

**BEFORE THE DIRECTOR  
OF THE WATER RESOURCES DEPARTMENT  
OF THE STATE OF OREGON**

**KLAMATH BASIN GENERAL STREAM ADJUDICATION**

In the Matter of the Claim of	)	PARTIAL ORDER OF
PACIFICORP, DBA PACIFIC POWER	)	DETERMINATION
AND LIGHT CO.	)	
_____	)	
	)	Water Right Claim 168

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

**A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS  
TO THE PROPOSED ORDER**

1. On January 31, 1991, PACIFICORP, DBA PACIFIC POWER AND LIGHT CO. (Claimant) timely submitted a Statement and Proof of Claim (Claim 168) to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication based upon use of water beginning prior to February 24, 1909 (pre-1909 claim).
2. Claim 168 and its associated contests (2056, 3162, and 3280) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 15.
3. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) on July 11, 2002, approving Claim 168.
4. Exceptions were filed to the Proposed Order by Medford Irrigation District and Rogue River Valley Irrigation District within the exceptions filing deadline. *See* MEDFORD AND ROGUE RIVER VALLEY IRRIGATION DISTRICTS' EXCEPTIONS TO PROPOSED ORDER (Aug. 16, 2002).
5. The exceptions were referred to the Office of Administrative Hearings for comment.

6. In comments to the exceptions, the Administrative Law Judge from the Office of Administrative Hearings, in summary, stated: “The exceptions presented in this case have no merit. The Adjudicator should make no changes in the order to accommodate them.”
7. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
  - a. The “History of the Case” is adopted with modifications, as set forth in Section A.8, below.
  - b. The “Evidentiary Rulings” is adopted with modifications, as set forth in Section A.9, below.
  - c. The “Issues” is adopted in its entirety.
  - d. The “Findings of Fact” is adopted in its entirety.
  - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.10, below.
  - f. The “Opinion” is adopted with modifications, as set forth in Section A.11, below.
  - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 168. The outcome of the Order is without modification; it is presented in a format standardized by OWRD.
8. **History of the Case.** Within the section titled “History of the Case” of the Proposed Order, the first sentence is modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):

The proceeding in the Klamath Basin Water Adjudication was commenced by a claim filed on January 31, ~~1981~~ 1991 by Pacificorp based upon use of water beginning prior to February 24, 1909. (OWRD Ex. 1 at 3-7.)

**Reason for Modification:** The ALJ’s finding with respect to the year the claim was filed is not supported by a preponderance of evidence in the record; to provide an additional citation to the record.

9. **Evidentiary Rulings.** Within the section titled “Evidentiary Rulings” of the Proposed Order, paragraphs 3, 4 and 5 are modified as follows (additions are shown in “underline” text and deletions are show in “~~striketrough~~” text):

The evidence objected to describes the development of works for diversion of water from Four Mile Lake to Fish Lake, and the history of the water rights attendant to that diversion. It is offered to support the proposition, stated in the Districts’ contest, that the appropriation of water

by Pacificorp should be conditioned so as to prevent a call that would conflict with the District's rights to the water in Four Mile Lake. The evidence is relevant to that issue and is admitted.

~~It is suggested that the adjudicator does not have the authority to impose such a condition as the Districts' propose. If this were so, then Pacificorp's objection would be well taken, since if the adjudicator cannot grant the relief requested, evidence in support of that relief would be immaterial.~~

~~However, I am not prepared to decide in the abstract whether, as a matter of law, the adjudicator is authorized to grant such relief in specific cases, if the evidence would not support the exercise of that authority even if it existed. The parties have not briefed that question in this case, and the arguments presented at the hearing regarding it were somewhat cursory. In order to decide whether it is necessary to reach the issue of the adjudicator's authority, I must review the evidence to determine whether it would support the imposition of the condition requested, even if such a condition was authorized. I find the evidence relevant and material to the determination whether, even if authorized, the relief should be allowed in this case. Consequently, the objection is overruled, and the evidence admitted.~~

**Reason for Modification:** For internal consistency between the "Opinion" section, as modified, and the "Evidentiary Rulings."

10. **Conclusion of Law.** Within the section titled "Conclusions of Law" of the Proposed Order, Conclusion #1 is modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

~~The evidence is insufficient to determine whether water from the Klamath Basin described in the water rights held by Rogue River Valley Irrigation District and Medford Irrigation District should "be 'water available' for~~

~~appropriation under the Klamath Adjudication.~~ Relief that regulates actual water use is inappropriate in this proceeding, the purpose of which is to determine the relative water rights of the parties.

**Reason for Modification:** For internal consistency between the “Opinion” section, as modified, and the “Conclusions of Law.”

11. **Opinion.** Within the section titled “Opinion” of the Proposed Order, the second introductory paragraph and the subsection “Four Mile Lake” are modified as follows (additions are shown in “underline” text, deletions are shown in “~~strike through~~” text):

There are really only two issues presented in this case that merit discussion. First, does the record support OWRD’s conclusion that the priority date of Pacificorp’s water right should be October 16, 1905, or should it be December 11, 1891 as Pacificorp asserts? Second, may the Districts obtain relief that regulates actual water use in this proceeding? If they may, is the water in Four Mile Lake to be treated as part of the Klamath Basin, and therefore subject to this adjudication, ~~or~~ is it not?

#### **Four Mile Lake**

In their contest the Districts asked the Adjudicator to impose a condition on Pacificorp’s water right barring Pacificorp from making a call on water from Four Mile Lake. ~~Aside from the question as to whether the Adjudicator would ever be authorized to impose such a condition, the record does not justify such an imposition in this case in any event.~~

~~Either Four Mile Lake originally had an outlet to Klamath Lake, or it did not. The evidence on this question is not conclusive, but the Districts appear to have concluded that at one time the two lakes were connected. The amount of water that actually reached Klamath Lake, if any, is completely unknown on this record.~~

~~If water from Four Mile Lake originally flowed into Klamath Lake, then the watershed of that lake is part of the Klamath Basin, and was originally part of the watershed that supplied Klamath Lake. Since the appropriation for the~~

~~diversion of the water of Four Mile Lake to Fish Lake was not recorded until the 1900s, it would have supplied part of the water flowing through Link River when Pacificorp's predecessor appropriated water in 1891. As such, it would have been included as junior to that appropriation, and should not be removed from it now.~~

~~However, the evidence is insufficient in this record to establish that the water in Four Mile Lake ever actually did flow to Klamath Lake. If the water from Four Mile Lake never flowed into Klamath Lake, it could not be treated as subject to Pacificorp's water right. In that event there would be no need or reason for imposition of a condition on Pacificorp's water right, since the water in Four Mile Lake could never be subject that water right.~~

~~Since, on this record, there is not enough evidence to determine whether or how much water from Four Mile Lake flowed to Klamath Lake, there is no evidentiary basis for imposing the condition sought by the districts, and their request must be denied.~~

The relief the Districts 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. Accordingly, it is unnecessary to decide the factual issue of whether or how much water flowed from Four Mile Lake to Klamath Lake.

Like most western states, Oregon follows the "prior appropriation" doctrine, which addresses which water rights are honored in times of shortage. See Robert E. Beck, *Prevalence and Definition*, 2 *Waters and Water Rights*, 83 (Robert E. Beck, ed. 1991). See also Janet C. Neuman, "Oregon," in 6 *Waters and Water Rights*, 704 (2d ed 1994). Under the prior appropriation doctrine, "a person may acquire an appropriative right on a 'first come, first served' basis by diverting water and applying it to a beneficial use." *Tee1 Irrigation District v. Water Resources Dept.*, 323 Or 663,667 (1996).

The prior appropriation doctrine governs distribution of water as well as the allocation of water and in times of shortage addresses which holder of water rights can receive water. Water rights holders with a later (junior) priority date are

not entitled to use water if their use would interfere with the rights of those who have earlier (senior) priority dates. Thus a water right is not an absolute right to use water, but a relative right that may only be exercised within the priority system. ORS 537.120 (subject to existing rights, and other exceptions not pertinent here "waters within the state may be appropriated for beneficial use"); ORS 540.045 (describing watermaster duties to "distribute water among the various users . . . in accordance with the users' existing water rights of record").

Contestant Irrigation Districts seek to prevent Claimant Pacificorp from placing a "call" on waters to which the Irrigation Districts have established water rights by conditioning Pacificorp's water right to prevent such a "call." Strictly speaking, water users do not place a "call" on other users' water rights. Rather, a water user places a "call" on the stream, river, or other source that supplies its right by demanding that the watermaster distribute water among the various users according to their water rights of record. ORS 540.045. It is then the watermaster's duty to determine how that "call" shall be enforced. *Id.* The watermaster is empowered to enforce a "call" by directly regulating a water user's diversion. ORS 540.045(c). The condition that Contestants seek, therefore, is one pertaining to regulation of water rights, not to the rights themselves.

The purpose of this proceeding is to identify and determine the relative rights of individuals and entities who began using water before February 24, 1909. ORS 539.010; 539.021. Only after identification, quantification and determination of those relative rights have been completed can there be meaningful discussion regarding regulation of those rights. ORS 540.045 (watermasters regulate in accordance with "rights of record"); ORS 540.145 (the Water Resources Commission may adopt rules pertaining to distribution of water pursuant to, among other things, rights established by "an order of the . . . Director in proceedings for the determination of relative rights to the use of water."). Thus, if a "call" or complaint is placed with the watermaster, he or she will then regulate in accordance with "rights of record" and other applicable law. *Id.*; see OAR 690-250-0020 (distribution of surface waters). Neither general

principals of the prior appropriation doctrine nor the applicable statutes entitle contestant Irrigation Districts to the regulatory condition they seek to impose on Claimant Pacificorp's Claim No. 168. Claimant Pacificorp's water right should not be conditioned in the manner that these Contestants seek.

**Reason for Modifications:** To clarify the basis supporting modified Conclusion of Law #1.

## **B. DETERMINATION**

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
  - a. The “History of the Case” is adopted with modifications, as set forth in Section A.8, above.
  - b. The “Evidentiary Rulings” is adopted with modifications, as set forth in Section A.9, above.
  - c. The “Issues” is adopted in its entirety.
  - d. The “Findings of Fact” is adopted in its entirety.
  - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.10, above.
  - f. The “Opinion” is adopted with modifications, as set forth in Section A.11, above.
  - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 168. The outcome of the Order is without modification; it is presented in a format standardized by OWRD.
2. The elements of a pre-1909 claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING PRE-1909 CLAIMS is incorporated as if set forth fully herein.
3. Based on the file and record herein, IT IS ORDERED that Claim 168 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO.** 168

**CLAIM MAP REFERENCE:**

OWRD INVESTIGATION MAP – T 38 S, R 9 E, W.M.

**CLAIMANT:** PACIFICORP, DBA PACIFIC POWER AND LIGHT CO.  
825 NE MULTNOMAH, SUITE 1700  
PORTLAND, OR 97232

**SOURCE OF WATER:**

The LINK RIVER, tributary to the KLAMATH RIVER

**PURPOSE or USE:** POWER

**RATE OF USE:** 205.0 CUBIC FEET PER SECOND MEASURED AT THE POINT OF DIVERSION

**PERIOD OF ALLOWED USE:** JANUARY 1 - DECEMBER 31

**DATE OF PRIORITY:** October 16, 1905

**THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:**

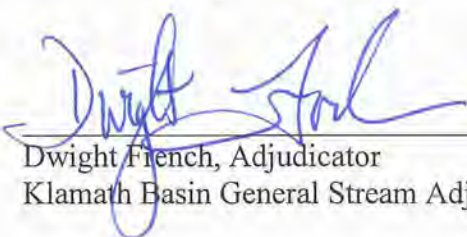
Twp	Rng	Mer	Sec	Q-Q	GLot
38 S	9 E	WM	30	NW SE	4

**THE PLACE OF USE IS LOCATED AS FOLLOWS:**

Twp	Rng	Mer	Sec	Q-Q	GLot	Remarks
38 S	9 E	WM	32	NW SW	1	West Side Power Plant

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication