

BEFORE THE OREGON

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

United States of America; 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; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC;
Contestants,

SECOND AMENDED PROPOSED ORDER

Case No. 165

Claim: 18

Contests: 2818¹, 3099, 3436², 3720, and 4076³

vs.

John M. Mosby; Marilyn Mosby;
Claimants/Contestants.

This SECOND AMENDED PROPOSED ORDER is issued pursuant to OAR 137-003-0655(3), and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. OAR 137-003-0655(3) requires an agency to issue an amended proposed order if the agency intends to reject a recommendation from an administrative law judge that adversely affects a party, and the changes to the proposed order are not within the scope of exceptions to which there was an opportunity to respond.

This SECOND AMENDED PROPOSED ORDER modifies the season of use recommended by the administrative law judge in his Amended Proposed Order issued on June 2, 2006. This issue was not raised by any of the parties in exceptions. The Amended Proposed Order recommended

¹ WaterWatch of Oregon, Inc. voluntarily withdrew, without prejudice, Contest 2818 on February 20, 2003.

² Don Vincent voluntarily withdrew from Contest 3436 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3436 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3436 on January 15, 2004.

³ The Klamath Tribes voluntarily withdrew Contest 4076 on August 12, 2004. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST (August 12, 2004).

a season of use of March 1 through October 31. This exceeds the claimed season of use, which is April 1 through October 31.

ORS 539.210 and OAR 690-030-0085 prohibit claim amendments that would expand a claim. By allowing a season of use greater than that claimed, the Amended Proposed Order effectively permits an impermissible claim amendment.

ORS 539.210 provides:

Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, *at the time and in the manner required by law*. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant.

(Emphasis added). ORS 539.210 means that claimants must file claims by the claim filing deadline (“at the time and in the manner required by law”) or they are estopped from subsequently asserting a claim. OAR 690-028-0065(3) provides further support for this position by requiring OWRD’s director to “set a time certain for filing statements and proofs of claim.” In addition, certain types of “amendments” to claims after the claim filing deadline so markedly change the claim as to essentially make a new claim outside the filing period. These “amendments”, which include amending a claim for a more senior priority date, for a greater quantity of water, or a longer season of use, are therefore impermissible new claims. Without this limit on certain types of claim amendments, the claim filing deadline would effectively become meaningless. Any (or all) claim attributes could be altered following the deadline, regardless of their relationship to the original claim.

OAR 690-030-0085 provides, in relevant part: “the Water Resources Director (Director) may not permit any alteration or amendment of the original claim after the period for inspection has commenced.” The period for inspection in the Klamath Basin Adjudication commenced in October 1999. There is no evidence that the Claimant attempted to amend the season of use claimed prior to this deadline.

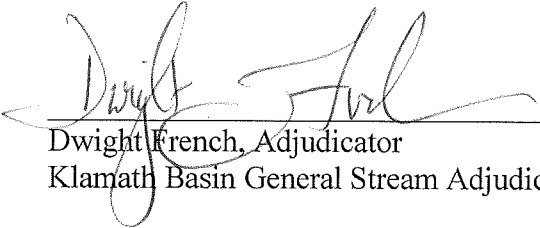
As a result of these provisions, the season of use is limited to that claimed: April 1 through October 31.

This SECOND AMENDED PROPOSED ORDER incorporates the Amended Proposed Order issued by the Office of Administrative Hearings on June 2, 2006, except to the extent that it is modified as described above. The Oregon Water Resources Department (“OWRD”) may make

additional modifications to the Amended Proposed Order when OWRD's Adjudicator issues the final order in the Klamath Basin Adjudication.

IT IS SO ORDERED.

Dated at Salem, Oregon on May 8, 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 parties 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 Department
725 Summer Street N.E., Suite "A"
Salem, Oregon 97301**

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2012, I mailed a true copy of the following:

SECOND AMENDED PROPOSED ORDER (Claim 18), by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first class postage prepaid thereon, and addressed to:

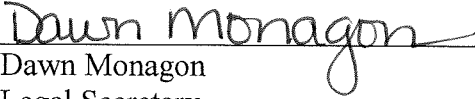
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