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Circuit Court of the State of Oregon

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July 15, 2013

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Re: In the Matter of the Waters of the Klamath River Basin
Case No: WS1300001/WS1300002/WS1300003 and WS 1300004

Dear Counsel:

INTRODUCTION AND BACKGROUND

These petitions pit upstream and downstream farmers, ranchers, and others against each other. After about 38 years of work, an order was filed March 7, 2013 that determines the rights of over 730 claims to the waters of the Klamath Basin.

Now, around 40 upstream farmers, ranchers, and businesses want parts of that order to be stayed and not in effect. Many disagree, including 15 downstream irrigation districts that serve hundreds of farmers and ranchers in the Klamath Basin, the Medford and Rogue River Irrigation Districts, the State of Oregon, the Klamath Tribe and the United States. The proposed stays could be in effect until this case is concluded in the Circuit Court which the parties estimate would be 5-10 years.

Four requests for stays have been filed. In cases WS1300001 and WS1300002, upstream farmers and ranchers want to limit the water that the order says will go to downstream farmers, ranchers and the Tribe and have that water provided to only them. In case WS1300003, an upstream ranch seeks to stop the enforcement of certain claims granted by the order. In case WS1300004, an upstream ranch is asking to stay the part of the order that denied his own claim to water.

Of course the court's job is nothing more and nothing less than to follow the law.

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SUMMARY OF DECISION

The requests for a stay in cases WS1300001 and WS1300002 are denied because, contrary to law, they would elevate petitioners over everyone so they would be the only ones to get extra water if downstream rights are curtailed as they request.

I also decide that as a condition of any stay, the party seeking it must agree to “pay all damages that may accrue by reason of the determination not being enforced.” ORS 539.180 This obligation is in addition to the bond and the amount of the bond does not limit or cap that obligation. In case WS1300003 Mr. Orford should notify me if his client would like to pursue or withdraw its petition for stay in view of this ruling. His client may want to withdraw its request for a stay because this ruling may make it subject to a significant liability. If it would like to pursue its request for a stay, I will then consider the many other arguments relating to whether the stay is mandatory or discretionary and will decide if one is to be granted. If one is granted, we will then set and conduct a further hearing on the amount of the bond.

The parties in case WS1300004 have the right to file further briefs and present arguments so I make no rulings on it at this time. I have set it for a status conference for July 24th, 2013 at 1:30 p.m. when we will set a time for oral arguments.

EXPLANATION IN CASES WS1300001 AND WS1300002

In cases WS1300001 and WS1300002 the petitioners ask for a stay of certain water rights but that these rights be stayed only as to themselves. They rely upon the language of ORS 539.180 that says that the order filed March 7, 2013 can be stayed “in part...” The question is what is meant by the words “in part.” When interpreting a statute, “[t]he first step remains an examination of text and context.” *State v. Gaines*, 346 Or. 160 (2009).

Like most western states, Oregon adheres to the water law known as the prior appropriation doctrine which generally provides that a person may acquire a right to appropriate, or use, water “on a ‘first come, first served’ basis by diverting water and applying it to a beneficial use.” *Teel Irrigation District v. Water Resources Dept of the State of Oregon*, 323 Or. 663, 666-667 (1996). That law provides context for ORS 539.180.

The effect of these proposed stays is to give the petitioners alone the benefit of the water right that was stayed. That violates the prior appropriation doctrine because those with more senior and better rights would not get any part of the water as they should. Thus, the term “in part” does not mean that a water right can be stayed only for the benefit of certain other water users as requested.

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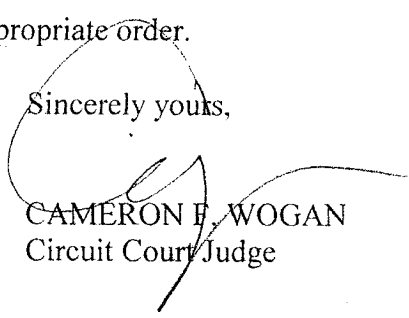
EXPLANATION ABOUT THE OBLIGATION TO PAY ALL DAMAGES

The law generally provides that someone who wants to stay or stop the effect of a lawful order or ruling while they appeal it must be prepared to pay for harm caused to the other party by the stay. Issues have developed about how those damages are paid.

To get a stay a party must file a bond or irrevocable letter of credit "...in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced." ORS 539.180 The petitioners want their potential liability to be limited to the amount of the bond. I now conclude that the obligation to pay damages is in addition to the bond and the amount of the bond is not a limit or cap to that promise because that is simply what the statute says. ORS 539.180; *State v. Gaines*, 346 Or. 160 (2009). Furthermore, three times the Oregon legislature has rejected proposed amendments that would have created such a cap. The effect of this law is straight forward: If a water user is wrongfully harmed because of a stay, they should get paid for their entire loss.

Mr. Simmons should present an appropriate order.

Sincerely yours,


CAMERON F. WOGAN
Circuit Court Judge

CFW/bad