

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, uia 12/27/95; Elaine G. Kerns, Sydney K. Giacomini and E. Martin Kerns, as Initial Trustees of the Elaine G. Kerns 1992 Trust uia 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~~¹, 3123², 3253³, 3254, 3318, 3324⁴, 3648, 3654⁵, 3883, 4006 and 4012

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

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

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

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

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

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”)⁶

(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.

⁶ 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.⁷

⁷ 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.

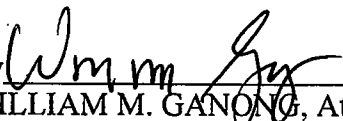
8. The terms, provisions, conditions, and covenants of this Stipulation are not severable, except, if any term, provision, condition, or covenant of this Stipulation is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the terms, provisions, conditions, 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.

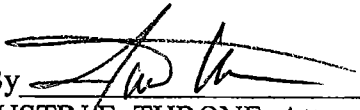
10. The Parties and OWRD agree and acknowledge that this Stipulation has been drafted after full and arms-length negotiations, and that the usual rule of contractual construction that all ambiguities shall be construed against the drafting party shall not apply to the interpretation of this Stipulation.

11. All Parties and OWRD shall each bear their own costs and consultants' and attorneys' fees incurred in connection with this Stipulation.

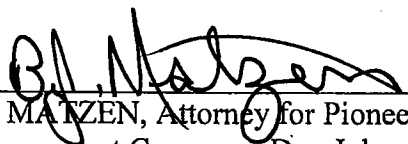
This Stipulation shall be effective as of the date of the last signature hereto.

By 
WILLIAM M. GANONG, Attorney for
Klamath Irrigation District, Malin Irrigation District,
and Modoc Lumber Company

Date May 8, 2009

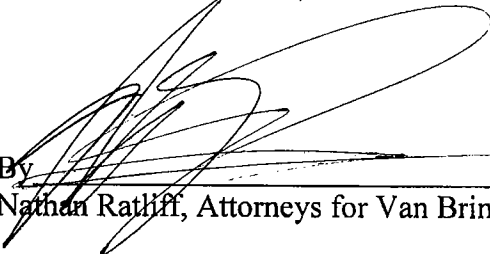
By 
JUSTINE E. THRONE, Attorney for
Ady District Improvement Company, Klamath
Drainage District, Klamath Basin Improvement
District, Midland District Improvement Company,
Poe Valley Improvement District, Sunnyside Irrigation
District, Enterprise Irrigation District and
Pine Grove Irrigation District

Date May 8, 2009

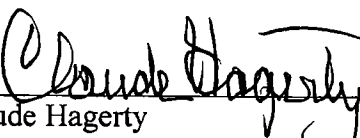
By 
B.J. MATZEN, Attorney for Pioneer District
Improvement Company, Don Johnston & Son,
Randy Walthall, Winema Hunting Lodge, Inc.,
Bradley S. Luscombe, and Inter-County Title Company

Date May 8, 2009

RATLIFF & RATLIFF, P.C.

By 
Nathan Ratliff, Attorneys for Van Brimmer Ditch Co.

Date 5.11.2009

By 
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

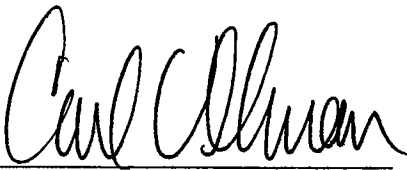
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KLAMATH WATER PROJECT

By 

Date 4 MAY 09

Carl V. Ullman

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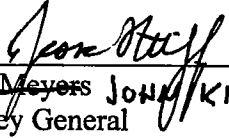
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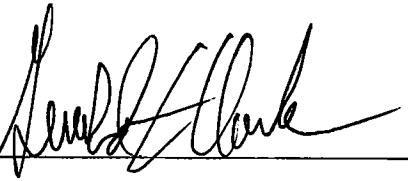
ATTORNEY FOR THE KLAMATH TRIBES

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Date May 14, 2009

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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. 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