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**RECEIVED**

JUL 05 2005

**WATER RESOURCES DEPT  
SALEM, OREGON**

July 1, 2005

Oregon Water Resources Commission  
c/o Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem, OR 97301-1271

Dear Oregon Water Resources Commission:

I am enclosing a petition from multiple groups to the Oregon Water Resources Commission ("Commission") requesting that it either withdraw the waters of the Klamath Basin from further appropriation (with certain exceptions) or undertake emergency rulemaking to classify the Klamath waters to restrict further appropriation.

Petitioners would very much like the opportunity to present the petition to the Commission and are working with the Water Resources Department to secure time on the agenda for your July 28 and 29<sup>th</sup> meeting. Petitioners are requesting half an hour to present the petition and answer questions from the Commission, and there will likely be other parties there in support and opposition who should be given the opportunity to share their perspectives. We plan to amend the petition to add additional parties joining prior to the Commission meeting.

I will be out of the office until July 13<sup>th</sup> and John DeVoe, Executive Director of WaterWatch, will be handling the petition in my absence. He can be reached at 503.295.4039 x22 or [john@waterwatch.org](mailto:john@waterwatch.org) if you have any questions.

Thank you in advance for your consideration of the petition.

Sincerely,

Lisa A. Brown

Enclosure: WaterWatch *et al.* Petition to Withdraw Waters of the Klamath River Basin from Further Appropriation, or for Emergency Rulemaking to Classify Klamath Waters to Restrict Further Appropriation (with Attachments)

cc: All individual Commissioners  
Phil Ward, Director, Oregon Water Resources Department

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**BEFORE THE WATER RESOURCES COMMISSION**  
**OF THE STATE OF OREGON**

WATER RESOURCES DEPT  
SALEM, OREGON

WATERWATCH OF OREGON, )  
PACIFIC COAST FEDERATION OF )  
FISHERMEN'S ASSOCIATIONS, )  
OREGON NATURAL RESOURCES )  
COUNCIL, INSTITUTE FOR FISHERIES )  
RESOURCES, HEADWATERS, )  
KLAMATH FOREST ALLIANCE, )  
FRIENDS OF THE RIVER, WORLD )  
WILDLIFE FUND, NORTH COAST )  
ENVIRONMENTAL CENTER, )  
KLAMATH-SISKIYOU WILDLANDS )  
CENTER, TROUT UNLIMITED )

Petitioners, )

and )

OREGON WATER RESOURCES )  
COMMISSION )

Respondent )

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PETITION TO WITHDRAW  
WATERS OF THE KLAMATH  
RIVER BASIN FROM FURTHER  
APPROPRIATION, OR FOR  
EMERGENCY RULEMAKING  
TO CLASSIFY KLAMATH  
WATERS TO RESTRICT  
FURTHER APPROPRIATION

## I. STATEMENT OF THE PROBLEM

The Klamath River Basin faces an unprecedented water crisis. The basin's waterways have become a severely depleted and polluted resource over many years. The fundamental root of the crisis is that state and federal officials have promised too much water to too many different interests in the Klamath Basin. There is today just not enough water, even in normal water years, to satisfy all the legitimate interests, yet the State of Oregon continues to issue *new* water appropriation permits in the Klamath Basin.

The always arid Upper Klamath River Basin<sup>1</sup> is also currently in the midst of a serious drought, potentially pitting upper basin water interests against lower basin Tribes and fishing-dependent communities, as well as pitting farmer against farmer, irrigation districts against the domestic water supplies of local towns, and greatly exacerbating already difficult water conflicts. There is increasing evidence of aquifer depletion in the Upper Basin<sup>2</sup> and great uncertainty remains over the extent (and even the existence) of current water allocations, most of which still remain unadjudicated. In addition, the Klamath is essentially an unregulated basin because the State has no way to effectively regulate water use until the adjudication is complete. Given these facts, the question must be asked: why would Oregon continue to issue new water rights?

Evidence of overallocation of Klamath River Basin waters includes severely declining fish and wildlife populations; listing of several aquatic species under the federal Endangered Species Act ("ESA"); failure to meet Tribal treaty and trust responsibilities and to provide for subsistence fisheries in the basin; economic harm to upper basin agricultural communities, communities that depend upon commercial salmon fishing, and Klamath River-related tourism and recreation industries; adverse impacts on domestic

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<sup>1</sup> At the Klamath Irrigation Project near Klamath Falls, average annual rainfall is only about 12 inches per year, classifying the region as high desert. Inflow to Upper Klamath Lake depends heavily on surrounding snowpacks that have been far below average levels in recent years.

<sup>2</sup> The recent U.S. Geological Survey assessment of the Klamath Project Pilot Water Bank found that increased ground water pumping due to the water bank has resulted in 2 to 8 foot year to year ground-water declines across broad areas surrounding large pumping centers in the basin, and seasonal declines of 10 to 20 feet near large pumping centers. U.S. Geological Survey, Assessment of the Klamath Project Pilot Water Bank: A Review from a Hydrologic Perspective, prepared for U.S. Bureau of Reclamation, Klamath Basin Area Office (May 3, 2005) at p.48-49 ("USGS Klamath Water Bank Assessment").

ground water supplies<sup>3</sup>; and failure to meet the water needs of the basin's National Wildlife Refuges. Each year, one or more of these legitimate interests suffer because of the overallocation of this limited and valuable resource.

Severe biological and economic problems already resulting from water overallocation were highlighted in 2002 by the tragic adult fish kill on the Klamath River. Though fish kills in the Klamath River have become all too common, this event was unprecedented in its magnitude, killing up to an estimated 80,000 adult chinook salmon and steelhead spawners, in addition to hundreds of ESA-listed coho.<sup>4</sup> Additionally, a spring 2002 juvenile fish kill of at least 200,000 has now resulted in very poor adult returns in 2005, triggering widespread ocean troll fishery closures in California and Oregon that may ultimately cost coastal fishing-dependent communities as much as \$100 million in lost fishing income and lost markets.

Prior to that massive 2002 fish kill, during similar severe drought conditions in the summer of 2001, the federal Klamath Irrigation Project suffered an abrupt reduction to about two-thirds of its normal water supply in order to meet the minimum flow needs of lower river fish to prevent extinction of federally protected coho salmon in the lower river. This reduction caused federal Klamath Irrigation Project crop losses estimated at between \$27 to 46 million to already hard-pressed upper Klamath Basin farming communities – again, another symptom of serious water over-appropriation that now results in rotating water crises from one part of the basin to another.<sup>5</sup>

Even though it is becoming increasingly clear that Klamath Basin water is already severely overallocated and over-promised, the State of Oregon continues to issue *new* water appropriation permits, thus continuing a practice that has been a major contributing factor to the water crisis. Since June of 2002, the Oregon Water Resources Department

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<sup>3</sup> There have been several instances of failing domestic wells, as well as situations where landowners have been forced to drill deeper as ground water levels drop from increased pumping. See Oregonian, Michael Milstein, Klamath Wells Deep in Trouble, May 3, 2004. See also Herald and News, Dylan Darling, Well Worry Rising as Water Table Dips, June 10, 2004.

<sup>4</sup> California Department of Fish and Game, September 2002 Klamath River Fish-Kill: Final Analysis of Contributing Factors and Impacts (July, 2004) at 158 (“The total fish-kill estimate of 34,056 fish was very conservative. Analysis of Trinity River spring-run to fall-run Chinook returns in 2002 compared to historic returns, indicate the fish-kill estimate may have underrepresented actual fish losses by 45,000 individuals.”)

<sup>5</sup> Estimated 2001 Klamath Irrigation Project crop losses from Water Allocation in the Klamath Reclamation Project, 2001 (Oregon State University Special Report 1037, December 2002), particularly Chapter 13, “Estimated Impacts and Reported Outcomes,” pp. 272-275.

("Department") has issued approximately 91 new, permanent ground water permits in the Klamath and Lost River Basins totaling over 300 cfs. *See Attachment 2: Klamath Application Tracking Spreadsheet.* Reducing – not increasing – the demand for increasingly scarce water must be central to any strategy for solving the Klamath water crisis. The State should not be making more promises it cannot keep.

In this atmosphere of over-appropriation, increasing uncertainty over water allocations, cycles of drought and escalating water conflict, it simply makes no sense to continue to issue yet more general water diversion permits as the Department continues to do. We believe caution and good sense demands a moratorium on the issuance of additional water permits in the Klamath Basin until ongoing ground water studies have been completed, the status of water allocations has been determined by completion of the adjudication, the Department has instituted measurement and enforcement programs, and the needs of fish, wildlife and Tribal<sup>6</sup> and down river communities are met.

## II. PETITIONERS' REQUEST

Petitioners request that the Oregon Water Resources Commission ("Commission") take immediate action to withdraw from further appropriation all of the unappropriated surface and ground waters of the Klamath and Lost River Basins (hereinafter the Lost River Basin is included in the terms "Klamath River Basin" and "Klamath Basin"), except for temporary emergency uses of water in times of drought,<sup>7</sup> or for statutorily exempt ground water uses.<sup>8</sup> This Petition likewise does not seek to affect existing water rights, nor any of the claims in the ongoing water right adjudication, nor any applications for new uses currently pending before the Department.

The requested action is necessary to avoid serious harm and prejudice to the public interest, protect existing rights and claims, prevent aquifer depletion, ensure compliance with the laws and policies of the State of Oregon and to ensure a coordinated

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<sup>6</sup> The Klamath Tribes have the senior water right in the Upper Klamath Basin, dating "from time immemorial." However, that water right has never been adjudicated, and is one of thousands that will remain uncertain until completion of the current adjudication process.

<sup>7</sup> ORS 536.750(1)(a) allows the Commission to issue temporary permits for emergency uses of water when a drought has been declared. A drought has formally been declared in the Klamath County for 2005, and actions under this Petition would not affect that authority. Drought declaration available on the web at: <http://governor.oregon.gov/Gov/pdf/eo0502.pdf> (visited April 8, 2005).

<sup>8</sup> These uses include wells for single or group domestic purposes in an amount not exceeding 15,000 gallons a day, watering of up to 1/2 acre of lawn or noncommercial garden, stockwatering purposes, or any single industrial or commercial purpose not to exceed 5,000 gallons per day. ORS 537.545(1).

approach to the use and control of Klamath River Basin waters. Each new water appropriation permit that the State of Oregon issues adds to the severity and magnitude of the Klamath water crisis.

Petitioners specifically ask that the Commission use its authority to issue an order of withdrawal for the waters of the Klamath River Basin pursuant to ORS 536.410. *See* Attachment 3: Petitioners' Proposed Order of Withdrawal. In the alternative, Petitioners request that the Commission undertake an immediate emergency rulemaking, pursuant to ORS 183.390, 183.335(5)(a) and OAR 690-01 and 137-001-0070, to classify the waters of the Klamath River Basin under ORS 536.340 in such a way as to prevent further appropriations. *See* Attachment 4: Petitioners' Proposed Basin Plan Amendments. If the Commission undertakes such a rulemaking, Petitioners also request that the Commission direct the Department to begin permanent rulemaking proceedings to establish a permanent rule consistent with this Petition.<sup>9</sup>

Petitioners request that this withdrawal or closure prohibit any new allocation of waters of the Klamath River Basin, except for drought emergency, exempt wells, and pending applications as detailed above. Petitioners request that the Commission maintain the sought-after withdrawal or closure until each of the following actions is completed and conditions met:

- a) Ongoing ground water studies have been concluded and show that specific additional groundwater development is sustainable and can occur without interfering with surface waters; and
- b) A final order of determination in the Klamath adjudication has been entered by the Adjudicator appointed by the Water Resources Department Director; and
- c) Water is available for further appropriation after the needs of fish (including ESA-listed species); wildlife; Native American Indian Tribes; lower river state and federally managed salmon and steelhead; Tribal commercial and recreational fisheries; down river communities; and existing water right holders are met; and
- d) Measurement and reporting devices have been installed on all major diversions in the basin (both ground and surface water); and
- e) Water Resources Department has implemented an aggressive enforcement program that ensures all water use in the basin is within legal limits.

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<sup>9</sup> ORS 183.335(6)(a) provides that a rule adopted under ORS 183.335(5) may be effective for a period of not longer than 180 days. The adoption of a rule under ORS 183.335(5) does not prevent adoption of an identical rule under the provisions for permanent rulemaking. ORS 183.335(6)(a).

### III. PETITIONERS

Petitioners represent a broad range of non-governmental organizations committed to restoring the Klamath River Basin. For a description of each Petitioner and its interests, *see* Attachment 1: Petitioners' Interests and Contact Information.

### IV. THE STATE OF OREGON CONTINUES TO ISSUE NEW WATER APPROPRIATION PERMITS DESPITE THE SEVERE OVERALLOCATION OF KLAMATH BASIN WATERS

Years of conflict over diminishing water resources have made it clear that surface waters throughout the Klamath River Basin are severely oversubscribed. Even in normal years the basin cannot meet current demands for Tribal, agricultural, industrial, municipal, and fish and wildlife needs. This is a basin-wide problem found from the headwaters to the estuary and including all tributaries to this river system. This problem is further exacerbated by years of drought, of which 2005 is another example. Long-term climate predictions are that such droughts will continue into the foreseeable future.

Existing demands for water have, in the past, been met mainly with surface water. However, as conflicts over surface water continue to increase, more and more people have been turning to ground water to meet both existing and new development needs. Unfortunately, increasing reliance on ground water is not sustainable, in part because ground water in the basin is critical to maintaining the flows and quality of the basin's already oversubscribed, and water quality impaired, surface waters.<sup>10</sup>

Upper Klamath Lake itself is supplied largely by ground water. Inflows to the lake "are mainly from the Williamson and Wood Rivers (which are primarily ground-water fed streams for most of the year), and from several hundred cubic feet per second (cfs) of ground water that directly enters the lake via seeps and springs."<sup>11</sup> The Lost River system, which contributes flows to the Klamath River system, also relies on ground water for its flow. A recent study of the Lost River conducted by the Department documented that, at least in a portion of that watershed, ground water in basalt is

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<sup>10</sup> WaterWatch of Oregon, Summary of Ground Water Information for the Upper Klamath Basin (2001) at 3 (on file with the authors). *See also* Oregon Department of Environmental Quality, Upper Klamath Lake Drainage Total Maximum Daily Load (TMDL) and Water Quality Management Plan (WQMP) (May 2002).

<sup>11</sup> U.S. Geological Survey, Klamath River Basin Hydrologic Conditions Prior to the September 2002 Die-Off of Salmon and Steelhead, Water Resources Investigations Report 03-4099 (2003) at 3.

hydraulically connected to the Lost River, and that existing ground water pumping diminishes flows in the springs and seeps that provide flow to the river.<sup>12</sup> Under current management of the Lost River, existing ground water pumping is sufficient to actually *eliminate* the flow of one of the major spring areas – Bonanza Big Springs – into the Lost River in most years.<sup>13</sup>

Pressure to develop ground water, along with concerns over the impacts of increased ground water development on already overallocated streamflows in the basin, led the Department and the U.S. Geological Survey (“USGS”) to begin development of a regional scale ground water model for the Klamath Basin. The study is due to be completed this year and will further document the nature and degree of connection between ground and surface waters in the basin. Yet despite undisputed and increasing evidence of hydrological linkage between Klamath ground water and surface water, coupled with the existing overallocation of the river system, the Department has continued to approve ground and surface water permits in the basin.

The recent assessment by the USGS of the Klamath Pilot Water Bank reinforces Petitioners’ request that the Department stop issuing new permanent water permits in the Klamath Basin until the regional ground water study is complete. That assessment reports that ground water pumping in recent years has created historically large seasonal and year-to-year water level declines and that at present levels of ground water pumping the regional ground water system will eventually achieve a new state of dynamic equilibrium. The assessment cautions that at present “there is no way to reliably predict the levels at which the water table will stabilize, or the spatial and temporal distribution of the effects to adjacent areas and streams.”<sup>14</sup> The assessment goes on to state that present and proposed USGS ground water studies “should help with ground-water management by providing the ability to estimate the declines in ground-water levels and losses of ground-water discharge to streams, springs, and lakes given various amounts and schedules of ground-water pumping.”<sup>15</sup> USGS cautions that “until [the

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<sup>12</sup> Grondin, G.H., 2004. Ground Water in the Eastern Lost River Sub-Basin, Langell, Yonna, Swan Lake, and Poe Valleys of Southeastern Klamath County, Oregon. Ground Water Report 41, Oregon Water Resources Department, Salem, Oregon, Executive Summary.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> USGS Klamath Pilot Water Bank Assessment at 37, 34.

<sup>15</sup> *Id.* at 37.



OWRD/USGS ground-water model] is available, water managers must rely on inferences that can be made from the data collected..."<sup>16</sup>

In May of 2002, a group of petitioners largely identical to Petitioners here petitioned this Commission to withdraw or close waters of the Klamath River Basin to further appropriation. The Commission refused, giving the Department the green light that allowed it to grant approximately 103 new permits in just three years, including 91 new ground water permits totaling over 300 cfs. *See Attachment 2: Klamath Application Tracking Spreadsheet.* A majority of these 91 new ground water permits are for agricultural purposes, with about one half of the permits issued with locations in the Lost River Basin.

Since 2002, in addition to the 91 new ground water permits, the Department also has issued five reservoir permits totaling approximately 62 acre feet, four surface water permits totaling less than one cfs, and three emergency ground water permits. Today there are approximately 20 applications pending for new permits, including ten ground water applications totaling 103 cfs that the Department has proposed to issue (six with Proposed Final Orders, four with initial review determinations). *See Attachment 2: Klamath Application Tracking Spreadsheet.* Though this Petition does not seek to affect pending applications, these numbers show the extent to which the Department continues to be faced with deciding whether to issue new Klamath ground water permits in the absence of adequate data regarding this public resource.

There is also a pending application for storage of 149,288 acre feet (roughly one-third again as much as the entire current annual irrigation water allocation from Link River Dam for the Klamath Irrigation Project as a whole) that would divert water directly from the Klamath River in a reach that is habitat to endangered species, during a time of year when high river flows are crucial to out migrating salmon.<sup>17</sup> After receiving the right to divert this water free of charge from the Oregon public, the applicant would then sell the water back to taxpayers under the U.S. Bureau of Reclamation's water bank (*see* section VI(A) below) at huge taxpayer expense. While this Petition would not affect this

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<sup>16</sup> *Id.* at 34.

<sup>17</sup> Application #R8204, filed by the Klamath Drainage District under the alternate reservoir statute (ORS 537.409). An earlier reservoir application (#R85813) filed by Klamath Drainage District under the standard reservoir statute (ORS 537.400) for the same storage project was withdrawn on June 24, 2005.

reservoir application, it is another example of the type of water management decisions the Department is faced with.

The Department has also recently recommended denying nine ground water permits in the Lost River Basin that were on hold pending the completion of the Department's 2004 Lost River ground water study.<sup>18</sup> Another five that were on hold have been proposed for issuance. The Department recommended the denials due to the potential substantial interference by the well(s) in each application with the nearest surface water. The Department was only able to predict this potential interference because it had completed its 2004 Lost River ground water study. These denials show the importance of refraining from issuing new permits until the Department has completed studies for the entire Klamath Basin that allow it to assess the impacts that new ground water permits might have on surface flows, such as the joint Department and USGS Klamath ground water study. Until such analysis is completed, the Department cannot adequately assess the impacts that new permits will have and therefore should not be issuing those new permits.

The continued permitting of new long-term junior ground water and surface water uses only fuels the flames of conflict over water in the basin, diminishes the ability to respond to drought and undercuts the water conservation efforts of many upper basin irrigators, water districts and agencies. Given the known hydraulic connection between ground and surface waters in much of the basin, granting new ground water rights amounts to a shell game by which the State is "robbing Peter to pay Paul" by authorizing ground water users to take water that already is allocated to a senior water right. Existing ground water users, senior surface water users and instream uses of water have the most to lose by the State's current approach. Klamath Basin ground water level data shows that ground water pumping already has contributed to ground water level declines,<sup>19</sup> which in the long term also will affect basin streamflows.

Further, the State's actions to permanently allocate water by granting new permits is at odds with its continued acknowledgement that "[w]hile ground water helped farmers

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<sup>18</sup> Grondin, G.H., 2004. Ground Water in the Eastern Lost River Sub-Basin, Langell, Yonna, Swan Lake, and Poe Valleys of Southeastern Klamath County, Oregon. Ground Water Report 41, Oregon Water Resources Department, Salem, Oregon.

<sup>19</sup> USGS Klamath Water Bank Assessment and personal communication USGS (February 15, 2005).

survive [the drought of 2001], it can't replace surface water year in and year out and must be managed on a sustainable basis."<sup>20</sup> This acknowledgment highlights the need to preserve the basin's remaining ground water resources to address drought year emergencies, such as in this year, rather than permanently allocating it and losing this important ability to address future drought emergencies.

In essence, the State's approach amounts to continuing to draw on an already overdrawn account in a futile effort to reduce the water deficit. This approach only exacerbates the existing overallocation problems in the basin and does nothing to address the need for water demand reduction, or to restore river systems in the basin. Indeed, the current policies make matters worse, increasing the pressure for more drastic demand reduction in the future. The State continues to give water away for free that later will have to be repurchased, at great taxpayer expense, if the ongoing water crisis is to be resolved.

#### **V. THE CURRENT KLAMATH WATER CRISIS REQUIRES IMMEDIATE ACTION BY THE COMMISSION**

In the three years since the Commission rejected the previous closure petition, several events have highlighted the need to close this basin to new appropriations. Water management decisions and actions have contributed to the catastrophic deaths of tens of thousands of adult salmon and steelhead and led to widespread ocean fisheries closures, seriously exacerbating the already existing water crisis, and have done nothing to protect – much less restore – the ecology of the basin.

##### **A. Klamath Basin Fisheries Suffered Severe Low Flow Related Fish-Kills in 2002, Harming Downstream Communities, and Commercial Fishing and Tribal Interests**

In the spring of 2002, near-record low flows released into the lower river from Iron Gate Dam resulted in a massive kill of juvenile salmon that occurred as they were migrating downstream in the spring.<sup>21</sup> Then in September of 2002, the Klamath River experienced yet another massive and tragic adult salmon and steelhead fish-kill, this time

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<sup>20</sup> Statement for the Record by Paul R. Cleary, Director, Oregon Water Resources Department to the National Research Council Committee on Endangered and Threatened Fishes in the Klamath River Basin (November 6, 2001) at 3.

<sup>21</sup> Pacific Coast Federation of Fishermen's Associations letter to George Bush requesting disaster assistance (July 14, 2004). Available on the web at: [www.pcffa.org/Klamath-PresidentLtr-14Jul04.pdf](http://www.pcffa.org/Klamath-PresidentLtr-14Jul04.pdf) (visited April 7, 2005).

the worst ever recorded on the Klamath River and perhaps on the Pacific coast.<sup>22</sup> This latter fish-kill was massive in scale with estimates of dead adult chinook and steelhead ranging up to nearly 80,000.<sup>23</sup> The adult fish ultimately succumbed to the ubiquitous pathogens known as Ich (*Ichthyophthirius multifiliis*) and Columnaris (*Flavobacterium columnare*) which spread rapidly due to very stressful conditions in the river, primary among them low flows and resultant high temperatures.<sup>24</sup> USGS analysis has shown that the Klamath River below Iron Gate Dam was flowing at only 59% of the 41-year average at the time of the fish kill.<sup>25</sup>

Two separate, independent scientific assessments of the issue have implicated low river flows as a critical cause of the fish-kill.<sup>26</sup> Flows in the lower Klamath River, and particularly in the portion of the river between Iron Gate Dam and the confluence of its main tributary, the Trinity River, were among the lowest recorded during the September, 2002 fish-kill.<sup>27</sup> The California Department of Fish and Game's comprehensive study of the fish-kill concluded that low flows, in addition to being an important stand-alone factor for the deaths, also contributed to the high water temperatures<sup>28</sup> and high fish densities<sup>29</sup> that supported the spread of the pathogens. The study identifies flow as "the

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<sup>22</sup> U.S. Fish and Wildlife Service, Klamath River Fish Die-off, September 2002, Causative factors of Mortality, Report number AFWO-F-02-03 (2003) at ii.

<sup>23</sup> California Department of Fish and Game, September 2002 Klamath River Fish-Kill: Final Analysis of Contributing Factors and Impacts (July, 2004) at 158 ("California Fish and Game Fish-Kill Analysis") ("The total fish-kill estimate of 34,056 fish was very conservative. Analysis of Trinity River spring-run to fall-run Chinook returns in 2002 compared to historic returns, indicate the fish-kill estimate may have underrepresented actual fish losses by 45,000 individuals.")

<sup>24</sup> *Id.*

<sup>25</sup> U.S. Geological Survey, Klamath River Basin Hydrologic Conditions Prior to the September 2002 Die-Off of Salmon and Steelhead, Water-Resources Investigations Report 03-4099 (2003) at 4.

<sup>26</sup> U.S. Fish and Wildlife Service, Klamath River Fish Die-off, September 2002, Causative factors of Mortality (2003), Report number AFWO-F-02-03; California Department of Fish and Game, September 2002 Klamath River Fish-Kill: Final Analysis of Contributing Factors and Impacts (July, 2004).

<sup>27</sup> The Pacific Fisheries Management Council reviewed gage data and found that "[a]verage flows in the lower Klamath River during September, 2002 were the fifth lowest on record since 1951," and that 2002 flows in the lower river were 34.6 percent less than in 2001. PFMC letter to Secretaries at 3.

<sup>28</sup> California Fish and Game Fish-Kill Analysis, *supra*, at 42 ("Significant [water temperature and flow] relationships existed in September 1999 (r [squared] = 0.44, p<0.001), 2001 (r [squared] = 0.46, p<0.001) and 2002 (r [squared] = 0.17, p<0.05) between maximum daily water temperature at Omegaar or Terwer and TRH+KAO flow . . . As flow decreased in 2001 and 2002, water temperatures increased.")

<sup>29</sup> California Fish and Game Fish-Kill Analysis, *supra*, at 158 ("Combined with the above average run of salmon, these low-flows and river volumes resulted in high fish densities. Fish passage may have been impeded by low-flow depths over certain riffles, or a lack of cues for fish to migrate upstream.")

only controllable factor and tool available in the Klamath Basin (Klamath and Trinity rivers) to manage risks against future epizootics and major adult fish-kills.”<sup>30</sup>

The problem was not simply naturally low flows. 2002 was classified as a “dry water year type” while 2001, which had higher fish numbers, higher (implemented) flows and no fish-kill, was classified as a drier, “critically dry water year type.”<sup>31</sup> In 2002, however, instead of allocating water to help imperiled fish as occurred in 2001, more water was diverted for irrigation use. In fact, from July 12<sup>th</sup> through August 31<sup>st</sup>, significantly more water was being sent to irrigators through the A Canal (870 cfs) than was in the Klamath River below Iron Gate Dam (711 cfs).<sup>32</sup> There is just not enough water in the basin to meet all these competing needs.

The results of a juvenile fish kill show up three years later in the form of low four year-old adult returns. The severe juvenile losses to Klamath salmon populations caused by these low flows in 2002 have resulted in a 2005 closure of much of the commercial chinook ocean troll fishery from the Columbia River in Oregon to Monterey Bay in California. These closures are directly related to low flows in the Klamath River in spring of 2005 and may cost Oregon and Northern California coastal fishing-dependent communities as much as \$100 million in economic losses this year alone. Similar losses are expected to hit that industry in 2006, as it feels the effect of the September 2002 adult fish kill. Due to these losses, the Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) has requested disaster assistance for Pacific coastal and Tribal communities to mitigate for the economic damage caused by the 2002 fish kill.<sup>33</sup>

The impacts of these fish kills and the depressed salmon runs of the Klamath generally have also been devastating to lower basin Tribal communities. Klamath River salmon are an essential part of the diet, culture and economy of the Yurok, Hoopa Valley

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<sup>30</sup> *Id.*

<sup>31</sup> Pacific Fishery Management Council letter to Secretaries Norton and Evans (December 4, 2002) (“PFMC letter to Secretaries”) (on file with the authors).

<sup>32</sup> Elwood Miller, Klamath Tribes Call for Action. September 30, 2002. Available on the web at: [http://www.klamathtribes.org/press\\_release\\_sep\\_302002.htm](http://www.klamathtribes.org/press_release_sep_302002.htm) (visited February 2, 2005) (also on file with the authors).

<sup>33</sup> Pacific Coast Federation of Fishermen’s Associations letter to George Bush requesting disaster assistance (July 14, 2004), *supra*, at 1. Available on the web at: [www.pcffa.org/Klamath-PresidentLtr-14Jul04.pdf](http://www.pcffa.org/Klamath-PresidentLtr-14Jul04.pdf) (visited April 7, 2005). See also more recent disaster assistance requests to the Governors of Oregon and California posted on PCFFA’s web page at: [www.pcffa.org](http://www.pcffa.org).

and Karuk Tribes. Loss of their traditional subsistence fisheries has devastated these communities and adversely affected the health of these communities.

**B. Klamath Lake and Klamath Basin National Wildlife Refuges Continue to Suffer from Severe Water Shortages**

Water overappropriation has also caused severe ecological problems in the upper Klamath Basin. Upper Klamath Lake, Oregon's largest freshwater lake, is drained each year below natural lake levels to meet the water needs of the Klamath Irrigation Project, exacerbating the water quality problems in the lake and increasing the intensity and duration of algal blooms in the lake. Upper Klamath Lake is a shallow lake, averaging eight feet in depth. Lowering the lake three to four feet each year has huge adverse impacts to the ecology of the lake and the status of the endangered suckers and redband trout that inhabit the lake. The endangered Lost River and shortnose suckers once occurred in prodigious numbers and were a cornerstone of the diet, economy and culture of the Klamath Tribes. The Klamath Tribes stopped harvesting the fish in the early 1980's and now can only take two per year for ceremonial purposes. Both species are now protected as "endangered" under the federal Endangered Species Act ("ESA").

The lake levels in Upper Klamath Lake historically fluctuated between 4,140 feet and 4,143.3 feet in elevation. When the lake is drained below an elevation of 4,140 feet the wetlands around the lake begin to dry out. When the elevation reaches 4,139 feet, all 14,400 acres of marsh within the Upper Klamath Lake National Wildlife Refuge and all other wetlands surrounding the lake go dry. Since the last closure petition was filed the lake levels have frequently been drained below natural levels, often from mid-August through December. Continued ground water development in the upper basin will continue to diminish lake levels in the lake because much of the inflow to the lake is from springs or spring-fed streams. Once a duck hunters mecca, the lake's drained wetlands no longer support the thousands of migratory waterfowl that attracted hunters to the area.

Water is also necessary to support the basin's six National Wildlife Refuges, among the crown jewels of the entire national refuge system. *See Attachment 5: Refuges in Peril: Fish, Wildlife, and the Klamath Water Crisis.* These valuable public lands are utilized by 80% of the birds in the Pacific Flyway, by the largest population of wintering bald eagles in the lower 48 states (federally protected under the ESA), and are some of the most important waterfowl breeding areas in the Northwest. But because of the over-

promising of water, critical seasonal and permanent wetlands in the National Wildlife Refuges are often left completely dry. The U.S. Fish & Wildlife Service has determined that 59% to 79% of the seasonal and permanent wetlands of Lower Klamath Lake and Tule Lake National Wildlife Refuge wetlands are likely to go dry in 50% of all future years.<sup>34</sup> Putting additional pressure on an already overtaxed system with new water allocations is just plain irresponsible.

**VI. KLAMATH CONSERVATION EFFORTS DEPEND ON RESTORING THE BALANCE BETWEEN WATER SUPPLY AND DEMAND: OREGON'S NEW WATER ALLOCATIONS THWART THESE EFFORTS AND WASTE TAXPAYER MONEY**

Resolution of the Klamath water crisis is dependent on restoring the balance between supply and demand of water in the basin. The severe over-allocation of water in the Klamath River Basin has spurred several federal programs in recent years that recognize this overarching need to bring basin water demand back into balance with actual supply. Several such programs are attempting to remedy the overallocation problem, primarily through voluntary and taxpayer-financed water banking and through improved water conservation. Tens of millions of dollars in federal funds now comes to the Klamath Basin to apply to water conservation and demand reduction programs of this sort.

Unfortunately, the Department's continuing approval of new water appropriation permits threatens to undercut all these ongoing conservation efforts, including many instigated and strongly supported by upper basin farmers as well as fishermen, conservationists and Tribes. To the extent that any program may have a chance to achieve real success in bringing water demand back into balance with supply, the State of Oregon is severely reducing these chances by handing out *new* water appropriation permits.

**A. New Water Allocations Thwart Water Bank Efforts**

The Bureau of Reclamation ("Bureau") is required under the currently operating 2002-2012 biological opinion on threatened Klamath River coho salmon to increase

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<sup>34</sup> United States Fish and Wildlife Service Draft Environmental Assessment on Implementation of an Agricultural Program on Tule Lake National Wildlife Refuge, Klamath Basin National Wildlife Refuge Complex (January 19, 2001) at 1.9, table 1.1 and 1.2.

downriver flows by acquiring water through an annual water banking program.<sup>35</sup> The water bank program explicitly endorses the need to bring water demand back into balance with water supply in the Klamath Basin, and is the only existing program to do so. Many millions of dollars in taxpayer money now goes annually to purchasing water for the water bank from willing sellers, with defined annual water bank goals. Unfortunately, the water bank program, as currently configured and managed, is for too little water, is too limited in scope, depends heavily on already over-appropriated groundwater, is not properly managed, is not sustainable, is not a good long-term investment, and does not offer permanent protection. For a thorough analysis of these and related problems, see Attachment 6: Klamath Basin Coalition letter to Dave Sabo re: Klamath Basin Water Banking Program (January 27, 2005).

Future improvements in the water bank's configuration and management that would give it the ability to permanently reduce irrigation season demand and increase streamflow are possible. However, the water bank's ability to achieve these conservation goals is significantly eroded by the ongoing new water allocations by the Department. The Government Accounting Office calculates that the water bank will cost taxpayers 65 million dollars by 2012.<sup>36</sup> Allowing the diversion of yet more scarce water works directly at cross purposes with the Bureau's water bank program. More in taxpayer funds will be required each year to offset the additional amounts of water being given away, just to get to the same conservation goals.

**B. Other Ongoing Water Conservation Programs are Hindered by the State of Oregon Handing Out New Water Appropriation Permits**

Other ongoing processes, such as the Bureau's Conservation Implementation Program ("CIP") and the Klamath River Watershed Coordination Agreement, will be successful only if they address the primary underlying problem in the basin – that too much water has been promised to too many interests. However, to the extent that any program has a chance of addressing this water overallocation, the State of Oregon is only

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<sup>35</sup> National Marine Fisheries Service, Biological Opinion for Klamath Project Operations (May 31, 2002). Available on the web at: <http://swr.nmfs.noaa.gov/psd/klamath/KpopBO2002finalMay31.PDF> (visited March 7, 2005).

<sup>36</sup> United States Government Accountability Office, KLAMATH RIVER BASIN: Reclamation Met Its Water Bank Obligations, but Information Provided to Water Bank Stakeholders Could Be Improved, Report to Congressional Requesters GAO-05-283 (March 2005). Available on the web at: <http://www.gao.gov/new.items/d05283.pdf> (visited April 8, 2005)



reducing that likelihood by handing out new water appropriation permits under current basin conditions, especially in the midst of a drought.

**C. New Water Allocations Waste Taxpayer Money**

Millions and millions of U.S. taxpayer dollars are being spent to help address the water crisis in the Klamath Basin. The water bank alone is expected to cost 65 million dollars by 2012. According to a Klamath Water Users Association talk given in 2004, the next two years of federal spending in the Klamath Basin will exceed \$260 million dollars.<sup>37</sup> Taxpayers are spending all of this money to help solve the water crisis, while Oregon is making it worse by handing out new, permanent water allocation permits. The State should lend support to the ongoing – and costly - federal conservation programs by ceasing to hand out new permanent water allocation permits in the Klamath Basin.

**VII. COMPLETION OF THE KLAMATH BASIN ADJUDICATION WILL NOT RESULT IN MORE WATER**

The Klamath Basin adjudication currently being administered by the Department, while important for long term water management, cannot address the fact that the basin's water has been overappropriated. In 2001, Paul Cleary, then Director of the Oregon Water Resources Department, made this clear in a statement to a National Research Council committee:

While completing the adjudication will be key to improving water management in the Upper Klamath Basin, it is important for everyone to understand that the adjudication will not create new water, will not restore habitat, will not improve water quality and will not recover species.<sup>38</sup>

Thus while the adjudication is a positive step for cleaning up several water management problems in the basin, it clearly is not going to relieve problems caused by overallocation of basin water. In addition until the adjudication is complete, the Department is not in a position to even know if there is unallocated water still available for appropriation. Until the Department has completed the adjudication, and the amount of water already that can be legally diverted is known, giving out yet more water permits, without even knowing whether as a practical matter the water to fulfill those permits exists, seems sheer folly.

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<sup>37</sup> Available on the web at: <http://www.kwua.org/speeches/danpubmeeting040704.htm> (visited March 15, 2005).

A precautionary approach should be used to put a moratorium on future permits until both the number and quantity of legal diversions can be fully known, and the amount of water still unallocated, IF ANY, can be fully ascertained.

#### **VIII. LEGAL AUTHORITY**

The Commission has both the legal authority and the mandate to take the action requested in this petition. *See* Attachment 7: Legal Duty and Authority for Action. The Commission should withdraw all unappropriated waters of the Klamath River Basin until it has the tools in place and the information needed to make proper allocation decisions. In the alternative, the Commission should immediately initiate emergency rulemaking to close the waters of the Klamath River Basin to further appropriations until certain requirements, set forth in Section II of this Petition, are met.

#### **IX. PERSONS KNOWN TO HAVE INTEREST IN THE PROPOSED EMERGENCY ACTION**

The entire public at large has an interest in this action. All taxpayers have an interest because they have spent many millions of dollars in recent years to try to address Klamath Basin water problems.<sup>39</sup> There is also broad public interest in the Klamath Basin's six National Wildlife Refuges, and its fish and wildlife populations, including the 80% of Pacific Flyway birds that depend on the basin, the largest wintering population of bald eagles in the lower 48 states, an impressive array of native resident fish including unique giant rainbow trout, and the culturally, biologically and economically critical salmon and steelhead runs. Further, many people and parties who hold unadjudicated water rights or current state water permits in the Klamath Basin have an interest in the sound management of the basin's water resources. Listing the names and addresses of

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<sup>38</sup> Statement for the Record by Paul R. Cleary, Director Oregon Water Resources Department to the National Research Council Committee on Endangered and Threatened Fishes in the Klamath River Basin (November 6, 2001).

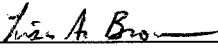
<sup>39</sup> For example, the 2002 Farm Bill included a 50 million dollar federal appropriation, sponsored by Greg Walden, for on farm expenditures in the Klamath Basin; the Bureau of Reclamation's Klamath Water Bank spent over \$2.3 million dollars in 2004 and 65 million dollars by 2012; and substantial federal expenditures arrived in the Klamath Basin as assistance related to the 2001 drought. According to a 2004 talk given by the Klamath Water Users Association, the "[f]ederal commitment to the Klamath Basin - for the past two years, and considering proposed Bush Administration spending for next year - federal spending in the Klamath Basin will exceed \$260 million dollars." Available on the web at: <http://www.kwua.org/speeches/danpubmeeting040704.htm> (visited March 15, 2005).

the entire public is not feasible. Petitioners suggest notice be published in all of the major news media to give adequate opportunity for public participation.

#### **X. CONCLUSION**

Klamath River Basin waters are like an overdrawn checking account. State and federal authorities simply have promised more water than nature can provide. Writing more “checks” on the already overdrawn water account, as the state continues to do, has not and will not solve the basin’s severe water shortages – it only makes the problem worse. The Commission must take immediate action to stop further overallocation of the rivers, lakes and ground water of the Klamath River Basin. Oregon law gives the Commission the mandate and the tools to take the necessary steps to keep the Klamath water crisis from deepening and to begin to address the roots of the crisis. The Commission should act immediately to either withdraw the basin from further appropriation or to close the basin through the basin classification program until the actions set forth in section II of this Petition are taken.

Respectfully submitted this 1st day of July, 2005,

  
\_\_\_\_\_  
Bob Hunter  
Lisa Brown  
WaterWatch of Oregon  
213 SW Ash Street, Suite 208  
Portland, OR 97204

ON BEHALF OF:

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Joseph Vaile  
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Jeff Curtis  
Trout Unlimited  
213 SW Ash Street, Suite 205  
Portland, OR 97204

**Attachment 1**

**Petitioners' Interests And Contact Information**

**RECEIVED**

JUL 05 2005

**WATER RESOURCES DEPT  
SALEM, OREGON**

## **Petitioners' Interests And Contact Information**

The Petitioners are as follows in alphabetical order:

Petitioner **Friends of the River** is a non-profit conservation organization founded in 1973, with its principal place of business in Sacramento, California. Friends of the River has more than 6,000 members and is the largest and oldest statewide river conservation organization in California. Its mission is to preserve, protect and restore California's rivers, streams, watersheds and aquatic ecosystems. Friends of the River has been involved in the protection and management of federal public lands in California and adjacent states since 1988, with an emphasis on protecting rivers, streams, watersheds, water quality, aquatic habitat, and aquatic species. Friends of the River supports efforts to improve water quality, fish and wildlife habitat, and river-based recreation opportunities in the Klamath watershed. Many members of Friends of the River utilize the Klamath River in Oregon and California for outdoor recreation and spiritual renewal. Friends of the River's address is 915 20<sup>th</sup> Street, Sacramento, CA 95814, contact person is Steven Evans.

Petitioner **Headwaters'** mission is to conserve, protect, and restore forest ecosystems, clean water and biological diversity in the Klamath-Siskiyou Bioregion. Headwaters is a non-profit educational group created in 1974 to protect critical watersheds in southwest Oregon. Headwaters believes that a diversified and sustainable economy depends on the wisest use of our natural resources. Last February, Headwaters sponsored a conference that included discussion of the environmental issues facing the Klamath Basin. Headwaters address is 84 4<sup>th</sup> Street, Ashland, OR 97250 and their contact person is Derek Volkart.

Petitioner **Institute for Fisheries Resources** is a not for profit organization dedicated to the study, protection and enhancement of both marine and anadromous biological resources on the Pacific coast of the United States and Canada. The Institute is independent of but affiliated with PCFFA. PCFFA has long been involved in resource conservation and protection issues, and the Institute for Fisheries Resources is expanding and carrying on PCFFA's 24-year conservation tradition. Petitioner's address is P.O. Box 11170, Eugene, OR 97440 and the contact person is Glen Spain.

Petitioner **Klamath Forest Alliance** works to protect the forests, rivers, and communities of the Klamath Mountains. The group was formed in 1989 and has its main office in Orleans, California. Klamath Forest Alliance is active on several projects aimed at

restoring and protecting the fishery resource of the Klamath River. Their address is P.O Box 21, Orleans, CA 95556 and their contact person is Petey Brucker.

Petitioner **Klamath-Siskiyou Wildlands Center** is dedicated to preserving the globally significant ecological diversity of the Klamath-Siskiyou region. Their address is 84 4<sup>th</sup> Street, Ashland, OR 97520 and their contact person is Joseph E. Vaile.

Petitioner **Northcoast Environmental Center (NEC)** is a non-profit tax-exempt environmental education organization serving northwestern California and southern Oregon that was established in 1971. Since then the NEC has worked with a wide range of community groups, including professional and recreational fishers, Indian tribes and schools to raise awareness of water quality, watershed and fisheries issues. NEC also works to encourage an informed citizenry to take action on finding and implementing solutions to environmental problems. And, finally, where education and action fail to curb lawlessness that adversely affects water quality, fisheries and the environment, the Center will sometimes bring suit to get legal compliance. The NEC board of directors has given high priority to Klamath-Trinity River issues that affect the watershed's water supply, quality, and fisheries because of the apparent adverse downstream impacts on coastal communities that upstream policies have had. NEC's address is 575 H Street, Arcata CA 95521 and the contact person is Tim McKay.

Petitioner **Oregon Natural Resources Council (ONRC)** was founded in 1974. ONRC's mission is to aggressively protect and restore Oregon's wild lands, wildlife, and waters as an enduring legacy. ONRC has advocated for nearly every one of the 1,800 miles of Oregon's Wild and Scenic rivers. ONRC's recent accomplishments in the Klamath Basin include stopping development of Pelican Butte, the largest roadless area in the Winema National Forest; educating the public regarding the role of the National Wildlife Refuges in the Pacific Flyway; and garnering support from over 30 conservation groups for a vision for the Klamath Basin. ONRC's address is 5825 N. Greeley Avenue, Portland, OR 97217 and the contact person is Regna Merritt.

Petitioner **Pacific Coast Federation of Fishermen's Associations (PCFFA)** is the largest and most politically active trade association of commercial fishermen on the west coast. For the last 20 years, PCFFA has been leading the industry in assuring the rights of individual fishermen and fighting for the long-term survival of commercial fishing as a productive livelihood and way of life. PCFFA is an "umbrella" group made up of diverse

associations all along the west coast which include a federation of 25 different port and fishermen's marketing associations spanning the west coast of the United States from San Diego to Alaska. More than any other fishery organization on the west coast of the United States, PCFFA embodies the working family fisherman. PCFFA provides the individual fisherman a vehicle to protect themselves and their industry, and to assure the sustainable protection of the fragile resources we all depend upon. Petitioner's address is P.O. Box 11170, Eugene, OR 97440 and the contact person is Glen Spain.

Petitioners **Trout Unlimited** is a conservation organization dedicated to the protection of cold water fisheries and their habitats. The organization has over 130,000 members nationwide, over 400 chapters and over 30 state councils. Trout Unlimited works on issues relating to the threatened fish populations in the Klamath and the west coast. The address for Trout Unlimited National and Oregon Council is 213 SW Ash, Suite 205, Portland, OR 97204 and the contact person is Jeff Curtis.

Petitioner **WaterWatch of Oregon** is a non-profit river conservation group dedicated to the protection and restoration of Oregon's rivers, lakes and ground waters as needed to support fish, wildlife, recreation and other resource values. WaterWatch's mission is to promote water policies and water allocation decisions in Oregon that provide for the quality and quantity of water necessary to support fish, wildlife, recreation, ecological values, public health and a sound state economy. Since its inception WaterWatch has worked on surface and ground water allocation issues in the Klamath Basin in an effort to protect and restore water in the basins rivers, lakes, springs and ground water needed for fish, wildlife, and recreation values in the Basin. WaterWatch's address is 312 SW Ash, Suite 208, Portland, OR 97204 and the contact persons are Bob Hunter and Lisa Brown.

Petitioner **World Wildlife Fund (WWF)** is a non profit conservation group that works in more than 100 countries worldwide to preserve the abundance and diversity of life on Earth. From its Ashland, Oregon office, WWF promotes conservation of the Klamath-Siskiyou conifer forests of southwestern Oregon and northern California. This area has been designated as one of WWF's "Global 200" ecoregions -- the most outstanding examples of the Earth's diverse terrestrial, freshwater, and marine habitats. Their address is 116 Lithia Way, Suite 7, Ashland, OR 97520, and the contact person is Brian Barr.



**Attachment 2**

**Klamath Application Tracking Spreadsheet**

**KLAMATH APPLICATION TRACKING SPREADSHEET**  
**WATERWATCH OF OREGON**

June 30, 2005

Type	App. #	Name	Application/Permit Status	Issue Date	Notes	Use (1)	Stream	Amount (cfs)
G	15523	Breckner	DENIED		Denied 5/5/03	I	Lost R.	0.506
G	15735	Marken	DENIED		Denied 7/10/03	Do	Cottonwood Cr.	0.334
G	15086	Welker	ISSUED	02/15/02	Issued 2/15/02	I, Com, Ponds	Klamath R.	6.46
G	15502	Fleming	ISSUED	02/28/02	Issued 2/28/02	I	Spring Lake/Lost R.	8.02
G	15332	Diaz	ISSUED	04/16/02	Issued 4/16/02	I	Lost R.	2.67
G	15470	Klamath Co. Youth Sports	ISSUED	05/24/02	Issued 5/24/02 FO 5/24	I	Lake Ewauna	2.18
G	15477	Summers	ISSUED	05/24/02	Issued 5/24/02	IS	Mills Cr./Lost R.	1
G	15524	McKoen	ISSUED	05/31/02	Issued 5/31/02	I	Lost R.	2.68
G	15589	Zalvnrado	ISSUED	05/31/02	Issued 5/31/02	I	Lost R.	0.5
G	15292	Masami Foods	ISSUED	06/24/02	Issued 6/24/02	Ind	Klamath R.	0.067
G	15340	Enman	ISSUED	07/12/02	Issued 7/12/02	I	Lost R.	7
G	15455	Okeefe	ISSUED	07/12/02	Issued 7/12/02	I	Upper Klamath Lake	2.3
G	15609	Yancey	ISSUED	07/12/02	Issued 7/12/02	I	Tingley Lake/ Lost R.	1.95
G	15479	Horsley	ISSUED	07/24/02	Issued 7/24/02	I	Klamath R.	4.09
G	15513	Murray	ISSUED	07/24/02	Issued 7/24/02	I	Lost R.	1.137
G	15539	Kandra	ISSUED	07/24/02	Issued 7/24/02	I	Lost R.	5
G	15541	Lyon	ISSUED	07/24/02	Issued 7/24/02	I	Lost R.	4
G	15573	Lone Pine Ranch	ISSUED	07/24/02	Issued 7/24/02	I	Sprague	2
G	15578	Ricketts	ISSUED	07/24/02	Issued 7/24/02	I	Round Lake/ Klamath R.	0.225
G	15604	Dean & Mauch	ISSUED	07/24/02	Issued 7/24/02	I	Lost R.	1.91
G	15642	Bair Farms	ISSUED	07/24/02	Issued 7/24/02	I	Klamath R.	10.4
G	15469	Lilly	ISSUED	07/31/02	Issued 7/31/02	I	Klamath R.	0.772
G	15485	Bocchi	ISSUED	07/31/02	Issued 7/31/02	I	Spring Lake/Lost R.	1
G	15515	Noonan	ISSUED	07/31/02	Issued 7/31/02	I	Klamath R.	0.637
G	15576	EIH Two	ISSUED	07/31/02	Issued 7/31/02	IS	Long Prarie Cr./ Williamson R.	10.39
G	15588	Ayarra	ISSUED	07/31/02	Issued 7/31/02	I	Nuss Lake/Lost R.	2.64
G	15616	Anderson	ISSUED	07/31/02	Issued 7/31/02	I	Klamath R.	2.2
G	15633	Lewis	ISSUED	07/31/02	Issued 7/31/02	I	Lost R.	0.106
G	15641	Michaels	ISSUED	07/31/02	Issued 7/31/02	I	Lost R.	0.988
G	15471	Noonan	ISSUED	08/08/02	Issued 8/8/02	I	Spring Lake/Lost R.	2.93
G	15504	Pope	ISSUED	08/08/02	Issued 8/8/02	I	Lost R.	1.38
G	15507	Moore	ISSUED	08/08/02	Issued 8/8/02	I	Lost R.	2.67
G	15517	Michael & Colville	ISSUED	08/08/02	Issued 8/8/02	I	Upper Klamath	0.118
G	15521	Pierce	ISSUED	08/20/02	Issued 8/20/02	I	Klamath R.	0.15
G	15549	Long	ISSUED	08/20/02	Issued 8/20/02	I	Lost R.	2.6
G	15514	Brag	ISSUED	08/27/02	Issued 8/27/02	I	Lost R.	0.31
G	15525	Moden	ISSUED	08/27/02	Issued 8/27/02	I	Spring Lake/Lost R.	0.5
G	15530	Waldrip Brothers	ISSUED	08/27/02	Issued 8/27/02	I	Klamath R.	6.7
G	15537	McCabe	ISSUED	08/27/02	Issued 8/27/02	I	Lost R.	2.09
G	15624	Duarte	ISSUED	08/27/02	Issued 8/27/02	I	Tule Lake	0.5
G	15496	Hill Land & Cattle	ISSUED	09/24/02	Issued 9/24/02	I	Lost R.	3.34
G	15542	Caldwell	ISSUED	09/24/02	Issued 9/24/02	I	Lost R.	1.15
G	15480	Balin	ISSUED	10/01/02	Issued 10/1/02	I	Spring Lake/Lost R.	1.7
G	15620	Hunter	ISSUED	10/10/02	Issued 10/10/02	I	Klamath Lake or Lost R.	2.24

(1) CM = Commerical; PM = Pwmer; IM = industrial, manufacturing; TC = temperature control; DS = domestic, stock; L = livestock; FW = fish and wildlife; RC = recreation; AG = agriculture; FM = forest mgmt; HC = human consumption.

**KLAMATH APPLICATION TRACKING SPREADSHEET  
WATERWATCH OF OREGON**

June 30, 2005

Type	App. #	Name	Application/Permit Status	Issue Date	Notes	Use (1)	Stream	Amount (cfs)
G	15728	High Country	ISSUED	10/17/02	Issued 10/17/02	IR	Tule Lake	0.362
G	15601	Zupan Farm	ISSUED	10/31/02	Issued 10/31/02	I	Klamath R.	1.69
G	15668	Curtiss	ISSUED	10/31/02	Issued 10/31/02	I/LV	Denny Cr.	12.5
G	15690	McPherson	ISSUED	11/12/02	Issued 11/12/02 Amended 7/12/04 (new well site)	IS	Klamath R.	7.54
G	15699	Fleming	ISSUED	11/12/02	Issued 11/12/02 10/18FO 11/12/02	IS	Spring Lake	7.37
G	15686	Mann	ISSUED	11/29/02	Issued 11/29/02	IR/SC	Lost R.	2.46
G	15617	Weststeyn	ISSUED	12/20/02	Issued 12/20/02	I	Lost R.	3.67
G	15486	Mauch	ISSUED	01/07/03	Issued 1/7/03	I	Lost R.	3.99
G	15516	Chin	ISSUED	01/07/03	Issued 1/7/03	I	Lost R.	2.94
G	15488	Walsh	ISSUED	01/16/03	Issued 1/16/03	I	Lost R.	0.602
G	15511	Jeld-Wen	ISSUED	01/30/03	Issued 1/30/03	IS	Upper Klamath Lake	3.34
G	15487	Frank	ISSUED	02/13/03	Issued 2/13/03	I	Lost R.	2.28
G	15089	Emard	ISSUED	02/20/03	Issued 2/20/03	I	Agency Lake/Wood R.	1
G	15679	Balin Farm Trust	ISSUED	02/20/03	Issued 2/20/03	AG/IL	Lost R.	7.44
G	15781	Orem Land Co	ISSUED	03/06/03	Issued 3/6/03	IS/LV	Lost R.	11.5
G	15315	Sukraw	ISSUED	03/13/03	Issued 3/13/03	IS	Klamath R.	14.59
G	15702	Sukraw	ISSUED	03/13/03	Issued 3/13/03	IS	Klamath R.	3
G	15653	Chin	ISSUED	04/10/03	Issued 4/10/03	I	Lost R.	2
G	15540	Jones	ISSUED	04/24/03	Issued 4/24/03	I	Lost R.	1.1
G	15509	Lyon	ISSUED	05/01/03	Issued 5/1/03	I	Lost R.	4.51
G	15327	Renne	ISSUED	05/16/03	Issued 5/16/03	I	Lost R.	2.69
G	15503	Rouse	ISSUED	05/16/03	Issued 5/16/03	I	Lost R.	2
G	15550	Kirkpatrick Potatoes	ISSUED	05/16/03	Issued 5/16/03	I	Lost R.	3.45
G	15591	Stastny	ISSUED	05/16/03	Issued 5/16/03	I	Lost R.	1.49
G	15484	Mallams	ISSUED	05/22/03	Issued 5/22/03	I	Sycan R.	2
G	15764	Shasta Nursery	ISSUED	05/22/03	Issued 5/22/03	IR	Mills Cr.	2.52
G	15650	Bessert	ISSUED	06/05/03	Issued 6/5/03	QM	Klamath R./ Upper Klamath Lake	4
G	15844	Klamath Tribes	ISSUED	08/12/03	Issued 8/12/03	IR	Williamson R.	0.134
G	15837	Schuman	ISSUED	08/23/03	Issued 8/23/03	IR	Upper Klamath Lake	0.25
G	15881	Cherry Crk Aggregate	ISSUED	09/15/03	Issued 9/15/03	IR/ Mining	Cherry Cr.	0.45
G	15914	Buscher	ISSUED	10/20/03	Issued 10/20/03	IR	Sycan R.	1.91
G	15711	Juncal	ISSUED	11/18/03	Issued 11/18/03	IR	Cottonwood Cr.	0.91
G	15678	City of K Falls	ISSUED	12/19/03	Issued 12/19/03	Mu	Lake Ewauna	1
G	15964	Carleton Farms	ISSUED	01/08/04	Issued 1/8/04	IR	Lost R.	13.5
G	15906	Lake Wood Dev.	ISSUED	01/16/04	Issued 1/16/04	DO	Lake of the Woods Basin	0.12
G	16226	Ady Improvement District	ISSUED	02/16/04	Issued 2/16/04	IS	Klamath R.	6.68
G	15774	Bocchi	ISSUED	04/22/04	Issued 4/22/04	IR	Klamath Lake	0.28
G	16227	Ady Improvement District	ISSUED	04/28/04	Issued 4/28/04	IS	Klamath R.	6.68
G	15600	Harris	ISSUED	04/30/04	Issued 4/30/04	I/L	Sprague R.	2
G	16105	Knoll	ISSUED	05/12/04	Issued 5/12/04	IS	Lost R.	7.9
G	16020	Boyle	ISSUED	09/09/04	Issued 9/9/04	IR	Lost R.	0.48
G	16138	Schriver	ISSUED	10/14/04	Issued 10/14/04	IR	Sprague R.	1.1
G	15834	Wood River Improvement Co.	ISSUED	10/21/04	Issued 8/16/04 Reissued 10/21/04 (2 permits)	IS	Wood R.	28.88
G	16183	Halpenny	ISSUED	11/03/04	Issued 11/3/04	IS/AG	Lost R.	2.16

(1) CM = Commercial; PM = Power; IM = industrial, manufacturing; TC = temperature control; DS = domestic, stock; L = livestock; FW = fish and wildlife; RC = recreation; AG = agriculture; FM = forest mgmt; HC = human consumption.

**KLAMATH APPLICATION TRACKING SPREADSHEET**

**WATERWATCH OF OREGON**

June 30, 2005

Type	App. #	Name	Application/Permit Status	Issue Date	Notes	Use (1)	Stream	Amount (cfs)
G	16135	City of K Falls	ISSUED	11/12/04	Issued 11/12/04	GT	Klamath R.	1
G	16251	Letsch	ISSUED	11/12/04	Issued 11/12/04	IS	Klamath R.	0.26
G	16186	Klamath Hills Water Co	ISSUED	11/18/04	Issued 11/18/04	IS	Lost R.	6
G	16175	Jeld Wen	ISSUED	12/02/04	Issued 12/2/04	IS	Klamath R.	7.8
G	16189	Wilson	ISSUED	02/04/05	Issued 2/4/05	IR	Lost R.	2.8
G	16206	Johnson	ISSUED	03/10/05	Issued 3/10/05	IR	Klamath R.	0.62
G	16321	JPC LLC	ISSUED	03/31/05	Issued 3/31/05	IS	Sprague R.	3.69
G	15474	Johnston	ISSUED	04/05/05	Issued 8/20/02	IS	Klamath R.	2.41
G	16337	Klamath County Youth Sports	ISSUED	06/16/05	Issue 6/16/05	GT	Klamath R.	1.114
G	15277	Francis	ISSUED	5/6/2002	Issued 5/06/02	I	Sprague R.	2.67
G	15495	Wollenhorst-Russ	ISSUED	5/1/03	Issued 5/1/03	I	Lost R.	2.15
G	15475	Hammerich	PENDING (D)	02/07/02	PFO3 5/03/05; protested 6/17/05	Wildlife	Lost R.	3.68
G	15481	Giordano	PENDING (D)	02/07/02	IR2 1/08/02, PFO3 5/03/05	I	Lost R.	4.46
G	15492	Hammerich	PENDING (D)		Comments due 2/7/02, PFO3 5/03/05, protested	I	Miller Cr./Lost R.	6.68
G	15565	Oxley	PENDING (D)		Comments due 2/7/02, PFO3 5/03/05, protested	I	Lost R.	8.02
G	15648	Disch	PENDING (D)		Comments due 5/16/02, PFO3 5/03/05 Protest period ended 6/17/05	I	Lost R.	12
G	15968	Somers	PENDING (D)		Comments due 5/18/04, PFO3 5/03/05, protested	IS	Lost R.	7.798
G	16068	Evans	PENDING (D)		Comments due 5/18/04, PFO3 5/03/05, protested	IR/DO	Lost R.	0.123
G	16396	Ruth Bowen	PENDING (D)		IR3 6/21/05, no water available in Larkin Cr.	IS/IR	Larkin Cr. (Williamson R.)	0.44
G	16301	Jason Chapman Poe Valley Imp. Dist.	PENDING (D) IR only		IR3 4/26/05	IR	Lost R.	6.684
G	15308	Sunnyfield Farms	PENDING (D)		Comments due 2/7/02, PFO2 5/03/05, Superseding PFO3 5/10/05	IS	Alkali Lake/Lost R.	0.67
G	15505	Hollands Dairy	PENDING (I)		Comments due 2/7/02, PFO2 5/03/05	I	Lost R.	3.88
G	15572	Cheyne	PENDING (I)		PFO2 5/03/05 Protest Period ended 6/17/05	I	Lost R.	2.532
G	16177	Lorenz	PENDING (I)		Comments due 5/18/04, PFO2 5/03/05	IR	Lost R.	3.052
G	16314	Smith	PENDING (I)		PFO2 5/17/05 Protest ends 7/1/05	IR	Rock Cr.	1
G	15757	Cobb Energy Facility	PENDING (I)		PFO2 4/22/2003, WRD site: NC 8/23/05, 2005 EFSC order to WRD to issue permit	IM/IR	Lost R.	16.9
G	15043	Shasta View Irrig. District	PENDING (I) (only if condition met: applicant supplies authorization/ easement info)		5/4/01, WRD site shows: FO 2/06/05	I	Lost R.	59.2
G	16181	US BLM LAKEVIEW	PENDING (I) IR only		IR2 5/10/05	FM/HC	Gerber Reservoir	0.066
G	16363	Howard	PENDING (I) IR only		IR2 4/19/05	I, IS	Klamath R.	1.67
G	16366	Upper Klamath Farms	PENDING (I) IR only		IR2 4/05/05	IS	Wood R.	5.54

(1) CM = Commercial; PM = Power; IM = industrial, manufacturing; TC = temperature control; DS = domestic, stock; L = livestock; FW = fish and wildlife; RC = recreation; AG = agriculture; FM = forest mgmt; HC = human consumption.

**KLAMATH APPLICATION TRACKING SPREADSHEET**  
**WATERWATCH OF OREGON**  
 June 30, 2005

Type	App. #	Name	Application/Permit Status	Issue Date	Notes	Use (1)	Stream	Amount (cfs)
G	16030	Klamath Basin Imp. District	PENDING (I) IR only (old)		IR2 12/02/03; WRD site: NC 6/23/05 (Cert. Letter sent to app: need lands description)	AG/IS	Nuss Lake	11.14
G	14561	US Fish & Wildlife	WITHDRAWN		Withdrawn	QM	Unnamed Stream	4.1
G	16023	Viera	WITHDRAWN		Withdrawn 12/23/03	IR	Whisky Cr.	2.67
G	16093	Jones	WITHDRAWN		Withdrawn 4/12/04	IR/DO	Upper Klamath Lake	0.35
G	16416	Vern Howard	ISSUED	04/01/05	Issued 4/1/05	IS	Klamath R.	1.48
E	16423	Lynda Baker	ISSUED	04/01/05	Issued 4/1/05	IS	Lost R.	2.16
G + GE	16447	Jason Chapman Poe Valley Imp. Dist	ISSUED	05/03/05 (G) 05/13/05 (GE)	FO 5/10/05 (G), FO 5/13/05 (GE)	IS	Lost R.	6.68
G E	16443	US BOR	ISSUED	05/06/05 05/24/05	FO 5/06/05 FO 5/24/05	IS	Lost R./ Klamath R.	159.1
R	85199	Burns	DENIED		Denied 12/10/02	AS, FI, FM, WI	Spring/ Cottonwood Cr.	4 af
R	85200	Burns	DENIED		Denied 12/10/02		Spring/ Cottonwood Cr.	4 af
R	85737	Rhodes	ISSUED	01/08/04	Issued 1/8/04	MP	Sprague R.	1.5 af
R	85924	Curtiss	ISSUED	07/01/04	Issued 7/1/04	MP	Denny Cr./Up. Klamath Lake	7.2 af
R	85751	BLM	ISSUED	07/15/04	Issued 7/15/04	AS, RC, WI	Keene Cr./Jenny Cr.	59 af
R	85989	Bowland	ISSUED	09/21/04	Issued 9/21/04	MP	EF Cottonwood Cr.	4 af
R	86056	Hyde Family	ISSUED	11/12/04	Issued 11/12/04	LV	Sprague R.	0.99 af
R	85256	Juncal	WITHDRAWN		Withdrawn 11/18/03		Spring/ Cottonwood Cr.	2.25 af
R	85362	Hamilton	WITHDRAWN		Withdrawn 10/29/03		Cherry Cr.	5.5 af
R	85363	Hamilton	WITHDRAWN		Withdrawn 10/29/03		Cherry Cr.	5.5 af
R	85364	Hamilton	WITHDRAWN		Withdrawn 10/29/03		Cherry Cr.	5.5 af
R	85365	Hamilton	WITHDRAWN		Withdrawn 10/29/03		Cherry Cr.	5.5 af
R	85813	Klamath Drainage District	WITHDRAWN		Withdrawn 6/24/05 Comments 12/11/2005 Admin hold until 3/15/05	MP	Klamath R.	149,288 af
R A	86204	Klamath Drainage District	PENDING		Comments due 5/28/05	Multi purpose	Klamath R.	149288, 74,644 per res.
S	85243	Germain	ISSUED	05/22/03	Issued 5/22/03	DN	Spring/EF Cottonwood Cr.	0.01 af
S	85219	Holm	ISSUED	01/06/04	Issued 1/6/04	DO, LV	Spring/ Cottonwood Cr.	0.1
S	85990	Bowland	ISSUED	04/07/04	Issued 4/07/04	DN/IR	Res/EF Cottonwood Cr.	0.166
S	85671	Hill	ISSUED	04/15/04	Issued 4/15/04	DO	Lone Cr.	0.01
S	69674	Nicolson	WITHDRAWN		Withdrawn 8/9/04	IS	Wood R.	2.1
S	84885	National Forest	WITHDRAWN		Withdrawn 2/26/03	IAQ, FY, RC, W	Spring/ Crane Cr.	2.6

(1) CM = Commercial; PM = Power; IM = Industrial, manufacturing; TC = temperature control; DS = domestic, stock; L = livestock; FW = fish and wildlife; RC = recreation; AG = agriculture; FM = forest mgmt; HC = human consumption.

**Attachment 3**

**Petitioners' Proposed Order of Withdrawal**

**BEFORE THE WATER RESOURCES COMMISSION  
OF THE STATE OF OREGON**

In the Matter of the Withdrawal of )  
the Unappropriated Waters of ) Order of Withdrawal  
the Klamath Basin ) \_\_\_\_\_, 2005  
\_\_\_\_\_ )

On \_\_\_\_\_, 2005, a public hearing was held under the provisions of ORS 536.410 after issuance and publication of notice. The purpose of the hearing was to consider a proposed withdrawal from further appropriation of all of the unappropriated surface and ground waters of the Klamath and Lost River Basins (hereinafter “waters of the Klamath River Basin”), except for temporary emergency uses of water in times of drought<sup>1</sup> or statutorily exempt ground water uses,<sup>2</sup> in order to protect the public’s interest in the water resources of the basin, existing rights and claims for water, and the State’s ability to respond to emergency drought years.

The Water Resources Commission, after considering the available information and being advised of the legal requirements, makes the following findings:

**FINDINGS**

- a. The waters of the Klamath River Basin support more than twenty species of fish. Four fish species in the basin are currently protected under the federal Endangered Species Act (“ESA”). Lost River and shortnose suckers are listed as endangered species, and bull trout and coho salmon are listed as threatened species.
- b. Other fish species in the basin include brook and brown trout, summer and winter steelhead, spring and fall chinook salmon, green sturgeon and some of the world’s largest rainbow trout. Green sturgeon in the Klamath River are federally listed as a Species of Special Concern due to remaining uncertainties about its status and threats.

<sup>1</sup> ORS 536.750(1)(a) allows the Commission to issue temporary permits for emergency uses of water when a drought has been declared.

<sup>2</sup> These uses include wells for single or group domestic purposes in an amount not exceeding 15,000 gallons a day, watering of up to 1/2 acre of lawn or noncommercial garden, stockwatering purposes, or any single industrial or commercial purpose not to exceed 5,000 gallons per day. ORS 537.545(1).

- c. Rivers in the Klamath Basin are recognized by both state and federal law for their wild, scenic and recreational values. The Klamath River below Upper Klamath Lake has been designated under the Oregon Scenic Waterway Act and the federal Wild and Scenic Rivers Act. The Sycan and Sprague Rivers, both tributaries to Upper Klamath Lake, are part of the federal Wild and Scenic Rivers system. These designations carry with them a requirement to protect the free-flowing condition of these rivers that support values including recreation, fish, wildlife, scenic and historic.
- d. The waters of the Klamath River Basin also support important wildlife habitat including six National Wildlife Refuges. These Refuges provide habitat for the largest wintering population of bald eagles, a federally threatened species, in the lower 48 states, and serve as critical staging areas for the fall and spring migration of 80% of the waterfowl in the Pacific Flyway. Water is critical to meeting the values of the Refuges.
- e. The ground water hydrology of the Klamath River Basin is understood only in a very general sense. This limited understanding of hydrology in the upper Klamath Basin makes it difficult to evaluate new ground water uses and their exact effect on existing ground water uses and streamflows in the basin.
- f. A regional-scale ground water study is being conducted by the United States Geological Survey in cooperation with Oregon Water Resources Department for the "upper" Klamath Basin and is scheduled for completion in 2005. The study will determine the nature and extent of the connection between ground and surface waters and the capacity of the ground water resource to support both short-term and long-term development in the upper Klamath Basin. As part of the study, researchers are developing a hydrologic model for the basin. It is not prudent to proceed with issuance of new permits that permanently allocate more groundwater until the State can use the results of this study to ensure that it is allocating ground water in a sustainable manner.
- g. Ground water is an important source of cool, clean surface water in the basin.
- h. Springs are, by definition, places where ground water discharges to surface waters. Springs throughout the basin contribute to surface water quality and quantity that is critical to supporting endangered Lost River and shortnose suckers, threatened bull trout and coho salmon, and rare species of fresh water mollusks. Twenty-two species of mollusks are considered critically globally imperiled or globally imperiled.
- i. The Klamath Basin in Oregon has portions of forty-six different rivers and lakes that fail to meet State water quality standards. Upper Klamath Lake, Oregon's largest freshwater lake, suffers from intense algal blooms, making it sometimes lethal to fish. Irrigation practices are one of the sources of pollution in the basin.



- j. Ground water discharges to surface waters through spring flows are important for maintaining and/or meeting water quality standards in the basin.
- k. Ground water is also an important source of drinking water in the basin. Drinking water has been greatly affected by uses of surface and ground water for irrigation in the basin. In one instance, ground and surface water management resulted in contamination of ground water that is a source of drinking water supplies for the town of Bonanza.
- l. Low streamflows, poor water quality, land management practices and other factors have resulted in dramatic declines in fish and wildlife populations in recent years.
- m. Tribal and commercial fishing communities have suffered severe economic losses as a result of the decline in Klamath River fisheries. For example, the endangered Lost River and shortnose suckers once occurred in prodigious numbers and were a cornerstone of the diet, economy and culture of the Klamath Tribes. The Klamath Tribes stopped harvesting the fish in the early 1980's and now can only take two per year for ceremonial purposes and both species are now protected as "endangered" under the federal ESA. Another example is the spring 2002 juvenile salmon fish kill of at least 200,000 that has now resulted in very poor adult returns in 2005, triggering widespread ocean troll fishery closures in California and Oregon that may ultimately cost coastal fishing-dependent communities as much as \$100 million in lost fishing income and lost markets.
- n. There is an ongoing adjudication that is key to improving water management in the Klamath River Basin. The adjudication involves, among other things, large tribal claims to water for instream flows in the Sprague, Williamson, Wood and Klamath Rivers as well as lake levels in Upper Klamath Lake. A large number of other federal reserved water right claims are also being adjudicated, including those for the federal irrigation project – the Klamath Basin Project.
- o. Irrigated agriculture accounts for 93% of the water use in the basin. Much of the irrigation water use in the basin predates the 1909 water code and is currently being quantified in the adjudication.
- p. The Water Resources Department lacks the information, resources and staffing to ensure that applications for new water use permits do not conflict with existing water rights or pending claims under the adjudication.
- q. Most, if not all, water use in the basin is not measured or controlled. Regulation occurs infrequently, if ever. In addition, the state has taken a position that it can not regulate in favor or against unadjudicated claims in the

basin until a final order of determination in the adjudication has been entered by the Adjudicator.

- r. The basin is fully appropriated under existing water rights and unadjudicated claims.
- s. There is an ongoing controversy as to how much water needs to be left in Upper Klamath Lake and in the Klamath River for fish species listed under the federal Endangered Species Act. In 2001, actions by the federal government, pursuant to the Act, led to water cutoffs last year to many farmers in the Klamath Basin Irrigation Project. In 2002, when water was instead used for irrigation, a massive adult salmon fish-kill occurred in the lower river.
- t. Conflicts over water, under existing water use regimes, abound in the basin.
- u. Additional appropriations of surface and ground water in this basin would likely contribute to further declines in the fish and wildlife populations, lead to further conflicts over water, and limit the State's ability to respond to drought year emergencies.

## CONCLUSIONS

The waters of the Klamath Basin are already severely overallocated and over-promised. In addition, great uncertainty exists as to the nature and extent of ground water in the basin, how the final determination in the adjudication will impact the resource and other water users, the effect of water regulations to protect species under the Endangered Species Act, and the State's long-term ability to respond to drought emergencies.

Additional appropriations of water should not be allowed until ground water studies are concluded that show that specific additional groundwater development is sustainable and can occur without interfering with surface waters; a final order of determination is entered in the Klamath adjudication; water is available for further appropriation after the needs of fish (including ESA-listed species); wildlife; Native American Indian Tribes; lower river state and federally managed salmon and steelhead; Tribal, commercial and recreational fisheries; down river communities; and existing water right holders are met; measurement and reporting devices have been installed on all major diversions in the basin (both ground and surface water); and Water Resources Department has implemented an aggressive enforcement program that ensures all water use in the basin is within legal limits. To continue to issue permits that permanently allocate more surface and ground water without first completing these steps will further impair the public interest in the resource and undermine existing rights to use water.

**Attachment 4**

**Petitioners' Proposed Basin Plan Amendments**

**Proposed Emergency Rules**  
**Additions in underline, deletions in strikethrough**

**OREGON ADMINISTRATIVE RULES**  
**WATER RESOURCES DEPARTMENT**  
**CHAPTER 690**  
**DIVISION 500**  
**BASIN PROGRAMS**

**690-500-0010**

**Basin Programs Preamble**

- (1) The Water Resources Commission is responsible for the establishment of policy and procedures for the use and control of the state's water resources. In executing this responsibility, the Commission develops, adopts and periodically modifies programs for the state's major drainage basins.
- (2) Basin programs are administrative rules which establish water management policies and objectives and which govern the appropriation and use of the surface and ground water within each of the respective basins. The rules classify surface and ground waters according to the uses which are permitted, may establish preferences among uses, may withdraw surface and ground waters from further appropriation, may reserve waters for specified future uses, and may establish minimum perennial streamflows. These rules are in addition to rules with statewide applicability which govern the allocation and use of water.
- (3) The Commission has adopted programs for the following basins:
- (a) North Coast Basin (Division 501);
  - (b) Willamette Basin (Division 502);
  - (c) Sandy Basin (Division 503);
  - (d) Hood Basin (Division 504);
  - (e) Deschutes Basin (Division 505);
  - (f) John Day Basin (Division 506);
  - (g) Umatilla Basin (Division 507);
  - (h) Grand Ronde Basin (Division 508);
  - (i) Powder Basin (Division 509);

- (j) Malheur -- Owyhee Basins (Division 510);
- (k) Goose and Summer Lakes Basin (Division 513);
- (l) Klamath Basin (Division 514);
- (m) Rogue Basin (Division 515);
- ~~(n)~~ (n) Umpqua Basin (Division 516);
- ~~(o)~~ (o) South Coast Basin (Division 517);
- ~~(p)~~ (p) Mid Coast Basin (Division 518);
- ~~(q)~~ (q) Columbia River (Division 519);
- ~~(r)~~ (r) Middle Snake River Basin (Division 520).

(4) Although the Commission has not adopted a comprehensive basin program for the waters of the Malheur Lake Basin, minimum perennial stream-flows have been adopted for specified streams in the basin. These minimum perennial streamflows are in Division 512. Allocation and use of the waters of the basin also are subject to administrative rules with statewide applicability.

(5) The Commission has ~~not~~ adopted a comprehensive basin program for the waters of the Klamath Basin. In addition to this basin program, allocation Allocation and use of the waters of the basin are subject to administrative rules with statewide applicability and to the provisions of the Klamath River Basin Compact (ORS 542.620).

**690-500-0020**

**Definitions**

Unless otherwise defined in a basin program, the following definitions apply in OAR Chapter 690, Divisions 501, 504 - 512, and 515 - 520 to any classification adopted prior to January 1, 1993:

- (1) "Domestic Use" means the use of water for domestic water use, group domestic water use, commercial water use of less than 5,000 gallons per day, or human consumption as defined in OAR 690-011-0010.
- (2) "Fish Culture or Fish Life Use" means the use of water for aquatic life water uses as defined in OAR 690-011-0010 and public uses related to fish culture or fish life water uses as defined in OAR 690-077-0010.

(3) "Industrial Use" means the use of water for commercial water use or industrial water use as defined in OAR 690-011-0010.

(4) "Irrigation Use" means the use of water for agricultural water use, cranberry use, irrigation, nursery operations use, or temperature control as defined in OAR 690-011-0010.

(5) "Livestock Use" means the use of water for stockwater use as defined in OAR 690-011-0010.

(6) "Mining Use" means the use of water for mining water use or placer mining as defined in OAR 690-011-0010.

(7) "Municipal Use" means the use of water for commercial water use, municipal water uses, or quasi-municipal water uses as defined in OAR 690-011-0010.

(8) "Pollution Abatement Use" means the use of water for pollution abatement or prevention water use as defined in OAR 690-011-0010 and public uses related to pollution abatement as defined in OAR 690-077-0010.

(9) "Power or Power Development Use" means the use of water for power development water use as defined in OAR 690-011-0010.

(10) "Recreation Use" means the use of water for recreation water use as defined in OAR 690-011-0010 and public uses related to recreation uses as defined in OAR 690-077-0010.

(11) "Wildlife Use" means the use of water for wildlife use as defined in OAR 690-011-0010 and public uses related to wildlife uses as defined in OAR 690-077-0010.

**Proposed Emergency Rules**  
**Additions in underline, deletions in strikethrough**

**OREGON ADMINISTRATIVE RULES**  
**WATER RESOURCES DEPARTMENT**

**CHAPTER 690**  
**DIVISION 514**  
**KLAMATH BASIN PROGRAM**

**Policies**

**OAR 690-514-010.** The surface water and ground water resources of the Klamath River Basin are important for maintaining instream and scenic values and for a variety of consumptive uses including irrigated agriculture - the largest use in the basin. It is the policy of the Water Resources Commission to only allocate water within the capacity of the resource and consistent with the principle that water belongs to the public to be used beneficially without waste. It is further the policy to protect waters of the state from overappropriation by new out-of-stream uses of surface water or new uses of ground water. With regard to ground water, the state policy is to manage ground water and surface water conjunctively in order to protect water resources, existing water rights and the public interest. For the Klamath Basin, the state policy is to achieve a balance in the management of and future appropriation of water between instream and total out-of-stream uses on the streams and ground waters in the basin.

**Objectives**

**OAR 690-514-020.** Objectives of the Commission in managing the surface and ground water resources of the Klamath Basin are to:

- (a) Meet public instream needs for fish life, wildlife, recreation and pollution abatement.
- (b) Protect instream values in state scenic waterways as described in ORS 390.835 and support management of national Wild and Scenic rivers in the basin.
- (c) Protect water needed for wildlife habitat including on the six National Wildlife Refuges in the basin.
- (d) Protect existing rights and claims to beneficially use water without waste in the basin.
- (e) Diligently pursue the adjudication of the pre-1909 water rights in the basin in order to eliminate uncertainty as to existing rights to use water and to facilitate management of the water resources of the basin.
- (f) Prevent declines of ground water levels and spring flows recognizing their importance for maintaining streamflows, water quality, fish and wildlife, and for supporting existing surface water rights and claims in the basin.

- (g) Increase basinwide water use efficiency.
- (h) Protect and encourage uses of water that will achieve a sustainable level of economic development in the basin that includes farming, industrial development, commercial and recreational fishing, and tourism.
- (i) Immediately implement measures to effectively manage the resources and water rights in the basin for the people of the State of Oregon.
- (j) Prohibit new appropriations of unappropriated surface waters and hydraulically connected ground water until the following has been done:
  - i. Ongoing ground water studies have been concluded and show that specific additional groundwater development is sustainable and can occur without interfering with surface waters; and
  - ii. A final order of determination in the Klamath adjudication has been entered by the Adjudicator appointed by the Water Resources Department Director; and
  - iii. Water is available for further appropriation after the needs of fish (including ESA-listed species); wildlife; Native American Indian Tribes; lower river state and federally managed salmon and steelhead; Tribal, commercial and recreational fisheries; down river communities; and existing water right holders are met; and
  - iv. Measurement and reporting devices have been installed on all major diversions in the basin (both ground and surface water); and
  - v. Water Resources Department has implemented an aggressive enforcement program that ensures all water use in the basin is within legal limits.

#### **Classification of Surface and Ground Water**

**OAR 690-514-020. (1) In order to further the maximum economic development of this state, the attainment of the highest and best use of the waters of the Klamath Basin, and the attainment of an integrated and coordinated program for the benefit of the state as a whole, all of the unappropriated surface and ground waters of the Klamath and Lost River Basins are closed to further appropriation. The closure shall continue in effect until such time as the Water Resources Commission shall modify or revoke the closure based upon findings by the Water Resources Commission that:**

- a) Ongoing ground water studies have been concluded and show that specific additional groundwater development is sustainable and can occur without interfering with surface waters; and
- b) A final order of determination in the Klamath adjudication has been entered by the Adjudicator appointed by the Water Resources Department Director; and



- c) Water is available for further appropriation after the needs of fish (including ESA-listed species); wildlife; Native American Indian Tribes; lower river state and federally managed salmon and steelhead; Tribal, commercial and recreational fisheries; down river communities; and existing water right holders are met; and
- d) Measurement and reporting devices have been installed on all major diversions in the basin (both ground and surface water); and
- e) Water Resources Department has implemented an aggressive enforcement program that ensures all water use in the basin is within legal limits.

(2) This closure does not apply to temporary emergency use permits issued pursuant to ORS 536.750(1)(a), and ground water uses that are exempt under ORS 537.545(1).

(3) This closure is effective as of [July 29, 2005].

### **Definitions**

#### **OAR 690-514-030**

(1) "Capacity of the resource" means the ability of a surface water or ground water resource to sustain a balance of public and private uses without causing over-appropriation or otherwise significantly impairing the function or character of the resource.

(2) "Classification" or "Classified" means the allowed and preferred beneficial use(s) of a given surface or ground water source for which future uses of water may be permitted. The Department shall not issue permits or limited license to appropriate, and no use shall be initiated of any of the surface or ground waters of the Klamath Basin for any uses except those for which the waters are classified. A classification does not affect legal uses existing on the date of adoption or alteration of the classification.

(3) "Ground water studies" refers to the regional-scale ground water study conducted by the USGS in cooperation with Water Resources Department for the "upper" Klamath Basin which is scheduled for completion in 2005, and the investigation of ground water in the Bonanza area of the Lost River Basin conducted by the Water Resources Department.

**Attachment 6**

**Klamath Basin Coalition letter to Dave Sabo re:  
Klamath Basin Water Banking Program (January 27, 2005)**

**The Klamath Basin Coalition**  
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January 27, 2005

Dave Sabo  
Bureau of Reclamation  
6600 Washburn Way  
Klamath Falls, OR 96703

RE: Comments on Klamath Basin Water Banking Program

Dear Mr. Sabo:

This letter is on behalf of the Klamath Basin Coalition, an alliance of local, regional and national organizations dedicated to conserving and restoring the biological resources of the west's once-great Klamath Basin. Coalition membership includes American Rivers, Defenders of Wildlife, Earthjustice, Friends of the River, Headwaters, Institute for Fisheries Resources, Klamath Basin Audubon Society, Klamath Forest Alliance, Northcoast Environmental Center, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen's Associations, the Sierra Club, Trout Unlimited, The Wilderness Society, Waterwatch of Oregon, and the World Wildlife Fund. The Coalition appreciates the opportunity to comment on Reclamation's water banking program in the Klamath Basin.

As Reclamation is painfully aware, water has been severely over-allocated and over-promised in the Klamath Basin. Any meaningful long-term solution will require considerable downsizing of the Klamath Project and the retirement of many other water rights (both Project and non-Project) throughout the basin on a permanent basis. In order to restore balance to the basin and avoid ongoing water crises, acquisitions must be on a permanent basis and the water saved or acquired must be dedicated to fish and wildlife and to meet Tribal water obligations.

The current water banking program is for too little water, is too limited in scope, is not properly managed, is not sustainable, is not a good long-term investment, and does not offer permanent protection. The Coalition first sets forth reasons the current water banking program is not a viable or sustainable long-term solution to the basin's problems and then offers some immediate and longer term recommendations for improvement.

## **Reasons the Water Bank Program is Not Viable or Sustainable**

### **1. The Current Program is For Too Little Water**

The 100,000 acre-feet of water that is to be acquired and provided for instream flows below Iron Gate Dam under the current water bank program is not enough to bring water use in this over-appropriated basin back into balance with what is ecologically sustainable. It will not add any water to Klamath Lake or the Klamath River over and above the inadequate and minimal amounts required simply to prevent jeopardy to ESA listed species under the existing biological opinions. Recovery will likely require more water than merely preventing immediate jeopardy.

Not only is the amount inadequate for ultimate recovery of ESA listed species, but it falls far short of what is needed to meet the federal government's Tribal trust responsibilities, to proactively meet the needs of other important fish and wildlife species so as to prevent them from later becoming ESA listed, and the needs of the basin's critically important national wildlife refuges (utilized by 80% of the birds in the Pacific Flyway and by the largest populations of wintering bald eagles in the lower 48 states, as well as a myriad of other species).

The Secretary of Interior has a legal duty under the National Wildlife Systems Improvement Act to insure that the nation's wildlife refuges have adequate supplies of water. That duty is not being met. Upper Klamath National Wildlife Refuge is frequently completely drained because of current management of the Klamath Project by the Bureau, and many acres of Lower Klamath Lake and Tule Lake National Wildlife Refuge wetlands are also frequently dewatered and lost to wildlife each season.

Reclamation should be using the water bank only as a means of transitioning to permanent demand reduction, while it designs and phase in a permanent demand reduction program that will allow it to meet all of the federal governments legal obligations and that will actually restore balance to the basin between supply and demand. If the Bureau does not accomplish this task, the basin will remain in crisis.

### **2. The Current Program is Too Limited In Scope**

As stated above the program should not just be focused on fulfilling the minimal water needs of ESA listed species, but additionally on meeting all of the federal government's other legal obligations, including the needs of the Tribes, the national wildlife refuges, and other fish and wildlife species.

To the extent the current water bank program only applies to dry or critically dry water year types, the scope of the program is too limited to address the fact that there is simply not enough water to meet the needs of the Tribes, fish and wildlife, the refuges, or the federal government's other legal obligations even in wetter water year types. Under the current program fish will still only be receiving survival flows (at best) even in good water years. In essence what is happening is permanent drought conditions are being artificially institutionalized for fish and wildlife, especially in the lower river. One way this happens for flows through Iron Gate Dam is that in its Annual Operations Plans the

Bureau has in the past two years artificially distorted the "base flows" radically downward, based on a clear misreading of the NRC report, so that base flows are now sometimes at or near historic lows. Then the water bank water is added "on top" of these already artificially low base flows, eventually bringing the water flow levels below Iron Gate Dam back within the range of where they should originally have been set to begin with as base flows – though this time at great taxpayer expense.

In other words, in several recent instances the Bureau appears to simply be holding back too much water from the river at the onset (including during recent winter flows), then putting the same water it artificially withheld back into the river and calling that water the "water bank". This is bogus bookkeeping at best, and will never achieve the purposes for which the water bank was established.

We remind you that the water bank was established to assist the Bureau in meeting its legal obligations under the Coho Biological Opinion (BiOp) to achieve long-term flows pursuant to Table 9 (pg.70) of that BiOp, including minimum flows at Iron Gate Dam of no less than 1,000 cfs throughout July, August and September as well as minimum flows of no less than 1,300 cfs in October of each year. This water level is essential to prevent another disastrous fish kill like the two fish kills (spring and fall) of 2002 as well as to meet ESA, Clean Water Act and Tribal trust obligations. The Bureau will never achieve those water targets by simply first taking too much water out to begin with, then returning that same water and calling that returned water the "water bank" addition. When combined together, one way or another, the total flow has to meet those long-term targets. To do that must include reducing the net demand for water in the upper basin, on both Project and non-Project lands, through phased in willing seller water purchases.

The water bank was intended merely to be the first phase toward that type of permanent demand reduction program. The current program should be redesigned to start the process of purchasing land and/or water rights from willing sellers and permanently retiring the water use so that the demand reduction benefits can be realized every year.

### **3. The Current Program is Not Properly Managed**

**A. Lack of Accountability and Monitoring.** Reclamation does not measure or monitor water use in the Klamath Project closely enough to ensure that the water being acquired at taxpayer expense is in fact going to supplement river flows as intended. In fact Reclamation's capacity to do so is limited, because of inadequate or nonexistent measurement and flow control capacity throughout the Project. Reclamation does not have the ability to shepherd acquired water through the Project back to the river or enough information to know to what extent that is actually occurring. Although flows through Iron Gate Dam can be measured with some accuracy, at present the "error bars" on the Bureau's measurement systems within the Project can exceed 50% error. Thus it is nearly impossible to ascertain whether projected water bank savings within the Project actually exist. These contentions are supported by a 2003 "Technical Memorandum" prepared for the Bureau by Dr. Burt.

This lack of accountability leads to covert water use by individuals paid not to use water and/or use of the acquired water bank water by other irrigators within the Project. Dr. Burt also noted a lack of enforcement by the Bureau, with some "fallowed" lands still being irrigated and grazed during 2003, in effect allowing some landowners to double-dip, getting income from both the water bank fallowing program as well as irrigated crop production. This means that to an unknown but potentially large extent the water acquired from irrigators or from groundwater for fish is actually being used for irrigation instead. To make up the difference more water than should be is taken from Upper Klamath Lake, the national wildlife refuges, or from other parts of the Project.

Reclamation needs to establish a better internal measuring, monitoring, headgate and enforcement program that ensures the purchased water actually goes to fish and wildlife. Water users need to be held accountable to ensure that the money spent provides the public benefits intended. Reclamation might also consider blocking acquisitions to make it easier to manage and account for the acquired water.

**B. Inappropriate Flow Regulation.** Reclamation should be regulating diversions into the Project at the front end to account for the water acquired in the water bank rather than just hoping it will come out the pipe at the other end. This is especially important because of the lack of internal monitoring capacity within the Project itself.

In other words, the acre-feet of water acquired within the Project for the water bank should be converted to cubic-feet per second (cfs) over the course of the irrigation season, *and diversions at the A-canal or other diversion points to the Project should be reduced throughout the irrigation season by the number of cubic-feet per second acquired.* In other words, Reclamation should be regulating the rate of diversions not just the overall duty. The best way to ensure that Project users do not exceed their overall duty is to regulate the rate of diversion into the Project at the front end throughout the irrigation season.

The diversions approved in the Bureau's Annual Operations Plan should be limited to the average diversion level for the Project for similar water year types and then further reduced by the cfs purchased for the water bank. This procedure would also ensure that the water actually purchased is not lost in the black box of the Project and is therefore available for its intended purpose. Unfortunately, Reclamation is regulating water diversions to the Project in a manner that undercuts the intended benefits of the water bank.

For example, instead of using average Project water diversions in similar water year types as a baseline and then reducing the rate and duty of diversions from there by the amount of water secured within the Project for the water bank, in its 2004 Operations Plan, the Bureau allocated 335,000 AF of water to the Project for that year, far above the average of 299,000 AF of water for every other similar water year over the past 41 years of record, and 5,000 AF higher than in any prior such water year in the past 41 years. In other words, the Bureau completely offset the 23,893 AF of Project demand reduction achieved due to the 2004 water bank, simply by raising the allocation to the Project to

36,000 AF above annual average for all prior similar water years – all at taxpayer expense. In fact, the net Project water demand reduction was thus NEGATIVE in 2004, at a cost to the taxpayers of \$2,339,365.79, according to the Bureau's own Fact Sheet summarizing the 2004 water bank program. To make up the difference and meet the water bank requirements Reclamation then reduced water deliveries to the refuges well below their needs, had to take more water from Upper Klamath Lake than it would otherwise have had to, and/or had to resort to water bank flow accounting tricks that are unfair to downstream interests. Instead of being transparent and understandable, management of the water becomes a sophisticated sort of shell game where it's difficult to tell who is getting what water and where it is coming from. This greatly erodes trust in the Bureau and in the water bank program itself.

### **C. Unreasonable Reliance on Ground Water Substitution and Supplementation.**

We are very concerned about the growing reliance of the water banking program on groundwater. It is well known that groundwater is connected to surface water in the basin in many ways, especially above Upper Klamath Lake and in the Lost River Basin where a great deal of surface water inflow is from springs. Paying irrigators to switch from surface water to groundwater is no more than robbing Peter to pay Paul.

There are many signs that the groundwater aquifer is declining and connected to declining surface flows. USGS and others are developing more information on the groundwater aquifer, and before those studies are completed, it doesn't make sense to rely so heavily on groundwater as a component of the water bank. In a basin with an already overdrawn aquifer, more reliance on groundwater for the water bank not only exacerbates the depletion of that aquifer, but simply causes more surface water to be absorbed into the aquifer, reducing the effective inflow to Upper Klamath Lake and the Lost River, two sources which the Project already draws from. This is confirmed by 2004's Upper Klamath Lake inflow figures, which were far less than predicted based on actual precipitation and prior experience. The missing inflow probably was absorbed into an exceptionally dry aquifer. Thus, taking water from the aquifer to feed the Project would be offset by less inflow to the Project – the functional equivalent of a transfusion from one arm to the other arm of the same patient.

There are also some indications that by paying irrigators to shift to groundwater, there is an actual increase in irrigation because some irrigators are able to irrigate lands with ground water that they could not effectively irrigate with surface water, and because of the federal payments to shift to groundwater they now find it economically viable to irrigate lands that didn't get much, if any, irrigation before. This ultimately increases the demand on the basin's overstretched water resources rather than reduces it.

The increased reliance of the water banking program on groundwater pumping out of an aquifer that is already overdrawn and dropping rapidly – all to maintain Project water demand that is clearly excessive - is not responsible. Without real demand reduction, no net water saving is actually achieved, only a shifting of water from one place to another at enormous taxpayer expense.

**D. Lack of Multiple Year Participation Requirement.** Single-year participation in the water bank promotes excess water use at the end of the prior years' irrigation season and at the commencement of the succeeding-years irrigation season thereby diminishing the return from water bank acquisitions. The program should be structured to limit irrigation on the same lands for more than a single irrigation season. This would also make enrollment in the program easier to predict year to year and cut down on some of the paperwork.

Frankly, the program, as currently structured and managed, appears to mainly serve the function of propping up an unsustainable level of irrigation and risks being subverted into another government subsidy to support over-appropriation in the basin at high taxpayer expense, while not providing the intended public benefits.

#### **4. The Current Program is Not Sustainable**

The year-to-year water-banking system is not a permanent solution and is not sustainable in the long-term. Any gains or improvements that might accrue through implementing the program would be lost if the program cannot be sustained because of lack of Congressional funding or lack of participants in any future year. It also becomes a gigantic game of "musical chairs" with many willing participants left out of the program each year through lack of funds. This makes it very hard for landowners who would like to plan their finances based on greater certainty. Worse, it could set up a massive new entitlement program for irrigators, serving only to compensate participants during the few times they may not receive full water deliveries under the existing biological opinions, and actually end up discouraging permanent demand reduction in the long run..

The ground water component of the water bank is also not sustainable for additional reasons. We are already seeing serious declines in the ground water table making it necessary to drill deeper and deeper wells. Increased groundwater development has been affecting domestic water supplies and has caused pollution of the City of Bonanza's domestic water supply. It should also be noted that groundwater pumping in the basin is currently greatly subsidized by power rates many times lower than typical for agricultural users. This subsidy will end in 2006, making it economically unfeasible for Reclamation to maintain the current level of reliance on groundwater for meeting its water bank goals.

#### **5. The Current Program is Not a Good Long-Term Investment**

The water-banking concept is likewise not a good use of taxpayers' dollars over the long term. A century from now US taxpayers should not be forced to continually pay water users in the Klamath Basin to not harm threatened fish and wildlife. The water bank program is far more expensive, in the long run, than outright purchase of and retirement of both land and water rights.

Approximately 20% of the lands that are dependent on the Project's water system are now or have recently been offered for sale. Permanent acquisitions could be obtained from willing sellers that would give benefits every year at a one-time cost that is far cheaper to the taxpayer than a year-to-year water banking system that would have to last forever and would need perpetual funding. Over time, the water bank could easily cost



taxpayers between *2.5 and 3.5 times* the present fair market value of the lands and all the water rights associated with those lands.

It is also important to note that by simply phasing out the commercial farming leases on the national wildlife refuges, irrigation season Project water demand could be permanently reduced by about 10% at no cost to the taxpayer. In fact each year the federal government pays more per acre to idle land in the Project than it receives from leasing out land on the national wildlife refuges that shouldn't as a policy matter be leased for commercial farming purposes in the first place.

The taxpayer is actually paying more for less under the current program. The current program simply doesn't increase natural storage, pollution abatement, or fish and wildlife habitat opportunities like a focused permanent demand reduction program could.

#### **6. The Current Program is Not a Permanent Solution to the Water Crisis**

In short, the current water bank program only makes sense as a short-term fix while a permanent demand reduction program is funded and implemented. If not coupled with a permanent demand reduction program it risks becoming little more than another expensive and unnecessary subsidy to irrigators, with very little or no actual benefits to fish and wildlife. It will not solve the water crisis in the basin and as currently managed could end up exacerbating it over the long-term.

### **SUMMARY OF RECOMMENDATIONS**

#### **Short-Term Recommendations**

##### **1. Decrease Reliance on Groundwater and Increase Crop Idling**

Reclamation should consider immediately eliminating payments for groundwater substitution as this is just paying irrigators to use a different straw from the same source and has nebulous benefits. Groundwater Supplementation should also be eliminated or at least decreased as this is not really a new source of water from which to draw and is not sustainable. A larger emphasis should be put on the crop idling portion of the program.

##### **2. Regulate Diversions to the Project Based on Water Year Types and Water Bank Acquisitions**

Though its difficult to regulate water use within the Project, there is no reason Reclamation could not regulate diversions into the Project at this time. However, before Reclamation can regulate it needs to determine how much water should be delivered to the Project each year. Much in the manner the lake and the river are allocated so much water in different water year types, the Project should also only be allocated so much water in various water year types. The baseline should be based on the average diversions for various water year types over the last 41 years of record. This baseline should then be reduced by the amount of water acquired within the Project for the water bank, and Reclamation should then regulate the rate and duty of diversions into the Project at the A canal and other diversions accordingly. This would bring immediate

accountability to the water bank and assure taxpayers that their dollars are actually providing the intended benefits.

### **3. Encourage Multiple-Year Participation**

Reclamation should encourage multi-year participation in the crop idling program by maintaining an option to idle the same land over at least a three-year period at the same price. This would give more certainty to the program and would increase program benefits because there would be less of an increase in irrigation from those about to enter or go out of the program.

### **4. Phase-out Commercial Farming on The National Wildlife Refuges**

Reclamation should consider not auctioning off the national wildlife refuge lands that come up for auction this year for commercial farming. This would be a very inexpensive way to meet a portion of the water bank requirements at no cost to the taxpayer.

### **5. Develop a Permanent Demand Reduction Program**

Reclamation should develop a permanent demand reduction program this year and make it a priority for the CIP process.

## **Long-Term Recommendations**

### **1. Develop and Implement a Permanent Demand Reduction Plan**

Water has been severely over-allocated and over-promised in the Klamath Basin. Any meaningful long-term solution will require considerable downsizing of the Klamath Project and the retirement of many other water rights throughout the basin (e.g. the Wood, Williamson, and Sprague Rivers in Oregon and the Shasta and Scott Rivers in California) on a permanent basis. There are currently tens of thousands of acres for sale in the Klamath Basin. A federally funded, voluntary program to give financial assistance to the farmers, who want to sell their land or water, by buying their land or water at a fair price would be an equitable way to reduce agricultural demand, while giving more security to those who want to stay in business. In order to commence restoring some balance to the basin and avoid ongoing water crises, acquisitions must be on a permanent basis and the water saved or acquired must be dedicated to fish and wildlife.

Other benefits could also be achieved by a demand reduction program that focused on reclaiming and restoring wetlands, especially in the Lower Klamath and Tule Lake Wildlife Refuge areas and around Upper Klamath Lake. These benefits would include providing for natural water storage, improving and increasing fish and wildlife habitat, and improving water quality. The recent report by the National Research Council highlighted the need to establish a massive wetlands restoration program in the Klamath Basin, and to re-flood portions of Lower Klamath and Tule Lake that were drained by the Klamath Project.

### **2. Phase-out Commercial Farming on the National Wildlife Refuges.**

Over 22,000 acres of federal refuge land in the Tule Lake and Lower Klamath National Wildlife Refuges is leased for commercial agriculture. These leases should be phased-out by allowing the leases to expire at the end of their existing lease terms. This would

not only allow management of these refuge lands for fish and wildlife, eliminate the use of pesticides on the refuges, allow refuge personnel to devote more time to refuge management, and help secure a reliable source of water for refuge purposes by allowing for the storage of approximately 30,000 to 40,000 acre-feet of water, but it would ease the irrigation season water demands of the Klamath Project. Water demand in the Klamath Project could be reduced by approximately 10% just by phasing out commercial farming on land already owned by the federal government. It's the right thing to do for the refuges, is cheaper than idling land through the water bank, and is an important step in solving the water crisis in the basin.

Thanks for the opportunity to comment.

Sincerely,

Robert G. Hunter  
Staff Attorney, WaterWatch  
On Behalf of The Klamath Basin Coalition

**Attachment 7**  
**Legal Duty and Authority to Act**

## I. INTRODUCTION

The State has both the legal duty and the legal authority to stop issuing permits that permanently allocate more water in the already overallocated Klamath and Lost River Basins (hereinafter the Lost River Basin is included in the terms “Klamath River Basin,” “Klamath Basin,” and “basin”). The State must stop issuing such new permits in order to meet its legal duty to protect existing claims and rights, and to protect the public interest. Two actions the State can take to meet this legal duty are: (1) withdraw the waters of the Klamath River Basin from further appropriation pursuant to ORS 536.410; or (2) initiate emergency rulemaking to close the waters of the Klamath River Basin to further appropriations pursuant to ORS 536.340(1).

## II. LEGAL DUTY TO ACT

The State has a legal duty to stop issuing new permits that permanently allocate more water in the already overallocated Klamath Basin. This legal duty comes, in part, from the State’s obligation to protect existing claims and rights to use water from the impacts of future development. The State must also act to protect water quality in the basin's rivers, streams, lakes and ground water. Furthermore, protection of wildlife and fish, because of their historical, cultural, biological and economic significance, is necessary to protect the public interest.

The Oregon Water Resources Commission (“Commission”) should adopt the Proposed Order of Withdrawal in order to ensure compliance with State water resources policy, to protect the public interest in conserving water resources of the State, to prevent extinction of fish and wildlife species, to prevent pollution of ground and surface waters, and to protect existing water rights. In the alternative, Petitioners request that the Commission undertake an immediate emergency rulemaking, to classify the waters of the Klamath River Basin under ORS 536.340 in such a way as to prevent further appropriations. *See* Attachment 4: Petitioners’ Proposed Basin Plan Amendments.

### **1. Withdrawal is Necessary to Achieve Compliance with Oregon Water Resources Law and Policy**

Withdrawal of the Klamath Basin from further appropriation of surface and ground water<sup>1</sup> is required to ensure compliance with Oregon water resources law and policy. The

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<sup>1</sup> With the exception of temporary emergency drought permits under ORS 536.750 and ground water uses exempt from permitting requirements under ORS 537.545.

policy of the State is to protect the water quality of ground and surface waters in the basin and to protect stream and spring flows needed for fish and wildlife in the basin. The State also has a duty to control water use and to protect existing rights to use water from injury. Given these policies and duties, the State should withdraw the basin's waters from further appropriation until the State has determined the nature and extent of the basin's ground water, the nature and extent of existing rights and whether water is still available for appropriation, and has instituted the tools necessary to manage and regulate basin water use. Such a withdrawal is necessary to prevent further depletion of the resource, preserve existing water rights and protect the public's interest in the resource.

It is widely recognized that the waters of the Klamath Basin are overallocated and that State water policy goals are not being met. Former Water Resources Department ("Department") Director Paul Cleary has stated that a serious imbalance exists in the Klamath River Basin.<sup>2</sup> He also recognized the need for certainty on the part of all water users in the basin and the critical importance that finishing the adjudication has on water management in the basin.<sup>3</sup> The situation with regard to the basin's listed species is so critical that a federal fishery agency and the Oregon Department of Environmental Quality ("DEQ") have called upon the State to find ways to restore streamflows in the basin. Current information shows that existing demands for water far exceed the system's capacity and threatens the once abundant fish and wildlife of the basin.

In addition, unadjudicated claims for water in the basin have yet to be accounted for in any water availability determination by the state. The continued allocation of water that has already been promised or claimed by other users severely undercuts those existing uses by adding more demand for water that is not there. This is contrary to the State's obligation to ensure its actions protect existing water rights and adds more fuel to the political firestorm that erupted in 2001.

The crisis in the Klamath Basin is not just a drought phenomena. The listing of four species of fish under the Endangered Species Act, the potential for more listings in the lower river, and the 46 rivers, lakes and streams in the basin not meeting State water quality standards are all evidence that the need for instream flows in the Klamath Basin is not limited to sporadic drought conditions. In addition, the existing overallocated state of surface waters,

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<sup>2</sup> Statement for the Record by Paul R. Cleary, Director Oregon Water Resources Department to the National Research Council Committee on Endangered and Threatened Fishes in the Klamath River Basin (November 6, 2001).

<sup>3</sup> *Id.*

recommendations to list rare and unique spring dependent mollusk populations in the basin, and the recent Department and DEQ studies documenting the importance of ground water contributions to water quality and quantity in the basin are evidence of the need to protect ground water contributions to surface waters.

There is simply no dispute that basin waters are overallocated and that the capacity of the basin's water resources to accommodate development have been exceeded. Under these conditions, further allocations of water are directly contrary to the State policy prohibiting overallocation of this public resource. Until the State has taken the five fundamental actions listed in the Petition and in the Proposed Order of Withdrawal, it does not have the information needed to determine whether ground or surface water is available for further appropriation in the basin. The Commission should withdraw the surface and ground waters from further appropriation as outlined in the Petition and the Proposed Order of Withdrawal (Attachment 3).

**2. Withdrawal is necessary to protect the public interest in conserving the water resources of the Klamath River Basin**

The fish populations of the basin are important to the public interest not only because of their historical, cultural, and biological significance, but also because these fish represent a large source of revenue in the State. Oregon's recreational fisheries and commercial fisheries supply income and jobs to thousands, but the fish populations are in steep decline. There are severe pollution problems throughout the entire basin. The Tribal and commercial fishing economies have been devastated. Cultures and ecosystems are threatened. The basin's National Wildlife Refuges support only a fraction of the wildlife they supported in the past. The Klamath Basin system is out of balance – public uses of water are not being protected. Preserving the fishing, recreational, and ecological values of the basin, and maintaining the multiple uses that the basin provides for, is clearly in the public interest and essential if we are to achieve the maximum beneficial use of the Klamath Basin.

The State's current practice of increasing demand by granting new permits for use of this publicly owned resource does not achieve the goals outlined by the State. Instead, it fosters more reliance and expenditures based on unrealistic expectations of a depleted resource. This practice only serves to increase future hardship and conflict and make preservation of the important fishing, recreational, and ecological values of the basin even more difficult. Until the State has the tools and information in place to manage the resource, and has determined that water is actually available for appropriation, further appropriation of

water in this basin is contrary to the public interest. To preserve the economic well being of the State and promote the maximum beneficial use of the resource, it is imperative that the Commission act now to conserve the unallocated water resources of the Klamath River Basin. Withdrawal of all unappropriated waters of the Klamath River Basin from further appropriation, as set forth in the Petition, is the best way to accomplish this.

- 3. If the Commission does not withdraw all unappropriated waters in the basin as set forth above, the Commission should immediately initiate emergency rulemaking to close the waters of the Klamath River Basin to further appropriations until certain requirements are met**

The Commission should immediately amend the Basin Program rule Division 500 and the Klamath Basin Program rule Division 514 to close the unappropriated surface and ground waters of the Klamath Basin to appropriation until the Commission finds that the State has taken the five fundamental actions listed in the Petition.

Currently there is no basin program for the Klamath Basin.<sup>4</sup> The Commission clearly has the authority to adopt a program for the use and control of water resources in the Klamath River Basin under ORS 536.300. Under this statute, the program may be adopted or amended at any time after a public hearing is held in the relevant river basin. As part of this program, the Commission has the authority to classify water bodies for “the future in aid of an integrated and balanced program for the benefit of the State as a whole.” ORS 536.340(1). The Commission has the ability to undertake rulemaking using abbreviated notice and hearing procedures when “failure to act promptly will result in serious prejudice to the public interest.” ORS 183.335(2).

The public’s interest in the Klamath River Basin has already been severely compromised. The State holds and manages the waters, both surface and ground water, in trust for the public. The State is violating this public trust by continuing to accept applications for and approve water rights for an already depleted resource in the face of: (1) extreme conflicts over water; (2) insufficient water supplies to meet existing claims to water; (3) an unadjudicated system that has claims for all the water in the basin; (4) listings under the federal Endangered Species Act; (5) total lack of comprehensive water management

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<sup>4</sup> The Department’s basin program binder refers to the Klamath Basin program being located at OAR 690-514-000 – but this section of the binder merely states that “WATER USE IN THE KLAMATH BASIN IS COVERED BY THE KALMATH RIVER BASIN COMPACT ORS 542.610 through 542.630”. However nothing in the compact prohibits, much less excuses, the Water Resources Commission from carrying out its planning obligations and its duty to protect the public interest under state law.



planning; (6) Oregon's inability to control existing uses of water; and (7) a lack of adequate information regarding the nature and extent of the basin's ground water resources, ground and surface water connection, and ground and surface water availability. The State's piecemeal approach to water management – making promise after broken promise for water – in the face of great uncertainties and resource crises also violates the statutory mandate of formulating “an integrated, coordinated program for the use and control of all the water resources of this state.” ORS 536.300(2).

An emergency exists in the Klamath River Basin. At least four species of fish have been pushed to the verge of extinction. The cultures, diets, and economies of Klamath Basin Native American Indian Tribes are suffering. Coastal communities in Oregon and California are suffering. Commercial fishermen are suffering. Basin farmers are suffering. The State's current and proposed water allocation scheme for the basin that allows for continued issuance of new permanent rights to use waters of the Klamath River Basin will only perpetuate and exacerbate the water crisis in the basin. Failure to take immediate action to close the basin will seriously prejudice the public's interest in protecting the unique and valuable resources of the Klamath River Basin. Immediate closure of the basin will allow the state to dedicate staff and monetary resources toward solving the basin's water problems rather than adding to them by piling up new unsustainable demands on the resource. It is time for the State to play a leadership role in addressing the basin's water problems by stopping further overallocation of the resource.

### **III. LEGAL AUTHORITY TO ACT**

ORS 536.410 grants the Commission the authority to withdraw from appropriation “any unappropriated waters of this state, including unappropriated waters released from storage or impoundment into the natural flow of the stream for specified purposes” ORS 536.410(1). The Commission may declare a withdrawal if it finds that either: (1) “it is necessary to insure compliance with the state water resources policy,” or (2) “it is otherwise necessary in the public interest to conserve the water resources of the state for the maximum beneficial use and control thereof . . .” *Id.* Under a withdrawal “no application for a permit to appropriate the waters withdrawn for the uses specified in the order and no application for a preliminary permit or license involving appropriations of such waters” can be received for filing by the Commission. ORS 536.410(5).

The Commission also has the authority to “classify and reclassify the lakes, streams, underground reservoirs or other sources of water supply in this state as to the highest and best

use and quantities of use thereof for the future in aid of an integrated and balanced program for the benefit of the state as a whole.” ORS 536.340(1). These classifications are adopted through rulemaking processes. *See e.g.* OAR 690-500 and 690-514-000. ORS 183.335(5) gives the Commission the ability to amend rules using abbreviated notice and hearing procedures when “its failure to act promptly will result in serious prejudice to the public interest.” Classifications have the effect of restricting the use of water only to those water sources classified. ORS 536.340(1)(a).<sup>5</sup>

All water from all sources of supply within the state belongs to the public.<sup>6</sup> The policy of the State of Oregon is to guarantee instream flows,<sup>7</sup> protect and restore native salmon and trout populations statewide,<sup>8</sup> protect wildlife,<sup>9</sup> and preserve the public interest.<sup>10</sup> The state policy further requires that allocation of surface and ground water be within the capacity of the resource. OAR 690-410-070(1). The capacity of the resource means “the ability of a surface water or ground water resource to sustain a balance of public and private uses without causing over-appropriation or otherwise significantly impairing the function or character of the resource.” OAR 690-400-010(4). Oregon’s policies further contemplate that new allocations can be limited to meet public uses when instream flow needs are not protected by instream water rights. OAR 690-410-070(2)(h). State policies require the Commission and the Department to manage and control water use in the State and to

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<sup>5</sup> The law provides a few very narrow exceptions to the classification for certain uses that may be approved by the Commission. ORS 536.340(1)(a).

<sup>6</sup> ORS 537.110, 537.334(2), 536.310(1) and 537.525. *See also Lane Electric Coop. V. Federated Rural Electric*, 114 Or. App. 156, 161 (“All waters within this state, which necessarily includes ground water, belongs to the public.”)

<sup>7</sup> The Commission has expressed the State’s policy regarding instream flows as follows:

“Benefits are provided by water remaining where it naturally occurs. Protecting streamflows which are needed to support public uses is a high priority for the state. The long term goal of this policy shall be to establish an instream water right on every stream, river and lake, which can provide significant public benefits . . . Where streamflows have been depleted to the point that public uses have been impaired, methods to restore the flows are to be developed and implemented.”

OAR 690-410-030(1).

<sup>8</sup> ORS 496.435 (“ . . . it is declared to be a goal of the people of the State of Oregon to restore native stocks of salmon and trout to their historic levels of abundance.”); ORS 506.109 (“It is the policy of the State of Oregon that food fish shall be managed to provide the optimum economic, commercial, recreational and aesthetic benefits for present and future generations of the citizens of this state.”); ORS 536.310(4) (“The fishery resource of this state is an important economic and recreational asset.”)

<sup>9</sup> OAR 690-400-000(4) (When formulating basin programs and other directives the commission has the duty to consider protection of wildlife); ORS 536.300(1) (Recognizing wildlife as a beneficial use of water.)

<sup>10</sup> OAR 690-400-000(4) (When formulating its water management program the Commission must consider protection of wildlife, recreation, watershed management and other priorities outlined by the legislature.); OAR 690-410-010(2)(a) (“Groundwater and surface water shall be managed conjunctively where to do so will protect water resources, existing water rights, and the public interest.”); OAR 690-400-000(2) (“Multiple water uses shall be preferred over single-purpose uses.”)

diligently enforce the laws concerning the cancellation of excessive unused claims to waters so as to make water available for other public uses. ORS 536.220(2)(a), 536.340(1)(b).

It is also public policy of the state to “protect, maintain, and improve the quality of the waters of the state” and “to provide for the prevention, abatement and control of new or existing water pollution.” ORS 468B.015(1) and (4). In addition, the Oregon legislature has declared a “goal of the people of the State of Oregon to prevent contamination of Oregon’s ground water resource while striving to conserve and restore this resource and to maintain the high quality of Oregon’s ground water resource for present and future uses.” ORS 468B.155. The law specifies that “pollution of the waters of the state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and impairs domestic, agriculture, industrial, recreational, and other legitimate beneficial uses of water.” ORS 468B.015. The statute further states that “[p]ollution of any of the waters of the state is declared to be not a reasonable or natural use of such waters and to be contrary of the public policy of the State of Oregon . . .” ORS 468B.020(1). The laws under which the Commission and its Department operate mandate that the Department act in a fashion that is consistent with these legislative policies and directives.<sup>11</sup>

Oregon law also requires that the State protect the free flowing character of designated state scenic waterways. ORS 390.815, 390.835. The Klamath River from John Boyle Dam powerhouse to the Oregon-California Border is a designated scenic waterway. ORS 390-826(2). The legislature has declared the highest and best uses of waters within a state scenic waterway to be recreation, fish and wildlife uses and requires that new allocations not interfere with the maintenance of flow levels necessary for these waterways. ORS 390.835(1), ORS 690-410-070(2)(g).

In addition to the State mandates for protection of scenic waterways, Congress has also declared that federally designated Wild and Scenic Rivers shall be preserved in free-flowing conditions and that the rivers and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. *See* 16 U.S.C. § 1271-1287. Portions of the Klamath, Sprague and Sycan Rivers are protected under the federal Wild and

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<sup>11</sup> OAR 690-400-000(1) (When formulating its programs the commission must consider priorities outlined by the legislature); ORS 468B.160(2), 536.220(2)(b) and ORS 537.525(11) (Commission programs and rules must be consistent with the overall goal to prevent contamination of and conserve and restore the ground water resource); OAR 690-400-010(3) & 690-300-010(5) (Beneficial use is a use for a purpose consistent with the laws, rules and the best interests of the people of the state); OAR 690-310-120(3)(b), 690-310-130(3)(b)(C) (Public interest determination includes consideration of water quality and for surface waters special attention to

Scenic Rivers Act. Designations under the federal act carry with them a federal reserved right for the specific flow needs of each designated waterway and the purposes of the Act. 16 USC § 1284(c) (1988). The Act's policy section requires the preservation of the "free-flowing condition" of designated rivers for their "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 USC § 1271. The statute specifically preserves the States' jurisdiction over waters of the state, but requires the States to exercise that jurisdiction in a way that will not impair the purposes of the Act. 16 USC § 1284(d) (1985). Thus, the federal wild and scenic river designations in the Klamath Basin have created reserved rights that the Department must protect when it manages waters within and above these special waterways.

#### **IV. CONCLUSION**

The State, through the Commission, clearly has both the legal duty and the legal authority to stop issuing permits that permanently allocate more water in severely overallocated Klamath and Lost River Basins. The Commission must act to stop issuing such new permits in order to meet its legal duty to protect existing claims and rights, and to protect the public interest. Two actions the Commission can take to meet this legal duty are: (1) withdraw the waters of the Klamath River Basin from further appropriation pursuant to ORS 536.410; or (2) initiate emergency rulemaking to close the waters of the Klamath River Basin to further appropriations pursuant to ORS 536.340(1). Petitioners urge the Commission to take a leadership role in addressing the Klamath Basin water crisis and to fulfill the State's water resource management duties by taking one of these actions.

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water quality limited streams.); ORS 537.525(9), OAR 690-410-010(1) (Ground water shall be managed to prevent overdraft or contamination.)