

**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 620

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 620) 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, 729<sup>1</sup>, and 730<sup>2</sup>.

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<sup>1</sup> 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).

<sup>2</sup> 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 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).

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 620 was denied.
5. On May 8, 2000, the Klamath Tribes timely filed Contest 4010 to the Claim and/or Preliminary Evaluation of Claim 620.
6. On May 8, 2000, the BIA timely filed Contest 3881 to the Claim and/or Preliminary Evaluation of Claim 620.
7. On May 8, 2000, the following parties, hereinafter collectively referred to as “Nicholson *et al.*,” filed Contest 3322 to the Claim and/or Preliminary Evaluation of Claim 620: Roger Nicholson; Roger Nicholson Cattle Co.<sup>3</sup>; Lloyd Nicholson Trust<sup>4</sup>; Dorothy Nicholson Trust<sup>5</sup>; Richard Nicholson; Jim McAuliffe and McAuliffe Ranches<sup>6</sup>; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Joe McAuliffe Company<sup>7</sup>; Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch; Dave Wood<sup>8</sup>; Kenneth Zamzow<sup>9</sup>; Anita Nicholson<sup>10</sup>; Wm. S. Nicholson; John B. Owens; Kenneth Owens; Wm L. Brewer; Mary Jane Danforth; Jane M. Barnes; Franklin Lockwood Barnes, Jr.; Jacob D. Wood<sup>11</sup>; 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 Mebane<sup>12</sup>; Walter Seput<sup>13</sup>; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams; River Springs Ranch; Pierre A. Kern Trust; William V. Hill<sup>14</sup>; Lillian M. Hill; Carolyn Obenchain; Lon Brooks Newman Enterprise; William C. Knudtsen<sup>15</sup>; Wayne Jacobs; Margaret Jacobs; Robert Bartell<sup>16</sup>; Rodney Z.

<sup>3</sup> Agri Water, LLC, successor in interest to Roger Nicholson Cattle Co.

<sup>4</sup> Roger Nicholson and Richard Nicholson, successors in interest to Lloyd Nicholson Trust

<sup>5</sup> Roger Nicholson and Richard Nicholson, successors in interest to Dorothy Nicholson Trust

<sup>6</sup> 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

<sup>7</sup> 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

<sup>8</sup> On October 26, 2004, Dave Wood voluntarily withdrew from Contest 3322. *See* VOLUNTARY WITHDRAWAL OF CONTEST BY DAVID WOOD (Oct. 26, 2004).

<sup>9</sup> On July 8, 2005, Kenneth Zamzow voluntarily withdrew from Contest 3322. *See* NOTICE OF WITHDRAWAL OF CONTEST (July 8, 2005).

<sup>10</sup> Nicholson Investments, LLC, successor in interest to Anita Nicholson

<sup>11</sup> On January 15, 2010, Jacob D. Wood voluntarily withdrew from Contest 3322. *See* NOTICE OF WITHDRAWAL OF CONTEST (Jan. 15, 2010).

<sup>12</sup> 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 3322. *See* NOTICE OF WITHDRAWAL OF CONTESTS (Feb. 13, 2007).

<sup>13</sup> James G. Wayne, Jr., successor in interest to Walter Seput.

<sup>14</sup> Lillian Hill, successor in interest to William V. Hill

<sup>15</sup> On September 13, 2005, William C. Knudtsen voluntarily withdrew from Contest 3322. *See* NOTICE OF WITHDRAWAL OF CONTESTS (Sept. 13, 2005).

James; Hilda Francis for Francis Loving Trust; William J. Rust and Ethel J. Rust<sup>17</sup>; James R. Goold for Tillie Goold Trust; Duane F. Martin; Modoc Point Irrigation District<sup>18</sup>; Peter M. Bourdet; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; Wm Bryant<sup>19</sup>; Peggy Marengo; Kenneth J. Hufford and Leslie Hufford<sup>20</sup>; and Hart Estate Investment Company<sup>21</sup>.

8. On May 8, 2000, the following parties, hereinafter collectively referred to as the "Klamath Project Water Users," filed Contest 3652 to the Claim and/or Preliminary Evaluation of Claim 620: Klamath Irrigation District, Klamath Drainage District, Tulalake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co.<sup>22</sup>, 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 Pritchard<sup>23</sup>, Don Vincent<sup>24</sup>, 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/dischmised with prejudice Contest 3652. *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).

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<sup>16</sup> Michael LaGrande, successor in interest to Robert Bartell

<sup>17</sup> Dave Cowan, successor in interest to William J. Rust and Ethel J. Rust

<sup>18</sup> On October 15, 2008, Modoc Point Irrigation District voluntarily withdrew from Contest 3322. *See* NOTICE OF WITHDRAWAL OF CONTEST (Oct. 15, 2008).

<sup>19</sup> On October 31, 2003, William Bryant voluntarily withdrew from Contest 3322. *See* NOTICE OF WITHDRAWAL OF CONTEST (Oct. 31, 2003).

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

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

<sup>22</sup> Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3652 on January 20, 2004. *See* NOTICE OF WITHDRAWAL OF CONTEST BY KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY.

<sup>23</sup> Berlva Pritchard voluntarily withdrew from Contest 3652 on June 24, 2002. *See* NOTICE OF WITHDRAWAL OF CLAIMANT.

<sup>24</sup> Don Vincent voluntarily withdrew from Contest 3652 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 3322, 3881, and 4010).
12. On December 15, 2006, the Adjudicator withdrew Case 283 from the Office of Administrative Hearings.
13. The land underlying Claim 620 is within the boundaries of the former Klamath Indian Reservation.
14. The primary purpose of the Tribes' reacquisition of the land underlying Claim 620 is for irrigation. See DECLARATION OF ALLEN T. FOREMAN (REVISED EXHIBIT C2) (Nov.13, 2006), admitted into the record November 21, 2006.
15. Based on the Claimants' map (*see* Claim # 620, Page 0013), OWRD finds the point of diversion described in the Settlement Agreement as being located 250 feet East and 165 feet South of the NW corner of the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , SECTION 21 is incorrect; the correct description of the location is 250 feet East and 165 feet South of the NW corner of the SW $\frac{1}{4}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$ , SECTION 21.

## B. DETERMINATION

1. The Settlement Agreement executed between OWRD, the Claimants, and the Contestants is adopted and incorporated as if set forth fully herein, with the exception of a scrivener's error; the legal description of the point of diversion is corrected to Lot 22 (SW $\frac{1}{4}$  NE $\frac{1}{4}$ ), Section 21, T 35 S, R 7 E., W.M., being 250 feet East and 165 feet South of the NW corner of the SW $\frac{1}{4}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$ , SECTION 21, as described in Finding 15, above.
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 purpose of irrigation 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.<sup>25</sup> *Id.* The land underlying Claim 620 is within the boundaries

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<sup>25</sup> 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.

of the former Klamath Indian Reservation, and was acquired for the primary purpose of irrigation. A water right with the priority date of the reacquisition of the land by the Klamath Tribes is recognized for these primary purposes.

3. 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.
4. Based on the file and record herein, IT IS ORDERED that Claim 620 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO. 620**

FOR AN INCHOATE WATER RIGHT

**CLAIM MAP REFERENCE:** CLAIM # 620, PAGE 0013, 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 11<sup>TH</sup> AVE  
PORTLAND, OR 97232

**PARCEL:** MODOC PUMP STATION

**SOURCE OF WATER:** The WILLIAMSON RIVER, tributary to the UPPER KLAMATH LAKE

**PURPOSE or USE:**

IRRIGATION OF 4.8 PRACTICABLY IRRIGABLE ACRES; USES WILL NOT AND CANNOT BE CHANGED TO INSTREAM USE.

**RATE OF USE:**

0.06 CUBIC FOOT PER SECOND 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.

**DUTY:**

1.83 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

**PERIOD OF ALLOWED USE:** APRIL 1 - OCTOBER 31

**DATE OF PRIORITY:** DECEMBER 5, 1988

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

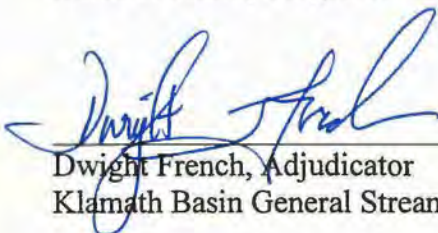
Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
35 S	7 E	WM	21	SW NE	22	165 FEET SOUTH AND 250 FEET EAST FROM NW CORNER of the SW ¼, SWNE, SECTION 21

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

PRACTICALLY IRRIGABLE ACREAGE						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
35 S	7 E	WM	21	SW NE	22	4.8

[End of Water Right Claim Description]

Dated at Salem, Oregon on February 28, 2014

  
Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication