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

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of THE KLAMATH TRIBES AND THE UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS AS TRUSTEE ON BEHALF OF THE KLAMATH TRIBES	)	CORRECTED PARTIAL ORDER OF DETERMINATION
	)	Water Right Claim 622 (Upper Klamath Lake)

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

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

1. Claims 616 and 622, (Claimants: THE KLAMATH TRIBES; AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS AS TRUSTEE ON BEHALF OF THE KLAMATH TRIBES (BIA)) and their associated contests[1] were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 286.

2. Claim 616 was filed by the Klamath Tribes. It is a claim that incorporates by reference the United States Bureau of Indian Affairs' Claim 622 based on the hunting, trapping, fishing, and gathering purposes of the Klamath Treaty of 1864.

3. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claims 616 and 622 on April 16, 2012.

4. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) the Oregon Water Resources Department, (2) Upper Basin Contestants, (3) Mathis Family Trust, and (4) Joint Limited by Klamath Tribes, United States and Klamath Project Water Users (KPWU). Responses to exceptions were timely filed by the United States, the Klamath Tribes and the Mathis Family Trust.

[1] Claim 616: 2062, 2731, 2741, 3020, 3123, 3253, 3318, 3648, 4006; Claim 622: 2063, 2732, 2742, 3021, 3254, 3318, 3324, 3654, 3883, 4012

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5. The exceptions filed to the Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claims 616 and 622. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Section A.9, below.

6. For administrative convenience, OWRD has addressed Claim 616 in a separate Partial Order of Determination for Claim 616. Section B.2 of this Partial Order of Determination makes a legal conclusion about the relationship between Claim 616 and the United States' Claim 622, and the ownership of the water rights that are recognized in these claims.

7. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "Procedural History" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted in its entirety.
   c. The "Expert Testimony" is adopted in its entirety.
   d. The "Issues" is adopted is adopted in its entirety.
   e. The "Findings of Fact" is adopted in its entirety. In addition, Finding of Fact #41 is added as set forth in Section A.8, below.
   f. The "Conclusions of Law" is adopted in its entirety.
   g. The "Opinion" is adopted with modifications, as set forth in Section A.9 below.
   h. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 622. The outcome of the Order is without modification; it is presented in a format standardized by OWRD.
   i. The "Amended Order on Stipulation" is adopted as described in Section A.10, below.

8. **Findings of Fact**. Finding of Fact #41 is added as follows:

   41. OWRD describes the place of use for Claim 622 as Upper Klamath Lake and Agency Lake being within portions of the following locations:

   Township 34 South, Range 7.5 East, W.M.
   Township 35 South, Range 7.0 East, W.M.
   Township 35 South, Range 7.5 East, W.M.
   Township 36 South, Range 6.0 East, W.M.
   Township 36 South, Range 7.0 East, W.M.
   Township 36 South, Range 7.5 East, W.M.
   Township 37 South, Range 7.0 East, W.M.
   Township 37 South, Range 8.0 East, W.M.
   Township 38 South, Range 8.0 East, W.M.
   Township 38 South, Range 9.0 East, W.M.

   OWRD Ex. 1 at 161 (map dated 10-1-1999 submitted with amended claim).

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9. **Opinion**. The Proposed Order's "Opinion" section is modified as described herein.

a. Introductory Paragraphs: The first two paragraphs of the Opinion Section are replaced in their entirety as follows:

> Claimants seek to maintain water levels within Upper Klamath Lake, which forms the western border of the former reservation. To succeed, Claimants must demonstrate that they are entitled, both legally and factually, to the claimed water uses. To do this, Claimants must show that the water right claimed is a type that is within the scope of the federal reserved water right doctrine, that the right was implied at the time of signing the Treaty and that such water is necessary to accomplish a primary purpose of the reservation created by the Treaty of 1864.

b. Section I: The second paragraph of Section I is deleted in its entirety. The remainder of Section I is incorporated without modification.

c. Sections II through IV: These sections are incorporated without modification.

d. Section V: This section is replaced in its entirety as follows:

> *V. Upper Klamath Lake serves as a boundary for the former Klamath Indian Reservation; applicable precedent establishes that federal reserved water rights may be recognized for waters bordering federal reservations.*
>
> Upper Klamath Lake is listed in Klamath Treaty of 1864's ("Treaty") description of the boundaries of the former Klamath Indian Reservation ("Reservation"). Article 1 of the Treaty describes the applicable portion of the boundary as follows: "Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's River; thence following up said eastern shore to the mouth of Wood River...."
>
> There is support in the case law for treating waters bordering Indian reservations as eligible for federal reserved water rights, assuming the other elements for such a right exist. *See United States v. Rio Grande Dam & Irrig. Co.,* 174 US 690, 703 (1899); *Winters v. United States*, 207 US 564, 565-567 (1908); *United States v. Ahtanum Irrig. Dist.,* 236 F2d 321, 325 (9th Cir 1956), *cert den* 352 US 988 (1957). As a result, OWRD concludes that the Claimants' claims for lake elevation levels on Upper Klamath Lake are not foreclosed by Upper Klamath Lake's boundary status.
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> The Proposed Order did not consider the caselaw permitting federal reserved water rights for waters bordering federal reservations. Instead, the Proposed Order incorrectly concluded that the federal reserved water right doctrine is broad enough to allow water rights in off-reservation stream reaches and bodies of water, no matter how distant from the land reserved. Because Upper

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Klamath Lake borders a part of the former Reservation, and because there is caselaw supporting federal reserved water rights for bordering waters, it is unnecessary to address the off-reservation federal reserved water right issue in this case.

e. *Sections VI through XI*: These sections are incorporated without modification.

10. Amended Order on Stipulation.

On June 19, 2009, the ALJ entered an Order on Klamath Tribes, United States, and Klamath Project Water Users' Stipulation of Conditional Withdrawal of KPWU's Contests to Claims 616 and 622 and Conditional and Interim No-Call Provisions by the United States and Klamath Tribes ("Order on Stipulation"). The Order on Stipulation provided that certain of its terms "shall be included in the Proposed Order issued under ORS 183.464(1) and OAR 137-003-0645 and any other Order or Judgment determining" the enumerated claims and contests.

On April 11, 2012, the United States filed the following documents:

AMENDED STIPULATION OF CONDITIONAL WITHDRAWAL OF KWPU'S CONTESTS TO CLAIMS 616 AND 622 AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES AND ATTACHMENTS 1 AND 2 ("Amended Stipulation");

JOINT MOTION FOR APPROVAL OF AMENDED STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU'S CONTESTS TO CLAIMS 616 AND 622 AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES; and

[PROPOSED] ORDER ON KLAMATH TRIBES, UNITED STATES, AND KLAMATH PROJECT WATER USERS' AMENDED STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU'S CONTESTS TO CLAIMS 616 AND 622 AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES.

The Amended Stipulation is an agreement between Claimants (the Klamath Tribes and the United States), Contestants Klamath Project Water Users ("KPWU"), and the Oregon Water Resources Department ("OWRD"). The Amended Stipulation is comprised of five sections. Section A is a stipulation of facts. Section B provides for the conditional withdrawal of KPWU's contests in this case. Section C provides for a conditional limitation on the exercise of the water rights recognized in this case. Section D requests the ALJ to enter a proposed order implementing the Amended Stipulation. Section E provides general terms pertaining to the Amended Stipulation.

On April 24, 2012, the ALJ entered the Order on Klamath Tribes, United States, and Klamath Project Water Users' Amended Stipulation of Conditional Withdrawal of KPWU's Contests to Claims 616 and 622 and Conditional and Interim No-Call

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Provisions by the United States and Klamath Tribes ("Order on Amended Stipulation"). The Order on Amended Stipulation is intended to implement the Amended Stipulation. The Order on Amended Stipulation supersedes and replaces the Order on Stipulation.

The Amended Order on Stipulation states that certain of its terms "shall be included in the Proposed Order on Claims 616 and 622." However, the Proposed Order does not explicitly include those terms or otherwise reference the Amended Order on Stipulation.

To provide clarity as to the status of the Order on Amended Stipulation, the Adjudicator adopts the Order on Amended Stipulation[2] and incorporates into this Partial Order of Determination the relevant terms, as follows:

1. Regarding Contests 3648 and 3654 filed by KPWU,[3] the following terms are a part of this Partial Order of Determination.

    a. Subject to paragraph 1.b, KPWU may file exceptions in the Circuit Court to the Findings of Fact and Order of Determination on Claims 616 and 622, consistent with ORS 539.150. Nothing in the Amended Stipulation or this "Amended Order on Stipulation" section of this Partial Order of Determination shall limit the exceptions which the United States, the Klamath Tribes and KPWU (collectively, the "Parties to the Amended Stipulation") may pursue or oppose in the Circuit Court, or the use they may make of the Findings of Fact and Order of Determination on Claims 616 and 622 in the Circuit Court, provided that any exception filed by KPWU must not be inconsistent with the CONTEST DISMISSAL AGREEMENT AND STIPULATION BETWEEN KLAMATH PROJECT WATER USERS, THE KLAMATH TRIBES, AND THE UNITED STATES; [PROPOSED] ORDER OF THE HEARING OFFICER IN CASE 003, Attachment 2 to the 2009 STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU'S CONTESTS TO CLAIMS 616 AND 622 AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES ("2009 Stipulation"). The Parties to the Amended Stipulation have, and have had since the entry of the 2009 Stipulation, no further discovery obligations regarding each other during the contested case process before the Office of Administrative Hearings or OWRD.

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[2] Even if the ALJ erred in failing to reference or incorporate the Amended Order on Stipulation in the Proposed Order, OWRD has the authority, which the Adjudicator hereby exercises, to incorporate terms of the Amended Order into this Partial Order of Determination. OAR 137-003-0665; 137-003-0655. The Claimants properly raised this issue in exceptions to which Contestants had an opportunity to respond.

[3] For purposes of this Order, Klamath Project Water Users include Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Malin Irrigation District, Midland Improvement District, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Randy Walthall and Inter-County Title Co., Inter-County Properties Co., Randolph and Jane Walthall 1995 Trust, Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Collins Products LLC and Plevna District Improvement Company.

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b. If none of the events described in paragraph 2.c.i have occurred and the Secretary publishes the notice under section 15.3.4.A of the KLAMATH BASIN RESTORATION AGREEMENT FOR THE SUSTAINABILITY OF PUBLIC AND TRUST RESOURCES AND AFFECTED COMMUNITIES ("Restoration Agreement") (including a notice under section 15.3.4.A following its amendment as provided in section 15.3.4.B of the Restoration Agreement, as applicable), KPWU shall refrain from filing exceptions to the Findings of Fact and Order of Determination or, if exceptions to the Findings of Fact and Order of Determination have already been filed, timely cease any litigation on exceptions and file the necessary pleading to dismiss their exceptions and the conditional withdrawal by KPWU of their Contests 3648 and 3654 shall become permanent and no longer conditional.

2. Regarding Claims 616 and 622, the following terms are a part of this Partial Order of Determination.

   a. From the time the Amended Stipulation was filed until the On Project Plan Implementation Deadline, any exercise of the water rights determined for Claims 616 and 622 (the "Tribal Water Rights") shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908.

   b. After the On Project Plan Implementation Deadline, any exercise of the water rights determined for Claims 616 and 622 shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908, except that the exercise of the water rights determined for Claims 616 and 622 may seek regulation such that DIVERSION (as defined in Appendix E-1 of the Restoration Agreement) is equal to the maximum DIVERSION that can occur if Appendix E-1 of the Restoration Agreement has been filed and is in effect. The exception that applies under this paragraph 2.b applies at all times after the On Project Plan Implementation Deadline, regardless of whether Appendix E-1 has in fact been filed and is in effect at that time.

   c. If the following events have all occurred, the conditional limitations on the exercise of the Tribal Water Rights set out in paragraph 2.a and paragraph 2.b above shall cease and be of no further force or effect:

      i. The Restoration Agreement has terminated without the Secretary of the Interior having published a notice under either section 15.3.4.A or 15.3.4.C of the Restoration Agreement, or the Secretary of the Interior has published the notice in the Federal Register described in section 15.3.4.C of the Restoration Agreement, or the Klamath Tribes have withdrawn from the Restoration Agreement under section 33.2.2 of the Restoration Agreement; and

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ii. KPWU have fully litigated the Parties to the Amended Stipulation's exceptions to the Findings of Fact and Order of Determination for Claims 616 and 622 consistent with the processes described in section 15.3.2.B.ii.b of the Restoration Agreement or have foregone their final opportunity to fully litigate the Parties to the Amended Stipulation's exceptions pursuant to such processes; and

iii. Following KPWU's litigation of exceptions as provided in paragraph 2.c.ii immediately above or following KPWU having foregone the final opportunity to fully litigate exceptions as provided in paragraph 2.c.ii immediately above, a judgment or decree (or amended judgment or decree) has been issued regarding Claims 616 and 622 under ORS 539.150(4) or 539.190 and is operative.

d. If none of the events described in paragraph 2.c.i have occurred and the Secretary publishes the notice described in section 15.3.4.A of the Restoration Agreement (including a notice under section 15.3.4.A following its amendment as provided in section 15.3.4.B of the Restoration Agreement, as applicable), then the conditional limitations on the exercise of the Tribal Water Rights set out in paragraph 2.a and paragraph 2.b above shall become permanent and unconditional.

e. For purposes of this paragraph 2, "On Project Plan Implementation Deadline" means the applicable deadline for full and complete implementation of the On Project Plan as established under sections 15.3.8.A or 15.3.8.B of the Restoration Agreement.

In addition to the incorporation of these terms, the Adjudicator makes the following findings with respect to the incorporated terms:

1. The provisions in paragraph 2.a. and paragraph 2.b, above, limit the scope or extent of a call made by the Klamath Tribes and United States under the water right that has been determined under Claims 616 and 622. Such provisions do not change the principle that any regulation by OWRD curtailing use of water shall be as provided in ORS 540.045(1)(a), based on the priority of regulated rights, with the latest priority right curtailed first.

2. Nothing in the Amended Stipulation diminishes, affects, defines, or resolves in any way: (a) the rights of Contestants other than KPWU to contest or oppose Claims 616 and 622; or (b) any contests other than Contests 3648 and 3654; or (c) any other claims of the Claimants. Nothing in the Amended Stipulation diminishes, affects, defines, or resolves in any way any other water rights or any other claim, contest, or case in the Klamath Basin Adjudication. In addition, nothing in the Amended Stipulation defines, or is intended to define, the scope and attributes of the Tribal Water Rights, either to satisfy the Tribes' treaty rights or otherwise.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
   a. The "Procedural History" is adopted in its entirety.
   b. The "Evidentiary Rulings" is adopted in its entirety.
   c. The "Expert Testimony" is adopted in its entirety.
   d. The "Issues" is adopted is adopted in its entirety.
   e. The "Findings of Fact" is adopted in its entirety. In addition, Finding of Fact #41 is added as set forth in Section A.8, above.
   f. The "Conclusions of Law" is adopted in its entirety.
   g. The "Opinion" is adopted with modifications, as set forth in Section A.9 above.
   h. The "Order" is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 622. The outcome of the Order is without modification; it is presented in a format standardized by OWRD.
   i. The "Amended Order on Stipulation" is adopted as described in Section A.10, above.

2. Both the United States and the Klamath Tribes filed claims based on the hunting, trapping, fishing and gathering purposes of the Klamath Treaty of 1864. The Klamath Tribes' Claim 616 incorporates the United States' Claim 622 by reference. The Klamath Tribes' claim is duplicative of the United States' claim, not additive. The United States holds the rights recognized herein in trust for the Klamath Tribes. *Colorado River Water Conservation Dist. v. United States*, 424 US 800, 810 (1976). As a result, Claim 616 is denied. Claim 616 is addressed in a separate Partial Order of Determination for Claim 616 and the United States' Claim 622 is determined in this Partial Order of Determination for Claim 622.

3. Based on the file and record herein, IT IS ORDERED that Claim 622 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 622

CLAIM MAP REFERENCE:
CLAIM # 622, PAGES 30-38, AMENDED MAPS FILED OCTOBER 1, 1999

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

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

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SOURCE OF WATER: UPPER KLAMATH LAKE, tributary to KLAMATH RIVER

PURPOSE or USE:

MINIMUM LAKE LEVELS IN UPPER KLAMATH LAKE TO ESTABLISH AND MAINTAIN A HEALTHY AND PRODUCTIVE HABITAT TO PRESERVE AND PROTECT THE TRIBES' HUNTING, FISHING, TRAPPING AND GATHERING RIGHTS ON FORMER RESERVATION LAND

PERIODS OF ALLOWED USE AND MINIMUM LAKE WATER LEVELS:

UPPER KLAMATH LAKE IS TO BE MAINAINED AT THE FOLLOWING MINIMUM LEVELS AS DETERMINIED BY ELEVATION ABOVE MEAN SEA LEVEL:

ELEVATION OF LAKE SURFACE

MONTH	MINIMUM LAKE LEVELS (IN FEET ABOVE MEAN SEA LEVEL)
January 1 – March 31	Consistent with flood control purposes, raise elevation as quickly as possible to 4143.0 by March 31
April 1 – June 15	4143.0
June 16 – June 30	4142.0
July 1 – July 15	4141.5
July 16 – August 15	4140.5
August 16 – October 15	4139.5
October 16 – November 30	4140.5
December 1 – December 31	4141.0

DATE OF PRIORITY: TIME IMMEMORIAL

PLACE OF USE:

UPPER KLAMATH LAKE AND AGENCY LAKE LOCATED WITHIN PORTIONS OF THE FOLLOWING LOCATIONS:

Twp	Rng	Mer
34 S	7.5 E	WM
35 S	7.0 E	WM
35 S	7.5 E	WM
36 S	6.0 E	WM
36 S	7.0 E	WM
36 S	7.5 E	WM
37 S	7.0 E	WM
37 S	8.0 E	WM
38 S	8.0 E	WM
38 S	9.0 E	WM

End of Water Right Claim Description]

Dated at Salem, Oregon on February 28, 2014

Dwight French, Adjudicator
Klamath Basin General Stream Adjudication