

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

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 L. 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; Robinson Best, LLC; ~~Dwight T. Mebane~~; ~~Helen Mebane~~; ~~Sevenmile Creek Ranch, LLC~~; James G. Wayne, Jr.; Clifford Rabe; Tom Griffith;

**AMENDED PROPOSED ORDER**

Case No. 273

Claims: 308, 309, 310, and 311

Contests: 2867, 2868, 2869, 2870<sup>1</sup>,  
~~3223, 3224, 3225, 3226~~<sup>2</sup>,  
3297, 3298, 3299, 3300<sup>3</sup>,  
3631, 3632, 3633, 3634<sup>4</sup>,  
and 3994

<sup>1</sup> WaterWatch of Oregon, Inc.'s Contests 2867, 2868, 2869, and 2870 were dismissed. *See* ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

<sup>2</sup> Medford and Rogue River Valley Irrigation Districts voluntarily withdrew from Contests 3223, 3224, 3225 and 3226 on March 3, 2003. *See*, VOLUNTARY WITHDRAWAL OF CONTEST BY MEDFORD AND ROGUE RIVER VALLEY IRRIGATION DISTRICTS. Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3223, 3224, 3225, and 3226 on April 25, 2005. *See*, VOLUNTARY WITHDRAWAL OF CONTEST NOS. 3223, 3224, 3225, & 3226 BY LANGELL VALLEY AND HORSEFLY IRRIGATION DISTRICTS.

<sup>3</sup> Change of Title Interest for Contests 3297-3300 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3297-3300 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3297-3300 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3297-3300 from Walter Seput to Wayne James, Jr. (6/2/05). Change of Title Interest for Contests 3297-3300 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3297-3300 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3297-3300 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3297-3300 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3297-3300 on September 13, 2005. Thomas W. Mallams voluntarily withdrew from Contests 3297-3300 on November 1, 2005. Ownership filed for Contest 3297-3300 reflecting that William V. Hill is deceased and his ownership rights transferred to Lillian M. Hill (6/15/06). Sevenmile Creek Ranch, LLC voluntarily withdrew from Contests 3297-3300 on March 1, 2007. Jane M. Barnes and Franklin Lockwood Barnes, Jr. voluntarily withdrew from Contests 3297-3300 on April 6, 2007. Change of Title Interest for Contests 3297-3300 from Robert Bartell to Michael LaGrande (1/9/09). Jacob D. Wood voluntarily withdrew from Contests 3297-3300 (Claims 308-311) on January 15, 2010. Change of Title Interest for Contests 3297-3300 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).

<sup>4</sup> Don Vincent voluntarily withdrew from Contests 3631-3634 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3631-3634 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3631-3634 on January 16, 2004.

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;  
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;  
Contestant(s),

vs.

United States Department of Interior, Fish and  
Wildlife Service,  
Claimant/Contestant.

This 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 AMENDED PROPOSED ORDER is issued for the sole purpose of addressing an impermissible claim amendment made by the United States. This issue was not raised by any of the parties in exceptions. The Oregon Water Resources Department (“OWRD”) may make additional modifications to the Administrative Law Judge’s (“ALJ”) Proposed Order, issued on December 15, 2006, when OWRD’s Adjudicator issues the final order in the Klamath Basin Adjudication.

On April 30, 1997, the United States filed Claims 308 through 311 for the use of water within the Upper Klamath National Wildlife Refuge. For each of the four Claims, the United

States stated the quantity of water claimed. The claimed quantities of water are as follows: Claim 308: 19,077.7 acre-feet; Claim 309: 12,583.5 acre-feet; Claim 310: 7,209 acre-feet; Claim 311: 562.3 acre-feet. On May 7, 1999, the United States filed amendments to each of the four claims, and in each claim increased the quantity of water claimed. The amended claimed quantities of water are as follows: Claim 308: 20,933.2 acre-feet; Claim 309: 13,857.5 acre-feet; Claim 310: 8,109.9 acre-feet; Claim 311: 609.7 acre-feet.

The Proposed Order determined that these upward amendments were permissible, based on OAR 690-030-0085. The Proposed Order did not consider ORS 539.210 in its analysis of the amendments. As described below, ORS 539.210 prohibits upward amendments of the quantity of water claimed after the applicable deadline for the filing of claims. In the case of the United States, this deadline was April 30, 1997. The United States is therefore limited to the quantity of water claimed on April 30, 1997 for Claims 308 through 311.

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). To provide certainty to water users, ORS 539.210 requires that prospective claimants in an adjudication appear and define their claims “at the time and in the manner required by law,” or be barred from asserting claims in the future. Many of the attributes that make up a water right, such as the quantity of water, the season of use, and the priority date, can result in the use of water by a right holder to the exclusion of other, junior right holders. When a claimant attempts to increase the terms of one of these attributes, that claimant is effectively making a “new” claim for water use – by claiming water use that was not covered by the original claim and that could have an effect on the use of water by other users. The statutes and rules governing the adjudication require claimants to identify these terms by a deadline specified by OWRD. OWRD considers that identifying the amount of water claimed is part of the “manner” required by law. OWRD therefore interprets ORS 539.210 to mean that a claimant who subsequently attempts to increase the claimed amount of water has failed to make this “new” claim for water use in the time and manner required by law, and is barred from doing so by ORS 539.210. 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.

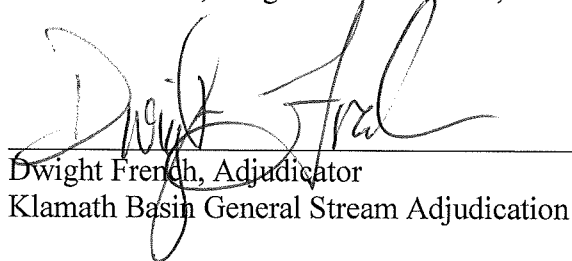
The quantities of water for Claims 308 through 311 are therefore limited to the amounts claimed by the United States on April 30, 1997, as follows:

Claim 308: 19,077.7 acre-feet  
Claim 309: 12,583.5 acre-feet  
Claim 310: 7,209 acre-feet  
Claim 311: 562.3 acre-feet

This AMENDED PROPOSED ORDER incorporates the Proposed Order issued by the Office of Administrative Hearings on December 15, 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 October 31, 2012.



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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 October 31, 2012, a true and correct copy of the **AMENDED PROPOSED ORDER (Claims 308, 309, 310 and 311)**, was served by email (where e-mail address is listed); or by mail service by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first class postage prepaid thereon, and addressed to the following addresses (where no email address is listed):

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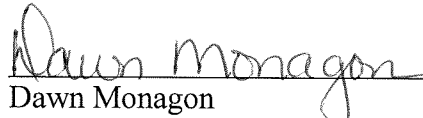
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