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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

~~WaterWatch of Oregon, Inc.~~; Cynthia L. Barrett, Trustee of Sydney's 1995 Irrevocable Trust, utu 12/27/95; Elaine G. Kerns, Sydney K. Giacomini and E. Martin Kerns, as Initial Trustees of the Elaine G. Kerns 1992 Trust utu 1/24/92; Mathis Family Trust; John M. Mosby; Marilyn Mosby; Robert Cook, TPC, LLC; ~~Pacificorp~~; ~~Horsefly Irrigation District~~; ~~Langell Valley Irrigation District~~; ~~Rogue River Valley Irrigation District~~; ~~Medford Irrigation District~~; Roger Nicholson; Richard Nicholson; NBCC, LLC; Agri Water, LLC; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch; ~~Dave Wood~~; ~~Kenneth Zamzow~~; Nicholson Investments, LLC; William S. Nicholson; John B. Owens; Kenneth Owens; William L. Brewer; ~~Mary Jane Danforth~~; ~~Jane M. Barnes~~; ~~Franklin Lockwood Barnes, Jr.~~; ~~Jacob D. Wood~~; ~~Elmore E. Nicholson~~; ~~Mary Ann Nicholson~~; Nicholson Loving Trust; Gerald H. Hawkins, Hawkins Cattle Co.; Owens &

ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS' AMENDED 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

Case No. 286

Claim Nos. 616 and 622

Contest Nos. ~~2062, 2063~~¹, 2731, 2732, 2741, 2742, ~~3020, 3021~~², 3123³, ~~3253, 3254~~⁴, 3318, 3324⁵, 3648⁶, 3654, 3883, 4006, 4012

¹ PacifiCorp voluntarily withdrew from Contests 2062 and 2063 on July 26, 2010.

² WaterWatch of Oregon, Inc.'s Contests 3020 and 3021 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

³ Change of Title Interest for Contest 3123 from Boyd Braren, Boyd Braren Trust to Robert Cook, TPC, LLC (10/25/05).

⁴ Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew, without prejudice, from Contests 3253 and 3254 on November 3, 2003. Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew Contests 3253 and 3254 on June 14, 2006.

⁵ 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. Change of Ownership filed for Contests 3318 and 3324 reflecting that William V. Hill is deceased and his ownership rights transferred to Lillian M. Hill (6/15/06). Sevenmile Creek

Hawkins; Harlow Ranch; Terry M. Bengard; Tom Bengard; Robinson Best, LLC; ~~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; Michael LaGrande; Rodney Z. James; Hilda Francis for Francis Loving Trust; David M. Cowan; James R. Goold for Tillie Goold Trust; Duane F. Martin; ~~Modoc Point Irrigation District; Peter M. Bourdet;~~ Peter M. Bourdet & Linda Long; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; ~~William Bryant;~~ Peggy Marengo; Jerry L. and Linda R. Neff; ~~Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; 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. Lusecombe; Randy Walthall; Inter County Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; Collins Products, LLC;~~

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Ranch, LLC voluntarily withdrew from Contests 3318 and 3324 on March 1, 2007. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily withdrew from Contests 3318 and 3324 on April 6, 2007. Mary Jane Danforth voluntarily withdrew from Contests 3318 and 3324 on June 19, 2008. Modoc Point Irrigation District voluntarily withdrew from Contests 3318 and 3324 on November 13, 2008. Change of Title Interest for Contests 3318 and 3324 from Robert Bartell to Michael LaGrande (1/9/09). Change of Title Interest for Contests 3318 and 3324 from Elmore E. Nicholson and Mary Ann Nicholson to Nicholson Loving Trust (12/8/09). Change of Title Interest for Contests 3318 and 3324 from Peter M. Bourdet to Peter Bourdet & Linda Long (12/10/09). Jacob D. Wood voluntarily withdrew from Contests 3318 and 3324 on January 15, 2010. Change of portion of Title Interest for Contests 3318 and 3324 from Roger Nicholson and Richard Nicholson to NBCC, LLC (3/17/2010). Change of Title Interest for Contests 3318 and 3324 from Dwight & Helen Mebane to Farm Credit West, PCA (7/20/2011), and from Farm Credit West, PCA to PCA Acquired Properties, LLC (7/20/2011), and from PCA Acquired Properties, LLC to Robinson Best, LLC (7/20/2011).

⁶ 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. The remaining entities comprising Klamath Project Water Users, conditionally withdrew from Contests 3648 and 3654 on May 18, 2009. See 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 (May 18, 2009).

CASE 286: [PROPOSED] ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS' AMENDED 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

vs.

United States, Bureau of Indian Affairs, as Trustee on behalf of the Klamath Tribes;

Claimant/Contestant and

The Klamath Tribes;

Claimant/Contestant.

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1. The "AMENDED 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" ("Amended Stipulation") is hereby approved and the Parties to the Amended Stipulation (Klamath Project Water Users ("KPWU"), 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.6 of the Amended Stipulation.

2. Regarding Contests 3648 and 3654 filed by KPWU,⁷ the following terms are a part of this Order and shall be included in the Proposed Order issued under ORS 183.464(1) and OAR 137-003-0645 and any other Order or Judgment determining these contests.

a. Subject to paragraph 2.b, KPWU may file exceptions in the Circuit Court to the Findings of Fact and Order of Determination on Claims 616 and 622, consistent with ORS 539.150. Nothing in the Amended Stipulation or this Order shall limit the

⁷ For purposes of this Order, Klamath Project Water Users include Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Malin Irrigation District, Midland Improvement District, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Randy Walthall and Inter-County Title Co., Inter-County Properties Co., Randolph and Jane Walthall 1995 Trust, Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Collins Products LLC and Plevna District Improvement Company.

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exceptions which the Parties may pursue or oppose in the Circuit Court, or the use they may make of the Findings of Fact and Order of Determination on Claims 616 and 622 in the Circuit Court, 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, Attachment 2 to the 2009 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 ("2009 Stipulation"). The Parties to the Amended Stipulation have, and have had since the entry of the 2009 Stipulation, no further discovery obligations regarding each other during the contested case process before the Office of Administrative Hearings or OWRD.

b. If none of the events described in paragraph 3.c.i have occurred and the Secretary publishes the notice under section 15.3.4.A of the KLAMATH BASIN RESTORATION AGREEMENT FOR THE SUSTAINABILITY OF PUBLIC AND TRUST RESOURCES AND AFFECTED COMMUNITIES ("Restoration Agreement") (including a notice under section 15.3.4.A following its amendment as provided in section 15.3.4.B of the Restoration Agreement, as applicable), KPWU shall refrain from filing exceptions to the Findings of Fact and Order of Determination or, if exceptions to the Findings of Fact and Order of Determination have already been filed, timely cease any litigation on exceptions and file the necessary pleading to dismiss their exceptions and the conditional withdrawal

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by KPWU of their Contests 3648 and 3654 shall become permanent and no longer conditional.

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. From the time the Amended Stipulation was filed until the On Project Plan Implementation Deadline, any exercise of the water rights determined for Claims 616 and 622 (the "Tribal Water Rights") shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908.

b. After the On Project Plan Implementation Deadline, any exercise of the water rights determined for Claims 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 that the exercise of the water rights determined for Claims 616 and 622 may seek regulation such that DIVERSION (as defined in Appendix E-1 of the Restoration Agreement) is equal to the maximum DIVERSION that can occur if Appendix E-1 of the Restoration Agreement has been filed and is in effect. The exception that applies under this paragraph 3.b applies at all times after the On Project Plan Implementation Deadline, regardless of whether Appendix E-1 has in fact been filed and is in effect at that time.

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

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- i. The Restoration Agreement has terminated without the Secretary of the Interior having published a notice under either section 15.3.4.A or 15.3.4.C of the Restoration Agreement, or the Secretary of the Interior has published the notice in the Federal Register described in section 15.3.4.C of the Restoration Agreement, or the Klamath Tribes have withdrawn from the Restoration Agreement under section 33.2.2 of the Restoration Agreement; and
- ii. KPWU have fully litigated the Parties' exceptions to the Findings of Fact and Order of Determination for Claims 616 and 622 consistent with the processes described in section 15.3.2.B.ii.b of the Restoration Agreement or have foregone their final opportunity to fully litigate the Parties' exceptions pursuant to such processes; and
- iii. Following KPWU's litigation of exceptions as provided in paragraph 3.c.ii immediately above or following KPWU having foregone the final opportunity to fully litigate exceptions as provided in paragraph 3.c.ii immediately above, a judgment or decree (or amended judgment or decree) has been issued regarding Claims 616 and 622 under ORS 539.150(4) or 539.190 and is operative.
- d. If none of the events described in paragraph 3.c.i have occurred and the Secretary publishes the notice described in section 15.3.4.A of the Restoration Agreement (including a notice under section 15.3.4.A following its amendment as provided in section 15.3.4.B of the Restoration Agreement, as applicable), then the conditional

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limitations on the exercise of the Tribal Water Rights set out in paragraph 3.a and paragraph 3.b above shall become permanent and unconditional.

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

4. The provisions in paragraph 3.a. and paragraph 3.b limit the scope or extent of a call made by the Klamath Tribes and United States under any water right that has been determined under Claims 616 and 622. Such provisions do not change the principle that any regulation by OWRD curtailing use of water shall be as provided in ORS 540.045(1)(a), based on the priority of regulated rights, with the latest priority right curtailed first.

5. Nothing in the Amended Stipulation or this Order shall diminish, affect, define, or resolve in any way: (a) the rights of Contestants other than KPWU to contest or oppose Claims 616 and 622; or (b) any contests other than Contests 3648 and 3654; or (c) any other claims of the Claimants. Nothing in the Amended Stipulation or this Order shall diminish, affect, define, or resolve in any way any other water rights or any other claim, contest, or case in the Klamath Basin Adjudication. In addition, nothing in the Amended Stipulation or this Order defines, or is intended to define, the scope and attributes of the Tribal Water Rights, either to satisfy the Tribes’ treaty rights or otherwise.

6. This Order supersedes and replaces the June 19, 2009 “ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS’ STIPULATION OF CONDITIONAL

WITHDRAWAL OF KPWU CONTESTS TO CLAIMS 616 AND 622 AND CONDITIONAL AND INTERIM
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Senior Administrative Law Judge

Date April 24, 2012

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USERS' AMENDED 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

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2012, I mailed a true copy of the following: **Order on Klamath Tribes, United States, and KPWU Amended Stipulation of Conditional Withdrawal of KPWU's Contests to Claims 616 and 622 and Conditional and Interim N-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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