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VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
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**Re: PacifiCorp's Memorandum in Opposition to KWUA's Motion to Admit Exhibit
and Estop PacifiCorp
Docket UE 171**

Enclosed for filing is PacifiCorp's Memorandum in Opposition to KWUA's Motion to Admit Exhibit and Estop PacifiCorp in the above-referenced docket. PacifiCorp is aware that the Commission issued its order in UE 171 earlier today. Because it is unclear whether this order resolves KWUA's motion, PacifiCorp is filing this response. A copy of this filing was served on all parties to this proceeding as indicated on the attached service list.

Very truly yours,

A handwritten signature in black ink, appearing to be "Katherine A. McDowell", written over a horizontal line.

Katherine A. McDowell

KAM:knp
Enclosure
cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 171

In the Matter of PACIFIC POWER &
LIGHT (d/b/a PacifiCorp) Klamath Basin
Irrigation Rates

PACIFICORP'S MEMORANDUM IN
OPPOSITION TO KWUA'S MOTION TO
ADMIT EXHIBIT AND ESTOP
PACIFICORP

Pursuant to OAR 860-013-0050, PacifiCorp respectfully submits this Memorandum in Opposition to the Klamath Water Users Association ("KWUA") Motion to Admit Exhibit and Estop PacifiCorp ("KWUA's Motion"). For the reasons set forth below, the Commission should deny KWUA's Motion.

KWUA's Motion is directed at obtaining a Commission order that PacifiCorp be estopped from asserting that the on-project irrigators are not third-party beneficiaries with respect to power. As a basis for its estoppel argument, KWUA seeks to have added to the record in this case PacifiCorp's Answering Brief in *Klamath Water Users Protective Ass'n v. Patterson*, 204 F3d 1206 (9th Cir 200) ("PacifiCorp's Brief"). More specifically, KWUA quotes a particular portion of PacifiCorp's Brief and argues that "the doctrine of judicial estoppel operates to bar a party from assuming a position in a legal proceeding that is inconsistent with the position that the same party has successfully asserted in a different judicial proceeding." KWUA Motion at 3. Contrary to KWUA's argument, the doctrine of judicial estoppel is not applicable in this case.

The doctrine of judicial estoppel described by KWUA was stated in *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599 609, 892 P2d 683 (1995) as a doctrine which "may be invoked under certain circumstances."¹ *Id.* For the doctrine to apply, the position previously

¹ Inasmuch as the doctrine, by its terms, is not applicable in this case for the reasons discussed, PacifiCorp does not address whether this case otherwise presents the "certain circumstances" under which the doctrine may apply.

1 asserted must have been *successfully* asserted. The position which KWUA claims PacifiCorp
2 successfully asserted in *Patterson* was a statement that a promise of 5 mill on-peak power
3 under Article 5 of the USBR Contract “confers on third parties an intentional, direct, and
4 specifically identifiable benefit: the right to electric power at a rate better than [sic] the
5 preexisting market rate.”² KWUA Motion at 2. KWUA has not shown, and cannot show,
6 that PacifiCorp successfully asserted the quoted position in *Patterson*. The 9th Circuit’s
7 analysis in the *Patterson* decision regarding the third-party beneficiary issue addresses
8 Articles 2, 6 and 15 of the USBR Contract, but *nowhere* does the Court even mention, let
9 alone rely on, the quoted position from PacifiCorp’s Brief.

10 In light of the inability to show that the quoted position was successfully asserted,
11 KWUA resorts to, and asks this Commission to rely on, speculation: “The Ninth Circuit
12 *apparently* agreed with PacifiCorp, as it determined that the on-project irrigators—the
13 KWUA members—are not third-party beneficiaries of the 1956 Contract with respect to
14 water.” KWUA Motion at 2 (emphasis added). The Commission should reject KWUA’s
15 invitation to apply the doctrine of judicial estoppel based purely on speculation that the Ninth
16 Circuit actually analyzed the third-party beneficiary issue in a manner not even referenced in
17 its written opinion.

18 Further, KWUA’s request that the Commission apply judicial estoppel to preclude
19 PacifiCorp from asserting that the on-project irrigators are not third-party beneficiaries under
20 the USBR Contract with respect to power is inappropriate because it assumes another
21 element of third-party beneficiary status which has not been addressed: the requirement that
22 when a government entity contracts with a nongovernment promisor (such as Copco) for the
23 provision of a public service (such as operation of the Link River Dam), public beneficiaries

24 _____
25 ² The 5 mill on-peak rate is applicable under Schedule “B” of the USBR Contract
26 “only to the pumps operated by the United States,” not other on-project irrigators. *See*
Affidavit of Laura Beane, Exhibit 1, submitted with PacifiCorp’s Motion for Summary
Disposition.

1 (such as KWUA) who seek to enforce a right against the promisor must show that the
2 contract gives them a direct right of enforcement or compensation.³ See e.g., *State of*
3 *Montana v. United States*, 124 F3d 1269, 1273 n. 6 (Fed Cir 1997). The USBR Contract
4 contains no provision granting KWUA a right of enforcement, and in fact states in Article 15
5 that the contract “binds and inures to the benefit of the parties hereto, their successors and
6 assigns, including without limitation any water users’ organization or similar group which
7 may succeed either by assignment or by operation of law to the rights of the United States
8 hereunder.” Pursuant to those terms, the USBR Contract does not inure to the benefit of
9 KWUA in the absence of it being a successor or assign of the United States, which it is not.⁴

10 Application of the doctrine of judicial estoppel also would be inappropriate because
11 the question of KWUA’s status as an intended third-party beneficiary under the USBR
12 Contract is not an issue that has been presented for the Commission’s decision. The issue
13 arises now only because KWUA takes exception to PacifiCorp’s citation to *Patterson*
14 regarding KWUA’s lack of third-party beneficiary status.⁵ KWUA’s focus on PacifiCorp’s
15 citation to *Patterson* fails to recognize the context in which the citation was made, and is
16 accordingly misdirected. The citation was made in the context of PacifiCorp’s argument that
17 KWUA cannot rely on a provision in PacifiCorp’s FERC license that is irrelevant to the issue
18 in this case with respect to rates for customers other than the United States Bureau of
19 Reclamation and Fish and Wildlife Service (collectively, the “Bureau”). The point was that
20 KWUA cannot use its members’ receipt of discounted rates specified in the USBR Contract
21 to leverage itself into the same contract position as the Bureau with regard to Section 35 of
22 the license.

23 _____
24 ³ Although not mentioned by KWUA, PacifiCorp also asserted this argument in its
25 Brief to the Ninth Circuit.

26 ⁴ See *Patterson* at 1212.

⁵ As noted by PacifiCorp’s counsel at oral argument, the *Patterson* holding was
specifically with respect to water rights.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document in docket UE 171 on the following named person(s) on the date indicated below by e-mail where available, or by first-class mail, addressed to said person(s) at his or her last-known address indicated below.

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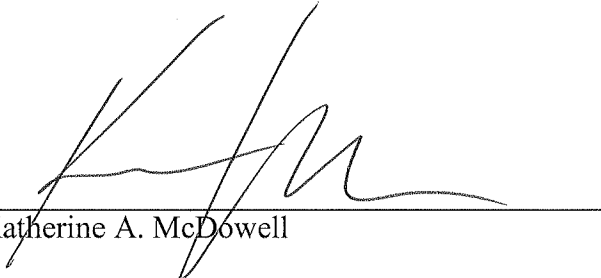
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DATED: June 7, 2005.


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