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; The Klamath Tribes; Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; Rogue River Valley Irrigation District; William J. & Ethel J. Rust; Leonard Baio; Gary Strong; Robert Bartell; Margaret Jacobs; Carolyn Obenchain; Rodney Z. James; Newman Enterprise; Douglas Newman; and Hilda Francis, Trustee Francis Loving Trust;
Contestants,

vs.

Pacific Power and Light Co. as Pacificorp; Charles M. Cline; David A. Baltazor; Albert J. Conforti; Scott C. Kellstron; Conrad Caillouette and Tamara Caillouette; Wilford A. Dunster; David C. Elliott; Eloise J. Elliott; Michael J. Reynolds; Pamela A. Traina; Massoud (Mike) Ghiassi; Beverly Ghiassi; James Dillon; Debra Dillon; Daryl Kollman; Marta Kollman; Klamath Crisis Center; Steven Hess; City of Klamath Falls; Herbert C. LeSueur; Mary C. LeSueur, Jeanene M. Oatman; Jess House; and Alice M. Galloway;
Claimants,
and

Pacificorp dba Pacific Power and Light Co.; Kathleen Boivin; and Terrel J. Wagstaff;
Claimants/Contestants.

AMENDED PROPOSED ORDER

Claim Nos. 145 through 159
161, 162, 163,
165, 166, 169

Contests 16, 44, 45, 280, 515, 985, 1220, 1454, 1803, 2054, 2055, 2255, 2490, 2852, 3139 through 3153, 3155 through 3157, 3159, 3160, 3163, 3376, 4171

After fully considering the entire record, the Adjudicator issues this AMENDED PROPOSED ORDER pursuant to OAR 137-003-0655(3). This AMENDED PROPOSED ORDER modifies the PROPOSED ORDER issued on December 12, 2002, and the ADDENDUM TO PROPOSED ORDER issued on February 10, 2003, by Administrative Law Judge William D. Young, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130.

This Amended Proposed Order modifies only certain portions of the Proposed Order. The sections of the Proposed Order entitled "Procedural Matters," "Evidentiary Rulings," "Issues," and "Conclusions of Law" are adopted without modification. The sections entitled "History of the Case," "Findings of Fact," "Opinion," and "Order" are modified as described herein.

MODIFICATIONS TO THE "HISTORY OF THE CASE"

The third paragraph of the "History of the Case" is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text; internal citations are incorporated by reference, but omitted from this description of modifications for clarity):

> The second set of claims and associated contests follows a similar pattern for eighteen ~~sixteen~~ properties along Riverside Avenue in Klamath Falls, Oregon. (*Clark testimony* page 7). One of these claims, Claim 166, covers all 18 ~~16~~ properties. Fourteen ~~twelve~~ of the properties are also covered by eleven individual claims, while four of the properties are covered only by PacifiCorp's Claim 166. (See OWRD Exhibit 5, map of Riverside Avenue claims, submitted with and attached to *Clark testimony*). The specific claims and contests are set out below:

Reason for Modification: To correct a scrivener's error.

The remainder of the "History of the Case" is adopted without modification.

MODIFICATIONS TO THE "FINDINGS OF FACT"

The Proposed Order's "Findings of Fact" section is modified as shown below. Modifications to findings of fact in the Proposed Order are shown in the "Modified Proposed Order Findings of Fact" section, below. Additional findings of fact are shown in the "Additional Findings of Fact" section, below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided at the end of the modified findings section. Reasons for the additional findings of fact are provided beneath each finding of fact, or group of facts if the reason for adding each fact in the group is identical.

Modified Proposed Order Findings of Fact

> (14) Claim 145 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.10 acre with a period of use from April 1 through October 30 ~~31~~ of each year and a priority date of December 11, 1891.
>
> (16) Claim 147 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.20 acre with a period of use from April 1 through October 30 ~~31~~ of each year and a priority date of December 11, 1891.

Reason for Modifications: To apply a standard season of use for all claims in Case 008, based on a preponderance of evidence in the record. The longer season recognized in the Proposed Order for these claims is not supported by a preponderance of evidence in the record.

Additional Findings of Fact

Findings of Fact #25 through #38 are added as follows (additions are shown in "underline" text): Need to add findings for all claims that the ALJ did not make findings for, specifically: Claims 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 161, 163

(25) Because there is no evidence in the record to the contrary, the duty for irrigation is based on the Department's standard as set forth in Appendix A of the Preliminary Evaluation, being 3.5 acre feet per acre.

Reasons for Additional Finding of Fact: To include a finding regarding a standard duty for irrigation per acre.

(26) While the season of use claimed varies slightly from claim to claim, the vast majority claim a season of use within a day or two of April 1 through October 30. The appropriate season of use for each of the claims in Case 008 is April 1 through October 30.

Reasons for Additional Finding of Fact: To include a finding regarding a standard season of use for irrigation.

(27) Claim 149 uses a total of 0.02 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.5 acre with a period of use from April 1 through October 30 of each year and a priority date of November 1, 1895.

(28) Claim 150 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.4 acre with a period of use from April 1 through October 30 of each year and a priority date of December 11, 1891.

(29) Claim 151 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.1 acre with a period of use from April 1 through October 30 of each year and a priority date of December 11, 1891.

(30) Claim 152 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.1 acre with a period of use from April 1 through October 30 of each year and a priority date of November 1, 1895.

(31) Claim 153 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.3 acre with a period of use from April 1 through October 30 of each year and a priority date of November 1, 1895.

(32) Claim 155 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.4 acre with a period of use from April 1 through October 30 of each year and a priority date of December 11, 1895.

(33) Claim 156 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.1 acre with a period of use from April 1 through October 30 of each year and a priority date of December 11, 1891.

(34) Claim 157 uses a total of 0.02 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.7 acre with a period of use from April 1 through October 30 of each year and a priority date of December 11, 1891.

(35) Claim 158 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.1 acre with a period of use from April 1 through October 30 of each year and a priority date of December 11, 1891.

(36) Claim 159 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.4 acre with a period of use from April 1 through October 30 of each year and a priority date of November 1, 1895.

(37) Claim 161 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.3 acre with a period of use from April 1 through October 30 of each year and a priority date of December 11, 1891.

(38) Claim 163 uses a total of 0.01 cfs from one point of diversion located on the Link River, tributary to Klamath River, for irrigation of 0.1 acre with a period of use from April 1 through October 30 of each year and a priority date of December 11, 1891.

Reasons for Additional Findings of Fact: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

The remainder of the "Findings of Fact" is adopted without modification.

MODIFICATIONS TO THE "OPINION"

The Proposed Order's "Opinion" section is modified as described herein (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text). First, the following sentence is added to the end of the first paragraph:

Where the claim is based on natural overflow, the appropriation may be established by evidence that the "proprietor of the land accepts the gift made by nature and garners the produce of the irrigation by harvesting or

utilizing the crops grown on the land***." *In re Silvies River*, 115 Or 27, 66 (1925).

Second, the second and third paragraphs of the "Issues Affecting All Claims" section of the "Opinion" are deleted in their entirety.

Third, the fourth paragraph of the "Issues Affecting All Claims" section of the "Opinion" is modified as follows:

> Contestant Irrigation Districts did not dispute the claimed priority date of any claim. Rather, they contended that the claimants failed to perfect Four Mile Lake and its tributaries and Fish Lake and its tributaries as sources of appropriation for the waters claimed, or that the claimants abandoned these sources of appropriation. *Medford and Rogue River Valley Irrigation Districts' Response to Claimants' Discovery Request* (Ref. No. 008F00060008). They also contended that claimants have never "called" for water from these sources and have failed to divert waters from those sources. Despite their admission that claimants have made no claim for an appropriation from Four Mile and Fish Lakes or their tributaries, the Irrigation Districts seek to prevent claimants from placing a future "call" on waters of Four Mile Lake, Fish Lake, and their tributaries and ask that the Adjudicator place a specific condition or an addendum on the various claimants' water right preventing such a "call."

Fourth, the eighth paragraph of the "Issues Affecting All Claims" section of the "Opinion" is modified as follows:

> Regardless of the state of the evidence, the larger issue is that the relief the Contestant Irrigation Districts ~~Contestant Irrigation Districts fare no better on the legal issues. Even if the evidence had established that the waters of Fish Lake or Four Mile Lake were an ultimate source of the waters affected by claimants' claims, the relief they~~ seek is one of regulation and is not appropriate to this proceeding, which is to determine the relative water rights of the parties, not regulate actual water use. If the claimants make a "call" based on the rights determined herein, OWRD will determine the sources subject to regulation at the time the "call" is made.

Fifth, the third paragraph of the "Joint Water Certificates" subsection of the "Issues Affecting All Claims" section of the "Opinion" is deleted and replaced with the following:

> Because PacifiCorp and the individual irrigators each hold an interest in the appropriated water (PacifiCorp for the purpose of diversion of the water, and the individual irrigators for the purpose of beneficial use of the water), both PacifiCorp's and the individual irrigators' claims are recognized herein. It is neither necessary nor appropriate to issue a form of certificate as part as this findings of fact and order of determination. *See* ORS 539.140.

Sixth, a new subsection, entitled "Season of Use," is added to the "Issues Affecting All Claims" section of the "Opinion," as follows:

> **Season of Use.** Pacificorp claimed a season of use of April 1 through October 30 in both Claims 165 and 166. The individual irrigators' season of use claims vary to some degree, but the vast majority of the claims are for a season of use within one or two days of the April 1 through October 30 period claimed by PacifiCorp. A preponderance of the evidence in the record therefore indicates that April 1 through October 30 is the appropriate season of use for all the claims consolidated in Case 008.

In addition to the modifications to the "Issues Affecting All Claims" section of the "Opinion," the following modifications are made to the "Specific Claims" section of the "Opinion."

The "Discussion" paragraph of the "Claim 147" subsection is modified as follows:

> Discussion. Claimant claimed a period of use from April 1 through November 1. As discussed above, the appropriate season of use for all claims in Case 008, including Claim 147, is April 1 through October 30. ~~The OWRD has established a standard period for irrigation from March 1 through October 31. (OWRD Exhibit 1, pages 01595-1597, "Appendix A"). The evidence in this record does not support a period extending beyond the standard period.~~

The "Discussion" paragraph under "Question 3" in the "Claim 166" subsection is modified as follows:

> Discussion: The appropriate rate for irrigation of 3.1 acres is 0.08 cfs. ~~The maximum rate for the Klamath Adjudication (Appendix A, OWRD Exhibit 1, pgs. 1158 and 1595-1597), for irrigation of 3.1 acres is 0.1 cfs.~~

Reasons for Modifications: To clarify beneficial use of water by the method of natural overflow for a Pre-1909 water right; to make the Opinion consistent with the modifications to the Findings of Fact; to further describe the interests held by the individual irrigators and PacifiCorp; to further describe the distinction between determining water rights in adjudication and regulating water rights that have been adjudicated.

The remainder of the "Opinion" is adopted without modification.

MODIFICATIONS TO THE "ORDER"

The Proposed Order's "Opinion" section is modified as described herein. (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

> A water right should be confirmed for each claim consistent with the Findings of Fact and Conclusions of Law stated in the Proposed Order, as modified by this Amended Proposed Order. The Appendix A, Summary Analysis attached to the Proposed Order is hereby withdrawn. OWRD intends to replace the Appendix A, Summary Analysis with individual claim descriptions for each water right recognized in Case 8 when OWRD issues its Findings of Fact and Order of Determination for the Klamath Basin Adjudication. It is unnecessary to provide a revised summary document for the purposes of this Amended Proposed Order.
>
> ~~I recommend that the Adjudicator for the Klamath basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out in Appendix A, Summary Analysis attached hereto.~~

IT IS SO ORDERED.

Dated at Salem, Oregon on February 6, 2012

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Administrative Law Judge. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Proposed Order.

Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dwight W. French, Adjudicator
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2012, I mailed a true copy of the following:

AMENDED PROPOSED ORDER (Claim Nos. 145 through 159, 161, 162, 163, 165, 166, 169), by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first class postage prepaid thereon, and addressed to:

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