

**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)	CORRECTED PARTIAL ORDER OF
THE KLAMATH TRIBES AND THE)	DETERMINATION
UNITED STATES DEPARTMENT OF)	
INTERIOR, BUREAU OF INDIAN)	
AFFAIRS AS TRUSTEE ON BEHALF OF)	
THE KLAMATH TRIBES)	
_____)	Water Right Claim 617

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

A. FINDINGS OF FACT

1. On April 30, 1997, the UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS AS TRUSTEE ON BEHALF OF THE KLAMATH TRIBES (BIA) timely submitted a Statement and Proof of Claim (Claim 617) to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication, claiming an inchoate Indian reserved water right under the Treaty of October 14, 1864, 16 Stat. 707.
2. On April 29, 1997, the Klamath Tribes timely submitted a Statement and Proof of Claim (Claim 613) to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication, claiming an inchoate Indian reserved water right under the Treaty of October 14, 1864, 16 Stat. 707.
3. Claim 613 is a composite claim incorporating by reference BIA Claims 617, 618, 619, 620, 621, 729¹, and 730².

¹ On October 10, 2003, Claim 83 was bifurcated, and Claim 729 was assigned to the portion of Claim 83 appurtenant to lands acquired by the Klamath Tribes on September 5, 1995. *See* STIPULATION TO BIFURCATE CLAIM 83, ASSIGN CLAIM 729 TO ONE PORTION OF BIFURCATED CLAIM 83 (Oct. 10, 2003). On October 16, 2003, Claim 729 was consolidated into Case 283 into which Claims 613, 617 – 621 of the Klamath Tribes and the BIA had already been consolidated. *See* ORDER ON MOTION TO CONSOLIDATE (Oct. 16, 2003).

² On February 24, 2005, the portion of Claim 83 remaining after the first bifurcation on October 10, 2003, was again bifurcated, and Claim 730 was assigned to appurtenant to lands acquired by the Klamath Tribes on September 8, 2004. Claim 730 was consolidated into Case 283 into which Claims 613, 617 – 621 of the Klamath Tribes and the

4. On October 4, 1999, following investigation of the evidence submitted, the Adjudicator issued a Summary and Preliminary Evaluation of Claims (Preliminary Evaluation) stating Claim 617 was denied.
5. On May 8, 2000, the Klamath Tribes timely filed Contest 4007 to the Claim and/or Preliminary Evaluation of Claim 617.
6. On May 8, 2000, the BIA timely filed Contest 3878 to the Claim and/or Preliminary Evaluation of Claim 617.
7. On May 8, 2000, the following parties, hereinafter collectively referred to as “Nicholson *et al.*,” filed Contest 3319 to the Claim and/or Preliminary Evaluation of Claim 617: Roger Nicholson; Roger Nicholson Cattle Co.³; Lloyd Nicholson Trust⁴; Dorothy Nicholson Trust⁵; Richard Nicholson; Jim McAuliffe and McAuliffe Ranches⁶; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Joe McAuliffe Company⁷; Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch; Dave Wood⁸; Kenneth Zamzow⁹; Anita Nicholson¹⁰; Wm. S. Nicholson; John B. Owens; Kenneth Owens; Wm L. Brewer; Mary Jane Danforth; Jane M. Barnes; Franklin Lockwood Barnes, Jr.; Jacob D. Wood¹¹; Elmore E. Nicholson; Mary Ann Nicholson; Gerald H. Hawkins, Hawkins Cattle Co.; Owens & Hawkins; Harlowe Ranch; Terry M. Bengard; Tom Bengard; Dwight T. Mebane and Helen Mebane¹²; Walter Seput¹³; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams; River Springs Ranch; Pierre A. Kern Trust; William V. Hill¹⁴; Lillian M. Hill; Carolyn Obenchain; Lon Brooks Newman Enterprise;

BIA had already been consolidated. *See* STIPULATION TO BIFURCATE CLAIM 83, AND ASSIGN CLAIM 730 TO A PORTION OF BIFURCATED CLAIM 83, AND TO CONSOLIDATE CLAIM NO. 730 INTO CASE 283. (Feb. 24, 2005).

³ Agri Water, LLC, successor in interest to Roger Nicholson Cattle Co.

⁴ Roger Nicholson and Richard Nicholson, successors in interest to Lloyd Nicholson Trust

⁵ Roger Nicholson and Richard Nicholson, successors in interest to Dorothy Nicholson Trust

⁶ Robinson Best, LLC, successors in interest to PCA Acquired Properties, LLC; PCA Acquired Properties, LLC, successors in interest to Farm Credit West, PCA; Farm Credit West, PCA, successors in interest to Dwight T. Mebane and Helen Mebane; Dwight T. Mebane and Helen Mebane, successors in interest to Jim McAuliffe and McAuliffe Ranches

⁷ Robinson Best, LLC, successors in interest to PCA Acquired Properties, LLC; PCA Acquired Properties, LLC, successors in interest to Farm Credit West, PCA; Farm Credit West, PCA, successors in interest to Dwight T. Mebane and Helen Mebane; Dwight T. Mebane and Helen Mebane, successors in interest to Joe McAuliffe Company

⁸ On October 26, 2004, Dave Wood voluntarily withdrew from Contest 3319. *See* VOLUNTARY WITHDRAWAL OF CONTEST BY DAVID WOOD (Oct. 26, 2004).

⁹ On July 8, 2005, Kenneth Zamzow voluntarily withdrew from Contest 3319. *See* NOTICE OF WITHDRAWAL OF CONTEST (July 8, 2005).

¹⁰ Nicholson Investments, LLC, successor in interest to Anita Nicholson

¹¹ On January 15, 2010, Jacob D. Wood voluntarily withdrew from Contest 3319. *See* NOTICE OF WITHDRAWAL OF CONTEST (Jan. 15, 2010).

¹² Robinson Best, LLC, successors in interest to PCA Acquired Properties, LLC; PCA Acquired Properties, LLC, successors in interest to Farm Credit West, PCA; Farm Credit West, PCA, successors in interest to Dwight T. Mebane and Helen Mebane; Sevenmile Creek Ranch, successor in partial interest to Dwight T. Mebane and Helen Mebane; On February 13, 2007, Sevenmile Creek Ranch voluntarily withdrew from Contest 3319. *See* NOTICE OF WITHDRAWAL OF CONTESTS (Feb. 13, 2007).

¹³ James G. Wayne, Jr., successor in interest to Walter Seput.

¹⁴ Lillian Hill, successor in interest to William V. Hill

William C. Knudtsen¹⁵; Wayne Jacobs; Margaret Jacobs; Robert Bartell¹⁶; Rodney Z. James; Hilda Francis for Francis Loving Trust; William J. Rust and Ethel J. Rust¹⁷; James R. Goold for Tillie Goold Trust; Duane F. Martin; Modoc Point Irrigation District¹⁸; Peter M. Bourdet; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; Wm Bryant¹⁹; Peggy Marengo; Kenneth J. Hufford and Leslie Hufford²⁰; and Hart Estate Investment Company²¹.

8. On May 8, 2000, the following parties, hereinafter collectively referred to as the "Klamath Project Water Users," filed Contest 3649 to the Claim and/or Preliminary Evaluation of Claim 617: Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co.²², 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, Berlva Pritchard²³, Don Vincent²⁴, Randy Walthall, Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Co., and Collins Products, LLC.
9. These matters were referred to the Office of Administrative Hearings for a contested case hearing. The Office of Administrative Hearings designated these matters and other like claims of the Klamath Tribes and the BIA as Case 283.
10. On November 26, 2002, Klamath Project Water Users withdrew/dismitted with prejudice Contest 3649. *See* 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 (Nov. 26, 2002) and APPROVAL AND ORDER OF HEARING OFFICER (Dec. 6, 2002).

¹⁵ On September 13, 2005, William C. Knudtsen voluntarily withdrew from Contest 3319. *See* NOTICE OF WITHDRAWAL OF CONTESTS (Sept. 13, 2005).

¹⁶ Michael LaGrande, successor in interest to Robert Bartell

¹⁷ Dave Cowan, successor in interest to William J. Rust and Ethel J. Rust

¹⁸ On October 15, 2008, Modoc Point Irrigation District voluntarily withdrew from Contest 3319. *See* NOTICE OF WITHDRAWAL OF CONTEST (Oct. 15, 2008).

¹⁹ On October 31, 2003, William Bryant voluntarily withdrew from Contest 3319. *See* NOTICE OF WITHDRAWAL OF CONTEST (Oct. 31, 2003).

²⁰ Jerry L. Neff and Linda R. Neff, successors in interest to Kenneth J. Hufford and Leslie Hufford

²¹ Jerry L. Neff and Linda R. Neff, successors in interest to Hart Estate Investment Company

²² Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3649 on January 20, 2004. *See* NOTICE OF WITHDRAWAL OF CONTEST BY KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY.

²³ Berlva Pritchard voluntarily withdrew from Contest 3649 on June 24, 2002. *See* NOTICE OF WITHDRAWAL OF CLAIMANT.

²⁴ Don Vincent voluntarily withdrew from Contest 3649 on November 29, 2000. *See* NOTICE OF WITHDRAWAL OF CLAIMANTS.

11. On December 14, 2006, OWRD and the Claimants (the Klamath Tribes and BIA) and the Contestants (Nicholson *et al.*) executed STIPULATION TO RESOLVE CONTESTS (Settlement Agreement) which resolved the remaining contests (Contest 3319, 3878, and 4007).
12. On December 15, 2006, the Adjudicator withdrew Case 283 from the Office of Administrative Hearings.
13. The land underlying Claim 617 is within the boundaries of the former Klamath Indian Reservation.
14. The primary purposes of the Tribes' reacquisition of the land underlying Claim 617 are for irrigation and for a fish hatchery and aquaculture. *See* DECLARATION OF ALLEN T. FOREMAN (REVISED EXHIBIT C2) (Nov.13, 2006), admitted into the record November 21, 2006.

B. DETERMINATION

1. The Settlement Agreement executed between OWRD, the Claimants, and the Contestants is adopted and incorporated as if set forth fully herein.
2. The Klamath Indian Tribe Restoration Act of August 27, 1986, 25 USC § 566, when combined with the Tribes' reacquisition of the parcel underlying this claim for the primary purposes of irrigation, a fish hatchery and aquaculture, is a valid basis for this claim. The Klamath Indian Tribe Restoration Act provides, among other things, that federal recognition of the Tribes is restored and that "[a]ll rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority...are restored..." 25 USC § 566(b). The Ninth Circuit has held that where a federally recognized Indian tribe reacquires land that was formerly a part of its reservation, the land is treated "in a manner analogous to that of a newly created federal reservation..." *United States v. Anderson*, 736 F2d 1358, 1363 (1984). Water rights for such land are implied to the extent necessary to "fulfill the very purposes for which [the] reservation was created." *Id.* The priority date of any such rights is the date of reacquisition by the Tribes.²⁵ *Id.* The land underlying Claim 617 is within the boundaries of the former Klamath Indian Reservation, and was acquired for the primary purposes of irrigation and a fish hatchery and aquaculture. A water right with the priority date of the reacquisition of the land by the Klamath Tribes is recognized for these primary purposes.
2. Because there is no evidence on the record to the contrary, the standard rate for irrigation, being 1/40 of one cubic foot per second per acre as outlined in the GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION will apply.

²⁵ The determination of this claim need not and does not address the issue of implied water rights for land acquired by a federally recognized Indian tribe that lies outside the boundaries of its reservation. Nor does the determination of this claim address the issue of implied water rights for privately held land subsequently acquired by the federal government outside the context of a federally recognized Indian tribe's reacquisition of land within the boundaries of its former reservation.

3. Based on the file and record herein, IT IS ORDERED that Claim 617 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 617
FOR AN INCHOATE WATER RIGHT

CLAIM MAP REFERENCE: CLAIM # 617, PAGE 0022, MAP FILED APRIL 20, 1999

CLAIMANTS: THE KLAMATH TRIBES
PO BOX 436
CHILOQUIN, OR 97624

UNITED STATES DEPARTMENT OF INTERIOR
BUREAU OF INDIAN AFFAIRS AS TRUSTEE ON
BEHALF OF THE KLAMATH TRIBES
911 NE 11TH AVE
PORTLAND, OR 97232

PARCEL NAME: BRAYMILL

SOURCE OF WATER: SPRAGUE RIVER, tributary to WILLIAMSON RIVER

PURPOSE or USE:
FISH HATCHERY AND AQUACULTURE (NON-CONSUMPTIVE USE EXCEPT FOR
EVAPORATION); IRRIGATION OF 12.8 PRACTICABLY IRRIGABLE ACRES; USES
WILL NOT AND CANNOT BE CHANGED TO INSTREAM USE

RATE, DUTY, AND PERIOD OF USE:

Use	Rate (CFS)*	Duty	Period
Fish Hatchery and Aquaculture	0.50	376.0 Acre-feet/Year	January 1 - December 31
Practicably Irrigable Acreage	0.15	1.88 Acre-Feet per acre irrigated during the irrigation season of each year	April 1 - October 31

* MEASURED AT THE POINT OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DATE OF PRIORITY: MAY 8, 1992

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
34 S	8 E	WM	19	NE SW	250 FEET NORTH AND 165 FEET WEST FROM SE CORNER, NESW, SECTION 19

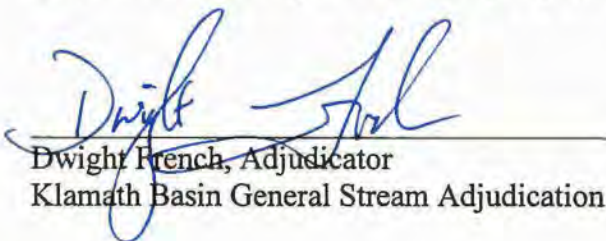
THE PLACE OF USE IS LOCATED AS FOLLOWS:

FISH HATCHERY AND AQUACULTURE					
Twp	Rng	Mer	Sec	Q-Q	
34 S	8 E	WM	19	NE SW	

PRACTICALLY IRRIGABLE ACREAGE					
Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	8 E	WM	19	NE SW	12.8

[End of Water Right Claim Description]

Dated at Salem, Oregon on February 28, 2014


Dwight French, Adjudicator
Klamath Basin General Stream Adjudication