

STATE OF OREGON
CLERK OF DISTRICT COURT

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Prepared for the United States
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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
WATERS OF THE KLAMATH RIVER)
BASIN,) **NOTICE OF OBJECTION OF THE**
) **UNITED STATES OF AMERICA AND**
) **KLAMATH TRIBES TO SUFFICIENCY**
) **OF SURETY AND MOTION FOR**
) **HEARING PURSUANT TO ORCP 82F**
) **AND 82G FOR CERTAIN TRIBAL**
) **CLAIMS**

1.

Pursuant to ORCP 82F and G, the United States of America on behalf of the Bureau of Indian Affairs as trustee for the Klamath Tribes and the Klamath Tribes hereby serve notice that they object to the sufficiency of the issuers or sureties in the Undertakings filed recently by the Upper Basin Contestants who are petitioners for a stay of enforcement of certain Tribal water rights (UBC Petitioners), and who are specifically named in Exhibit 1 to UBC's April 30, 2013,

1 Memorandum in Support of Petition for Partial Stay of Certain Tribal Claims.¹ ORCP 82F
2 requires that notice of objection to the sufficiency of issuers or sureties be served within 10 days
3 after receipt of a copy of the undertaking; thus the United States and Klamath Tribes are required
4 to file this notice in advance of their Requests to be Heard in response to UBC Petitioners'
5 Petition for Partial Stay of Certain Tribal Claims. The United States and Klamath Tribes will file
6 their Requests to Be Heard and memorandum of points and authorities in support thereof in
7 accordance with the deadlines specified in Case Management Order #1 and Case Management
8 Order #2, and in this Notice only address the narrow issue of the insufficiency of issuers or
9 sureties required to be addressed within the 10-day timeframe by ORCP 82F.

10 **2.**

11 The United States and the Klamath Tribes request that the Court reject the Undertakings filed by
12 the UBC Petitioners due to the insufficiency of the insurers or sureties as described herein. If the
13 Court does not outright reject UBC Petitioners' Undertakings for this reason, the United States
14 and Klamath Tribes request, pursuant to ORCP 82F and G, a hearing as to the sufficiency of the
15 surety, or makers of the undertakings, as described in paragraph 10 below.

16 **3.**

17 On April 30, 2013, the UBC Petitioners filed with the Court their *Petition for a Partial Stay of*
18 *Certain Tribal Claims* (Petition) and *Upper Basin Contestants' Memorandum in Support of*
19 *Petition for Partial Stay of Certain Tribal Claims* (Memorandum).

20 //

21 //

22
23 ¹ The United States is responding separately to the two undertakings filed by the UBC Petitioners because the
24 undertakings were filed separately and each undertaking concerns water rights held by different agencies of the
United States.

1 4.

2 On May 3, 2013, UBC Petitioners filed with the Court thirty-nine documents all titled
3 *Undertaking for a Partial Stay of the Findings of Fact and Partial Order of Determination as to*
4 *Certain Tribal Claims* (Undertaking). Each Undertaking was associated with individual
5 members of UBC Petitioners and had attached to it a receipt for the deposit of either \$500 or
6 \$1000. Each deposit was purported to be “in lieu of a bond or irrevocable letter of credit, as
7 allowed by ORS 22.020” for each named individual members of the UBC Petitioners.

8 5.

9 On May 13, 2013, UBC Petitioners filed with the Court an additional four documents also titled
10 *Undertaking for a Partial Stay of the Findings of Fact and Order of Determination as to Certain*
11 *Tribal Claims*. Each Undertaking was associated with individual members of UBC Petitioners
12 and had attached to it a receipt for the deposit of either \$500 or \$1000. Each deposit was
13 purported to be “in lieu of a bond or irrevocable letter of credit, as allowed by ORS 22.020” for
14 each named individual members of the UBC Petitioners.

15 6.

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

1 22.070 shall ... make or cause to be made, with the treasurer of the county or city within which
2 the bond is to be furnished ... the deposit authorized by O.R.S 22.020.” UBC Petitioners assert
3 in their Memorandum that a deposit of \$500 for each member of the UBC Petitioners is
4 sufficient to satisfy a “nominal” stay bond that the Court should approve and accept and,
5 accordingly, issue an order to stay enforcement of the Tribal water rights throughout the Klamath
6 River Basin. Memorandum at 16 – 23.

7 7.

8 UBC Petitioners assert that their deposits are in *lieu* of the bond or an irrevocable letter of credit
9 as described by ORS 539.180; however, by describing 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* ORCP 82B (“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

3 Neither the individuals nor the corporations which filed the stay petition and submitted funds to
4 the Court have provided proof of their status to serve as an individual or corporate surety,
5 respectively. Clearly the UBC Petitioners have not shown that each member meets the
6 requirements of the rules. Absent such a demonstration, the UBC Petitioners’ Undertakings are
7 invalid. The United States and the Klamath Tribes are rightfully concerned that not all those
8 filing as individuals may be a resident of the state or have a net worth, exclusive of property
9 exempt from execution, sufficient to cover the substantial damages that a stay will cause. Each
10 UBC Petitioner must demonstrate that it has complied with ORCP 82F and that it is qualified to
11 act as an insurer or surety for the damages that a stay will cause; no UBC Petitioner has done so.
12 Therefore, the United States and Tribes provide this Notice of Objection to the sufficiency of
13 such insurers or sureties. ORCP 82F.

14 **9.**

15 As previously instructed by the Court, the United States and the Klamath Tribes will respond to
16 the substance of the Petition and Memorandum on or before June 17, 2013. *See Case*
17 *Management Order #1 at 2* (“Any party desiring to be heard on a petition must file a document
18 entitled “Request To Be Heard On [Petitioner’s] Petition For Stay” within 30 days from the date
19 the party was served with the petition.”) and *Case Management Order #2 at 2* (“A party must file
20 their written memorandum of points and authorities within 14 days of the time they file their
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 Petition for Stay or Request to be Heard.”). In the anticipated response, the United States and the
2 Klamath Tribes will describe, *inter alia*, how, contrary to the assertions of the Memorandum, the
3 Court has discretion to, and should, deny the request for a stay bond. Further, in the event that
4 this Court ultimately considers allowing a stay, the United States and the Klamath Tribes will
5 present substantial argument and evidence establishing the substantial damages that will be
6 suffered in the event that a stay bond is ordered and justifying that a substantial bond be ordered.

7 **10.**

8 If the Court does not outright reject UBC Petitioners’ Undertakings for the reasons described
9 herein, the United States and Klamath Tribes request, pursuant to ORCP 82F and G, a hearing as
10 to the sufficiency of the surety, or makers of the undertakings. At such hearing, UBC Petitioners
11 must demonstrate full compliance with ORCP 82D and 82G (demonstrating “pecuniary
12 responsibility” for the undertaking or bond).

13
14 Respectfully submitted this 15th day of May, 2013.

15
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17
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24 U.S. Department of Justice

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