages, or losses resulting from performance under this section and under any new or amended contracts consistent with this Section 15.1.2.

**D. Klamath Reclamation Project Diversions**

Water for the LKNWR and TLNWR will be provided as part of the DIVERSION identified in Appendix E-1 as necessary to meet the commitments herein, but may be provided from other sources used in the Klamath Reclamation Project and delivered through Klamath Reclamation Project facilities. The water delivery commitments herein do not preclude the use of water for another purpose prior to the delivery to Wildlife Refuge lands and/or the Refuge Allocation described in Section 15.1.2.E (e.g., delivery of return flows) so long as the delivery obligations and specific quantities are maintained.

**i. Water for TLNWR and LKNWR Lease Lands**

Water for LKNWR's lease lands and for TLNWR's lease lands, cooperative farming lands, and maintenance of the sumps, except for draining and refill of the sumps by the Refuges as provided in Section 15.1.2.E.iii.b, shall be provided from the DIVERSION, identified in Appendix E-1, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities, without any effect on the Refuge Allocation identified in Section 15.1.2.E.i. Also, delivery of water to LKNWR's (Area K) lease lands and to TLNWR shall be under applicable contracts and the On-Project Plan described in Section 15.2, *provided* that the portion of the On-Project Plan applicable to such Wildlife Refuge lands will be developed with and approved by the Refuge Manager, and the On-Project Plan as it relates to Refuge lands shall treat such Refuge lands equitably. Further, the portion of the On-Project Plan applicable to such National Wildlife Refuge lands shall be implemented and administered with the Refuge Manager and in a manner not inconsistent with the adopted On-Project Plan.

**ii. Refuge Water Allocations**

Water for the LKNWR wetlands, cooperative farming lands, and the uses in Section 15.1.2.E.iii (constituting the Refuge Allocation) shall be as provided below in Section 15.1.2.E.

**iii. Measurement Points**

DIVERSION under Appendix E-1 shall be measured at the points of diversion or control, as described in Appendix E-1. The points of measurement for the Refuge Allocation shall be the points of delivery as described at Section 15.1.2.E.iv.

**iv. Conveyance Losses**

Conveyance losses associated with delivery of water for the Refuge Allocation will not be charged to the Refuge Allocation, except as provided in Section 15.1.2.E.iii.c and 15.1.2.E.iii.d.

**E. Refuge Allocation**

The Refuge Allocation shall be comprised of water for the following: LKNWR wetlands; LKNWR cooperative farming lands; refilling of TLNWR sumps after intentional draining by the Refuges (as identified in Section 15.1.2.E.iii.b); Refuge-approved walking wetlands (as

identified in Section 15.1.2.E.iii.a); conveyance losses, if any, resulting from bypassing water at Anderson-Rose Dam solely for LKNWR wetlands, (as identified in Section 15.1.2.E.iii.c); and conveyance losses for any delivery to LKNWR via North Canal (as identified in Section 15.1.2.E.iii.d). The Refuge Allocation shall: be provided through water diverted under the DIVERSION, identified in Appendix E-1, or from other sources used in the Klamath Reclamation Project in the OPPA and delivered through Klamath Reclamation Project facilities, and shall be based on two periods: November through February (winter period Refuge Allocation) and March through October (summer period Refuge Allocation).

**i. Summer Period**

Except as provided in Section 15.1.2.F.i (Shortages), the summer period Refuge Allocation (March 1 through October 31) shall be based on the Forecast used for DIVERSIONS, described in Appendix E-1 (i.e., the March 1 Natural Resource Conservation Service 50 percent exceedance forecast for net inflow to Upper Klamath Lake for April - September) and shall consist of the following:

- a. When the Forecast is 287,000 or less, 48,000 acre-feet;
- b. When the Forecast is more than 287,000 acre-feet but less than 569,000 acre-feet, the quantity in thousands of acre-feet resulting from the following equation:  $48 + (7.64 \times [(Forecast - 287) \div 282])$ ; and
- c. When the Forecast is 569,000 acre-feet or more, 60,000 acre-feet.

**ii. Winter Period**

Subject to Section 15.1.2.F.ii, the winter period Refuge Allocation (November 1 through February 28 or February 29 in leap years) shall be 35,000 acre-feet, except, when additional water is available under Applicable Law and this Agreement, the November through February allocation may be increased up to 60,000 acre-feet, subject to any agreement for delivery of water, as needed. Any such additional amount (i.e. winter allocation above 35,000 acre-feet) shall be charged against the summer period Refuge Allocation, except if such additional water is made available upon recommendation of the KBCC to provide for augmentation of the Refuge Summer Allocation pursuant to Section 18.3.2.B.v, but not including the 10,000 acre-feet identified in Section 15.1.1.

### **iii. Other Refuge Uses**

The Refuge Allocation described above in Paragraphs (i) and (ii) applies to LKNWR wetlands and cooperative farming lands and the following uses, and delivery to the LKNWR Delivery Points described in Section 15.1.2.E.iv.a will be adjusted downward based on the following:

- a. One acre-foot per acre for each acre of walking wetlands where any such practice is part of a Klamath Basin Refuge-approved program or agreement in the following areas: TLNWR's lease lands and cooperative farming lands; LKNWR's Area K lease lands; and lands within the Klamath Reclamation Project outside of TLNWR and LKNWR, subject to any necessary approvals to such use of the Refuges' water rights;
- b. If Sump 1A or Sump 1B has been drained or lowered intentionally at the request or direction of the manager of the Klamath Basin Refuges Complex (Refuge Manager), by the quantity used to refill either such sump;
- c. If it is reasonably necessary to bypass water at Anderson-Rose Dam solely to meet delivery requirements for the LKNWR wetlands, or cooperative farming lands, by conveyance losses as agreed upon by the Refuge Manager and KPWU. The Refuge Manager and KPWU will agree on the amount of such conveyance losses within 18 months of the Effective Date.
- d. If the Refuge Manager and KDD agree to any delivery to LKNWR by diversion through North Canal, by conveyance losses as agreed upon by the Refuge and KPWU.
- e. If additional Klamath Reclamation Project surface water that is conveyed through Project facilities becomes available for LKNWR through a controlled means other than the LKNWR Delivery Points identified below in Section 15.1.2.E.iv.a, and is delivered to the LKNWR, by that amount.

### **iv. Points of Measurement for Refuge Allocation**

The points of measurement for the Refuge Allocation shall be as follows:

- a. For water comprising and charged to the Refuge Allocation for LKNWR wetlands, open water, and cooperative farming lands, the delivery points and measurement points shall include: Ady/South Canal at State Line; D Plant (minus use by private P-Canal water users); North Canal at State Line; and any location identified in Section 15.1.2.E.iii.e (collectively, “LKNWR Delivery Points”).
- b. For refill of Sumps 1A Sump 1B, if drained or lowered intentionally at the request or direction of the Refuge Manager, as provided in Section 15.1.2.E.iii.b, the measurement points shall be the points of delivery.
- c. For Refuge-approved walking wetlands the measurement shall be as provided above in Section 15.1.2.E.iii.a.
- d. For conveyance losses if any for deliveries with respect to Section 15.1.2.E.iii.c (bypass at Anderson Rose Dam as agreed upon in Section 15.1.2.E.iii.c); and with respect to Section 15.1.2.E.iii.d (extension of North Canal, as agreed upon in Section 15.1.2.E.iii.d).

**F. Shortages**

**i. Summer Period Shortages**

In any year that the applicable DIVERSION quantity for the summer period (March 1 through October 31) identified in Appendix E-1 is not available for diversion at the Settlement Points of Diversion for the Klamath Reclamation Project, the difference between the applicable DIVERSION quantity and the amount available for diversion at the Settlement Points of Diversion by the Klamath Reclamation Project (the deficit) shall be addressed as follows:

- a. For up to the first 10,000 acre-feet of deficit in the summer period DIVERSION during Phase 1, identified in Appendix E-1, and for up to 20,000 acre-feet of deficit during Phase 2, identified in Appendix E-1, there shall be no effect on delivery of the summer period Refuge Allocation (at the LKNWR Delivery Points described in Section 15.1.2.E.iv) if forbearance agreements have been entered for the summer (March – October) period covering non-Refuge lands in the Klamath Reclamation Project sufficiently to reduce

water demand by an amount equivalent to such deficit. Such forbearance agreements would be in addition to those existing and being exercised in the year under the On-Project Plan and may occur under Section 19.2.2.B.iii.a or otherwise. Drought relief funds under Section 19.2.2.A.viii shall be made available for this purpose; additionally, any other funds available to the Refuge may be used by it for this purpose. KWAPA will assist the Refuge in addressing any such agreements.

- b.** After the application of step a, above, or to the extent that step a is not implemented, delivery for the summer period Refuge Allocation will be temporarily reduced at the LKNWR Delivery Points as necessary to cover the remaining deficit to the summer period Klamath Reclamation Project DIVERSION until delivery under the summer period Refuge Allocation to all uses described above at Section 15.1.2.D.ii, 15.1.2.E and 15.1.2.E.iii has been reduced to 24,000 acre-feet.
- c.** After application of step b, above, if said summer period DIVERSION continues to have a deficit, the Refuge Allocation and delivery to the OPPA will proportionately share any additional deficits to the summer period DIVERSION. For example, if the remaining deficit is five percent of the applicable summer period DIVERSION, delivery to the Refuge Allocation calculated above in step b will be reduced by five percent and delivery to the OPPA from the Settlement Points of Diversion will also be reduced by five per cent.

## **ii. Winter Period Shortage**

In any year that the applicable DIVERSION quantity for the winter period (November - February), identified in Appendix E-1, is not available for diversion by the Klamath Reclamation Project, shortage will be shared based on a plan to share shortages agreed upon by the Refuge Manager and KPWU. The plan will be completed within one year of the Effective Date.

**G. Delivery Facilities**

**i. TID Water Deliveries**

The delivering entity, TID, its assigns, or Reclamation, shall provide or continue to provide water deliveries to the Wildlife Refuges as follows:

- a.** Delivery of water, through D Pumping Plant, to LKNWR wetlands and cooperative farming lands, including delivery of at least 9,000 acre-feet of water through D Pumping Plant to LKNWR wetlands or cooperative farming lands during the period September through October, subject to any agreed variation by TID, or its assigns, and the Refuge Manager, and such amount in April through August as determined by the Refuge Manager in consultation with TID and Reclamation and subject to reasonable operational terms;
- b.** Operation of Klamath Reclamation Project water control infrastructure to maintain water surface elevations in TLNWR's Sumps 1A and 1B per Section 6 of the Kuchel Act, section 7(b) of the TID contract, other applicable laws, rules, regulations, and any other applicable requirements (e.g., Endangered Species Act);
- c.** Delivery of water to TLNWR lease lands pursuant to applicable contract(s), subject to Sections 15.1.2.G.i.d and 15.1.2.D.i; and
- d.** Any additional specific obligations for delivery as agreed upon by TID, or its assigns, and the Refuge Manager.

**ii. KDD Water Deliveries**

The delivering entity, KDD or its assigns, shall continue to provide delivery of water to LKNWR as follows:

- a.** Delivery of water diverted at Ady Channel and Ady Canal headgates through the South Canal to the LKNWR wetlands and cooperative farming lands, as provided in Contract No. Ilr-402 between KDD and the United States, as amended and supplemented, with the point of measurement of deliveries being State Line; and



- b. Delivery of water to LKNWR's Area K lease, in accordance with the terms of Contract No. Ilr-402, as amended and supplemented, and the agreement of May 29, 1980 between KDD and the United States, as amended and supplemented, subject to Section 15.1.2.D.i.

**iii. North Canal Water Deliveries**

If agreed upon by KDD and the United States, KDD will provide for delivery of water diverted at North Canal, with the point of delivery and measurement being at State Line.

**iv. On-Project Plan and Refuge Lease Lands**

Water deliveries to LKNWR's Area K lease lands and TLNWR's lease lands may be limited pursuant to the On-Project Plan described at Section 15.2.

**v. Plan for General Parameters of Delivery of Refuge Allocation**

Not later than one year after the Effective Date, the Refuge Manager, Reclamation, TID, and KDD will agree to the general parameters of delivery of the Refuge Allocation.

**vi. Schedule for Deliveries of Refuge Allocation**

The Refuge Manager shall prepare, as needed, a schedule(s) of deliveries to LKNWR other than Area K, subject to concurrence by Reclamation, TID, and KDD or their assigns in light of operational needs or limitations. Such schedule will be flexible and may be adjusted by agreement of said entities according to climate or other conditions and Refuge needs, so long as consistent with the applicable Refuge Allocation and reasonably achievable through the operation of relevant works.

**vii. North Canal as Point of Diversion**

Subject to Section 15.1.2.G.iii, KPWU shall not oppose any action by the Refuge to establish North Canal as a point of diversion for any water rights associated with the LKNWR lands outside of the Refuge's Area K lease lands.

## **H. Other**

### **i. Pass-Through of Excess Water**

Water that becomes physically available at the LKNWR Delivery Points due to the operation of Klamath Reclamation Project works but that is in excess of the applicable Refuge Allocation shall be conveyed to the Klamath River, provided, that any such water in excess of an applicable delivery schedule that becomes available through the operation of Project works and is in fact used on the LKNWR lands outside of Area K lease lands shall be charged against the Refuge Allocation.

### **ii. Determination of Passed-Through Excess Water**

Such water that is available at P Canal through operation of D Pumping Plant that is passed through the LKNWR to the Klamath River will not be charged against the Refuge Allocation. The Refuge Manager and KPWU shall, within one year of the Effective Date, develop an agreed-upon system to determine whether water was passed through the LKNWR lands outside of Area K lease lands.

### **iii. LKNWR Acquisition of Lands**

If additional Klamath Reclamation Project lands are acquired by and included in LKNWR, the water rights or delivery rights, if any, associated with those lands at the time prior to acquisition will remain with those lands after acquisition and where there are associated Klamath Reclamation Project delivery rights, they will be incorporated and added into the Refuge Allocation.

## **I. Contracts**

TID, Reclamation, and FWS agree that the only costs to be charged to FWS by TID associated with the operation and maintenance of D Pumping Plant for LKNWR shall be those identified in Section 15.4.2, and no further charges or reimbursement to TID shall occur for delivery to LKNWR, whatever the amount and scheduling of said delivery shall be. This limitation shall not, however, preclude an agreement to additional terms related to any wheeling of groundwater.

## **J. Interim Agreement**

Although the terms of this Section 15.1.2 are not effective until Appendix E-1 is effective, as provided in Section 15.1.2.C, KPWU

and the FWS recognize that both agriculture in the Klamath Reclamation Project and the lands within the Wildlife Refuges need water to continue their operations. KPWU and FWS recognize that it is in their best interests and agree to continue to work together cooperatively to manage water for the benefit of agriculture and the Wildlife Refuges, under legal authorities and obligations existing prior to enactment of Authorizing Legislation or the effectiveness of Section 15.1.2. KPWU and FWS will seek to resolve outstanding issues related to water rights for the Refuges, with an emphasis on the federal reserved rights claims, prior to the commencement of proceedings under ORS 539.150(1) in the KBA, and will consider approaches similar to Section 15.3.2.B. In addition, prior to the effectiveness of this Section 15.1.2, certain actions will be completed that will become effective upon the effectiveness of Section 15.1.2, including the following: the Refuge Manager and KPWU will develop a plan consistent with Section 15.1.2.F.ii and a system consistent with 15.1.2.H.ii; and the Refuge Manager, Reclamation, TID, and KDD will agree to a plan consistent with Section 15.1.2.G.v.

**K. Term and Effect of Section 15.1.2**

Notwithstanding Section 1.6, this Section 15.1.2 shall remain in effect until modified by agreement of the FWS and KPWU.

**Appendix E-2**  
**Groundwater Investigation Scope of Work**  
**Prepared by the United States Geological Survey (USGS)**

**Predicting and Monitoring the Effects of Groundwater Use**  
**in the Upper Klamath Basin**

**Utilization of US Geological Survey monitoring, science, and models as part of the Klamath**  
**River Basin Restoration Agreement**

**I.**

**Introduction**

Groundwater pumping is an element of the Klamath River Basin Restoration Agreement. It is important, therefore, that all parties to the agreement have a clear understanding of the short and long term hydrologic effects of groundwater use, and that there be a consensus as to the methods that will be used to predict and monitor those effects. This document briefly describes the hydrologic effects of groundwater use, methods for determining those effects, and ways in which the methodologies being developed by the USGS can be best utilized as part of the Restoration Agreement.

**II.**

**Effects of Groundwater Use**

Groundwater removed from aquifers comes from a combination of reduced subsurface storage and changes in flows at aquifer boundaries. Aquifer boundaries are those places where water enters or leaves aquifer systems such as streams and springs, wetlands, and adjoining basins. The proportions of water coming from storage and boundaries change with time as pumping progresses, with water coming primarily from storage at the onset of pumping, and then coming more from changes in flows at boundaries as pumping continues and the hydrologic system approaches a new equilibrium. The change in subsurface storage is manifest as a decline in the water level elevations in aquifers (drawdown). The water-level elevations stabilize when the decline has spread sufficiently to alter the flows at the aquifer boundaries. Changes in flows at aquifer boundaries may include, among other things, changes in groundwater flow to or from streams, to or from adjoining basins, and changes in discharge to springs, wetlands, and subirrigation. If the boundary flows are insufficient to supply the pumping, then the water table will continue to decline.

The groundwater flow system in the upper Klamath Basin, including the water table elevation and the major hydrologic boundaries, is described by Gannett and others (2007). Considerable data exist that can be used to characterize the response of the flow system (including boundary flows) to external stresses including climate variations (drought cycles) and pumping. These data provide insight into how the groundwater system is likely to respond to increased pumping.

When considering groundwater use as part of an overall water-management strategy in the upper Klamath Basin, it should be understood that consumptive use of groundwater will have some effect on groundwater discharge to streams, and, as a consequence, streamflow. The conservation of mass, a basic law of physics, requires that pumping water from an aquifer must result in a change in subsurface storage (a decline in the water table) and/or a change in the amount of water entering or leaving at aquifer boundaries. Water level data indicate that, for the most part, groundwater levels have been historically stable in the upper Klamath Basin, mostly fluctuating in response to climate. The generally-stable water levels suggest that much of the groundwater pumped and consumptively used is being made up for by changes in flow into or out of aquifers. The conditions under which groundwater pumping can induce additional water to flow into an aquifer from a source other than a stream are rare. Groundwater pumping most commonly results in a decrease in flow out of the aquifer, which is generally to springs and streams. Some of the groundwater pumped may ultimately come from boundaries other than streams such as boundaries with adjacent basins, or, in areas of shallow groundwater, reduced discharge to phreatophytes (plants with roots extending to the water table) or drains. The proportion of groundwater pumped that ultimately comes from streamflow and the timing and location of the impacts vary depending on the location of pumping and proximity to the stream and other aquifer boundaries. The timing of the impacts to streams (and other boundaries) may be quite different than the timing of the actual groundwater pumping. Developing a water management strategy in the upper Klamath Basin, therefore, requires a method to predict, evaluate, and monitor the rate, distribution, and timing of the short and long term response of streams to groundwater use.

### **III.** **Methods to Quantify the Effects of Groundwater Use**

Directly measuring the way in which streams are affected by groundwater use is often problematic. When pumping occurs very close to springs or small streams, the effects on flow may be directly measurable. When pumping occurs at larger distances from springs or streams, in contrast, the effects are often impossible to discriminate in streamflow records for a number of reasons. The principal reason is that the effects become diffused with distance, and so become spread out over time and across large geographic areas. As a result, the impacts to a single spring or stream reach are often very small compared to the streamflow or spring discharge. The relatively small impacts, although potentially cumulatively significant, are difficult to detect given the uncertainty in streamflow measurement techniques, the masking effects of other signals in the hydrologic record (such as normal climate-driven variations in runoff, diversions, and so forth), and the fact that effects of pumping stresses have been gradually accumulating over decades.

In situations where effects on streams and springs of groundwater use cannot be directly measured, the only tools available for quantitatively understanding these effects are mathematical models, which most commonly take the form of numerical groundwater flow models (or simply *computer models*). Such models are constructed to represent all important elements of a flow system. Properly constructed and calibrated groundwater flow models can simulate the distribution of hydraulic head (water-table elevation) and flows within a groundwater system including the flows to and from major boundaries such as springs and

streams. Such models also can predict the response of the groundwater system to proposed pumping. Computer modeling is the state of the art method for evaluating the types of groundwater related questions likely to be important to the Klamath River Basin Restoration Agreement. Such models are widely used to address similar water management issues throughout the Nation.

#### IV.

#### **Existing Upper Klamath Basin Groundwater Modeling Project**

The USGS, in cooperation with the Oregon Water Resources Department and the Bureau of Reclamation, is presently working to complete a computer model that will simulate the groundwater flow system in the upper Klamath Basin. The model covers the entire basin above Iron Gate Dam with a grid spacing of 2500 feet, meaning that groundwater head (water-level elevation) and flow are calculated on about one-half mile spacing. All major streams and many of the major tributaries are represented in the model. Major hydrologic processes such as recharge from precipitation, and discharge to streams, lakes, drains, wetlands, and wells, are also included in the model. The model is being calibrated to simulate hydrologic conditions (groundwater levels and discharge variations) measured between 1970 and 2004. The water level and groundwater discharge data being used for calibration are described in Gannett and others (2007). The model will be able to simulate the rate, geographic distribution, and timing of changes in streamflow, and other boundary flows, as well as changes in subsurface storage resulting from groundwater pumping at any location in the basin above Iron Gate Dam. It can also simulate changes resulting from climate variation or other external stresses.

The accuracy of the model will ultimately be determined by the resolution of the model grid, the accuracy with which the complexities of the flow system are represented, and the uncertainty in the data used for calibration. Model uncertainty, including uncertainty in model predictions, can be quantified. Therefore, confidence intervals can be placed on model predictions of the effects of new groundwater use.

Under the current scope of work, the calibrated groundwater model will be coupled to an optimization (or management) model and the combined models will be used to explore a limited number of yet-to-be-determined management scenarios. The model and accompanying report are scheduled to be completed by February 2010. The model will be available for use once the report is approved and published. A second report quantifying model uncertainty is expected to be published by April 2010.

#### V.

#### **Utilization of US Geological Survey Science, Models and Monitoring to Inform Implementation of the Klamath Basin Restoration Agreement**

This section describes ways in which the USGS can help in implementation of the Klamath River Basin Restoration Agreement. Three major elements are described in the following subsections: application of existing USGS model, possible enhancements to the model, and improved hydrologic monitoring.

**A. Application of the existing USGS groundwater model for the purposes of the Klamath Basin Restoration Agreement**

Certain sections of the Klamath Basin Restoration Agreement require the assessment of the effects of groundwater development on surface-water resources. The model presently under development by the USGS will be well suited to answer many of the groundwater related questions important to the Klamath River Basin Restoration Agreement. It will have the ability to predict the geographic distribution, amount, and timing of the effects caused by groundwater pumping at any location. The spatial resolution of groundwater discharge to streams in the model will likely be at a river-reach scale similar to that shown in Figure 7 of Gannett and others (2007) (this figure is included at the end of this document). Even though the locations of major springs are well known, groundwater discharge is currently evaluated at a reach scale of 1 to 10 miles.

The principal task for USGS scientists would be to work with the parties to the Restoration Agreement, Coordinating Council, or Technical Advisory Team to identify specific questions, scenarios, or management options they want to evaluate, run the appropriate simulations, and report the results. A probable modeling task would be to determine the ways in which streams and other boundaries are likely to be affected by a variety of rates, locations, frequency, and duration of groundwater pumping. It would also be possible to evaluate probable effects of climate variability or change on flows.

Parties to the Restoration Agreement (or committees formed as part of the agreement) should have a thorough understanding of the model, how it works, and the way in which the results should be used. A secondary task, therefore, would be to educate the appropriate groups with regard to basic modeling concepts and how hydrologic processes in the upper Klamath Basin are represented in the model. This would likely be accomplished in a workshop or series of workshops. USGS scientists could be made available to attend meetings of the appropriate committees formed as part of the Restoration Agreement, such as the Coordinating Council or Technical Advisory Team, to answer model-related questions and help with discussions.

**B. Possible refinements to the USGS groundwater model to improve resolution and accuracy and to reduce model uncertainty**

Model accuracy and resolution required for implementation of the Klamath Basin Restoration Agreement may ultimately exceed what is planned under the scope of the present USGS study. Should this be the case, there are ways in which model uncertainty can be reduced and model resolution and accuracy improved with certain enhancements.

Some improvement might be realized by providing more information for model calibration without modifying the model structure. Such information could include additional measurements of head (the water-table elevation), groundwater discharge to springs and streams, or groundwater ages. Additional improvements might require structural changes to the model to better meet specific requirements of the Restoration Agreement. Refinement could include increasing the complexity of the geologic framework to better represent locations of spring discharge, refining the grid spacing or layering to more precisely represent certain hydrologic features (e.g. critical spring complexes), or explicitly simulating additional hydrologic processes.

Detailed subregional models, for example at a subbasin scale, could be nested within the regional model. The ability to add complexity or new processes to the model, however, may be limited by a lack of data. Some model improvements, therefore, may require substantial collection of additional data.

**C. Improved hydrologic monitoring to support the Klamath Basin Restoration Agreement**

Although there is considerable hydrologic monitoring of groundwater and surface water in the upper Klamath Basin by the USGS, OWRD, Reclamation, Tribes, and the California Department of Water Resources, present efforts are not optimized for the groundwater aspects of the Restoration Agreement. Improvements to the network of observation wells and stream gages would provide better information on the effects of future changes in groundwater use. The efforts described in this section pertain primarily to detecting the effects of groundwater use; other aspects of the Restoration Agreement may require additional monitoring efforts.

Monitoring of groundwater levels will provide information on drawdown resulting from new pumping and on the possible impacts to existing groundwater users and to streams. Monitoring groundwater discharge to streams (with the use of existing and new stream gages) will provide information on possible effects of new pumping on spring discharge and baseflow. Targeted monitoring could provide confirmation that the effects of pumping are too small to discriminate, or it could detect any large, unexpected changes not predicted by the model or otherwise unanticipated.

Improved hydrologic monitoring would also be beneficial to modeling efforts. Regardless of how well a model is calibrated, it is critical to maintain an ongoing monitoring program. With time, data from an enhanced hydrologic monitoring network could help validate model predictions, or identify areas where model predictions are not as accurate as expected. Data from a monitoring network could be used to help refine calibration and reduce model uncertainty.

It is important to recognize that any monitoring program must be considered a long-term commitment. As previously discussed, it is difficult to detect the effects of groundwater pumping on streams in most cases. In streamflow data, the effects of groundwater pumping are masked by other, much larger, variations in flow due to climate cycles, storms, and diversion activities. However, if data are collected for a sufficient period of time (on the order of decades) and the effects of groundwater pumping large enough relative to streamflow, it may be possible to discriminate them from variations in discharge due to other causes.

A monitoring program would include a number of components. The backbone of such a program would be the existing stream gaging network. Existing sites could be evaluated to ensure maximum accuracy is being obtained. Certain historic gage sites (for example the Klamath River near Copco and Fall Creek near Copco) could be reestablished if required to better quantify groundwater discharge. Additional gages could be installed in selected bypass canals or diversions to better quantify groundwater discharge with the existing gage network. In addition there may be sites on major spring-fed streams or important spring complexes where additional gaging stations could be of use.



A second major component of such a monitoring program would be monitoring groundwater levels. Changes in the water-table elevation are easily measured, and monitoring the magnitude and location of pumping-related variations in the water table could provide insight into possible impacts to streams. There is presently an extensive network of wells being monitored in the upper Klamath Basin by the USGS, the Oregon Water Resources Department, and the California Department of Water Resources. This network was designed to monitor the response of the groundwater system to pumping and climate variability, but not specifically to track potential changes in groundwater discharge to streams. The network could be revised (i.e. have wells added) to provide better tracking of potential impacts to streams. It may be possible to use existing wells, but new wells drilled specifically for monitoring may be required at some locations.

Developing a monitoring program would occur in phases. The first phase would be to evaluating all existing and historic stream gaging station and groundwater level monitoring sites and data, and identify the additional sites where streamflow, spring discharge, or groundwater level data are required. The second phase would be actually establishing the sites (securing landowner permission, obtaining and installing equipment, etc.). The third phase would be the actual collection of data over time, analysis of data, and reporting of findings.

## **VI.** **Estimated Costs**

The following costs are estimates. When the Klamath River Basin Restoration Agreement becomes effective and funding secured, a detailed work plan with more refined cost estimates will be developed.

### **A. Use Of Groundwater Model As Presently Being Developed**

The costs associated with this work element are primarily due to the staff time required to interact with the Restoration Agreement committees and travel costs. Staff time would be required to prepare for and attend meeting and workshops, to make model runs, and document expected results from various management scenarios. It is assumed that this activity would begin Fiscal Year 2010 and continue through 2012. Estimated costs are: FY 2010, \$77,000; FY 2011, \$55,000; FY 2012, \$44,000. The costs are larger the first year due to the need to develop workshops on the model and its use for the Restoration Agreement.

### **B. Refinements To The Groundwater Model As Presently Being Developed**

A two year effort is described, probably starting in 2011. The first year would primarily entail efforts to reduce prediction uncertainty of the existing model by incorporating data from 2005 to 2010, and collecting additional data. No substantial structural modifications to the model are envisioned. The second year would entail structural changes to the model possibly including model grid refinement, addition of new parameters, or inclusion of additional hydrologic processes. The estimated costs are \$165,000 for the first year and \$137,000 for the second year.

These costs are uncertain because the need for, and level of, improvements to the existing model are not yet known.

**C. Improved Hydrologic Monitoring**

Budgets were estimated for three years, but the third year costs could be repeated as long as monitoring is to continue (adjusted for inflation). The first year (FY 2010) consists largely of reviewing existing streamflow and water-level data collection and historic data, identification of potential new sites and field reconnaissance. The second year (FY 2011) consists of implementing the new monitoring program, establishing the new sites, and probably installing some new gaging stations. The third and subsequent years consist primarily of collection, analysis, and reporting of data. Estimated costs are \$50,000 for the first year, \$180,000 for the second year, and \$137,000 for the third year. The operation costs assume four additional stream gaging stations will be operated in the basin. These cost estimates do not include drilling of additional monitoring wells.

| <b>Budget Summary</b>                               |                   |                   |                   |
|---|-------------------|-------------------|-------------------|
|   | <b>FY 10</b>      | <b>FY 11</b>      | <b>FY 12</b>      |
| Use existing model to address settlement needs      | \$ 77,000         | \$ 55,000         | \$ 44,000         |
| Refine existing model/reduce prediction uncertainty |                   | \$ 165,000        | \$ 137,000        |
| Improve hydrologic monitoring                       | \$ 50,000         | \$ 180,000        | \$ 137,000        |
| <b>Total for all elements</b>                       | <b>\$ 127,000</b> | <b>\$ 400,000</b> | <b>\$ 318,000</b> |

**VII.  
References Cited**

Gannett, M.W., Lite, K.E. Jr., La Marche, J.L., Fisher, B.J., and Polette, D.J., 2007, Ground-water hydrology of the upper Klamath Basin, Oregon and California: U.S. Geological Survey Scientific Investigations Report 2007-5050, 84 p.

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24 Ground-Water Hydrology of the Upper Klamath Basin, Oregon and California

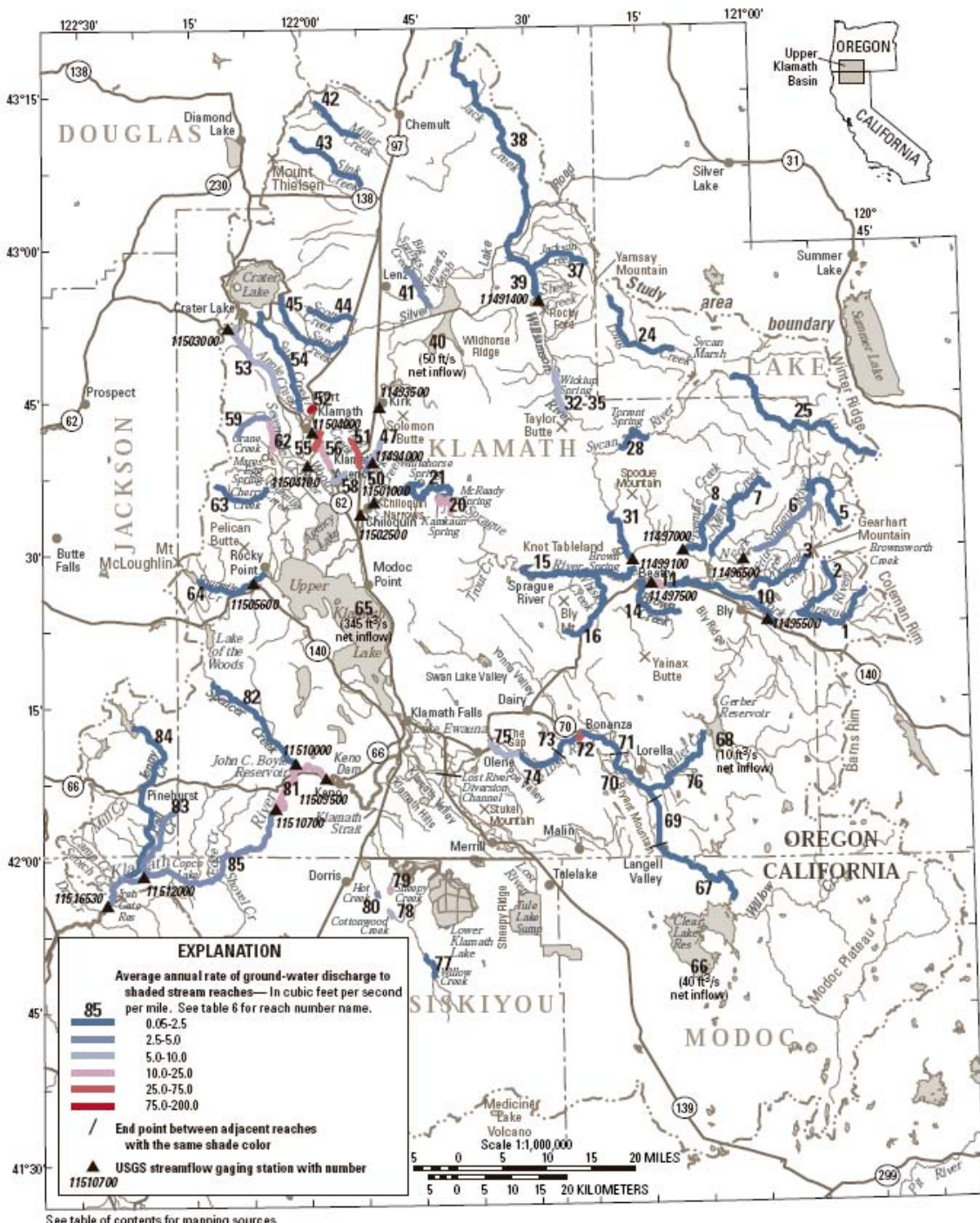


Figure 7. Principal areas of ground-water discharge to streams and major springs in the upper Klamath Basin, Oregon and California, and selected stream-gaging stations. Shading along main stem reaches represents ground-water discharge (in cubic feet per second per mile) averaged along the entire shaded reach. The actual location of ground-water discharge may be localized. Shading along headwater streams represents the ground-water discharge averaged over the shaded reach and includes ground-water discharge to tributaries. See table 6 for detailed descriptions of measurement locations.

**Appendix E-3**  
**Instream Water Right Applications and Protests**

**OR Instream Water Right Applications**

| <b>Application</b> | <b>Stream</b>                   | <b>Protestant</b>                          |
|--------------------|---------------------------------|--|
| 70798              | CHERRY CR > FOURMILE CR         | M.J. GAIL DANFORTH ET AL.                  |
| 70798              | CHERRY CR > FOURMILE CR         | FORT KLAMATH CRITICAL HABITAT LANDOWNERS   |
| 70799              | S FK SPRAGUE R > SPRAGUE R      | RIVER SPRINGS RANCH ET AL.                 |
| 70799              | S FK SPRAGUE R > SPRAGUE R      | WATERWATCH AND OREGON TROUT                |
| 70800              | S FK SPRAGUE R > SPRAGUE R      | RIVER SPRINGS RANCH ET AL.                 |
| 70800              | S FK SPRAGUE R > SPRAGUE R      | WATERWATCH AND OREGON TROUT                |
| 70801              | S FK SPRAGUE R > SPRAGUE R      | RIVER SPRINGS RANCH ET AL.                 |
| 70801              | S FK SPRAGUE R > SPRAGUE R      | WATERWATCH AND OREGON TROUT                |
| 70802              | S FK SPRAGUE R > SPRAGUE R      | RIVER SPRINGS RANCH                        |
| 70802              | S FK SPRAGUE R > SPRAGUE R      | WATERWATCH AND OREGON TROUT                |
| 70804              | SPRAGUE R > WILLIAMSON R        | RIVER SPRINGS RANCH ET AL.                 |
| 70804              | SPRAGUE R > WILLIAMSON R        | WATERWATCH AND OREGON TROUT                |
| 70807              | CROOKED CR > WOOD R             | DICK FAIRCLO f/OWENS & HAWKINS             |
| 70807              | CROOKED CR > WOOD R             | FORT KLAMATH CRITICAL HABITAT LANDOWNERS   |
| 70807              | CROOKED CR > WOOD R             | WATERWATCH AND OREGON TROUT                |
| 70808              | DEMING CR > S FK SPRAGUE R      | RIVER SPRINGS RANCH ET AL.                 |
| 70808              | DEMING CR > S FK SPRAGUE R      | WATERWATCH AND OREGON TROUT                |
| 70809              | FISHHOLE CR > S FK SPRAGUE R    | FISHHOLE CREEK SENIOR WATER RIGHTS HOLDERS |
| 70809              | FISHHOLE CR > S FK SPRAGUE R    | WATERWATCH AND OREGON TROUT                |
| 70815              | N FK SPRAGUE R > SPRAGUE R      | RIVER SPRINGS RANCH ET AL.                 |
| 70815              | N FK SPRAGUE R > SPRAGUE R      | WATERWATCH AND OREGON TROUT                |
| 70816              | N FK SPRAGUE R > SPRAGUE R      | RIVER SPRINGS RANCH ET AL                  |
| 70816              | N FK SPRAGUE R > SPRAGUE R      | WATERWATCH AND OREGON TROUT                |
| 70824              | WILLIAMSON R > UPPER KLAMATH LK | RICHARD WHITMAN f/GERDA HYDE, Yamsi Ranch  |
| 70829              | WOOD R > AGENCY LK              | DICK FAIRCLO f/MEADOWS DRAIN DIST          |
| 70829              | WOOD R > AGENCY LK              | DICK FAIRCLO f/OWENS & HAWKINS             |
| 70829              | WOOD R > AGENCY LK              | FORT KLAMATH CRITICAL HABITAT LANDOWNERS   |
| 70829              | WOOD R > AGENCY LK              | WATERWATCH AND OREGON TROUT                |
| 70830              | SEVENMILE CR > AGENCY LK        | RBT FAIRCLO f/MEADOWS DRAIN DIST           |
| 70830              | SEVENMILE CR > AGENCY LK        | WATERWATCH AND OREGON TROUT                |
| 70830              | SEVENMILE CR > AGENCY LK        | FORT KLAMATH CRITICAL HABITAT LANDOWNERS   |

**Flows below Upper Klamath Lake**

| <b>Application</b> | <b>Stream</b>             | <b>Protestant</b>                |
|--------------------|---------------------------|----------------------------------|
| 70094              | KLAMATH R > PACIFIC OCEAN | KLAMATH DRAINAGE DISTRICT        |
| 70094              | KLAMATH R > PACIFIC OCEAN | KLAMATH WATER USERS ASSOC. ET AL |
| 70094              | KLAMATH R > PACIFIC OCEAN | WATERWATCH AND OREGON TROUT      |
| 70812              | KLAMATH R > PACIFIC OCEAN | PETER SERRURIER f/PACIFICORP     |
| 70812              | KLAMATH R > PACIFIC OCEAN | KLAMATH DRAINAGE DISTRICT        |
| 70812              | KLAMATH R > PACIFIC OCEAN | KLAMATH WATER USERS ASSOC. ET AL |

|       |                           |  |
|-------|---------------------------|--|
| 70812 | KLAMATH R > PACIFIC OCEAN | FORT KLAMATH CRITICAL HABITAT LANDOWNERS |
| 70813 | LINK R > KLAMATH R        | WM GANONG f/KLAM IRR DIST                |
| 70813 | LINK R > KLAMATH R        | RUNNING Y RANCH                          |
| 70813 | LINK R > KLAMATH R        | PETER SERRURIER f/PACIFICORP             |
| 70813 | LINK R > KLAMATH R        | DON MOONEY f/KLAM W USERS ASSN.          |
| 70813 | LINK R > KLAMATH R        | DON MOONEY f/TULELAKE IRR DIST           |
| 70813 | LINK R > KLAMATH R        | FORT KLAMATH CRITICAL HABITAT LANDOWNERS |

With Gail Danforth's protest on application 70798 were: Grant and Lois Brown, Dave and Gina Danforth, Theodore and Debra Paddock, Chris and Becky Brown, Dan and Elouise Brown, and Vern and Barb Keffer.

With Fort Klamath Critical Habitat Landowners protests on applications 70798, 70807, 70812, 70813, 70829 and 70830 were: Tulana Farms, Leonard Garrison, McAuliffe Ranches, J.P. McAuliffe, Joe McAuliffe Co., Ambrose and Susan McAuliffe, Jeffery Mathis, Mathis Ranches, Double K Ranch, Kenneth L Tuttle, Lee & Edna Hunsaker, Dorothy Nickolson, Harris & Wood Ranches, Maxine Kizer, M.J. Gail Danforth, Wm. L. Brewer, Clay Charley, Charley Livestock Co., Gail & Denny Rickards, Elaine G. Kerns, Roger Nicholson, Nicholson, Anita Nicholson Jack Owens Ranches, John B. Owens,

With River Springs Ranch protests for applications 70799, 70800, 70801, 70802, 70804, 70808, (S FK Sprague R) were: Pierre A. Kern Trust, Pierre A. Kern, Newman Enterprises, Diamond Newman, Dale Newman, Stanley Newman, Douglas Newman, James S. Hall, Steven C. Ranch, Nelson Somers, Robert Valladao, Rodney L. Hadley, LeeAnna D. Hadley, James S. Hall, William and Lillian Hill, William V. Hill, Sr. and the Lillian M. Hill Trust, Larry Olson.

With River Springs Ranch protests for applications 70815 and 70816 (N FK Sprague R) were: Pierre A. Kern Trust, Pierre A. Kern, Obenchain Cattle Co., Ruth Obenchain, Carolyn Obenchain, Margaret Jacobs, Larry Olson, William and Lillian Hill, William V Hill, Sr., and Lillian M. Hill Trust.

With Fishhole Creek Senior Water Rights Holders protests for applications 70809 were: Diamond Newman, James Hall, Rodney & Kathy Todd, William and Ethel Rust, Steve & Karen Simmons,

**Appendix E-4**  
**Federal Instream Water Right Claims Not to be Opposed**

Note: This table is a listing of federal instream water rights claims in the Klamath Basin Adjudication that will not be opposed at the Circuit Court phase of the Adjudication by the Parties to the KBRA. Further information regarding the specific attributes of each water right may be found at the Oregon Water Resources Department.

| <b>CLAIM</b> | <b>PARTY</b>              | <b>SOURCE/STREAM</b>       |
|--------------|---------------------------|----------------------------|
| 376          | Bureau of Land Management | Klamath River              |
| 493          | Forest Service, USDA      | Sycan River                |
| 494          | Forest Service            | Sycan River                |
| 495          | Forest Service            | Sycan River                |
| 496          | Forest Service            | Sycan River                |
| 497          | Forest Service            | Sycan River                |
| 500          | Forest Service            | Sycan River                |
| 501          | Forest Service            | Sycan River                |
| 502          | Forest Service            | Sycan River                |
| 524          | Forest Service            | Sycan River                |
| 525          | Forest Service            | Sycan River                |
| 527          | Forest Service            | Sycan River                |
| 528          | Forest Service            | Sycan River                |
| 529          | Forest Service            | Sprague River              |
| 530          | Forest Service            | Sprague River              |
| 565          | Forest Service            | Sprague River – North Fork |
| 566          | Forest Service            | Sprague River – North Fork |
| 568          | Forest Service            | Sprague River – North Fork |
| 569          | Forest Service            | Sprague River – North Fork |
| 571          | Forest Service            | Sprague River – North Fork |
| 572          | Forest Service            | Sprague River – North Fork |
| 574          | Forest Service            | Sprague River – North Fork |
| 575          | Forest Service            | Sprague River – South Fork |
| 577          | Forest Service            | Sprague River – South Fork |
| 578          | Forest Service            | Williamson River           |
| 579          | Forest Service            | Williamson River           |

| <b>CLAIM</b> | <b>PARTY</b>          | <b>SOURCE/STREAM</b>                 |
|--------------|-----------------------|--------------------------------------|
| 580          | Forest Service        | Williamson River                     |
| 582          | Forest Service        | Williamson River                     |
| 583          | Forest Service        | Williamson River                     |
| 585          | Forest Service        | Williamson River                     |
| 586          | Forest Service        | Williamson River                     |
| 588          | Forest Service        | Williamson River                     |
| 589          | Forest Service        | Williamson River                     |
| 591          | Forest Service        | Williamson River                     |
| 592          | Forest Service        | Williamson River                     |
| 593          | Forest Service        | Williamson River                     |
| 594          | National Park Service | Annie Creek, etc.                    |
| 595          | National Park Service | Bear Creek, etc.                     |
| 596          | National Park Service | Crater Lake                          |
| 597          | National Park Service | Desert Creek, etc.                   |
| 598          | National Park Service | Pothole Creek                        |
| 599          | National Park Service | Sand Creek                           |
| 600          | National Park Service | Scott Creek                          |
| 601          | National Park Service | Silent Creek                         |
| 712          | National Park Service | Sun Creek, etc.                      |
| 713          | National Park Service | Unnamed Creek (near Annie Creek)     |
| 715          | National Park Service | Unnamed Creek (in NE corner of Park) |
| 716          | Forest Service        | Gearhart Mountain Wilderness         |
| 724          | Forest Service        | Gearhart Mountain Wilderness         |
| 725          | Forest Service        | Mountain Lakes Wilderness            |
| 726          | Forest Service        | Mount Thielsen Wilderness            |
| 727          | Forest Service        | Sky Lakes Wilderness                 |

**Appendix E-5**  
**Simulated Klamath River Flows and Upper Klamath Lake Levels**

Appendix E-5 contains hydrologic model (KLAMSIM) outputs which some Settlement Parties evaluated in preparing the Agreement. Considering specific assumptions (model inputs) and based on the terms of the Agreement, Appendix E-5 describes KLAMSIM results illustrating relative operations between Upper Klamath Lake and the Klamath River as the potential outcomes of various management schemes for Managed Environmental Water under hypothetical circumstances of water availability. The Parties' sole intention in appending the data is to provide to the Technical Advisory Team (TAT), KLAMSIM model outputs addressing Upper Klamath Lake levels and Klamath River flows at the current location of Iron Gate Dam under those assumed conditions of water availability, to illustrate those potential relative operations. These and future KLAMSIM model outputs will be made available to the TAT as it improves and modifies the KLAMSIM model, and develops real-time management recommendations for lake and river flows. The data presented in Appendix E-5 does not imply that any future condition will occur or define any legal or regulatory obligation or minimum lake or flow requirements.

KLAMSIM is a hydrologic model capable of simulating flows in the upper Klamath River as they would have happened under various management scenarios and allows comparison of alternatives. The period of record for the KLAMSIM model analysis is 1961-2000. Inflows to Upper Klamath Lake are the primary driver of the system, and are "hard-wired" into the model. Thus, the model shows what would have happened in the 1961-2000 period if flows, lake levels, and agricultural diversions (among other factors) were different than they actually were historically.

Table 1 details the assumptions and inputs upon which the R32\_340, R33\_340, and R34\_340 simulations are based. Simulation results are presented in Tables 2, 4, and 6, and in Figures 1-4 for flows in the Klamath River (at Iron Gate Dam), and in Tables 3, 5, and 7, and in Figures 5-8 for water levels in Upper Klamath Lake.

It is important to note that none of the three simulations make any attempt to simulate the outcome of the Drought Plan in Section 19.2, and therefore the river flows and lake levels presented here in the Extreme Drought (1992 and 1994) and Drought years (as defined in 19.2.2.A.i) are different than they would otherwise be if the simulations had included the Drought Plan.

Finally, none of the simulations attempt to predict future hydrologic conditions or changes that may occur beyond those specified in the assumptions explicitly included in the simulation. It is anticipated that the Technical Advisory Team will recommend revisions or refinements to the basic operations between Upper Klamath Lake and the Klamath River as it deems appropriate and in response to new information including any changes in habitat conditions, water availability that may result from new storage (beyond that assumed in the model runs), the Drought Plan, or factors that may occur in the future.



Table 1. Summarized assumptions for and inputs to the KLAMSIM R32\_340, R33\_340, and R34\_340 simulations (UKL = Upper Klamath Lake; taf = thousands of acre feet).

| Input Parameter or Assumption   | Description  |
|---|--|
| Net inflow to UKL   | Historic plus 30 taf during the Mar-Oct irrigation season.   |
| Wetland areas reconnected to UKL  | Williamson River Delta, Agency Lake and Barnes Ranches, Wood River Wetland.  |
| Klamath Reclamation Project Diversion from UKL and Klamath River exclusive of Refuge Allocation | Mar-Oct: 340 taf when Mar 1 inflow forecast for Apr-Sep UKL net inflow is $\leq 287$ taf; 365 taf when forecast = 569 taf; linear between forecasts of 287 and 569; 385 taf when forecast is $> 569$ taf. Nov-Feb deliveries same as historic. Delivery set to higher priority than lake or river.   |
| Refuge allocation   | Mar-Oct: 48 taf when Mar 1 inflow forecast for Apr-Sep UKL net inflow is $\leq 287$ taf; 55 taf when forecast = 569 taf; linear between forecasts of 287 and 567; 60 taf when forecast is $> 569$ taf. Nov-Feb: 35 taf. Diversions from UKL reduced by a portion of estimated D Plant pumping. Delivery set to higher priority than lake or river. |
| Flood Control curve   | Most recent version provided by BOR as of October 2007, with minor modifications   |
| Iron Gate flow targets  | Adjusted iteratively to evaluate alternative management scenarios. Time step specific targets selected based on cumulative winter or summer inflows to UKL through the previous time step, using the Inflow Exceedence Index (IEI). Interpolate between targets based on the IEI.  |
| UKL level targets   | Adjusted iteratively to evaluate alternative management scenarios. Time step specific targets selected based on cumulative winter or summer inflows to UKL through the previous time step, using the Inflow Exceedence Index (IEI). Interpolate between targets based on the IEI.  |

Table 2. Simulated flows (cfs) at Iron Gate Dam during 1961-2000 resulting from the R32\_340 simulation.

| Water Year | Oct  | Nov  | Dec  | Jan  | Feb  | Mar 1-15 | Mar 16-31 | Apr 1-15 | Apr 16-30 | May 1-15 | May 16-31 | Jun 1-15 | Jun 16-30 | Jul 1-15 | Jul 16-31 | Aug  | Sep  |
|------------|------|------|------|------|------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|------|------|
| 1961       | 1113 | 1300 | 1300 | 1802 | 1382 | 2765     | 3109      | 2374     | 2127      | 1780     | 1929      | 1517     | 1596      | 1011     | 996       | 980  | 1208 |
| 1962       | 1300 | 1213 | 1300 | 1884 | 1651 | 2497     | 2527      | 2431     | 3131      | 2236     | 2400      | 1734     | 1462      | 868      | 823       | 838  | 1022 |
| 1963       | 1186 | 1300 | 3255 | 2253 | 2724 | 2415     | 2760      | 4222     | 3844      | 2640     | 2693      | 2161     | 1910      | 1140     | 1158      | 963  | 1177 |
| 1964       | 1227 | 1297 | 1300 | 1987 | 2006 | 2408     | 2406      | 1816     | 3197      | 2228     | 2118      | 1781     | 1862      | 1142     | 1114      | 956  | 1083 |
| 1965       | 1100 | 1182 | 7588 | 7869 | 7145 | 4257     | 4597      | 3475     | 3239      | 2668     | 2656      | 2093     | 1987      | 1237     | 1225      | 1087 | 1230 |
| 1966       | 1215 | 1300 | 1300 | 2215 | 2406 | 2655     | 2719      | 2529     | 2762      | 2260     | 2137      | 1634     | 1517      | 930      | 954       | 845  | 1107 |
| 1967       | 1078 | 1166 | 1300 | 2053 | 2387 | 3118     | 3537      | 3614     | 3285      | 3881     | 4176      | 2431     | 2428      | 1473     | 1361      | 920  | 974  |
| 1968       | 1087 | 1037 | 1059 | 1091 | 1338 | 2819     | 3184      | 2144     | 1702      | 1265     | 1406      | 1104     | 1021      | 744      | 761       | 910  | 1086 |
| 1969       | 1091 | 1090 | 1090 | 1212 | 2432 | 3286     | 3602      | 6153     | 5824      | 3011     | 3050      | 2430     | 2302      | 1454     | 1342      | 887  | 979  |
| 1970       | 1131 | 1122 | 1166 | 5908 | 4578 | 3950     | 4215      | 2415     | 1790      | 2092     | 2179      | 1662     | 1557      | 962      | 941       | 806  | 1029 |
| 1971       | 1080 | 1146 | 1896 | 4297 | 3611 | 5467     | 5820      | 6819     | 6484      | 4946     | 5352      | 2734     | 2750      | 1880     | 1880      | 1334 | 1381 |
| 1972       | 1300 | 1300 | 2092 | 2842 | 5174 | 10502    | 10747     | 4356     | 4008      | 2811     | 2849      | 2125     | 1823      | 1206     | 1201      | 1203 | 1219 |
| 1973       | 1180 | 1279 | 1477 | 2725 | 2412 | 2562     | 2855      | 2279     | 2231      | 1738     | 1793      | 1289     | 1130      | 747      | 752       | 721  | 973  |
| 1974       | 1158 | 1300 | 3303 | 6032 | 3520 | 5618     | 5971      | 7104     | 6744      | 3086     | 3312      | 2469     | 2141      | 1558     | 1659      | 1347 | 1316 |
| 1975       | 1290 | 1256 | 1300 | 2075 | 2842 | 5126     | 5515      | 4827     | 4504      | 3731     | 4093      | 2613     | 2489      | 1738     | 1772      | 1263 | 1325 |
| 1976       | 1300 | 1300 | 2268 | 2383 | 2561 | 3023     | 3286      | 2905     | 2296      | 2151     | 2163      | 1644     | 1549      | 967      | 992       | 1112 | 1269 |
| 1977       | 1300 | 1252 | 1249 | 1318 | 1000 | 1345     | 1349      | 1366     | 1280      | 1068     | 1246      | 1137     | 1149      | 851      | 833       | 746  | 985  |
| 1978       | 1013 | 1129 | 1805 | 4032 | 3085 | 3901     | 4189      | 4014     | 3679      | 2725     | 2687      | 1975     | 1716      | 1054     | 1048      | 840  | 1150 |
| 1979       | 984  | 1093 | 1049 | 1064 | 1039 | 2256     | 2127      | 1999     | 1999      | 1802     | 1878      | 1506     | 1311      | 858      | 837       | 813  | 1017 |
| 1980       | 1094 | 1188 | 1228 | 2546 | 3461 | 2951     | 3243      | 2365     | 2187      | 2028     | 2140      | 1662     | 1565      | 969      | 947       | 795  | 1003 |
| 1981       | 1024 | 963  | 1050 | 1040 | 1040 | 1649     | 1649      | 1713     | 1719      | 1340     | 1440      | 1227     | 1166      | 846      | 834       | 793  | 862  |
| 1982       | 944  | 1075 | 3519 | 2585 | 7778 | 5658     | 6005      | 6221     | 5862      | 2907     | 2957      | 2257     | 2041      | 1479     | 1570      | 1199 | 1217 |
| 1983       | 1216 | 1275 | 1809 | 2820 | 5727 | 7298     | 7611      | 5946     | 5691      | 4062     | 4409      | 2760     | 2760      | 1880     | 1880      | 1507 | 1472 |
| 1984       | 1300 | 1557 | 6104 | 3320 | 3720 | 6156     | 6523      | 5639     | 5273      | 3531     | 3873      | 2747     | 2696      | 1722     | 1650      | 1369 | 1487 |
| 1985       | 1300 | 3446 | 2854 | 2393 | 2550 | 2880     | 2914      | 4283     | 4568      | 2615     | 2417      | 1785     | 1633      | 947      | 883       | 851  | 1266 |
| 1986       | 1182 | 1269 | 1300 | 2227 | 7102 | 6715     | 6979      | 3291     | 3012      | 2620     | 2455      | 2085     | 1844      | 1191     | 1158      | 855  | 1182 |
| 1987       | 1168 | 1239 | 1300 | 2033 | 1130 | 2913     | 3202      | 2111     | 2044      | 1807     | 1757      | 1329     | 1259      | 907      | 1022      | 935  | 1142 |
| 1988       | 1065 | 1020 | 1062 | 1131 | 1563 | 2159     | 2474      | 1632     | 1632      | 1452     | 1549      | 1301     | 1377      | 988      | 975       | 863  | 980  |
| 1989       | 960  | 1015 | 1122 | 1078 | 1052 | 4565     | 6766      | 5236     | 4951      | 2835     | 2839      | 1867     | 1440      | 1276     | 1150      | 874  | 1106 |
| 1990       | 1169 | 1162 | 1115 | 1054 | 1015 | 1543     | 2998      | 1814     | 1559      | 1685     | 1755      | 1437     | 1430      | 961      | 963       | 955  | 1107 |
| 1991       | 1052 | 1020 | 937  | 957  | 952  | 1253     | 1295      | 1415     | 1454      | 1196     | 1315      | 1106     | 1095      | 844      | 846       | 885  | 943  |
| 1992       | 855  | 848  | 871  | 854  | 809  | 1022     | 1021      | 1063     | 1022      | 807      | 843       | 698      | 646       | 509      | 524       | 442  | 512  |
| 1993       | 549  | 647  | 774  | 841  | 874  | 2540     | 5829      | 5544     | 5228      | 2949     | 3058      | 2531     | 2404      | 1408     | 1215      | 1105 | 1059 |
| 1994       | 1076 | 1003 | 985  | 959  | 928  | 1239     | 1151      | 1184     | 1125      | 924      | 1069      | 913      | 873       | 629      | 574       | 485  | 577  |
| 1995       | 582  | 690  | 762  | 994  | 1013 | 3168     | 4860      | 3799     | 3477      | 2792     | 2913      | 2447     | 2276      | 1393     | 1325      | 840  | 926  |
| 1996       | 968  | 895  | 1026 | 2913 | 8938 | 4628     | 4959      | 3880     | 3600      | 3009     | 3383      | 2379     | 2162      | 1368     | 1313      | 950  | 1099 |
| 1997       | 1196 | 1265 | 3294 | 9017 | 4715 | 3389     | 3376      | 2909     | 2804      | 2450     | 2392      | 2005     | 2024      | 1215     | 1218      | 1057 | 1272 |
| 1998       | 1287 | 1300 | 1286 | 3070 | 3911 | 4870     | 5258      | 4870     | 4523      | 5553     | 5823      | 2647     | 2775      | 1835     | 1835      | 1271 | 1278 |
| 1999       | 1249 | 1166 | 2845 | 3054 | 3773 | 6258     | 6560      | 6196     | 5812      | 3273     | 3627      | 2669     | 2541      | 1663     | 1616      | 1360 | 1403 |
| 2000       | 1300 | 1300 | 1272 | 2625 | 3684 | 3367     | 3645      | 3619     | 3358      | 2593     | 2593      | 1903     | 1717      | 1018     | 1010      | 806  | 1198 |

Table 3. Simulated levels (ft) of Upper Klamath Lake during 1961-2000 resulting from the R32\_340 simulation.

| Water Year | Oct    | Nov    | Dec    | Jan    | Feb    | Mar 1-15 | Mar 16-31 | Apr 1-15 | Apr 16-30 | May 1-15 | May 16-31 | Jun 1-15 | Jun 16-30 | Jul 1-15 | Jul 16-31 | Aug    | Sep    |
|------------|--------|--------|--------|--------|--------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|--------|--------|
| 1961       | 4139.6 | 4140.4 | 4141.4 | 4141.5 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4142.8    | 4142.7   | 4142.5    | 4142.2   | 4141.9    | 4141.3   | 4140.7    | 4140.1 | 4139.6 |
| 1962       | 4139.8 | 4140.4 | 4141.1 | 4141.1 | 4142.1 | 4142.4   | 4142.7    | 4143.0   | 4143.1    | 4142.9   | 4142.7    | 4142.1   | 4141.5    | 4140.9   | 4140.2    | 4139.7 | 4139.1 |
| 1963       | 4140.8 | 4141.6 | 4141.9 | 4141.6 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.5   | 4141.9    | 4141.3   | 4140.7    | 4139.9 | 4139.6 |
| 1964       | 4139.7 | 4140.5 | 4141.2 | 4141.7 | 4141.9 | 4142.1   | 4142.3    | 4142.9   | 4143.1    | 4142.8   | 4142.5    | 4142.3   | 4142.0    | 4141.4   | 4140.8    | 4140.0 | 4139.3 |
| 1965       | 4139.2 | 4140.0 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.8    | 4142.3   | 4141.9    | 4141.3   | 4140.7    | 4140.3 | 4139.7 |
| 1966       | 4140.0 | 4141.0 | 4141.8 | 4142.1 | 4142.0 | 4142.4   | 4142.7    | 4142.9   | 4143.0    | 4142.6   | 4142.3    | 4141.9   | 4141.4    | 4141.0   | 4140.5    | 4139.7 | 4139.3 |
| 1967       | 4139.3 | 4140.0 | 4141.4 | 4142.0 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.8   | 4142.4    | 4141.7   | 4140.9    | 4139.8 | 4139.1 |
| 1968       | 4139.2 | 4139.6 | 4140.4 | 4141.2 | 4142.7 | 4142.9   | 4143.0    | 4142.6   | 4142.3    | 4142.2   | 4142.0    | 4141.5   | 4141.1    | 4140.6   | 4140.1    | 4139.7 | 4139.2 |
| 1969       | 4139.3 | 4140.1 | 4140.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.1   | 4143.1    | 4142.6   | 4142.2    | 4141.5   | 4140.7    | 4139.7 | 4139.1 |
| 1970       | 4139.3 | 4139.8 | 4141.5 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4143.0    | 4142.8   | 4142.6    | 4142.1   | 4141.7    | 4141.1   | 4140.5    | 4139.6 | 4139.1 |
| 1971       | 4139.2 | 4140.8 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4143.0   | 4142.7    | 4142.1   | 4141.4    | 4140.3 | 4139.9 |
| 1972       | 4140.2 | 4141.2 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4142.9    | 4142.5   | 4142.0    | 4141.5   | 4140.9    | 4140.1 | 4139.6 |
| 1973       | 4140.0 | 4140.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4142.7    | 4142.5   | 4142.2    | 4141.6   | 4141.1    | 4140.6   | 4140.1    | 4139.3 | 4138.9 |
| 1974       | 4139.4 | 4141.2 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.7   | 4142.2    | 4141.8   | 4141.2    | 4140.4 | 4139.8 |
| 1975       | 4139.8 | 4140.3 | 4141.3 | 4141.9 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.8   | 4142.5    | 4141.9   | 4141.3    | 4140.5 | 4140.0 |
| 1976       | 4140.4 | 4141.3 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4143.0    | 4142.7   | 4142.4    | 4142.0   | 4141.5    | 4141.1   | 4140.6    | 4140.7 | 4140.1 |
| 1977       | 4140.1 | 4140.6 | 4141.0 | 4141.2 | 4141.9 | 4142.2   | 4142.5    | 4142.2   | 4142.0    | 4142.1   | 4142.1    | 4141.8   | 4141.4    | 4140.7   | 4140.1    | 4139.2 | 4138.9 |
| 1978       | 4139.1 | 4140.0 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.8    | 4142.1   | 4141.5    | 4141.0   | 4140.5    | 4139.6 | 4139.5 |
| 1979       | 4139.4 | 4139.7 | 4140.4 | 4141.4 | 4142.3 | 4142.6   | 4143.0    | 4143.0   | 4143.0    | 4142.9   | 4142.8    | 4142.1   | 4141.5    | 4140.9   | 4140.3    | 4139.5 | 4139.0 |
| 1980       | 4139.3 | 4140.1 | 4140.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.7    | 4142.2   | 4141.8    | 4141.2   | 4140.6    | 4139.5 | 4139.0 |
| 1981       | 4139.1 | 4139.5 | 4140.5 | 4141.2 | 4142.4 | 4142.6   | 4142.9    | 4142.9   | 4142.9    | 4142.8   | 4142.6    | 4142.0   | 4141.5    | 4140.9   | 4140.2    | 4139.2 | 4138.5 |
| 1982       | 4138.9 | 4140.3 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.1   | 4143.0    | 4142.6   | 4142.2    | 4141.7   | 4141.2    | 4140.0 | 4139.6 |
| 1983       | 4139.9 | 4140.6 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4143.0   | 4142.7    | 4142.2   | 4141.6    | 4140.8 | 4140.1 |
| 1984       | 4140.5 | 4141.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.9   | 4142.6    | 4141.9   | 4141.2    | 4140.4 | 4140.2 |
| 1985       | 4141.1 | 4141.7 | 4141.9 | 4142.0 | 4142.2 | 4142.5   | 4142.8    | 4143.0   | 4143.1    | 4142.7   | 4142.4    | 4141.9   | 4141.4    | 4140.8   | 4140.2    | 4139.6 | 4139.8 |
| 1986       | 4140.1 | 4140.8 | 4141.5 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.7    | 4142.1   | 4141.6    | 4141.0   | 4140.4    | 4139.6 | 4139.6 |
| 1987       | 4140.1 | 4140.6 | 4141.2 | 4141.5 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4142.8    | 4142.4   | 4142.0    | 4141.7   | 4141.3    | 4141.0   | 4140.7    | 4139.9 | 4139.4 |
| 1988       | 4139.3 | 4139.7 | 4140.9 | 4141.9 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.0    | 4142.8   | 4142.6    | 4142.3   | 4142.0    | 4141.3   | 4140.6    | 4139.6 | 4138.9 |
| 1989       | 4138.9 | 4140.0 | 4140.6 | 4141.3 | 4142.1 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4142.9    | 4142.3   | 4141.8    | 4141.1   | 4140.4    | 4139.7 | 4139.4 |
| 1990       | 4139.7 | 4140.0 | 4140.5 | 4141.6 | 4142.3 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.7    | 4142.3   | 4141.9    | 4141.3   | 4140.8    | 4140.1 | 4139.5 |
| 1991       | 4139.4 | 4139.7 | 4140.0 | 4140.8 | 4141.4 | 4141.8   | 4142.2    | 4142.3   | 4142.3    | 4142.3   | 4142.3    | 4141.9   | 4141.5    | 4141.0   | 4140.5    | 4139.4 | 4138.6 |
| 1992       | 4138.6 | 4139.2 | 4139.8 | 4140.3 | 4140.7 | 4140.9   | 4141.1    | 4141.0   | 4140.9    | 4140.5   | 4140.1    | 4139.6   | 4139.1    | 4138.8   | 4138.5    | 4137.7 | 4137.4 |
| 1993       | 4137.7 | 4138.5 | 4139.4 | 4140.2 | 4141.0 | 4142.5   | 4143.0    | 4143.0   | 4143.1    | 4143.1   | 4143.1    | 4142.7   | 4142.4    | 4141.7   | 4140.9    | 4139.9 | 4139.2 |
| 1994       | 4139.4 | 4139.6 | 4140.2 | 4140.7 | 4141.3 | 4141.4   | 4141.7    | 4141.5   | 4141.3    | 4141.3   | 4141.1    | 4140.6   | 4140.1    | 4139.5   | 4138.8    | 4137.9 | 4137.6 |
| 1995       | 4137.8 | 4138.6 | 4139.3 | 4140.9 | 4142.3 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.7   | 4142.3    | 4141.6   | 4140.9    | 4139.6 | 4138.9 |
| 1996       | 4138.9 | 4139.3 | 4141.3 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.6   | 4142.0    | 4141.4   | 4140.7    | 4139.9 | 4139.4 |
| 1997       | 4139.5 | 4140.3 | 4141.9 | 4142.3 | 4142.7 | 4142.8   | 4142.9    | 4142.9   | 4143.0    | 4142.8   | 4142.6    | 4142.4   | 4142.1    | 4141.6   | 4141.0    | 4140.2 | 4139.8 |
| 1998       | 4139.9 | 4140.6 | 4141.1 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4143.3   | 4143.3    | 4142.6   | 4141.8    | 4140.6 | 4139.9 |
| 1999       | 4140.1 | 4141.6 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.8   | 4142.5    | 4141.9   | 4141.2    | 4140.6 | 4140.1 |
| 2000       | 4140.2 | 4140.8 | 4141.6 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.7    | 4142.1   | 4141.6    | 4141.1   | 4140.5    | 4139.5 | 4139.6 |

Table 4. Simulated flows (cfs) at Iron Gate Dam during 1961-2000 resulting from the R33\_340 simulation.

| Water Year | Oct  | Nov  | Dec  | Jan  | Feb  | Mar 1-15 | Mar 16-31 | Apr 1-15 | Apr 16-30 | May 1-15 | May 16-31 | Jun 1-15 | Jun 16-30 | Jul 1-15 | Jul 16-31 | Aug  | Sep  |
|------------|------|------|------|------|------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|------|------|
| 1961       | 1500 | 1496 | 1552 | 1531 | 1466 | 1602     | 2969      | 2236     | 2053      | 1956     | 1523      | 1283     | 1305      | 1050     | 952       | 952  | 1304 |
| 1962       | 1458 | 1596 | 1581 | 1565 | 1513 | 1613     | 2497      | 3442     | 3131      | 2366     | 1898      | 1699     | 1396      | 1063     | 963       | 963  | 1307 |
| 1963       | 1413 | 1800 | 2216 | 1749 | 3281 | 2415     | 2760      | 4222     | 3844      | 2507     | 2810      | 1792     | 1517      | 1098     | 1003      | 1003 | 1329 |
| 1964       | 1476 | 1554 | 1577 | 1542 | 1531 | 1620     | 2119      | 3471     | 3416      | 2422     | 1853      | 1652     | 1418      | 1079     | 979       | 979  | 1312 |
| 1965       | 1425 | 1503 | 7116 | 7869 | 7145 | 4257     | 4597      | 3475     | 3147      | 2621     | 2037      | 1838     | 1575      | 1114     | 1015      | 1014 | 1335 |
| 1966       | 1599 | 1748 | 1749 | 1598 | 1571 | 2892     | 3408      | 3140     | 2793      | 2484     | 1920      | 1716     | 1451      | 1070     | 969       | 969  | 1309 |
| 1967       | 1464 | 1426 | 1564 | 1553 | 1610 | 3229     | 3537      | 3614     | 3285      | 3881     | 4176      | 1883     | 1615      | 1126     | 1026      | 1026 | 1338 |
| 1968       | 1402 | 1439 | 1418 | 1363 | 1313 | 1716     | 2695      | 2100     | 1772      | 1511     | 1235      | 1126     | 993       | 842      | 814       | 900  | 1153 |
| 1969       | 1331 | 1330 | 1360 | 1460 | 1502 | 2618     | 3602      | 6153     | 5824      | 2766     | 2731      | 1948     | 1659      | 1142     | 1042      | 1042 | 1344 |
| 1970       | 1419 | 1480 | 1507 | 5540 | 4578 | 3950     | 4215      | 2442     | 2498      | 2334     | 1830      | 1629     | 1375      | 1057     | 957       | 957  | 1301 |
| 1971       | 1356 | 1403 | 1599 | 3414 | 3611 | 5467     | 5820      | 6819     | 6484      | 4946     | 5049      | 2149     | 1880      | 1250     | 1150      | 1190 | 1448 |
| 1972       | 1545 | 1952 | 2821 | 2842 | 5174 | 10502    | 10747     | 4356     | 4008      | 2900     | 2500      | 2200     | 1890      | 1225     | 1123      | 1112 | 1400 |
| 1973       | 1650 | 1697 | 1643 | 1698 | 2412 | 2534     | 2881      | 2306     | 2307      | 2096     | 1623      | 1456     | 1177      | 981      | 881       | 915  | 1300 |
| 1974       | 1436 | 1586 | 1822 | 6032 | 3520 | 5618     | 5971      | 7104     | 6744      | 3006     | 3084      | 2196     | 1849      | 1235     | 1136      | 1137 | 1438 |
| 1975       | 1442 | 1540 | 1549 | 1777 | 3460 | 5126     | 5515      | 4827     | 4504      | 3731     | 3808      | 2019     | 1741      | 1171     | 1071      | 1072 | 1373 |
| 1976       | 1571 | 2037 | 2845 | 2383 | 2561 | 2989     | 3317      | 2576     | 2518      | 2395     | 1878      | 1677     | 1436      | 1074     | 975       | 975  | 1315 |
| 1977       | 1448 | 1462 | 1530 | 1502 | 913  | 915      | 991       | 851      | 947       | 914      | 927       | 905      | 774       | 775      | 900       | 1003 | 1003 |
| 1978       | 1470 | 1388 | 1708 | 4032 | 3085 | 3901     | 4189      | 4014     | 3679      | 2651     | 2058      | 1856     | 1555      | 1108     | 1008      | 1008 | 1327 |
| 1979       | 1673 | 1473 | 1320 | 1256 | 1156 | 1460     | 1710      | 1693     | 1771      | 1823     | 1434      | 1358     | 1122      | 957      | 857       | 903  | 1300 |
| 1980       | 1386 | 1449 | 1525 | 1513 | 2939 | 2951     | 3243      | 2365     | 2050      | 2201     | 1743      | 1607     | 1355      | 1039     | 933       | 930  | 1300 |
| 1981       | 1407 | 1204 | 1201 | 1159 | 1159 | 1103     | 1304      | 1301     | 1310      | 1170     | 1061      | 1007     | 953       | 801      | 800       | 872  | 939  |
| 1982       | 1117 | 1300 | 3202 | 2585 | 7778 | 5658     | 6005      | 6221     | 5862      | 2860     | 2384      | 2100     | 1799      | 1199     | 1111      | 1122 | 1421 |
| 1983       | 1518 | 1647 | 1899 | 2820 | 5727 | 7298     | 7611      | 5946     | 5691      | 4062     | 4107      | 2200     | 1900      | 1350     | 1250      | 1250 | 1550 |
| 1984       | 1620 | 2873 | 6104 | 3320 | 3720 | 6156     | 6523      | 5639     | 5273      | 3531     | 3570      | 2174     | 1900      | 1291     | 1191      | 1150 | 1493 |
| 1985       | 1691 | 4556 | 2854 | 1882 | 2189 | 3272     | 3608      | 4878     | 4568      | 2702     | 2103      | 1809     | 1534      | 1103     | 998       | 997  | 1323 |
| 1986       | 1700 | 1800 | 1672 | 1569 | 6072 | 6715     | 6979      | 3272     | 2949      | 2835     | 2228      | 1972     | 1670      | 1138     | 1038      | 1038 | 1346 |
| 1987       | 1700 | 1722 | 1593 | 1547 | 1260 | 1602     | 2512      | 1847     | 1947      | 2310     | 1802      | 1530     | 1240      | 1005     | 908       | 940  | 1300 |
| 1988       | 1260 | 1260 | 1249 | 1417 | 1361 | 1188     | 1418      | 1531     | 1249      | 1336     | 1152      | 1074     | 1035      | 918      | 839       | 900  | 1089 |
| 1989       | 1018 | 1023 | 1468 | 1311 | 1206 | 4370     | 6766      | 5236     | 4951      | 2873     | 2308      | 2047     | 1719      | 1149     | 1049      | 1048 | 1349 |
| 1990       | 1487 | 1520 | 1500 | 1215 | 1025 | 1198     | 1194      | 1016     | 1559      | 1664     | 1326      | 1197     | 1064      | 883      | 828       | 900  | 1238 |
| 1991       | 1209 | 1112 | 1019 | 934  | 800  | 922      | 921       | 1032     | 1137      | 1039     | 965       | 898      | 866       | 742      | 744       | 847  | 891  |
| 1992       | 917  | 914  | 833  | 819  | 800  | 800      | 800       | 800      | 800       | 800      | 800       | 800      | 800       | 700      | 700       | 800  | 800  |
| 1993       | 800  | 829  | 914  | 992  | 835  | 2540     | 6675      | 5544     | 5228      | 2886     | 2424      | 2120     | 1820      | 1210     | 1097      | 1086 | 1385 |
| 1994       | 1302 | 1358 | 1160 | 1106 | 1025 | 996      | 860       | 824      | 821       | 813      | 812       | 811      | 809       | 706      | 705       | 804  | 808  |
| 1995       | 811  | 800  | 800  | 861  | 1010 | 2460     | 4860      | 3799     | 3477      | 2693     | 3006      | 1902     | 1596      | 1120     | 1020      | 1020 | 1332 |
| 1996       | 1144 | 1148 | 1102 | 2711 | 8938 | 4628     | 4959      | 3880     | 3600      | 2992     | 3391      | 1928     | 1636      | 1131     | 1031      | 1031 | 1341 |
| 1997       | 1453 | 1527 | 3194 | 9017 | 4715 | 3011     | 3317      | 3049     | 2788      | 2534     | 1945      | 1745     | 1477      | 1086     | 986       | 986  | 1320 |
| 1998       | 1481 | 1560 | 1541 | 3297 | 3911 | 4870     | 5258      | 4870     | 4523      | 5553     | 5726      | 2659     | 2866      | 1160     | 1060      | 1060 | 1360 |
| 1999       | 1430 | 1708 | 2994 | 3054 | 3773 | 6258     | 6560      | 6196     | 5812      | 3273     | 3325      | 2070     | 1771      | 1186     | 1086      | 1097 | 1410 |
| 2000       | 1493 | 1574 | 1972 | 3032 | 3684 | 3367     | 3645      | 3619     | 3358      | 2566     | 2012      | 1768     | 1497      | 1092     | 992       | 992  | 1319 |

Table 5. Simulated levels (ft) of Upper Klamath Lake during 1961-2000 resulting from the R33\_340 simulation.

| Water Year | Oct    | Nov    | Dec    | Jan    | Feb    | Mar 1-15 | Mar 16-31 | Apr 1-15 | Apr 16-30 | May 1-15 | May 16-31 | Jun 1-15 | Jun 16-30 | Jul 1-15 | Jul 16-31 | Aug    | Sep    |
|------------|--------|--------|--------|--------|--------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|--------|--------|
| 1961       | 4139.3 | 4140.0 | 4140.9 | 4141.1 | 4142.3 | 4142.9   | 4143.0    | 4142.9   | 4142.9    | 4142.7   | 4142.7    | 4142.4   | 4142.2    | 4141.6   | 4141.0    | 4140.4 | 4139.9 |
| 1962       | 4140.0 | 4140.3 | 4140.8 | 4141.0 | 4142.1 | 4142.7   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.9    | 4142.2   | 4141.6    | 4141.0   | 4140.3    | 4139.6 | 4138.8 |
| 1963       | 4140.4 | 4140.9 | 4141.9 | 4142.0 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.6   | 4142.1    | 4141.6   | 4141.1    | 4140.3 | 4139.8 |
| 1964       | 4139.8 | 4140.3 | 4140.8 | 4141.6 | 4142.1 | 4142.6   | 4142.9    | 4143.0   | 4143.1    | 4142.7   | 4142.5    | 4142.3   | 4142.2    | 4141.7   | 4141.1    | 4140.2 | 4139.4 |
| 1965       | 4139.1 | 4139.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4143.0    | 4142.6   | 4142.3    | 4141.8   | 4141.3    | 4140.9 | 4140.3 |
| 1966       | 4140.3 | 4141.0 | 4141.6 | 4142.2 | 4142.6 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.7   | 4142.4    | 4141.9   | 4141.5    | 4141.0   | 4140.6    | 4139.6 | 4139.1 |
| 1967       | 4138.8 | 4139.4 | 4140.6 | 4141.6 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4143.0   | 4142.8    | 4142.2   | 4141.6    | 4140.4 | 4139.4 |
| 1968       | 4139.4 | 4139.5 | 4140.0 | 4140.6 | 4142.2 | 4142.7   | 4143.0    | 4142.6   | 4142.3    | 4142.1   | 4142.0    | 4141.5   | 4141.0    | 4140.5   | 4140.0    | 4139.7 | 4139.1 |
| 1969       | 4139.0 | 4139.6 | 4140.2 | 4141.5 | 4142.5 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.0   | 4142.7    | 4142.1   | 4141.5    | 4140.4 | 4139.5 |
| 1970       | 4139.6 | 4139.8 | 4141.2 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4142.8    | 4142.5   | 4142.4    | 4142.0   | 4141.6    | 4141.0   | 4140.4    | 4139.3 | 4138.6 |
| 1971       | 4138.5 | 4139.9 | 4141.3 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.2   | 4143.3    | 4142.8   | 4142.4    | 4141.4 | 4141.1 |
| 1972       | 4141.2 | 4141.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4143.0    | 4142.5   | 4142.1    | 4141.5   | 4141.0    | 4140.2 | 4139.6 |
| 1973       | 4139.7 | 4140.1 | 4141.2 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4142.7    | 4142.3   | 4142.1    | 4141.5   | 4140.9    | 4140.3   | 4139.8    | 4138.8 | 4138.2 |
| 1974       | 4138.5 | 4140.2 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4142.9   | 4142.5    | 4142.1   | 4141.8    | 4141.1 | 4140.4 |
| 1975       | 4140.4 | 4140.7 | 4141.5 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.1   | 4143.0    | 4142.6   | 4142.3    | 4141.6 | 4141.1 |
| 1976       | 4141.3 | 4141.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.0    | 4142.7   | 4142.5    | 4142.0   | 4141.6    | 4141.1   | 4140.6    | 4140.8 | 4140.3 |
| 1977       | 4140.1 | 4140.4 | 4140.6 | 4140.8 | 4141.5 | 4141.9   | 4142.3    | 4142.2   | 4142.1    | 4142.3   | 4142.4    | 4142.1   | 4141.9    | 4141.3   | 4140.7    | 4139.7 | 4139.4 |
| 1978       | 4139.3 | 4139.9 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4143.0    | 4142.4   | 4141.9    | 4141.3   | 4140.8    | 4139.8 | 4139.6 |
| 1979       | 4139.0 | 4139.1 | 4139.5 | 4140.4 | 4141.3 | 4141.9   | 4142.4    | 4142.5   | 4142.6    | 4142.5   | 4142.6    | 4141.9   | 4141.3    | 4140.7   | 4140.1    | 4139.2 | 4138.5 |
| 1980       | 4138.5 | 4139.2 | 4139.9 | 4142.0 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.8    | 4142.3   | 4142.0    | 4141.4   | 4140.8    | 4139.6 | 4138.9 |
| 1981       | 4138.7 | 4139.0 | 4139.8 | 4140.5 | 4141.6 | 4142.1   | 4142.5    | 4142.6   | 4142.7    | 4142.6   | 4142.6    | 4142.1   | 4141.6    | 4141.0   | 4140.4    | 4139.3 | 4138.6 |
| 1982       | 4138.8 | 4140.1 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.1   | 4143.2    | 4142.8   | 4142.5    | 4142.1   | 4141.8    | 4140.7 | 4140.1 |
| 1983       | 4140.2 | 4140.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.2   | 4143.3    | 4142.9   | 4142.5    | 4141.9 | 4141.2 |
| 1984       | 4141.3 | 4141.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.2   | 4143.1    | 4142.6   | 4142.1    | 4141.4 | 4141.2 |
| 1985       | 4141.8 | 4141.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.7   | 4142.5    | 4142.0   | 4141.5    | 4140.9   | 4140.3    | 4139.6 | 4139.6 |
| 1986       | 4139.6 | 4140.0 | 4140.4 | 4141.7 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.8   | 4142.8    | 4142.2   | 4141.7    | 4141.2   | 4140.6    | 4139.7 | 4139.6 |
| 1987       | 4139.6 | 4139.9 | 4140.3 | 4140.9 | 4142.1 | 4142.7   | 4143.0    | 4143.0   | 4142.9    | 4142.4   | 4142.0    | 4141.5   | 4141.2    | 4140.9   | 4140.6    | 4139.8 | 4139.1 |
| 1988       | 4138.9 | 4139.2 | 4140.3 | 4141.1 | 4142.0 | 4142.5   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4142.9    | 4142.7   | 4142.5    | 4141.9   | 4141.2    | 4140.2 | 4139.4 |
| 1989       | 4139.4 | 4140.4 | 4140.7 | 4141.3 | 4142.1 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4143.1    | 4142.4   | 4141.9    | 4141.2   | 4140.5    | 4139.6 | 4139.3 |
| 1990       | 4139.2 | 4139.3 | 4139.6 | 4140.6 | 4141.4 | 4142.1   | 4142.8    | 4143.0   | 4143.1    | 4142.9   | 4142.8    | 4142.5   | 4142.2    | 4141.7   | 4141.2    | 4140.6 | 4139.9 |
| 1991       | 4139.7 | 4139.9 | 4140.2 | 4140.9 | 4141.6 | 4142.2   | 4142.7    | 4142.9   | 4143.0    | 4143.1   | 4143.2    | 4142.8   | 4142.5    | 4142.0   | 4141.6    | 4140.6 | 4139.9 |
| 1992       | 4139.8 | 4140.3 | 4140.9 | 4141.4 | 4141.8 | 4142.1   | 4142.4    | 4142.3   | 4142.3    | 4141.9   | 4141.6    | 4141.1   | 4140.5    | 4140.2   | 4139.9    | 4138.8 | 4138.3 |
| 1993       | 4138.4 | 4139.0 | 4139.8 | 4140.5 | 4141.3 | 4142.8   | 4143.0    | 4143.0   | 4143.1    | 4143.1   | 4143.3    | 4143.1   | 4142.9    | 4142.3   | 4141.6    | 4140.6 | 4139.8 |
| 1994       | 4139.7 | 4139.7 | 4140.1 | 4140.6 | 4141.1 | 4141.3   | 4141.7    | 4141.6   | 4141.5    | 4141.5   | 4141.4    | 4141.0   | 4140.5    | 4139.8   | 4139.2    | 4138.0 | 4137.5 |
| 1995       | 4137.6 | 4138.3 | 4139.0 | 4140.6 | 4142.0 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.9   | 4142.6    | 4142.0   | 4141.5    | 4140.1 | 4139.1 |
| 1996       | 4139.0 | 4139.2 | 4141.1 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.7   | 4142.4    | 4141.8   | 4141.3    | 4140.3 | 4139.7 |
| 1997       | 4139.6 | 4140.2 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.8   | 4142.8    | 4142.7   | 4142.6    | 4142.1   | 4141.6    | 4140.9 | 4140.4 |
| 1998       | 4140.5 | 4140.9 | 4141.3 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4143.3   | 4143.3    | 4142.8   | 4142.3    | 4141.2 | 4140.5 |
| 1999       | 4140.6 | 4141.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.1   | 4143.0    | 4142.5   | 4142.1    | 4141.7 | 4141.2 |
| 2000       | 4141.2 | 4141.6 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.9    | 4142.4   | 4141.9    | 4141.4   | 4140.9    | 4139.7 | 4139.7 |

Table 6. Simulated flows (cfs) at Iron Gate Dam during 1961-2000 resulting from the R34\_340 simulation.

| Water Year | Oct  | Nov  | Dec  | Jan  | Feb  | Mar 1-15 | Mar 16-31 | Apr 1-15 | Apr 16-30 | May 1-15 | May 16-31 | Jun 1-15 | Jun 16-30 | Jul 1-15 | Jul 16-31 | Aug  | Sep  |
|------------|------|------|------|------|------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|------|------|
| 1961       | 1500 | 1576 | 1636 | 1531 | 1633 | 1791     | 2284      | 2090     | 2023      | 1871     | 1547      | 1377     | 1412      | 1111     | 2090      | 1038 | 1386 |
| 1962       | 1699 | 1596 | 1581 | 1565 | 1552 | 1703     | 2204      | 2579     | 3131      | 2140     | 1902      | 1655     | 1355      | 999      | 873       | 899  | 1145 |
| 1963       | 2072 | 2047 | 2135 | 1954 | 2639 | 2415     | 2760      | 4222     | 3844      | 2489     | 2827      | 1816     | 1538      | 1108     | 1004      | 1000 | 1320 |
| 1964       | 1636 | 1653 | 1577 | 1617 | 1557 | 1698     | 2172      | 2575     | 3416      | 2119     | 1770      | 1681     | 1546      | 1148     | 1029      | 1013 | 1245 |
| 1965       | 1474 | 1503 | 7152 | 7869 | 7145 | 4257     | 4597      | 3475     | 3147      | 2369     | 2041      | 1878     | 1661      | 1175     | 1072      | 1157 | 1455 |
| 1966       | 1854 | 1945 | 1812 | 1770 | 1620 | 1781     | 2540      | 3140     | 2793      | 2159     | 1795      | 1612     | 1388      | 1039     | 950       | 919  | 1254 |
| 1967       | 1464 | 1454 | 1626 | 1745 | 1808 | 3163     | 3537      | 3614     | 3285      | 3881     | 4176      | 1988     | 1801      | 1223     | 1084      | 1007 | 1162 |
| 1968       | 1548 | 1439 | 1418 | 1363 | 1469 | 1716     | 2150      | 1943     | 1671      | 1391     | 1158      | 1060     | 954       | 806      | 773       | 970  | 1198 |
| 1969       | 1455 | 1393 | 1360 | 1614 | 1713 | 1854     | 3602      | 6153     | 5824      | 2654     | 2836      | 2017     | 1798      | 1205     | 1074      | 1006 | 1198 |
| 1970       | 1631 | 1480 | 1719 | 5146 | 4578 | 3950     | 4215      | 2286     | 2270      | 2028     | 1774      | 1589     | 1368      | 1034     | 919       | 856  | 1132 |
| 1971       | 1420 | 1672 | 1805 | 3560 | 3611 | 5467     | 5820      | 6819     | 6484      | 4946     | 5049      | 2297     | 2179      | 1469     | 1378      | 1356 | 1656 |
| 1972       | 1969 | 1973 | 1993 | 2421 | 5174 | 10502    | 10747     | 4356     | 4008      | 2634     | 2436      | 2138     | 1859      | 1192     | 1084      | 1088 | 1346 |
| 1973       | 1803 | 1742 | 1768 | 2028 | 2037 | 2534     | 2881      | 2112     | 2099      | 1853     | 1523      | 1330     | 1078      | 886      | 785       | 784  | 1104 |
| 1974       | 1453 | 1857 | 2424 | 6032 | 3520 | 5618     | 5971      | 7104     | 6744      | 3006     | 3084      | 2214     | 1916      | 1312     | 1246      | 1267 | 1524 |
| 1975       | 1856 | 1635 | 1677 | 1745 | 2408 | 5126     | 5515      | 4827     | 4504      | 3731     | 3808      | 2112     | 1942      | 1339     | 1263      | 1281 | 1596 |
| 1976       | 2070 | 2128 | 2011 | 2148 | 2272 | 2989     | 3317      | 2576     | 2370      | 2107     | 1804      | 1614     | 1396      | 1049     | 961       | 1196 | 1541 |
| 1977       | 1815 | 1611 | 1530 | 1502 | 981  | 981      | 1116      | 948      | 897       | 940      | 966       | 953      | 952       | 783      | 755       | 789  | 945  |
| 1978       | 1470 | 1388 | 1850 | 3157 | 3085 | 3901     | 4189      | 4014     | 3679      | 2394     | 2052      | 1814     | 1522      | 1080     | 980       | 940  | 1334 |
| 1979       | 1673 | 1473 | 1320 | 1256 | 1191 | 1503     | 1815      | 1751     | 1768      | 1766     | 1453      | 1323     | 1085      | 902      | 784       | 822  | 1130 |
| 1980       | 1386 | 1449 | 1525 | 1882 | 3056 | 2951     | 3243      | 2365     | 2081      | 2031     | 1767      | 1628     | 1403      | 1064     | 940       | 870  | 1152 |
| 1981       | 1407 | 1204 | 1201 | 1159 | 1255 | 1198     | 1451      | 1419     | 1356      | 1186     | 1103      | 1049     | 995       | 822      | 799       | 851  | 847  |
| 1982       | 1200 | 1518 | 2862 | 2585 | 7778 | 5658     | 6005      | 6221     | 5862      | 2622     | 2380      | 2129     | 1887      | 1286     | 1225      | 1166 | 1440 |
| 1983       | 1760 | 1774 | 1897 | 2353 | 5727 | 7298     | 7611      | 5946     | 5691      | 4062     | 4107      | 2352     | 2204      | 1591     | 1507      | 1541 | 1801 |
| 1984       | 2075 | 2189 | 5307 | 3320 | 3720 | 6156     | 6523      | 5639     | 5273      | 3531     | 3570      | 2295     | 2144      | 1452     | 1341      | 1318 | 1780 |
| 1985       | 2424 | 2995 | 2854 | 2197 | 1913 | 3137     | 3608      | 4878     | 4568      | 2339     | 1921      | 1691     | 1455      | 1015     | 897       | 922  | 1420 |
| 1986       | 1883 | 1816 | 1672 | 1776 | 6103 | 6715     | 6979      | 3272     | 2949      | 2507     | 2086      | 1843     | 1572      | 1067     | 967       | 937  | 1347 |
| 1987       | 1902 | 1722 | 1593 | 1547 | 1465 | 1819     | 2540      | 1963     | 1965      | 1916     | 1593      | 1378     | 1161      | 985      | 945       | 964  | 1268 |
| 1988       | 1446 | 1260 | 1327 | 1471 | 1501 | 1357     | 1647      | 1410     | 1339      | 1385     | 1222      | 1202     | 1209      | 1028     | 903       | 928  | 1065 |
| 1989       | 1224 | 1307 | 1468 | 1311 | 1206 | 2241     | 6704      | 5236     | 4951      | 2611     | 2271      | 1959     | 1623      | 1046     | 916       | 915  | 1232 |
| 1990       | 1584 | 1520 | 1500 | 1253 | 1152 | 1205     | 1482      | 1414     | 1559      | 1719     | 1401      | 1304     | 1210      | 1016     | 955       | 1069 | 1351 |
| 1991       | 1467 | 1179 | 1019 | 941  | 914  | 952      | 1061      | 1160     | 1176      | 1082     | 1066      | 1038     | 1034      | 887      | 895       | 958  | 912  |
| 1992       | 1058 | 1003 | 903  | 846  | 809  | 800      | 826       | 786      | 767       | 701      | 668       | 610      | 581       | 515      | 537       | 533  | 519  |
| 1993       | 800  | 829  | 914  | 992  | 871  | 2540     | 4864      | 5544     | 5228      | 2663     | 2631      | 2216     | 2014      | 1298     | 1138      | 1088 | 1262 |
| 1994       | 1673 | 1358 | 1160 | 1106 | 1025 | 996      | 924       | 847      | 813       | 798      | 823       | 773      | 753       | 607      | 561       | 548  | 552  |
| 1995       | 811  | 800  | 800  | 989  | 1236 | 2174     | 4860      | 3799     | 3477      | 2693     | 3006      | 1967     | 1731      | 1197     | 1074      | 940  | 1103 |
| 1996       | 1356 | 1154 | 1425 | 2308 | 8938 | 4628     | 4959      | 3880     | 3600      | 2992     | 3391      | 1934     | 1680      | 1150     | 1039      | 1013 | 1274 |
| 1997       | 1642 | 1635 | 2945 | 9017 | 4715 | 3011     | 3317      | 3049     | 2788      | 2261     | 1924      | 1829     | 1666      | 1227     | 1121      | 1140 | 1500 |
| 1998       | 1771 | 1722 | 1598 | 2336 | 3911 | 4870     | 5258      | 4870     | 4523      | 5553     | 5726      | 2659     | 2866      | 1383     | 1272      | 1195 | 1435 |
| 1999       | 1904 | 2011 | 1977 | 2872 | 3773 | 6258     | 6560      | 6196     | 5812      | 3273     | 3325      | 2174     | 1985      | 1336     | 1237      | 1342 | 1666 |
| 2000       | 1945 | 1829 | 1763 | 1920 | 3490 | 3367     | 3645      | 3619     | 3358      | 2312     | 1999      | 1762     | 1505      | 1090     | 985       | 908  | 1375 |

Table 7. Simulated levels (ft) of Upper Klamath Lake during 1961-2000 resulting from the R34\_340 simulation.

| Water Year | Oct    | Nov    | Dec    | Jan    | Feb    | Mar 1-15 | Mar 16-31 | Apr 1-15 | Apr 16-30 | May 1-15 | May 16-31 | Jun 1-15 | Jun 16-30 | Jul 1-15 | Jul 16-31 | Aug    | Sep    |
|------------|--------|--------|--------|--------|--------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|----------|-----------|--------|--------|
| 1961       | 4139.3 | 4139.9 | 4140.8 | 4141.0 | 4142.1 | 4142.6   | 4143.0    | 4142.9   | 4142.9    | 4142.8   | 4142.7    | 4142.4   | 4142.1    | 4141.6   | 4141.0    | 4140.3 | 4139.7 |
| 1962       | 4139.6 | 4139.9 | 4140.5 | 4140.7 | 4141.8 | 4142.3   | 4142.7    | 4143.0   | 4143.1    | 4143.0   | 4142.9    | 4142.3   | 4141.7    | 4141.1   | 4140.5    | 4139.8 | 4139.2 |
| 1963       | 4140.2 | 4140.6 | 4141.7 | 4141.6 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.6   | 4142.1    | 4141.6   | 4141.1    | 4140.2 | 4139.8 |
| 1964       | 4139.6 | 4140.1 | 4140.6 | 4141.4 | 4141.9 | 4142.3   | 4142.6    | 4143.0   | 4143.1    | 4142.8   | 4142.6    | 4142.5   | 4142.3    | 4141.7   | 4141.1    | 4140.3 | 4139.5 |
| 1965       | 4139.1 | 4139.7 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4143.1    | 4142.7   | 4142.4    | 4141.9   | 4141.3    | 4140.8 | 4140.1 |
| 1966       | 4140.0 | 4140.5 | 4141.1 | 4141.6 | 4142.0 | 4142.6   | 4143.0    | 4143.0   | 4143.1    | 4142.8   | 4142.6    | 4142.1   | 4141.7    | 4141.3   | 4140.8    | 4139.9 | 4139.5 |
| 1967       | 4139.1 | 4139.7 | 4140.8 | 4141.7 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4143.0   | 4142.8    | 4142.1   | 4141.4    | 4140.3 | 4139.4 |
| 1968       | 4139.3 | 4139.4 | 4139.9 | 4140.5 | 4142.0 | 4142.5   | 4143.0    | 4142.6   | 4142.4    | 4142.2   | 4142.1    | 4141.6   | 4141.2    | 4140.7   | 4140.2    | 4139.8 | 4139.2 |
| 1969       | 4139.1 | 4139.6 | 4140.2 | 4141.4 | 4142.3 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4142.9   | 4142.7    | 4142.0   | 4141.4    | 4140.3 | 4139.6 |
| 1970       | 4139.4 | 4139.7 | 4140.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4142.9    | 4142.7   | 4142.7    | 4142.2   | 4141.8    | 4141.2   | 4140.7    | 4139.7 | 4139.1 |
| 1971       | 4139.0 | 4140.2 | 4141.4 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.2   | 4143.1    | 4142.6   | 4142.2    | 4141.0 | 4140.5 |
| 1972       | 4140.3 | 4140.9 | 4141.6 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.1   | 4143.1    | 4142.6   | 4142.2    | 4141.7   | 4141.1    | 4140.4 | 4139.9 |
| 1973       | 4139.8 | 4140.2 | 4141.2 | 4142.1 | 4142.7 | 4142.9   | 4143.0    | 4142.9   | 4142.8    | 4142.5   | 4142.3    | 4141.8   | 4141.2    | 4140.7   | 4140.2    | 4139.3 | 4138.9 |
| 1974       | 4139.1 | 4140.6 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4142.8   | 4142.5    | 4142.1   | 4141.7    | 4140.9 | 4140.2 |
| 1975       | 4139.8 | 4140.1 | 4140.9 | 4141.7 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.1   | 4142.9    | 4142.5   | 4142.1    | 4141.2 | 4140.5 |
| 1976       | 4140.4 | 4140.8 | 4141.6 | 4142.1 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.8   | 4142.7    | 4142.2   | 4141.8    | 4141.3   | 4140.8    | 4140.9 | 4140.2 |
| 1977       | 4139.8 | 4140.0 | 4140.2 | 4140.3 | 4141.0 | 4141.5   | 4141.8    | 4141.7   | 4141.6    | 4141.7   | 4141.8    | 4141.6   | 4141.2    | 4140.6   | 4140.0    | 4139.1 | 4138.9 |
| 1978       | 4138.7 | 4139.4 | 4141.3 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4143.1    | 4142.5   | 4142.0    | 4141.5   | 4141.0    | 4140.0 | 4139.8 |
| 1979       | 4139.2 | 4139.2 | 4139.7 | 4140.6 | 4141.5 | 4142.0   | 4142.5    | 4142.6   | 4142.7    | 4142.6   | 4142.6    | 4142.0   | 4141.4    | 4140.8   | 4140.2    | 4139.5 | 4138.9 |
| 1980       | 4138.9 | 4139.5 | 4140.2 | 4142.1 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.8    | 4142.4   | 4142.0    | 4141.4   | 4140.8    | 4139.7 | 4139.1 |
| 1981       | 4138.8 | 4139.1 | 4140.0 | 4140.6 | 4141.7 | 4142.1   | 4142.5    | 4142.6   | 4142.7    | 4142.6   | 4142.5    | 4142.0   | 4141.5    | 4140.9   | 4140.3    | 4139.2 | 4138.5 |
| 1982       | 4138.7 | 4139.8 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.1   | 4143.3    | 4142.9   | 4142.6    | 4142.1   | 4141.7    | 4140.7 | 4140.0 |
| 1983       | 4140.0 | 4140.4 | 4141.6 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.2   | 4143.1    | 4142.6   | 4142.2    | 4141.4 | 4140.5 |
| 1984       | 4140.3 | 4141.2 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.1   | 4143.0    | 4142.4   | 4141.8    | 4141.1 | 4140.7 |
| 1985       | 4140.8 | 4141.7 | 4141.9 | 4142.1 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.8   | 4142.6    | 4142.2   | 4141.8    | 4141.2   | 4140.6    | 4139.9 | 4139.9 |
| 1986       | 4139.8 | 4140.1 | 4140.6 | 4141.7 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.9    | 4142.4   | 4141.9    | 4141.4   | 4140.9    | 4140.1 | 4140.0 |
| 1987       | 4139.9 | 4140.1 | 4140.5 | 4141.1 | 4142.1 | 4142.7   | 4143.0    | 4142.9   | 4142.9    | 4142.5   | 4142.1    | 4141.7   | 4141.4    | 4141.1   | 4140.9    | 4140.0 | 4139.4 |
| 1988       | 4139.0 | 4139.3 | 4140.3 | 4141.1 | 4142.0 | 4142.4   | 4142.8    | 4142.8   | 4142.9    | 4142.8   | 4142.7    | 4142.4   | 4142.2    | 4141.5   | 4140.8    | 4139.8 | 4139.0 |
| 1989       | 4138.8 | 4139.6 | 4140.0 | 4140.6 | 4141.4 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.1   | 4143.2    | 4142.6   | 4142.0    | 4141.4   | 4140.7    | 4140.0 | 4139.7 |
| 1990       | 4139.6 | 4139.7 | 4139.9 | 4140.9 | 4141.6 | 4142.3   | 4142.9    | 4143.0   | 4143.1    | 4142.9   | 4142.8    | 4142.4   | 4142.1    | 4141.6   | 4141.0    | 4140.2 | 4139.4 |
| 1991       | 4139.1 | 4139.3 | 4139.5 | 4140.3 | 4140.9 | 4141.5   | 4142.0    | 4142.1   | 4142.2    | 4142.3   | 4142.4    | 4142.0   | 4141.6    | 4141.1   | 4140.5    | 4139.4 | 4138.7 |
| 1992       | 4138.5 | 4139.0 | 4139.5 | 4140.1 | 4140.4 | 4140.7   | 4141.0    | 4141.0   | 4141.0    | 4140.6   | 4140.3    | 4139.8   | 4139.3    | 4139.1   | 4138.8    | 4137.9 | 4137.6 |
| 1993       | 4137.7 | 4138.3 | 4139.2 | 4139.9 | 4140.7 | 4142.2   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.1   | 4142.9    | 4142.1   | 4141.5    | 4140.5 | 4139.7 |
| 1994       | 4139.4 | 4139.4 | 4139.8 | 4140.3 | 4140.7 | 4141.0   | 4141.3    | 4141.3   | 4141.2    | 4141.2   | 4141.1    | 4140.7   | 4140.2    | 4139.6   | 4138.9    | 4138.0 | 4137.7 |
| 1995       | 4137.7 | 4138.4 | 4139.1 | 4140.7 | 4141.9 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.9   | 4142.6    | 4142.0   | 4141.4    | 4140.0 | 4139.2 |
| 1996       | 4139.0 | 4139.2 | 4140.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4142.7   | 4142.3    | 4141.8   | 4141.2    | 4140.3 | 4139.7 |
| 1997       | 4139.5 | 4140.1 | 4141.9 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4142.9   | 4142.9    | 4142.7   | 4142.6    | 4142.0   | 4141.5    | 4140.7 | 4140.1 |
| 1998       | 4139.9 | 4140.3 | 4140.6 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.2    | 4143.3   | 4143.3    | 4142.7   | 4142.2    | 4141.0 | 4140.2 |
| 1999       | 4139.9 | 4140.9 | 4141.8 | 4142.3 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.2   | 4143.3    | 4143.1   | 4142.9    | 4142.4   | 4141.9    | 4141.3 | 4140.6 |
| 2000       | 4140.3 | 4140.6 | 4141.0 | 4142.2 | 4142.7 | 4142.9   | 4143.0    | 4143.0   | 4143.1    | 4143.0   | 4143.0    | 4142.5   | 4142.0    | 4141.5   | 4141.0    | 4139.9 | 4139.8 |

Klamath River at Iron Gate Dam 1961-1970

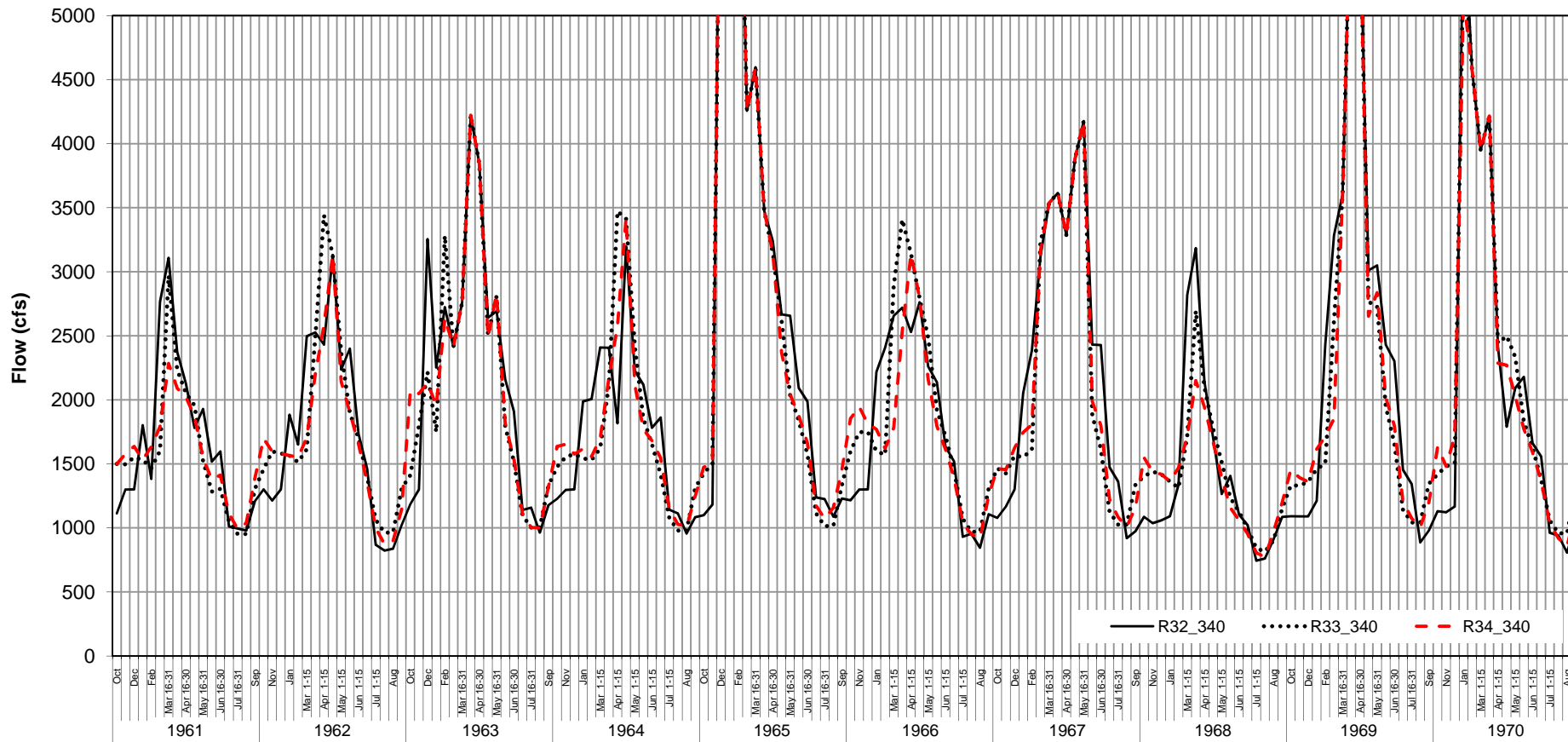


Figure 1. Results of the R32\_340, R33\_340, and R34\_340 simulations for Iron Gate flows during 1961-1970.



Klamath River at Iron Gate Dam 1971-1980

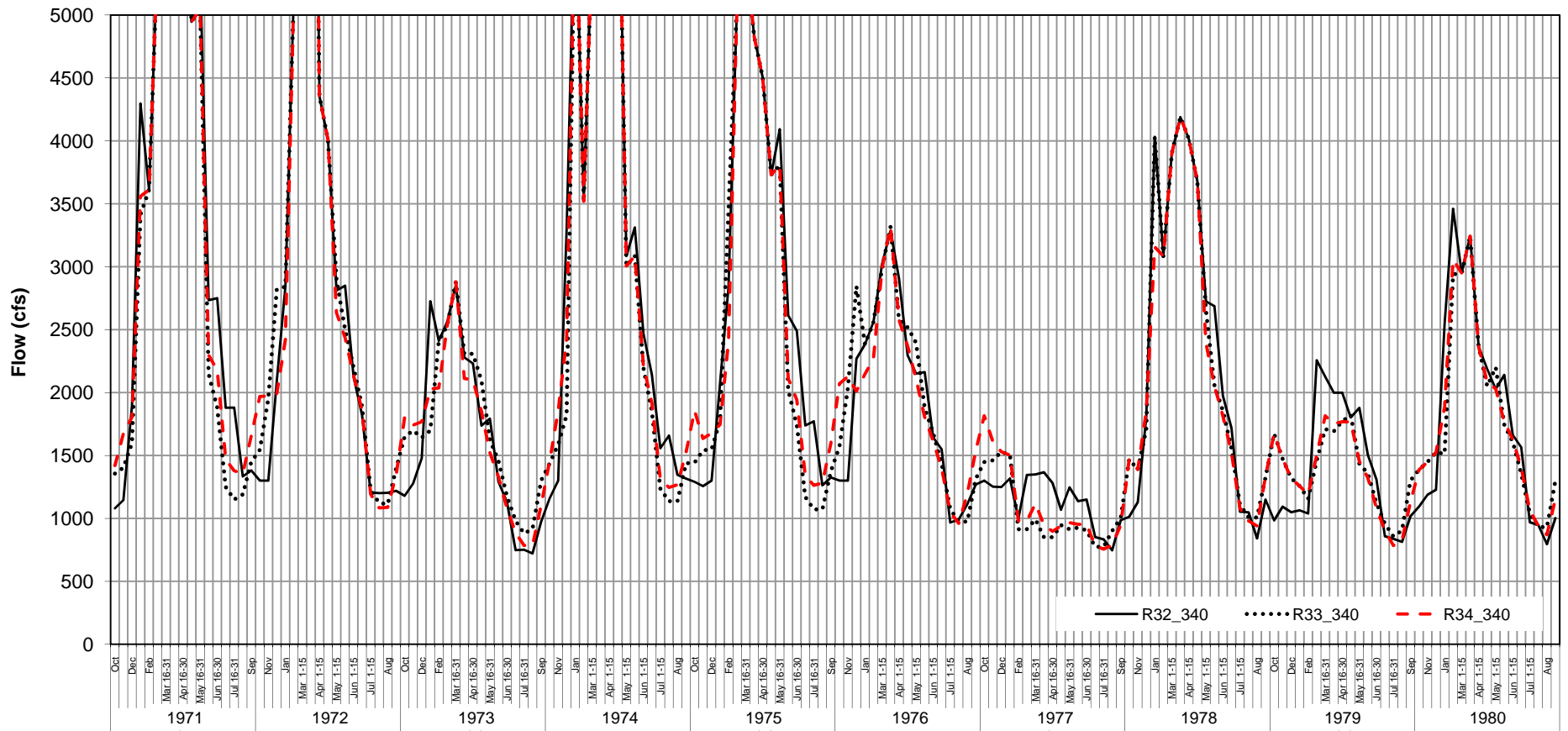


Figure 2. Results of the R32\_340, R33\_340, and R34\_340 simulations for Iron Gate flows during 1971-1980.

Klamath River at Iron Gate Dam 1981-1990

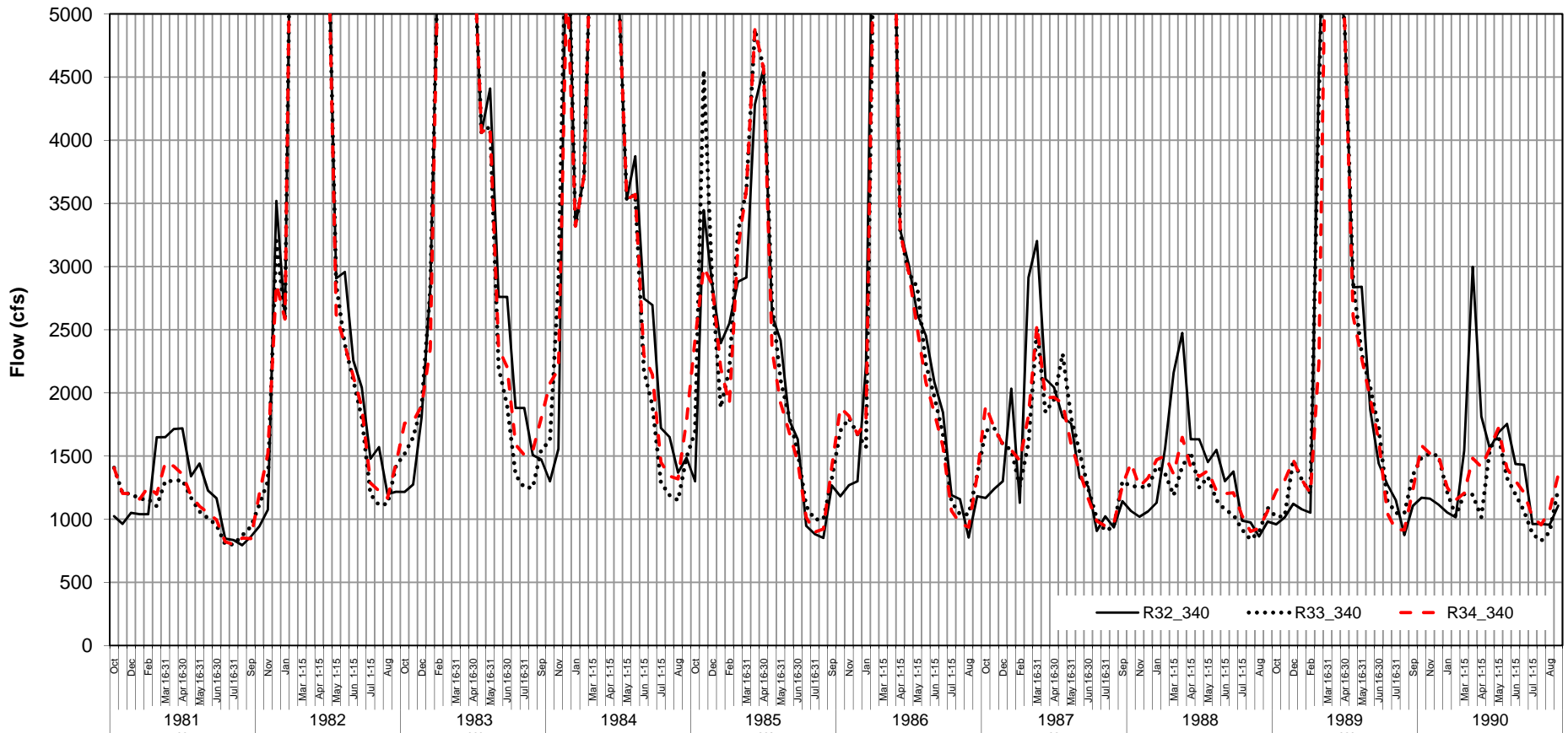


Figure 3. Results of the R32\_340, R33\_340, and R34\_340 simulations for Iron Gate flows during 1981-1990.

Klamath River at Iron Gate Dam 1991-2000

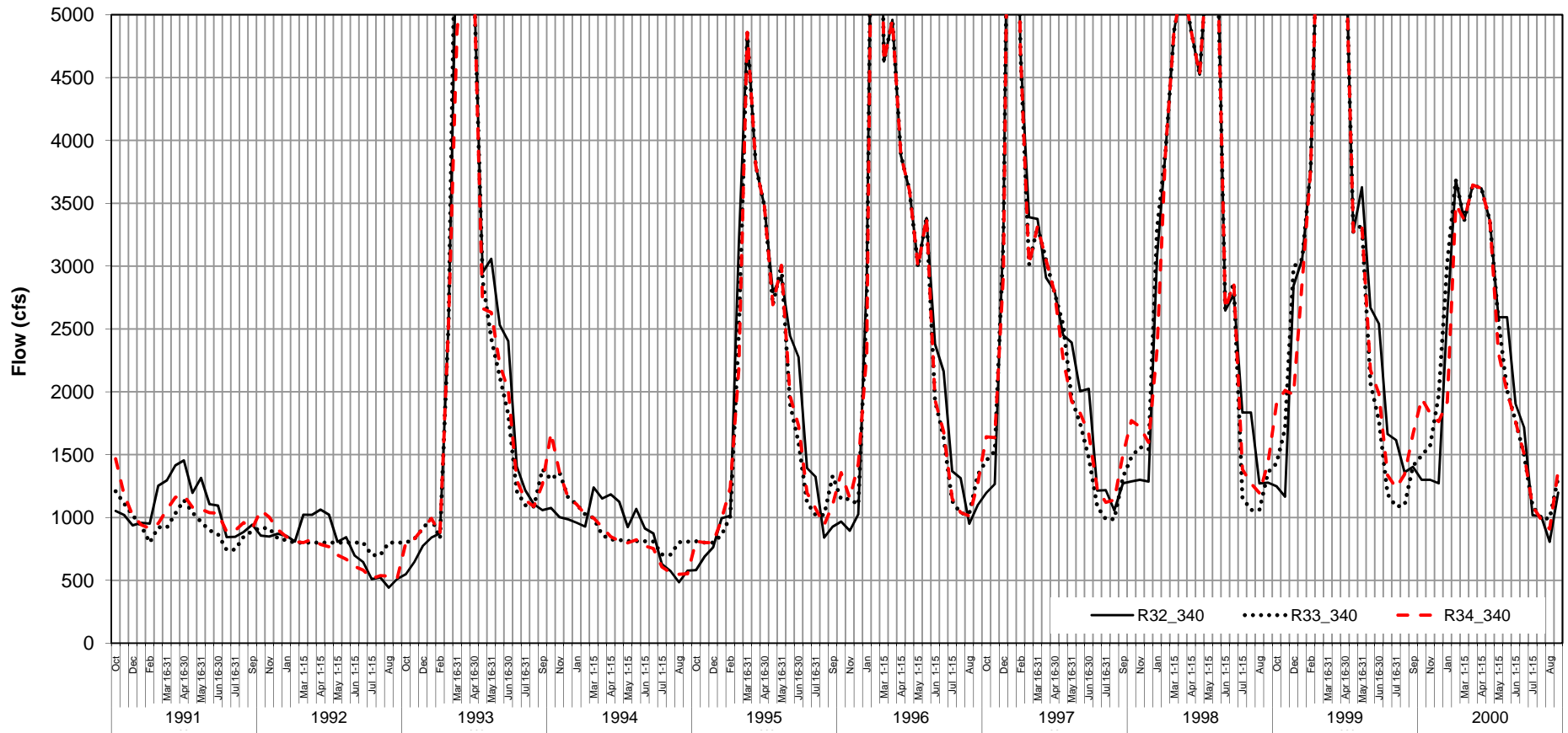


Figure 4. Results of the R32\_340, R33\_340, and R34\_340 simulations for Iron Gate flows during 1991-2000.

### Upper Klamath Lake 1961-1970

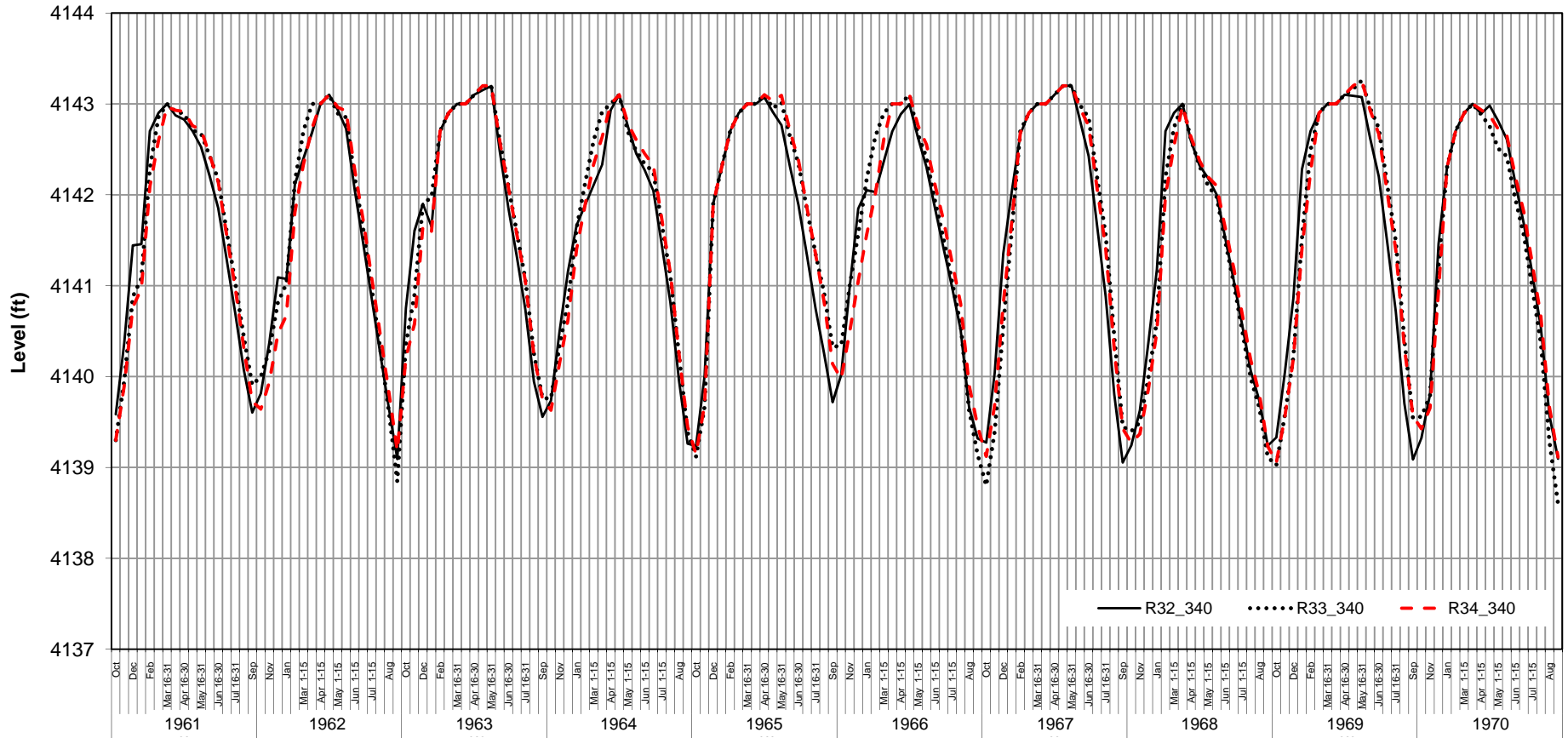


Figure 5. Results of the R32\_340, R33\_340, and R34\_340 simulations for Upper Klamath Lake levels during 1961-1970.

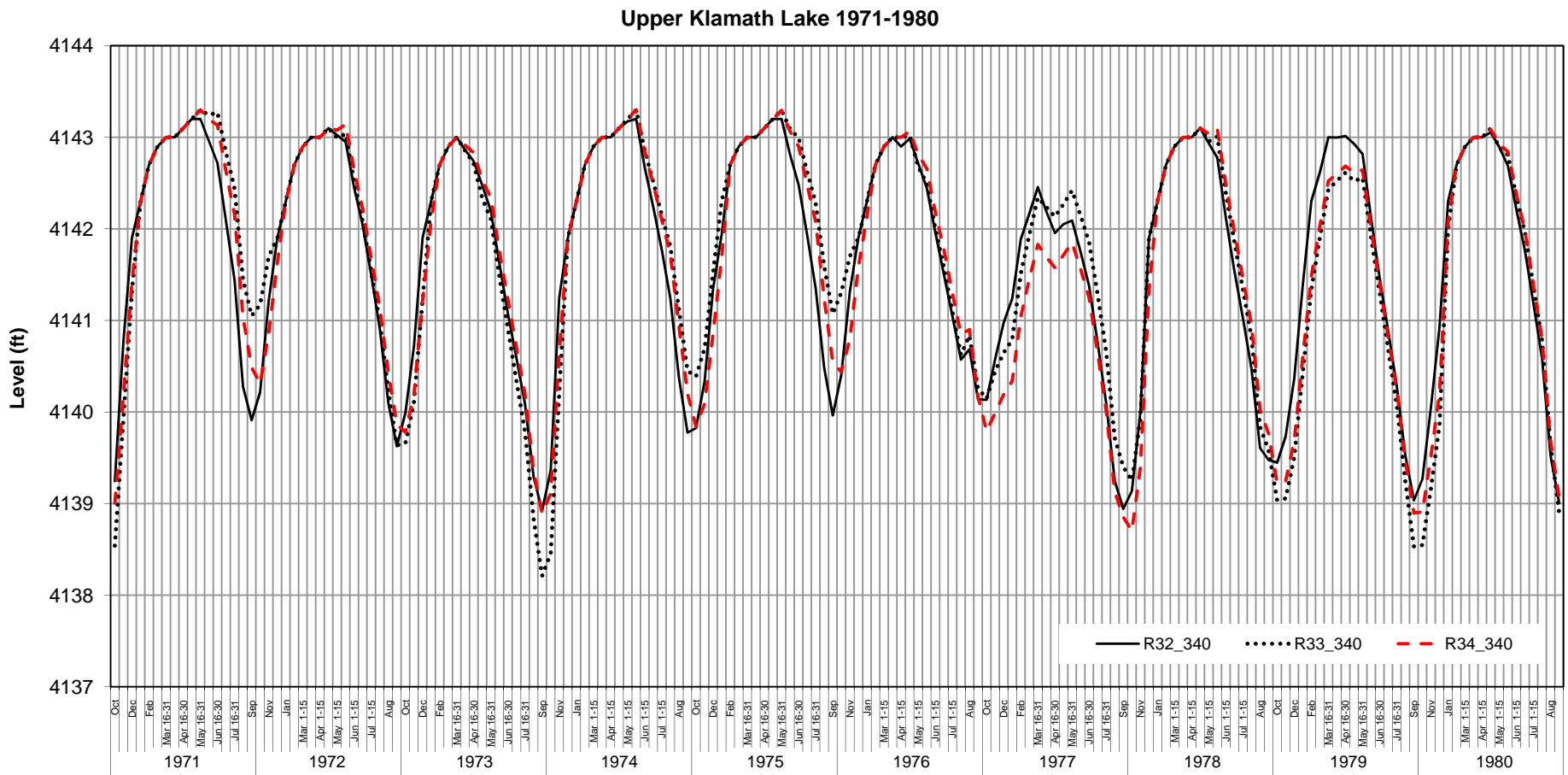


Figure 6. Results of the R32\_340, R33\_340, and R34\_340 simulations for Upper Klamath Lake levels during 1971-1980.

### Upper Klamath Lake 1981-1990

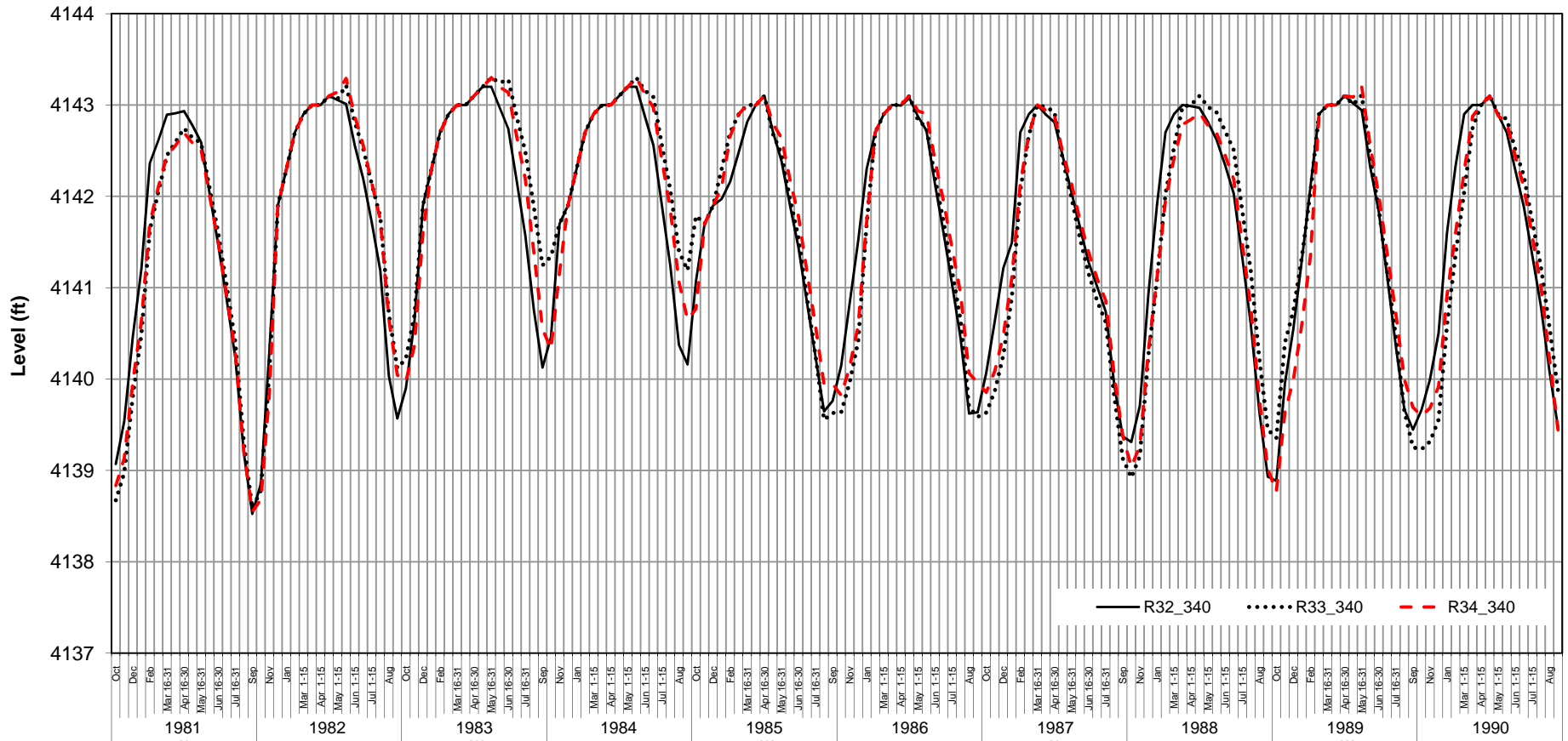


Figure 7. Results of the R32\_340, R33\_340, and R34\_340 simulations for Upper Klamath Lake levels during 1981-1990.

Upper Klamath Lake 1991-2000

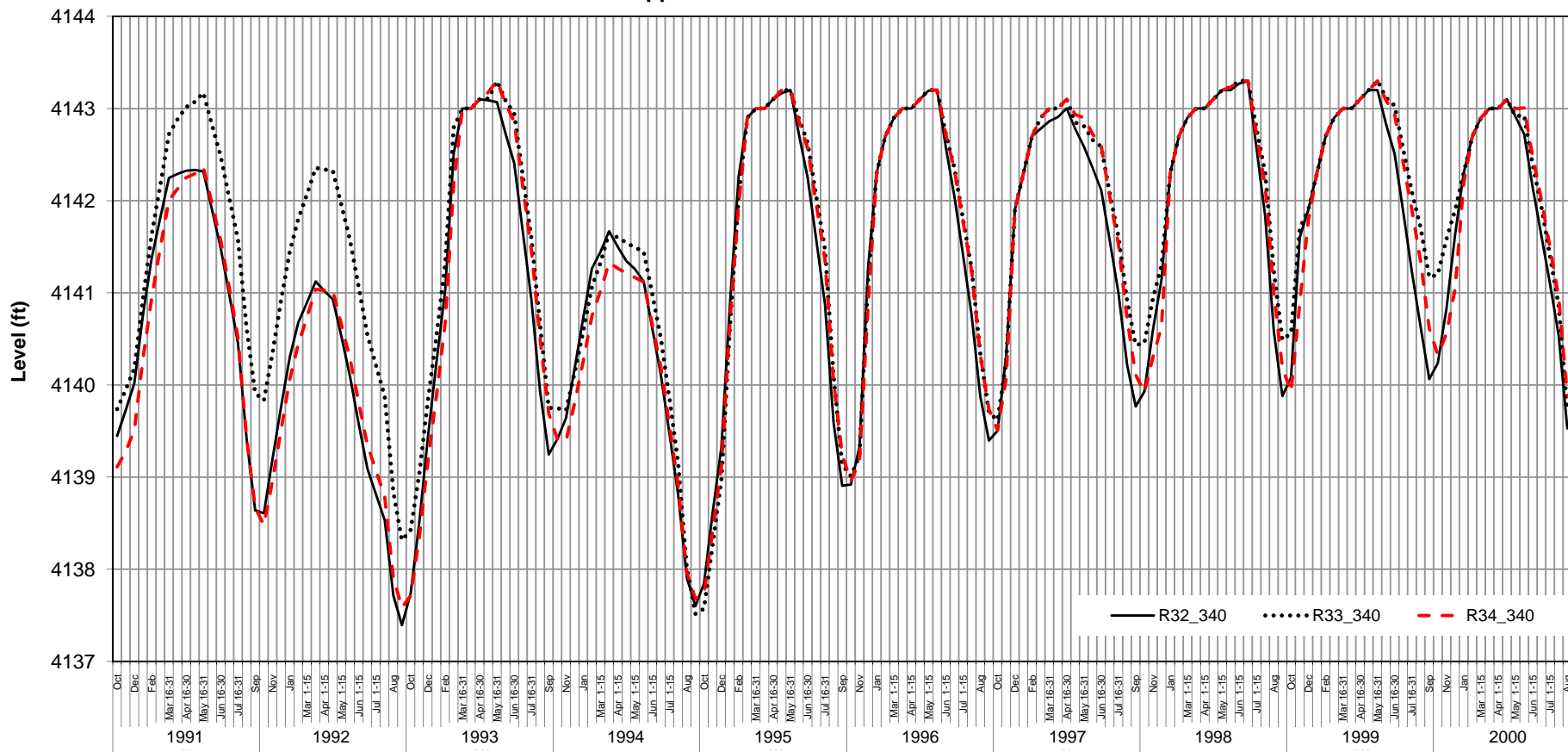


Figure 8. Results of the R32\_340, R33\_340, and R34\_340 simulations for Upper Klamath Lake levels during 1991-2000.

**Appendix E-6**

**Stipulations filed with the Office of Administrative Hearings,  
State of Oregon, for the Water Resources Department;  
and Orders of the Administrative Law Judge**



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; Water Watch 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; 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 Cowan; James R. Goold for Tillie Goold Trust; Duane F. Martin; Modoc Point Irrigation~~

**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;  
[PROPOSED] ORDER**

Case No. 282

Claim No. 671, 672, 673, and that  
Portion of Claim 612 pertaining to the  
Klamath River

Contest Nos. 2062, 2064, 2065, 2066,  
~~3016, 3070, 3071, 3072~~<sup>1</sup>, 3249, 3257,  
3258, 3259<sup>2</sup>, 3314<sup>3</sup>, 3373, 3374,

<sup>1</sup> Water Watch of Oregon, Inc.'s Contests 3016, 3070, 3071 and 3072 were dismissed. Order Dismissing Water Watch of Oregon, Inc.'s Contests, May 20, 2003.

<sup>2</sup> Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3249, 3257, 3258 and 3259 and 3254 on October 16, 2003.

<sup>3</sup> 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 Contests 3314 and 3373-3375 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contests 3314 and 3373-3375 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 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. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily served a Notice of Withdrawal of Contests on April 7, 2007.

District; Thomas Stephens; Peggy Marengo; Jerry L. and Linda R. Neff; Tom Bentley; Peter Bourdet; John Briggs; ~~William Bryant~~; Vincent Briggs; J.T. Ranch Co.; 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; 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.

3375<sup>4</sup>, 3644, 3657, 3658, 3659, 3932, 3933, 3934, 4002, 4061, 4062, 4063

Claimants, the Klamath Tribes and the United States, Bureau of Indian Affairs (“United States”) and the Contestants Klamath Project Water Users (“KPWU”)<sup>5</sup> (collectively, “Parties”), and the Oregon Water Resources Department (“OWRD”) hereby agree and stipulate and request the Administrative Law Judge and Adjudicator to resolve the above-captioned Contests to Claims 671, 672, 673, and that portion of Claim 612 pertaining to the Klamath River, as follows.

<sup>4</sup> Don Vincent voluntarily withdrew from Contests 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.

<sup>5</sup> For purposes of this Stipulation, 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

## A. STIPULATED FACTS

1. The United States filed Claims 671, 672 and 673 in the Klamath Basin Adjudication (“Adjudication”). The Klamath Tribes filed Claim 612 in the Adjudication, adopting and incorporating by reference United States Claims 671, 672 and 673 and certain other claims of the United States. The term “Claim 612” as used in this Stipulation refers only to that portion of Claim 612 that adopts and incorporates by reference Claims 671, 672 and 673 pertaining to the Klamath River. Claims 671, 672, 673, and 612 assert water rights to maintain specified flows in the Klamath River in specified reaches between Upper Klamath Lake and the Oregon-California border. These four Claims have been consolidated into Case 282 in the Adjudication. KPWU filed Contests 3657, 3658 and 3659 against Claims 671, 672 and 673, and Contest 3644 against Claim 612, and these Contests are part of Case 282.

2. The Parties sought rulings on legal issues, propounded discovery requests to each other, and received discovery responses from each other, all before conditionally resolving KPWU’s contests in this case on the terms below.

3. The Parties have negotiated terms to resolve KPWU’s contests in the context of the proposed “Klamath River Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities” (“Restoration Agreement”) which includes mutual commitments. The commitments are found in various provisions of the Restoration Agreement, including Section 1.5, in parts of Section 15.3, and Appendix E-1, which, as agreed to by the Parties, are all included as Attachment 1 to this Stipulation. Final approvals and resultant effectiveness of the Restoration Agreement has not occurred at this time due to circumstances not related to the Restoration Agreement terms that are the subject of this Stipulation, and the

Parties and OWRD expect to agree to, and anticipate the effectiveness of, the Restoration Agreement.<sup>6</sup>

4. The Parties and OWRD agree that KPWU's Contests 3657, 3658, 3659, and 3644 can be conditionally resolved without the need for hearing pursuant to the terms outlined below in sections B and C.

## **B. CONDITIONAL WITHDRAWAL OF CONTESTS**

1. KPWU hereby: acknowledge the time immemorial priority and amounts of water under Claims 671, 672, 673, and 612 and conditionally withdraw their Contests 3657, 3658, 3659, and 3644 to Claims 671, 672, 673, and 612 in Case 282 and do not oppose that the Adjudicator approve water rights under Claims 671, 672, 673, and 612, consistent with the provisions of this Stipulation. KPWU will not further participate in the administrative hearing process as to Claims 671, 672, 673, and 612 other than as to being heard on scheduling matters that may affect the timing of adoption of the Findings of Fact and Order of Determination in this Adjudication and as provided in paragraph E.2, below.

2. The Restoration Agreement provides that the Secretary of the Interior ("Secretary") is required: to publish a notice in the Federal Register after the Timely occurrence of certain events described in Section 1.5.2 of the Restoration Agreement; and to publish a notice in the Federal Register within 45 days of the occurrence of particular events described in Section 15.3.4 of the Restoration Agreement if all of those events occur by December 31, 2012.

---

<sup>6</sup> In the event that there is any change, mutually agreed to by the Parties and OWRD, to any relevant provision of the Restoration Agreement between the time this Stipulation is entered into and the time of final adoption of the Restoration Agreement, the Parties and OWRD intend to file an amended version of this Stipulation and Attachments that will reflect those mutually agreed changes.

3. If the Restoration Agreement becomes effective and the Secretary publishes both notices described in paragraph B.2 above, the conditional withdrawal by KPWU of their Contests in Case 282 shall become permanent and no longer conditional.

4. 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, the conditional withdrawal by KPWU of their Contests in Case 282 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 Tribes and United States or any other party, to any Findings of Fact and Order of Determination on Claims 671, 672, 673, and 612 before the State of Oregon Circuit Court. KPWU shall file any exceptions to the Findings of Fact and Order of Determination on Claims 671, 672, 673, and 612 as required by 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 671, 672, 673, and 612 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 Stipulation 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 671, 672, 673, and 612 in the Circuit Court, under the circumstances of the first sentence of this paragraph. 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. The Parties have no further discovery obligations regarding each other during the contested case process before the Office of Administrative Hearings or OWRD.

5. OWRD staff hereby recommends to the Administrative Law Judge and Adjudicator that the KPWU's Contests in Case 282 to Claims 671, 672, 673, and 612 be disposed of as described in this section B of this document.

### **C. CONDITIONAL LIMITATION ON EXERCISE OF THE TRIBAL WATER RIGHTS**

1. Regarding Claims 671, 672, 673, and 612, the Klamath Tribes and the United States agree that the exercise of any water rights hereafter determined under Claims 671, 672, 673, and 612 by any decision-maker in the Adjudication, shall be limited in the following manner.

2. If the Restoration Agreement becomes effective and the Secretary publishes both notices described in paragraph B.2 above, the following limitations shall apply:

a. from the time this Stipulation is 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 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;

b. 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 under Section 15.3.9.A, then after December 1, 2017, 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 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 as part of Attachment 1.

3. 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, the following limitation shall apply: any exercise of the water rights determined for Claims 671, 672, 673, and 612 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. OWRD staff hereby recommends to the Adjudicator that the resolution of Claims 671, 672, 673, and 612 be consistent with section C of this Stipulation.

#### **D. IMPLEMENTING ORDER**

1. The Parties and OWRD jointly move the Administrative Law Judge, Office of Administrative Hearings, to adopt the [Proposed] Order attached hereto as Attachment 2.

#### **E. GENERAL PROVISIONS**

1. If the Findings of Fact and Order of Determination issued by the Adjudicator for Claims 671, 672, 673, and 612 does not accord with the [Proposed] Order attached hereto as Attachment 2, all Parties reserve any and all rights they may have to file exceptions to the Findings of Fact and Order of Determination as to Claims 671, 672, 673, and 612 in the Circuit Court and reserve all rights such Parties may have to participate in any future proceedings authorized by law.

2. Consistent with sections B and C, above, the Parties shall support this Stipulation and all of its terms, provisions, conditions, or covenants, and Orders of the Adjudicator and order,

judgment or decree of the Circuit Court consistent with this Stipulation, including if any provision of it, or any consistent Order, Judgment or Decree from the Klamath Basin Adjudication, is challenged in the administrative or judicial phases of the Adjudication or any appeals thereof.

3. This Stipulation is entered into for the purpose of resolving KPWU's contests to disputed Claims 671, 672, 673, and 612, and no other contests are affected by this Stipulation. The limitation on the exercise of the tribal water rights in section C applies only to the claims in this Case, Claims 671, 672, 673, and 612. The Parties and OWRD agree that the Stipulation shall not be offered as evidence or treated as an admission regarding any matter herein and may not be used in proceedings on any other claim or contest whatsoever, except that the Stipulation may be used in any future proceeding to interpret and/or enforce the terms of this Stipulation or the Restoration Agreement. The Parties and OWRD agree that this Stipulation is not inconsistent with, and implements terms identified in, the Restoration Agreement. Further, the Parties and OWRD agree that neither the Stipulation nor any of its terms shall be used to establish precedent with respect to any other claim or contest in the Adjudication, or in any other proceeding. Nothing in this Stipulation or the Restoration Agreement is an admission or waiver of any position by any Party or OWRD with respect to whether, or under what circumstances, any court may or should determine the merits of water rights claims equivalent to those described in Klamath Basin Adjudication Claims 671, 672, 673, and 612.

4. Regarding the ALJ's Proposed Order or OWRD's Findings of Fact and Order of Determination issued under ORS 539.130(1) for Claims 671, 672, 673, and 612 and only those two documents and no others, the Parties further agree that neither of these two documents shall be used by any Party as the basis of administrative or regulatory positions or actions that



interfere with the diversion, use, and reuse of water for the Klamath Reclamation Project. The Parties also agree that their use of any judgment of a court shall be consistent with section C.2 of this Stipulation and the Restoration Agreement.

5. The Parties agree that any obligation KPWU have to exhaust their remedies in the administrative process before OWRD has been fulfilled and the Parties will not argue before OWRD or the Circuit Court or otherwise that KPWU failed to exhaust any administrative remedies.

6. This Stipulation shall be binding upon and shall inure to the benefit of the Parties and OWRD and their respective heirs, executors, administrators, trustors, trustees, beneficiaries, predecessors, successors, affiliated and related entities, officers, directors, principals, agents, employees, assigns, representatives and all persons, firms, associations, and/or corporations connected with them.

7. Each Party and OWRD represents, warrants, and agrees that the person who executed this Stipulation on its behalf has the full right and authority to enter into this Stipulation on behalf of that entity and bind that entity to the terms of the Stipulation.

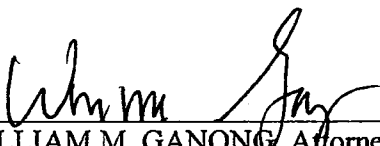
8. The terms, provisions, conditions, and covenants of this Stipulation are not severable, except, if any term, provision, condition, or covenant of this Stipulation is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the terms, provisions, conditions, and covenants shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

9. This Stipulation may be executed in several counterparts and all documents so executed shall constitute one Stipulation, binding on the Parties and OWRD, notwithstanding that the Parties and OWRD did not sign the same original or the same counterparts.

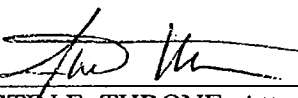
10. The Parties and OWRD agree and acknowledge that this Stipulation has been drafted after full and arms-length negotiations, and that the usual rule of contractual construction that all ambiguities shall be construed against the drafting party shall not apply to the interpretation of this Stipulation.

11. All Parties and OWRD shall each bear their own costs and consultants' and attorneys' fees incurred in connection with this Stipulation.

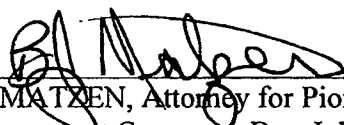
This Stipulation shall be effective as of the date of the last signature hereto.

By   
WILLIAM M. GANONG, Attorney for  
Klamath Irrigation District, Malin Irrigation District,  
and Modoc Lumber Company

Date May 8, 2009


By   
JUSTIN E. THRONE, Attorney for  
Ady District Improvement Company, Klamath  
Drainage District, Klamath Basin Improvement  
District, Midland District Improvement Company,  
Poe Valley Improvement District, Sunnyside Irrigation  
District, Enterprise Irrigation District and  
Pine Grove Irrigation District

Date May 8, 2009

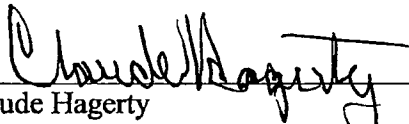
By   
B.J. MATZEN, Attorney for Pioneer District  
Improvement Company, Don Johnston & Son,  
Randy Walthall, Winema Hunting Lodge, Inc.,  
Bradley S. Luscombe, and Inter-County Title Company

Date May 8, 2009

RATLIFF & RATLIFF, P.C.

By   
Nathan Ratliff, Attorneys for Van Brimmer Ditch Co.

Date May 11, 2009

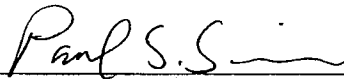
By   
Claude Hagerty  
President, Shasta View Irrigation District

DAVIS WRIGHT TREMAINE

By \_\_\_\_\_  
Richard M. Glick, Attorneys for Collins Products LLC  
and Plevna District Improvement Company

Date \_\_\_\_\_

SOMACH SIMMONS & DUNN  
A Professional Corporation

By   
Paul S. Simmons  
Attorneys for Tulelake Irrigation District

Date 5-5-09

ATTORNEYS FOR THE KLAMATH PROJECT WATER USERS

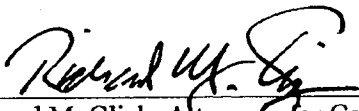
RATLIFF & RATLIFF, P.C.

By \_\_\_\_\_  
Nathan Ratliff, Attorneys for Van Brimmer Ditch Co.

Date \_\_\_\_\_

By \_\_\_\_\_  
Claude Hagerty  
President, Shasta View Irrigation District

DAVIS WRIGHT TREMAINE

By  \_\_\_\_\_  
Richard M. Glick, Attorneys for Collins Products LLC  
and Plevna District Improvement Company

Date 5-5-09

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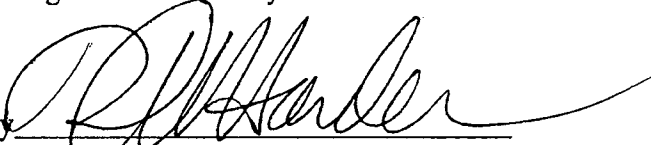
By \_\_\_\_\_  
Paul S. Simmons  
Attorneys for Tulelake Irrigation District

Date \_\_\_\_\_

ATTORNEYS FOR THE KLAMATH PROJECT WATER USERS

UNITED STATES DEPARTMENT OF JUSTICE

John C. Cruden  
Acting Assistant Attorney General

By 

Date May 5, 2009

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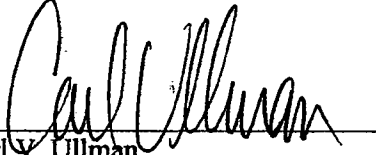
By 

Date 05/04/09

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KLAMATH WATER PROJECT

By   
Carl V. Ullman

Date

4 May 09

KLAMATH WATER PROJECT

P.O. Box 957

Chiloquin, Oregon 97624

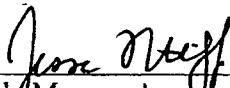
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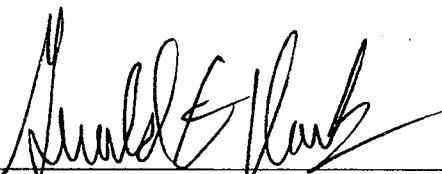
ATTORNEY FOR THE KLAMATH TRIBES

OREGON DEPARTMENT OF JUSTICE:

By   
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Date May 14, 2009

ATTORNEYS FOR THE OREGON WATER RESOURCES DEPARTMENT

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Date May 14, 2009

OREGON WATER RESOURCES DEPARTMENT STAFF

## LIST OF ATTACHMENTS TO STIPULATION

1. Klamath River Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities, sections 1.5, and as agreed to between the parties revised section 15.3 and Appendix E-1.
2. Proposed Order for ALJ to implement Stipulation.



## CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of May, 2009, I sent a true and correct copy of the **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, Attachment 1, and Attachment 2 ([Proposed] Order)**, in Case 282, Claims 671-673, with Administrative Law Judge Richard D. Barber, Oregon Office of Administrative Hearings, PO Box 14020, Salem OR 97303-4924, by first class mail and by email to [richard.d.barber@state.or.us](mailto:richard.d.barber@state.or.us). I further certify that I served the same on the parties hereby listed below by e-mail (where an email address is listed below) and first class mail where no email address is available.

DATED this 18<sup>th</sup> day of May, 2009.

---

Kate Svinarich

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Tom & Althia Stephens  
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Chiloquin, OR 97624

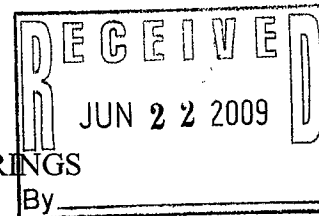
Jacob D. Wood  
11161 Table Rock Road  
Central Point, OR 97502

As filed with the Office of Administrative Hearings, the preceding Stipulation included the following attachments:

**Attachment 1: Selected Provisions Of The Klamath Basin Restoration Agreement  
As Agreed To Among These Parties [draft terms as then-current]**

**Attachment 2: [Proposed] Order On Klamath Tribes, United States, And Klamath  
Project Water Users' Stipulation Of Conditional Withdrawal Of  
KPWU Contests To Claims 671, 672, 673, And That Portion Of  
Claim 612 Pertaining To The Klamath River And Conditional And  
Interim No-Call Provisions By The United States And Klamath  
Tribes**

These attachments area omitted here.



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; 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 Cowan; James R. Goold for Tillie Goold Trust; Duane F. Martin; Modoc Point Irrigation District; Thomas Stephens; Peggy Marenco; Jerry L. and Linda R. Neff; Tom Bentley; Peter Bourdet; John Briggs;~~

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

**Case No. 282**

Claim No. 671, 672, 673, and that Portion of Claim 612 pertaining to the Klamath River

Contest Nos. 2062, 2064, 2065, 2066, 3016, 3070, 3071, 3072<sup>1</sup>, 3249, 3257, 3258, 3259<sup>2</sup>, 3314<sup>3</sup>, 3373, 3374,

<sup>1</sup> WaterWatch of Oregon, Inc.'s Contests 3016, 3070, 3071 and 3072 were dismissed. Order Dismissing WaterWatch of Oregon, Inc.'s Contests, May 20, 2003.

<sup>2</sup> Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3249, 3257, 3258 and 3259 and 3254 on October 16, 2003.

<sup>3</sup> 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 Contests 3314 and 3373-3375 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contests 3314 and 3373-3375 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 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. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily served a Notice of Withdrawal of Contests on April 7, 2007.

CASE 282: ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS' STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU CONTESTS TO CLAIMS 671, 672, 673, AND THAT PORTION OF CLAIM 612 PERTAINING TO THE KLAMATH RIVER AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES

~~William Bryant~~; Vincent Briggs; J.T. Ranch Co.; 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; 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.

3375<sup>4</sup>, 3644, 3657, 3658, 3659, 3932, 3933, 3934, 4002, 4061, 4062, 4063

1. The “Stipulation of Conditional Withdrawal of KPWU Contests to Claims 671, 672, 673, and that Portion of Claim 612 Pertaining to the Klamath River and Conditional and Interim No-Call Provisions by the United States and Klamath Tribes” (“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 obligation to exhaust administrative remedies before OWRD, remedies have been exhausted, consistent with Section E.4 of the Stipulation. As used in this Order, the term “Claim 612” refers to Claim 612 insofar as it adopts and incorporates by reference Claims 671, 672 and 673.

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<sup>4</sup> Don Vincent voluntarily withdrew from Contests 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.

2. Regarding contests 3657, 3658, 3659, and 3644 filed by Klamath Project Water Users (KPWU),<sup>5</sup> 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 3657, 3658, 3659, and 3644 of Claims 671, 672, 673, and 612 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 282 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 Tribes and United States or any other party, to any Findings of Fact and Order of Determination on Claims 671, 672, 673, and 612 before the State of Oregon Circuit Court. KPWU shall file any exceptions to the Findings of Fact and Order of

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<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, 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

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

a. 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 671, 672, 673, and 612 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 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;


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 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 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 671, 672, 673, and 612 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 671, 672, 673, and 612 or any other claims, or b) any contests other than Contests 3657, 3658, 3659, and 3644.

  
\_\_\_\_\_  
Joe L. Allen, Administrative Law Judge  
Office of Administrative Hearings

Date: June 19, 2009

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2009, I mailed a true copy of the following: **ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS' STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU CONTESTS TO CLAIMS 671, 672, 673, AND THAT PORTION OF CLAIM 612 PERTAINING TO THE KLAMATH RIVER AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES**, 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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United States Department of Justice  
Environment and Natural Resources Div  
1961 Stout Street – 8<sup>th</sup> Floor  
Denver, CO 80294  
Phone: 303-844-1372  
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Carl V. Ullman  
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The Klamath Tribes  
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Walter Echo-Hawk  
Native American Rights Fund  
1506 Broadway

Certificate of Service; Case 282, Claims: 671-673, and that Portion of Tribal Claim 612 pertaining to the Klamath River.

Page 1

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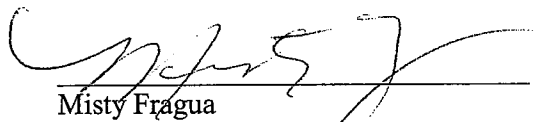
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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
WATER RESOURCES DEPARTMENT

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

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

Case No. 286

Claim No. 616 and 622

Contest Nos. 2062, 2063, 2731, 2732, 2741,  
2742, ~~3020~~, ~~3021~~<sup>1</sup>, 3123<sup>2</sup>, 3253<sup>3</sup>, 3254, 3318,  
3324<sup>4</sup>, 3648, 3654<sup>5</sup>, 3883, 4006 and 4012

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

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

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

<sup>4</sup> 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.

<sup>5</sup> 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.

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.

Claimants, the Klamath Tribes and the United States, Bureau of Indian Affairs (“United States”) and the Contestants Klamath Project Water Users (“KPWU”)<sup>6</sup> (collectively, “Parties”), and the Oregon Water Resources Department (“OWRD”) hereby agree and stipulate and request the Administrative Law Judge and Adjudicator to resolve the above-captioned Contests to Claims 616 and 622 as follows.

<sup>6</sup> For purposes of this Stipulation, 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

## A. STIPULATED FACTS

1. The Klamath Tribes filed Claim 616 and the United States filed Claim 622 in the Klamath Basin Adjudication (“Adjudication”). Both of these Claims assert water rights to maintain specified surface elevations in Upper Klamath Lake. These two Claims have been consolidated into Case 286 in the Adjudication. KPWU filed Contests 3648 and 3654 against Claims 616 and 622, and these Contests are part of Case 286.

2. The Parties sought rulings on legal issues, propounded discovery requests to each other, and received discovery responses from each other, all before conditionally resolving KPWU’s contests in this case on the terms below.

3. The Parties have negotiated terms to resolve KPWU’s contests in the context of the proposed “Klamath River Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities” (“Restoration Agreement”) which includes mutual commitments. The commitments are found in various provisions of the Restoration Agreement, including section 1.5, in parts of section 15.3, and Appendix E-1, which, as agreed to by the Parties, are all included as Attachment 1 to this Stipulation. Final approvals and resultant effectiveness of the Restoration Agreement has not occurred at this time due to circumstances not related to the Restoration Agreement terms that are the subject of this Stipulation, and the Parties and OWRD expect to agree to, and anticipate the effectiveness of, the Restoration Agreement.<sup>7</sup>

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<sup>7</sup> In the event that there is any change, mutually agreed to by the Parties and OWRD, to any relevant provision of the Restoration Agreement between the time this Stipulation is entered into and the time of final adoption of the Restoration Agreement, the Parties and OWRD intend to file an amended version of this Stipulation and Attachments that will reflect those mutually agreed changes.

4. The Parties and OWRD agree that KPWU's Contests 3648 and 3654 can be conditionally resolved without the need for hearing pursuant to the terms outlined below in sections B and C.

## **B. CONDITIONAL WITHDRAWAL OF CONTESTS**

1. KPWU hereby: acknowledge the time immemorial priority and amounts of water under claims 616 and 622 and conditionally withdraw their Contests 3648 and 3654 to Claims 616 and 622 in Case 286 and do not oppose that the Adjudicator approve water rights under claims 616 and 622, consistent with the provisions of this Stipulation. KPWU will not further participate in the administrative hearing process as to Claims 616 and 622 other than as to being heard on scheduling matters that may affect the timing of adoption of the Findings of Fact and Order of Determination in this Adjudication and as provided in paragraph E.2, below.

2. The Restoration Agreement provides that the Secretary of the Interior ("Secretary") is required: to publish a notice in the Federal Register after the Timely occurrence of certain events described in Section 1.5.2 of the Restoration Agreement; and to publish a notice in the Federal Register within 45 days of the occurrence of particular events described in Section 15.3.4 of the Restoration Agreement if all of those events occur by December 31, 2012.

3. If the Restoration Agreement becomes effective and the Secretary publishes both notices described in paragraph B.2 above, the conditional withdrawal by KPWU of their Contests in Case 286 shall become permanent and no longer conditional.

4. 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, 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 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 539.150. 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 Stipulation 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, attached hereto as Attachment 2. 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. The Parties have no further discovery obligations regarding each other during the contested case process before the Office of Administrative Hearings or OWRD.

5. OWRD staff hereby recommends to the Administrative Law Judge and Adjudicator that the KPWU's Contests in Case 286 to Claims 616 and 622 be disposed of as described in this section B of this document.

### **C. CONDITIONAL LIMITATION ON EXERCISE OF THE TRIBAL WATER RIGHTS**

1. Regarding Claims 616 and 622, the Klamath Tribes and the United States agree that the exercise of any water rights hereafter determined under Claims 616 and 622 by any decision-maker in the Adjudication, shall be limited in the following manner.

2. If the Restoration Agreement becomes effective and the Secretary publishes both notices described in paragraph B.2 above, the following limitations shall apply:

a. from the time this Stipulation is 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;

b. 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 under Section 15.3.9.A, 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 as part of Attachment 1.

3. 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, 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. OWRD staff hereby recommends to the Adjudicator that the resolution of Claims 616 and 622 be consistent with section C of this Stipulation.

#### **D. IMPLEMENTING ORDER**

1. The Parties and OWRD jointly move the Administrative Law Judge, Office of Administrative Hearings, to adopt the [Proposed] Order attached hereto as Attachment 3.

#### **E. GENERAL PROVISIONS**

1. If the Findings of Fact and Order of Determination issued by the Adjudicator for Claims 616 and 622 does not accord with the [Proposed] Order attached hereto as

Attachment 3, all Parties reserve any and all rights they may have to file exceptions to the Findings of Fact and Order of Determination as to Claims 616 and 622 in the Circuit Court and reserve all rights such Parties may have to participate in any future proceedings authorized by law.

2. Consistent with sections B and C, above, the Parties shall support this Stipulation and all of its terms, provisions, conditions, or covenants, and Orders of the Adjudicator and order, judgment or decree of the Circuit Court consistent with this Stipulation, including if any provision of it, or any consistent Order, Judgment or Decree from the Klamath Basin Adjudication, is challenged in the administrative or judicial phases of the Adjudication or any appeals thereof.

3. This Stipulation is entered into for the purpose of resolving KPWU's contests to disputed claims 616 and 622, and no other contests are affected by this Stipulation. The limitation on the exercise of the tribal water rights in section C applies only to the claims in this Case, claims 616 and 622. The Parties and OWRD agree that the Stipulation shall not be offered as evidence or treated as an admission regarding any matter herein and may not be used in proceedings on any other claim or contest whatsoever, except that the Stipulation may be used in any future proceeding to interpret and/or enforce the terms of this Stipulation or the Restoration Agreement. The Parties and OWRD agree that this Stipulation is not inconsistent with, and implements terms identified in, the Restoration Agreement. Further, the Parties and OWRD agree that neither the Stipulation nor any of its terms shall be used to establish precedent with respect to any other claim or contest in the Adjudication, or in any other proceeding.

Nothing in this Stipulation or the Restoration Agreement is an admission or waiver of any position by any Party or OWRD with respect to whether, or under what circumstances, any court may or should determine the merits of water rights claims equivalent to those described in Klamath Basin Adjudication Claims 616 and 622.

4. Regarding the ALJ's Proposed Order or OWRD's Findings of Fact and Order of Determination issued under ORS 539.130(1) for claims 616 and 622 and only those two documents and no others, the Parties further agree that neither of these two documents shall be used by any Party as the basis of administrative or regulatory positions or actions that interfere with the diversion, use, and reuse of water for the Klamath Reclamation Project.. The Parties also agree that their use of any judgment of a court shall be consistent with Section C.2 of this Stipulation and the Restoration Agreement.

5. The Parties agree that any obligation KPWU have to exhaust their remedies in the administrative process before OWRD has been fulfilled and the Parties will not argue before OWRD or the Circuit Court or otherwise that KPWU failed to exhaust any administrative remedies.

6. This Stipulation shall be binding upon and shall inure to the benefit of the Parties and OWRD and their respective heirs, executors, administrators, trustors, trustees, beneficiaries, predecessors, successors, affiliated and related entities, officers, directors, principals, agents, employees, assigns, representatives and all persons, firms, associations, and/or corporations connected with them.

7. Each Party and OWRD represents, warrants, and agrees that the person who executed this Stipulation on its behalf has the full right and authority to enter into this Stipulation on behalf of that entity and bind that entity to the terms of the Stipulation.

8. The terms, provisions, conditions, and covenants of this Stipulation are not severable, except, if any term, provision, condition, or covenant of this Stipulation is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the terms, provisions, conditions, and covenants shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

9. This Stipulation may be executed in several counterparts and all documents so executed shall constitute one Stipulation, binding on the Parties and OWRD, notwithstanding that the Parties and OWRD did not sign the same original or the same counterparts.

10. The Parties and OWRD agree and acknowledge that this Stipulation 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 shall not apply to the interpretation of this Stipulation.

11. All Parties and OWRD shall each bear their own costs and consultants' and attorneys' fees incurred in connection with this Stipulation.

This Stipulation shall be effective as of the date of the last signature hereto.

By William M. Ganong  
WILLIAM M. GANONG, Attorney for  
Klamath Irrigation District, Malin Irrigation District,  
and Modoc Lumber Company

Date May 8, 2009

By Justin E. Throne  
JUSTINE E. THRONE, Attorney for  
Ady District Improvement Company, Klamath  
Drainage District, Klamath Basin Improvement  
District, Midland District Improvement Company,  
Poe Valley Improvement District, Sunnyside Irrigation  
District, Enterprise Irrigation District and  
Pine Grove Irrigation District

Date May 8, 2009

By B.J. Matzen  
B.J. MATZEN, Attorney for Pioneer District  
Improvement Company, Don Johnston & Son,  
Randy Walthall, Winema Hunting Lodge, Inc.,  
Bradley S. Luscombe, and Inter-County Title Company

Date May 8, 2009

RATLIFF & RATLIFF, P.C.

By Nathan Ratliff  
Nathan Ratliff, Attorneys for Van Brimmer Ditch Co.

Date 5.11.2009

By Claude Hagerty  
Claude Hagerty  
President, Shasta View Irrigation District

Date May 4, 2009

DAVIS WRIGHT TREMAINE

By \_\_\_\_\_ Date \_\_\_\_\_


Richard M. Glick, Attorneys for Collins Products LLC  
and Plevna District Improvement Company

SOMACH, SIMMONS & DUNN  
A Professional Corporation

By Paul S. Simmons Date 5-5-09  
Paul S. Simmons  
Attorneys for Tulelake Irrigation District

ATTORNEYS FOR THE KLAMATH PROJECT WATER USERS

DAVIS WRIGHT TREMAINE

By 

Date 5-5-09

Richard M. Glick, Attorneys for Collins Products LLC  
and Plevna District Improvement Company

SOMACH, SIMMONS & DUNN  
A Professional Corporation

By \_\_\_\_\_  
Paul S. Simmons  
Attorneys for Tulelake Irrigation District


Date \_\_\_\_\_

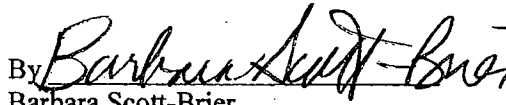
ATTORNEYS FOR THE KLAMATH PROJECT WATER USERS



UNITED STATES DEPARTMENT OF JUSTICE

John C. Cruden  
Acting Assistant Attorney General

By  Date May 5, 2009  
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Indian Resources Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
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By  Date 05/04/09  
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ATTORNEYS FOR THE UNITED STATES, BUREAU OF INDIAN AFFAIRS

KLAMATH WATER PROJECT

By Carl Ullman

Date 4 MAY 09

Carl V. Ullman

KLAMATH WATER PROJECT

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Chiloquin, Oregon 97624


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ATTORNEY FOR THE KLAMATH TRIBES

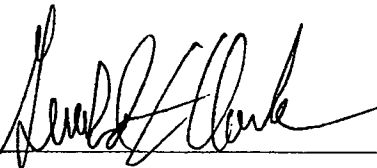
FOR THE OREGON WATER RESOURCES DEPARTMENT:

By   
Hardy Meyers JOHN KROBER  
Attorney General

Date May 14, 2009

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ATTORNEYS FOR THE OREGON WATER RESOURCES DEPARTMENT

By 

Date May 14, 2009

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OREGON WATER RESOURCES DEPARTMENT STAFF

## LIST OF ATTACHMENTS TO STIPULATION

1. Klamath River Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities, sections 1.5, and as agreed to between the parties revised section 15.3 and Appendix E-1.
2. 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, and
3. Proposed Order for ALJ to implement Stipulation

## CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of May, 2009, I sent a true and correct copy of the **Stipulation of Conditional Withdrawal of KPWU's Contests to Claims 612 and 622 and Conditional and Interim No-Call Provisions by the United States and Klamath Tribes, and Attachment 1, Attachment 2, and Attachment 3 ([Proposed] Order)** in Case 286, Claims 612 and 622, with Administrative Law Judge Richard D. Barber, Oregon Office of Administrative Hearings, PO Box 14020, Salem OR 97303-4924, by first class mail and by email to [richard.d.barber@state.or.us](mailto:richard.d.barber@state.or.us). I further certify that I served the same on the parties hereby listed below by e-mail (where an email address is listed below) and first class mail where no email address is available.

DATED this 18<sup>th</sup> day of May, 2009.

---

Kate Svinarich

Richard D. Barber  
Administrative Law Judge  
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[eeh@dunn-carney.com](mailto:eeh@dunn-carney.com)

Sydney's 1995 Irrevocable Trust  
Cynthia L. Barrett, Trustee  
1500 SW 1<sup>st</sup> Avenue, Suite 760  
Portland, OR 97201

Elaine G. Kerns 1992 Trust  
Cynthia L. Barrett, Trustee  
1500 SW 1<sup>st</sup> Avenue, Suite 760  
Portland, OR 97201

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Central Point, OR 97502

Tom & Althia Stephens  
P. O. Box 1251  
Chiloquin, OR 97624

As filed with the Office of Administrative Hearings, the preceding Stipulation included the following attachments:

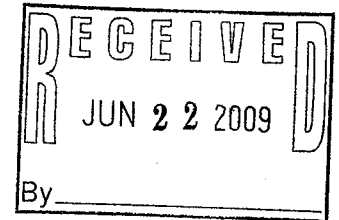
Attachment 1: Selected Provisions Of The Klamath Basin Restoration Agreement As Agreed To Among These Parties [draft terms as then-current]

Attachment 2: 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

Attachment 3: [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

These attachments area omitted here.

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, uti 12/27/95; Elaine G. Kerns, Sydney K. Giacomini and E. Martin Kerns, as Initial Trustees of the Elaine G. Kerns 1992 Trust uti 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

**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~~<sup>1</sup>, 3123<sup>2</sup>, 3253<sup>3</sup>, 3254, 3318,  
3324<sup>4</sup>, 3648, 3654<sup>5</sup>, 3883, 4006 and 4012

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

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

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

<sup>4</sup> 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.

<sup>5</sup> 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.



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 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),<sup>6</sup> 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 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

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<sup>6</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, 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

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:

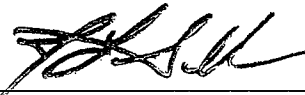
i. from the time the Stipulation was filed until the date selected by the Klamath Water and Power Agency under Section 15.3.9.A of the Restoration Agreement, including any extension of that date as provided in Section 15.3.9.B of the Restoration Agreement, any exercise of the water rights determined 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.



---

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

Date: June 19, 2009

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2009, I mailed a true copy of the following: **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**, 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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725 Summer Street N.E., Suite "A"  
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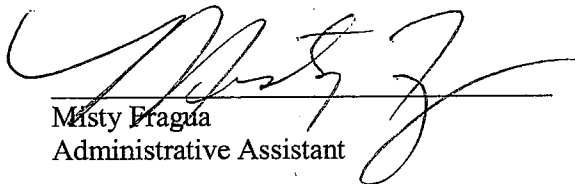
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