

April 2, 2018

Oregon Water Resources Commission
 Attn: Cindy Smith
 725 Summer St. NE
 Suite A
 Salem, OR 97301

The Klamath Tribes Tribal Council

By Email to Cindy.s.smith@oregon.gov
 And to Thomas.j.paul@oregon.gov

Dear Commissioners:

The Klamath Tribes understand that, in the wake of Governor Brown's recent drought declaration, the Oregon Water Resources Commission ("Commission") is considering promulgating temporary "emergency" rules that would prioritize water rights for human and stock water consumption above water rights for all other purposes, including the Tribes' time immemorial instream flow claims. The Tribes have previously expressed to the Commission the Tribes' concerns that such rules come directly at the expense of the Tribes' senior water rights, and risk unacceptable impacts to essential Tribal treaty resources and federally listed critically endangered C'waam (Lost River Sucker) and Koptu (Shortnose Sucker). We continue to have those concerns now, and are submitting these comments and proposed modifications to the 2015 temporary rules to avoid these impacts.

Perhaps most seriously, as we articulated in our comments regarding your Klamath County-focused rulemaking processes in 2014 and 2015, by subordinating the Tribes' senior water rights to "preferred" domestic and stock uses, these preference rules run contrary to the federal reserved water rights doctrine, and that the State of Oregon lacks the legal authority to supersede the Tribes' water rights in this manner. Nevertheless, and without contradicting or compromising this principal, the Tribes will continue to work constructively with the Commission, the Oregon Water Resources Department (OWRD), and our neighbors in the Klamath Basin to develop reasonable emergency rules for this low water year that do not force us into a more adversarial posture.

We appreciate that the Commission took some of our comments into account in its development of the 2015 temporary rules (OAR 690-022-0050, *et seq.*), such as the importance of promulgating separate rules for human and stock consumption and the inclusion of the requirement that streams may not be dewatered under those rules. Yet those 2015 rules still raise serious issues that can be avoided. To that end, we submit in this letter both general comments and specific language suggestions that provide greater clarity and certainty for all water rights holders in the Klamath Basin and better meet the legislative and administrative goals and objectives of temporary drought rules pursuant to ORS 536.700-536.780 and OAR 690-019-0700.



Content of Proposed Rules

Quantitative Limits. The 2015 rules impose only narrative limitations on the amount of water that may be used under their exceptions. OAR §§ 690-022-0054(4); 690-022-0055(3). Any new rule should impose quantitative limits on the maximum amount of water, on a per capita per day basis, that is authorized for use under the rules. As the Klamath Tribes – and other senior water rights holders – are the ones being deprived of the water that will be used pursuant to these rules, it is essential to impose stringent limits on the amount of water the Tribes and other senior water rights holders are being forced to contribute. The 2015 rules’ narrative limitations allow too much room for “business as usual” water consumption, where emergency drought rules that reallocate water away from senior water rights holders should instead be crafted and implemented to require heightened conservation and efficiency.

No expansion of stock demand. The Klamath Tribes and other senior water right holders should not have their senior water rights diminished to satisfy the needs of livestock that other water rights holders voluntarily chose to bring into the Klamath Basin from elsewhere this year. Therefore, stock use under any new rule should be limited both by a per-head volume (as stated above) and also based on the number of animals that were in fact present in the Klamath Basin as of the date of publication of the proposed rules, or no later than April 15, 2018.

Efficiency. The 2015 rules allow for the delivery of stock water by any means, with no limitation on the use of long, potentially leaky or otherwise inefficient canals or ditches. Any new rule should require the efficient delivery of stock water by either closed piping or truck and preclude the use of open ditches. Along with being a sound water conservation measure, this requirement would also reduce the risk of “inadvertent” irrigation occurring along the course of a long open ditch – which we trust is not a practice the Commission intends to condone but the risk of which remained too large under the 2015 rules. While this requirement may impose some burden on certain stock water users, it is important to bear in mind that the Tribes and other senior water right holders bear the brunt of these rules, inverting the prior appropriation doctrine. The Commission should strive to minimize this inversion to the greatest extent possible, and propose reasonable efficiency requirements that are directly and closely related to this important goal.

Measurement and Reporting. This is at least the third time in the past five years that rules prioritizing domestic and stock uses in the Klamath Basin are being considered due to poor water conditions. To allow for better planning to address future drought conditions, and to understand the magnitude of the impacts such rules impose on the Klamath Tribes and other senior water right holders, all users of water under any new rule should be required to measure those uses of water, and to file a report with OWRD no later than 45 days after the rules’ expiration inventorying the quantity and timing of their uses while the rules were in effect. While this requirement, too, may impose some burden on junior water users, it is an eminently reasonable and appropriate condition when laid against the tremendous benefit that the rules’ preference confers on those users at the expense of senior water right holders like the Tribes.

Stream Dewatering. While the narrative requirement in the 2015 rules that stock water users may not completely dewater a stream is a step in the right direction, it is not sufficiently protective to ensure that privileged stock uses under the rule do not pose grave risks federally endangered aquatic species. The Klamath Tribes therefore propose that the requirement be strengthened to preclude any diversion for stock use that would have the effect of reducing live stream flow below 2 cubic feet per second in any reach where the proposed stock water diversion would take place.

Penalties for Abuse. Since the proposed rules invite junior water right holders to use water they otherwise would not be entitled to use, the rules should also contain meaningful disincentives for abuse. A penalty provision is particularly important because of the limitations inherent in trying to rely on real-time enforcement of dispersed stock and human consumption uses to ensure water user compliance with these rules. Despite the Klamath Tribes having raised this issue then, the 2015 rules were disappointingly silent on this front.

Specific Language Changes

The proposed changes set forth below use the language of the 2015 rules as their starting point (additions are underlined; deletions are in strike-through). They are intended to capture the minimum improvements the Klamath Tribes wish to see in any new set of rules and are not intended to be an endorsement of either the 2015 rules or any prospective rules for 2018 or future years.

Rule 690-022-0054:

Amend subsection (4) as follows:

“Water diverted for stock water is limited to the amount appropriate for the specific number of livestock it serves, up to a maximum of two gallons per hundred pounds of bodyweight per animal per day, and only for livestock physically present in the Klamath Basin no later than April 15, 2018. Water used under this subsection and shall be delivered only through covered piping or by truck. Conveyance of water through open canals, ditches or similar methods of conveyance is not allowed under this rule ~~only the conveyance amount necessary to provide water to the place of use.”¹~~

Amend subsection (5) as follows:

“The diversion of water under the stock water preference is not allowed if the diversion will result in the flow of the reach where the diversion would occur to fall below 2 cfs~~shall not result in the complete dewatering of a stream.~~”

New Section:

“Measurement and Reporting.

“(1) Every person diverting water pursuant to the stock water preference of these rules shall meter or otherwise measure their diversions on both a daily and a cumulative basis.

¹ This change would also require the modification of OWRD’s draft 2018 Stock Water Preference Notice to remove the options of “Open Canal” and “Other” under the “Water Delivery Method” section on page 2 of that form.

“(2) Within 45 days of the conclusion of the effective period for the temporary preference as set forth in [OAR 690-022-0050(3)], every person diverting water pursuant to the stock water preference of these rules shall file with the Department a report, on a form prescribed by the Department, concerning their water use under these rules.”²

New Section:

“Violations and Penalties.

“(1) Any violation of the terms of these rules constitutes a Major Class I violation under [OAR 690-260-0040].


“(2) Civil penalty assessments shall be imposed for violations of these rules on the terms and pursuant to the process set forth in [OAR 690 Division 260].”

Conclusion

The Klamath Tribes are disappointed to find ourselves again in a situation where the provision of emergency relief is being contemplated at the expense of the Tribes’ water rights and treaty resources. The Klamath Basin needs to arrive as a sustainable level of water demand that recognizes the priority of the Tribes’ time immemorial instream flows to protect its invaluable treaty resources, and the repeated promulgation of “emergency” rules is delaying this effort. The Tribes strongly urge the Commission to make clear that long-term planning that includes all stakeholders is needed to equitably account for recurring drought and changing climatic conditions, and that future requests to rely on temporary rules will be looked on very unfavorably, particularly when it comes to exceptions for stock water use. The Tribes are forced to plan on an annual basis for the protection of our treaty resources under actual water conditions. Stock growers should be expected to do nothing less, and without recourse to water that rightfully should go to the Tribes in the first instance. At a bare minimum, the provisions we identified in this letter should be included in any new rules.

Thank you for your consideration of these comments and recommendations. Please do not hesitate to contact the Klamath Tribes’ legal counsel (Douglas MacCourt at dmaccourt@rosettela.com or Jay Weiner at jweiner@rosettela.com) for any questions or clarifications in this letter.

Regards,



Donald C. Gentry
Chairman, The Klamath Tribes

² This form should require, at a minimum, the name and address of the diverter, the water use authorization under which they claim the right to use water, and the inclusion of both the daily and cumulative use information. In the event that the stock water rule form identified in 690-022-0054(3) remains substantially the same as the draft that was shared with the Tribes on March 26, 2018, that could be sufficient information for stock water uses. For human consumption uses, the form contemplated by subsection (2) of the Measurement and Reporting provision should also the point(s) of diversion, the water delivery method, and the steps being taken to secure alternate supplies to meet future needs without recourse to temporary emergency preference rules.