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Prepared for the United States
By Andrew "Guss" Guarino, Trial Attorney
Colorado Bar No. 21864

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF KLAMATH

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
A Tributary of the Pacific Ocean

In Re:) Case No.: ~~WS1300002~~ ^{WS1300001} 
WATERS OF THE KLAMATH RIVER)
BASIN,) **NOTICE OF OBJECTION OF THE**
) **UNITED STATES OF AMERICA TO**
) **SUFFICIENCY OF SURETY AND**
) **MOTION FOR HEARING, PURSUANT**
) **TO ORCP 82F AND 82G FOR CASE 003**
)
)

INTRODUCTION

1.

Pursuant to ORCP 82F and G, the United States of America objects to the issuers or sureties in the Undertakings filed recently by the Upper Basin Contestants who are petitioners for a stay of enforcement of certain Klamath Project water rights (UBC Petitioners), and who are specifically named in Exhibit 1 to UBC's April 30, 2013, Memorandum in Support of Petition for Partial

1 Stay as to Case 003. The United States files this objection for the reason that the issuers or
2 sureties are insufficient.¹

3
4 **2.**

5 The United States requests that the Court reject the Undertakings currently filed by the UBC
6 Petitioners. If the Court does not reject the undertakings forthwith, the United States requests
7 that the Court require that UBC Petitioners post a bond, issued by a licensed surety in the amount
8 deemed appropriate by the Court after all responses are timely filed to UBC Petitioner's stay
9 petition and after review of such by the Court. The United States intends to file, pursuant to ORS
10 539.180 and Case Management Order Nos. 1 and 2, a request to be heard and a memorandum in
11 opposition to the UBC Petitioners' request for stay. This objection is not itself such a request to
12 be heard or memorandum in opposition to the petition.

13 **BACKGROUND**

14 **3.**

15 On April 30, 2013, the UBC Petitioners filed with the Court their *Petition for a Partial Stay as to*
16 *AOH Case 003 (Claims 294, 312, 317, 321-1, 321-4, 321-6, 321-9, KPCC 321-17/293/323-3)*
17 *(Petition)* and *Upper Basin Contestants' Memorandum in Support if Petition for Partial Stay for*
18 *OAH Case 003 (Memorandum).*

19 **4.**

20 On May 3, 2013, UBC Petitioners filed with the Court thirty-four documents all titled
21 *Undertaking for a Partial Stay of the Findings of Fact and Partial Order of Determination for*
22

23 ¹ The United States is responding separately to the Undertakings filed by the UBC Petitioners, *i.e.*, the petition
24 concerning Case 003, and the petition concerning certain tribal claims, because the Undertakings were filed
separately and each Undertakings concerns water rights held by different agencies of the United States.

1 *AOH Case 003 (Claims 294, 312, 317, 321-1, 321-4, 321-6, 321-9, KPCC 321-17/293/323-3)*

2 (Undertaking). Each Undertaking was associated with individual members of UBC Petitioners
3 and had attached to it a receipt for the deposit of either \$500 or \$1000. Each deposit was
4 purported to be “in lieu of a bond or irrevocable of credit (sic), as allowed by ORS 22.020” for
5 each named individual members of the UBC Petitioners.

6 **5.**

7 On May 13, 2013, UBC Petitioners filed with the Court an additional three documents also titled
8 *Undertaking for a Partial Stay of the Findings of Fact and Order of Determination for AOH*
9 *Case 003 (Claims 294, 312, 317, 321-1, 321-4, 321-6, 321-9, KPCC 321-17/293/323-3)*. Each
10 Undertaking was associated with individual members of UBC Petitioners and had attached to it a
11 receipt for the deposit of either \$500 or \$1000. Each deposit was purported to be “in lieu of a
12 bond or irrevocable of credit (sic), as allowed by ORS 22.020” for each named individual
13 members of the UBC Petitioners.

14 **6.**

15 Based on their pleadings and the receipts provided, UBC Petitioners appear to have deposited
16 with the Klamath County Treasurer’s Office several thousand dollars in cash which UBC
17 Petitioners purport is pursuant to O.R.S. 539.180 and 22.030. ORS 539.180 states that a party
18 seeking a stay of an adjudicator’s order must file “a bond or an irrevocable letter of credit issued
19 by an insured institution as defined in ORS 706.008 in the circuit court wherein the
20 determination is pending, in such amount as the judge may prescribe, conditioned that the party
21 will pay all damages that may accrue by reason of the determination not being enforced.” ORS
22 22-030(1) provides that “Any party desiring to make use of the provisions of O.R.S. 22.020 to
23 22.070 shall ... make or cause to be made, with the treasurer of the county or city within which

24 Notice of Objection of the US to Sufficiency of Surety and Motion for Hearing, Pursuant to
ORCP 82F and 82G for Case 003

1 the bond is to be furnished ... the deposit authorized by O.R.S 22.020.” UBC Petitioners assert
2 in their Memorandum that a deposit of \$500 for each member of the UBC Petitioners is
3 sufficient to satisfy a “nominal” stay bond that the Court should approve and accept and,
4 accordingly, issue an order to stay enforcement of the Case 003 water rights throughout the
5 Klamath River Basin. Memorandum at 8 – 11.

6 **DEFICIENCIES IN UNDERTAKINGS**

7 **7.**

8 UBC Petitioners’ deposits appear to be in *lieu* of the bond or an irrevocable letter of credit as
9 described by O.R.S. § 539.180; however, by describing that their May 3rd and 13th pleadings as
10 “undertakings,” UBC Petitioners suggest that its members are also proper “sureties,” either
11 singly or collectively, for the stay bond that is the subject of the Petition and for which the Court
12 has made no determination. *See* Rule 82B, ORCP (“Whenever these rules or other rule or statute
13 require or permit the giving of security by a party, and security is given in the form of a bond or
14 stipulation or *other undertaking with one or more sureties ...*.” (Emphasis added)).

15 **8.**

16 UBC Petitioners have not established that their members, either singularly or collectively, satisfy
17 the criteria of ORCP 82D(1) and (2) to establish an individual or corporate surety. ORCP
18 82D(1) provides that:

19 Each individual surety must be a resident of the state. If there is one
20 individual surety, that surety must be worth twice the sum specified in the
21 undertaking, exclusive of property exempt from execution, and over and
22 above all just debts and liabilities; where there is more than one individual
23 surety, each may be worth a lesser amount if the total net worth of all of
24 them is equal to twice the sum specified in the undertaking. No attorney at
law, peace officer, clerk of any court, or other officer of any court is
qualified to be surety on the undertaking.

1 ORCP 82D(2) provides that “A corporate surety must be qualified by law to issue surety
2 insurance as defined in ORS 731.186.”² Neither the individuals nor the corporations which filed
3 the stay petition and submitted funds to the Court have provided proof of their status to serve as
4 an individual or corporate surety, respectively. Clearly the UBC Petitioners have not shown that
5 each member meets the requirements of the rules. Absent such a demonstration, the UBC
6 Petitioners’ Undertakings are invalid. Moreover, UBC Petitioners specifically do not condition
7 their purported security by providing that they are jointly and severally liable to “pay all
8 damages that may accrue by reason of the determination not being enforced” as required by
9 O.R.S. 539.180. The United States is rightfully concerned that not all those filing as individuals
10 may be a resident of the state or have a net worth, exclusive of property exempt from execution,
11 sufficient to cover the substantial damages that a stay will cause. Each UBC Petitioner must
12 demonstrate that it has complied with ORCP 82F and that it is qualified to act as an insurer or
13 surety for the damages that a stay will cause; no UBC Petitioner has done so. Therefore, the
14 United States provide this Notice of Objection to the sufficiency of such insurers or sureties.
15 ORCP 82F.

16 CONCLUSION

17 9.

18 As previously instructed by the Court, the United States will respond to the substance of the
19 Petition and Memorandum on or before June 17, 2013. *See Case Management Order #1 at 2*
20 (“Any party desiring to be heard on a petition must file a document entitled “Request To Be

21 _____
22 ² Pursuant to ORS 731.186, “Surety insurance” means insurance guaranteeing the fidelity of persons holding places
23 of trust, the performance of duties, contracts, bonds and undertakings, including the signing thereof as surety, and
insuring the performance of obligations of employers under workers’ compensation laws by surety bond.

1 Heard On [Petitioner's] Petition For Stay" within 30 days from the date the party was served with
2 the petition.") and Case Management Order #2 at 2 ("A party must file their written
3 memorandum of points and authorities within 14 days of the time they file their Petition for Stay
4 or Request to be Heard."). In the anticipated response, the United States will describe how,
5 contrary to the assertions of the Memorandum, the Court has discretion to deny the request for a
6 stay bond. Further, in the event that this Court ultimately considers allowing a stay, the United
7 States will present substantial argument and evidence establishing the substantial damages that
8 will be suffered in the event that a stay bond is ordered and justifying that a substantial bond be
9 ordered.

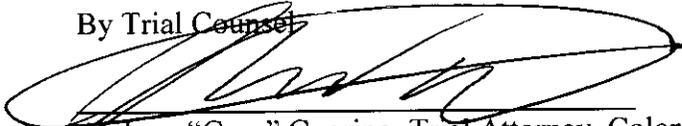
10 **10.**

11 If the Court does not outright reject UBC Petitioners' Undertakings, the United States requests,
12 pursuant to ORCP 82F and G, a hearing as to the sufficiency of the surety, or makers of the
13 undertakings. At such hearing, UBC Petitioners must demonstrate full compliance with ORCP
14 82D and 82G (demonstrating "pecuniary responsibility" for the undertaking or bond).

15
16 Respectfully submitted this 15th day of May, 2013.

17 Ignacia S. Moreno
18 Assistant Attorney General
19 Environment & Natural Resources Division

20 By Trial Counsel


21 Andrew "Guss" Guarino, Trial Attorney, Colorado
22 Bar No. 21864

23 Vanessa Boyd Willard, Trial Attorney, Colorado
24 Bar No. 30278

Bruce D. Bernard, Trial Attorney, Colorado Bar No.
12166

David W. Harder, Trial Attorney, Kansas Bar No.
13306

Notice of Objection of the US to Sufficiency of Surety and Motion for Hearing, Pursuant to
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U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources and Natural Resources Sections
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
Telephone: 303.844.1343
Telephone: 303.844.1353
Telephone: 303.844.1361
Telephone: 303.844.1372
Fax: 303.844.1350
Guss.Guarino@usdoj.gov
Vanessa.Willard@usdoj.gov
Bruce.Bernard@usdoj.gov
David.Harder@usdoj.gov

s/ Barbara Scott-Brier

Barbara Scott-Brier, Special Attorney, Iowa Bar
No. AT0007090
U.S. Department of Justice
Environment & Natural Resources Division
Office of the Solicitor, Pacific Northwest Region
U.S. Department of the Interior
800 SW Broadway Street, Suite 605
Portland, Oregon 97205
Telephone: 503.231.2139
Fax: 503.231.2166
barbara.scott-brier@sol.doi.gov

s/ Stephen R. Palmer

Stephen R. Palmer, Special Attorney,
Washington Bar No. 17,404 and California Bar No.
241,089
U.S. Department of Justice
Environment & Natural Resources Division
Office of Solicitor, Pacific Southwest Region
2800 Cottage Way, E-1712
Sacramento, California 95825
Telephone: 916.978.5683
Fax: 916.978.5694
steve.palmer@sol.doi.gov

**ATTORNEYS FOR THE UNITED STATES OF
AMERICA**