

Ref. No. 271 F 000 40007
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE STATE OF OREGON
WATER RESOURCES DEPARTMENT

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

WaterWatch of Oregon, Inc.; John M. Mosby; Marilyn Mosby; Boyd P. Braren; Boyd P. Braren Trust; Roger Nicholson; Roger Nicholson Cattle Co.; Lloyd Nicholson Trust; Dorothy Nicholson Trust; Richard Nicholson; Jim McAuliffe; McAuliffe Ranches; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Joe McAuliffe Company; Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch; Dave Wood; Kenneth Zamzow; Anita Nicholson; William S. Nicholson; John B. Owens; Kenneth L. Owens; William L. Brewer; Mary Jane Danforth; Jane M. Barnes; Franklin Lockwood Barnes, Jr.; Jacob D. Wood; Elmore E. Nicholson; Mary Ann Nicholson; Gerald H. Hawkins; Hawkins Cattle Co.; Owens & Hawkins; Harlow Ranch; Terry M. Bengard; Tom Bengard; Dwight T. Mebane; Helen Mebane; Walter Seput; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams; River Spring Ranch; Pierre A. Kern Trust; William V. Hill; Lillian M. Hill; Carolyn Obenchain; Lon Brooks; Newman Enterprise; William C. Knudtsen; Wayne Jacobs; Margaret Jacobs; Robert Bartell; Rodney Z. James; Hilda Francis for Francis Loving Trust; William J. Rust; Ethel J. Rust; James R. Goold for Tillie Goold Trust; Duane F. Martin; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Modoc Lumber Co.; Bradley S. Luscombe; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC;

Contestants,

vs.

Unites States of America, Fish and Wildlife Service,
Claimant/Contestant

**STIPULATION TO
ENTRY OF
[SUGGESTED]
PROPOSED ORDER ON
UNITED STATES'
FEDERAL RESERVED
WATER RIGHT CLAIM
FOR KLAMATH
MARSH NATIONAL
WILDLIFE REFUGE**

Case No.: 271
Claim: 300
Contests: 2866, 3112,
3289, 3660,
and 3992

Claimant, the United States of America, on behalf of the Department of the Interior, Fish

and Wildlife Service (the “United States”), Contestants, John M. Mosby and Marilyn Mosby, Robert M. Cook, TPC, LLC, those members of the Nicholson Group^{1/} identified on page 6 below, and the Klamath Project Water Users^{2/} (the United States and Contestants collectively referred to as the “Parties”), and the Oregon Water Resources Department (“OWRD”), hereby agree and stipulate, and request the Administrative Law Judge and the Adjudicator to resolve the

^{1/} The group of contestants that filed Contest No. 3289, generally known as the Nicholson Group, includes Roger Nicholson, Roger Nicholson Cattle Co., Lloyd Nicholson Trust, Dorothy Nicholson Trust, Richard Nicholson, Jim McAuliffe, McAuliffe Ranches, Maxine Kizer, Ambrose McAuliffe, Susan McAuliffe, Joe McAuliffe Company, Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch, Dave Wood, Kenneth Zamzow, Anita Nicholson, Wm. S. Nicholson, John B. Owens, Kenneth Owens, Wm. L. Brewer, Mary Jane Danforth, Jane M. Barnes, Franklin Lockwood Barnes, Jr., Jacob D. Wood, Elmore E. Nicholson, Mary Ann Nicholson, Gerald H. Hawkins, Hawkins Cattle Co., Owens & Hawkins, Harlowe Ranch, Terry M. Bengard, Tom Bengard, Dwight T. Mebane, Helen Mebane, Walter Seput, Clifford Rabe, Tom Griffith, William Gallagher, Thomas William Mallams, River Springs Ranch, Pierre A. Kern Trust, William V. Hill, Lillian M. Hill, Carolyn Obenchain, Lon Brooks, Newman Enterprise, William C. Knudtsen, Wayne Jacobs, Margaret Jacobs, Robert Bartell, Rodney Z. James, Hilda Francis for Francis Loving Trust, William J. Rust, Ethel J. Rust, James R. Goold for Tillie Goold Trust, and Duane F. Martin.

The members of the Nicholson Group listed on page 6 below appeared through their attorney, Carol DeHaven Skerjanec, and have joined in this Stipulation to Entry of [Suggested] Proposed Order. The remaining members of that group of Contestants, i.e., Dave Wood, Mary Jane Danforth, Jacob D. Wood, Dwight T. Mebane, Helen Mebane, Walter Seput, William C. Knudsen, William J. Rust and Ethel J. Rust, have not further appeared or participated in these proceedings and have not joined in or opposed this Stipulation to Entry of [Suggested] Proposed Order.

^{2/} The group of contestants generally known as the Klamath Project Water Users includes Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Co., Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Modoc Lumber Co, Bradley S. Luscombe, Berlva Pritchard, Don Vincent, Randy Walthall, Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Company, and Collins Products, LLC. Subsequently, Berlva Pritchard and Don Vincent withdrew from Contest 3660 filed by KPWU.

above-captioned claim and contests as follows:

1. The Parties hereby move the Administrative Law Judge to resolve this matter by entering the attached [Stipulated Suggested] Proposed Order on United States' Federal Reserved Water Right Claim for the Klamath Marsh National Wildlife Refuge (Ref. No. 271 F 40008).

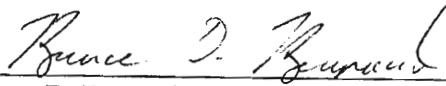
2. OWRD adjudication staff hereby recommends to the Adjudicator that this Claim 300 be approved in the Findings of Fact and Order of Determination issued by the Adjudicator in accordance with the terms of the attached [Stipulated Suggested] Proposed Order.

3. The Parties agree that they will not file exceptions in the Circuit Court to the Findings of Fact and Order of Determination issued by the Adjudicator as long as it is consistent with the terms of the [Stipulated Suggested] Proposed Order. If the Findings of Fact and Order of Determination does not conform to the terms of the [Stipulated Suggested] Proposed Order, the Parties reserve any rights they may have to file exceptions to the Findings of Fact and Order of Determination as to this Claim 300 in the Circuit Court for Klamath County, and reserve any rights that they may have to participate in any future proceedings authorized by law concerning Claim 300.

4. The Parties agree that this Stipulation has been reached through good faith negotiations for the purpose of resolving a disputed claim. The Parties agree that this Stipulation, the [Stipulated Suggested] Proposed Order and the Proposed Order entered by the Administrative Law Judge in this case shall not be deemed to establish precedent with respect to any other claim or contest in the Klamath Basin Water Rights Adjudication.

Stipulated this ____ day of December, 2004.

Stipulated this 1st day of ~~December~~ ^{January, 2005} 2004.

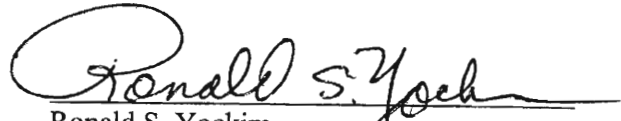


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Barbara Scott-Brier
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U.S. Department of Justice
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500 NE Multnomah #607
Portland, Oregon 97232
(503) 231-2139

ATTORNEYS FOR CLAIMANT,
UNITED STATES OF AMERICA,
on behalf of the Department of the Interior,
Fish and Wildlife Service

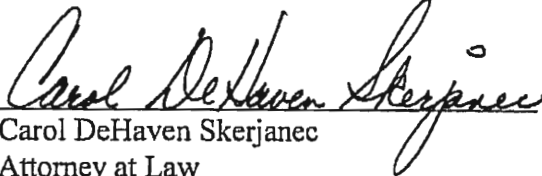
Stipulated this 23rd day of December, 2004.



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ATTORNEY FOR CONTESTANTS, JOHN
M. MOSBY AND MARILYN MOSBY

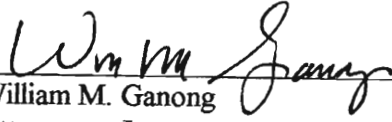
Stipulated this 31 day of ~~December~~, 2004. ^{JANUARY 5}



Carol DeHaven Skerjanec
Attorney at Law
P.O. Box 220
Vale, Oregon 97918
(541) 473-3141

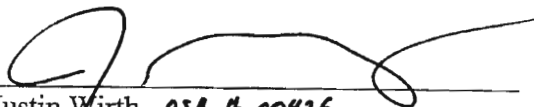
ATTORNEY FOR CONTESTANTS,
ROBERT M. COOK, TPC, LLC, AND THE
FOLLOWING MEMBERS OF THE
NICHOLSON GROUP: Roger Nicholson,
Roger Nicholson Cattle Co., Lloyd
Nicholson Trust, Dorothy Nicholson Trust,
Richard Nicholson, Jim McAuliffe,
McAuliffe Ranches, Maxine Kizer,
Ambrose McAuliffe, Susan McAuliffe, Joe
McAuliffe Company, Kenneth L. Tuttle and
Karen L. Tuttle dba Double K Ranch,
Kenneth Zamzow, Anita Nicholson, Wm. S.
Nicholson, John B. Owens, Kenneth Owens,
Wm. L. Brewer, Jane M. Barnes, Franklin
Lockwood Barnes, Jr., Elmore E. Nicholson,
Mary Ann Nicholson, Gerald H. Hawkins,
Hawkins Cattle Co., Owens & Hawkins,
Harlowe Ranch, Terry M. Bengard, Tom
Bengard, Walter Seput, Clifford Rabe, Tom
Griffith, William Gallagher, Thomas
William Mallams, River Springs Ranch,
Pierre A. Kern Trust, William V. Hill,
Lillian M. Hill, Carolyn Obenchain, Lon
Brooks, Newman Enterprise, Wayne Jacobs,
Margaret Jacobs, Robert Bartell, Rodney Z.
James, Hilda Francis for Francis Loving
Trust, James R. Goold for Tillie Goold
Trust, and Duane F. Martin

Stipulated this 24th day of December, 2004.


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ATTORNEY FOR CONTESTANTS,
KLAMATH PROJECT WATER USERS

Stipulated this 27th day of ~~December~~, 2004. *January, 2005*

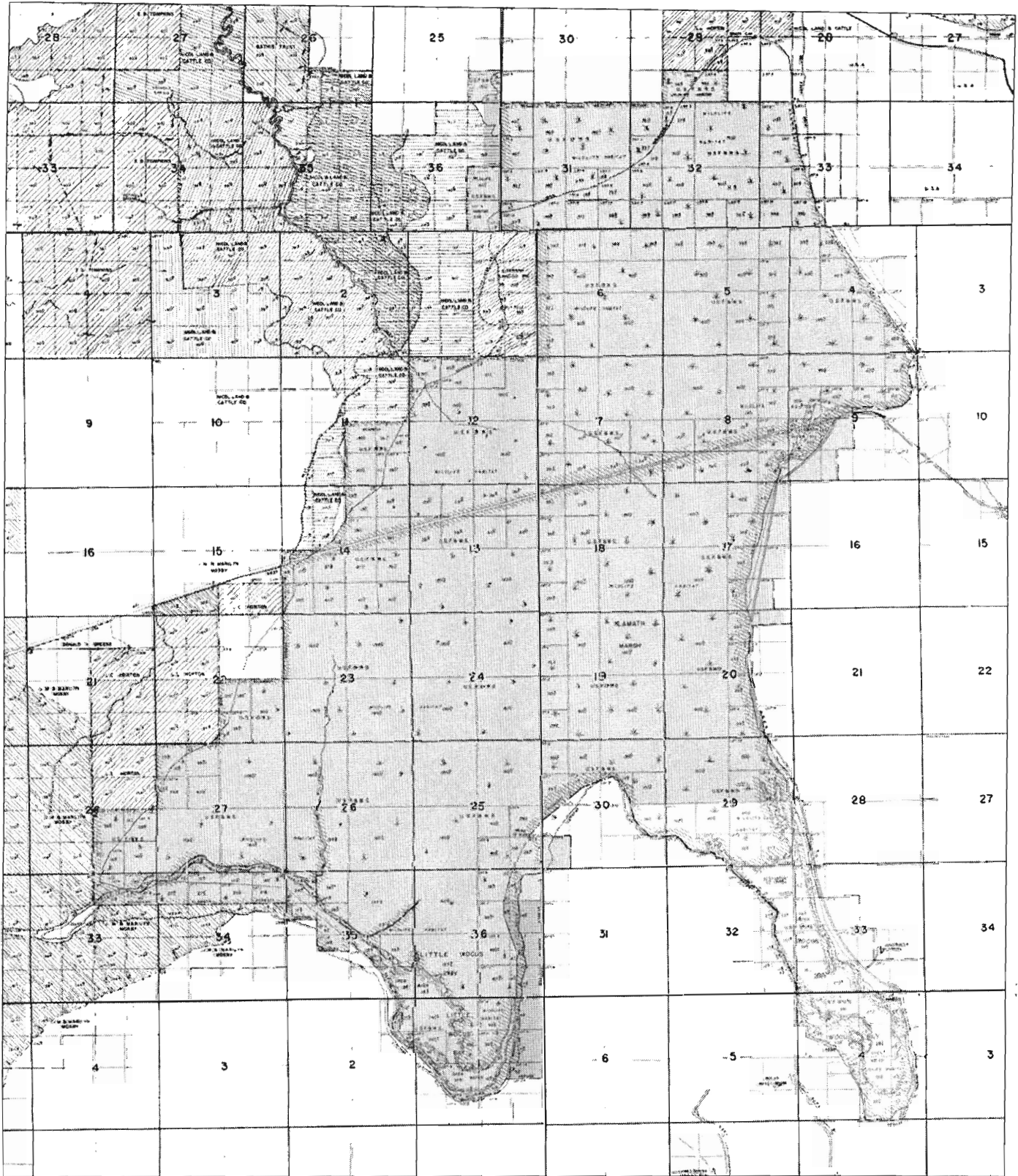

Justin Wirth OSB # 00426
Oregon Department of Justice
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ATTORNEY FOR OREGON WATER
RESOURCES DEPARTMENT



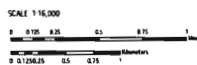
U.S. Fish & Wildlife Service
Klamath Marsh National Wildlife Refuge

Attachment 2
Place of Use Under Claim No. 300 within the Adair Lands



Base map: Oregon Water Resources Department
 File: 811_ADA_Clam300_AcquisitionDate.MXD
 Plot: 1/21/04 by Dan Crowe

Water address for Adair
 divisions of Engineering
 104179, 218, 219, 220
 104179, 218, 219, 220



Adair Lands by Priority Date

- 9/7/1960
- 8/10/1972
- 2/21/1977
- 1/22/1980

All of the information on this map was derived from different sources of varying scales and accuracies. The purpose of this map is to identify the general location of the water right. It is not intended to provide information relative to the location of property owner's boundary lines.

ATTACHMENT 2



ITEM CODE 126
 100001
 1/22/04

Ref. No. 271 F 000 40008
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE STATE OF OREGON
WATER RESOURCES DEPARTMENT

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

WaterWatch of Oregon, Inc.; John M. Mosby; Marilyn Mosby; Boyd P. Braren; Boyd P. Braren Trust; Roger Nicholson; Roger Nicholson Cattle Co.; Lloyd Nicholson Trust; Dorothy Nicholson Trust; Richard Nicholson; Jim McAuliffe; McAuliffe Ranches; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Joe McAuliffe Company; Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch; Dave Wood; Kenneth Zamzow; Anita Nicholson; William S. Nicholson; John B. Owens; Kenneth L. Owens; William L. Brewer; Mary Jane Danforth; Jane M. Barnes; Franklin Lockwood Barnes, Jr.; Jacob D. Wood; Elmore E. Nicholson; Mary Ann Nicholson; Gerald H. Hawkins; Hawkins Cattle Co.; Owens & Hawkins; Harlow Ranch; Terry M. Bengard; Tom Bengard; Dwight T. Mebane; Helen Mebane; Walter Seput; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams; River Spring Ranch; Pierre A. Kern Trust; William V. Hill; Lillian M. Hill; Carolyn Obenchain; Lon Brooks; Newman Enterprise; William C. Knudtsen; Wayne Jacobs; Margaret Jacobs; Robert Bartell; Rodney Z. James; Hilda Francis for Francis Loving Trust; William J. Rust; Ethel J. Rust; James R. Goold for Tillie Goold Trust; Duane F. Martin; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Modoc Lumber Co.; Bradley S. Luscombe; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC;

Contestants,

**[STIPULATED
SUGGESTED]
PROPOSED ORDER ON
UNITED STATES'
FEDERAL RESERVED
WATER RIGHT CLAIM
FOR KLAMATH
MARSH NATIONAL
WILDLIFE REFUGE**

Case No.: 271
Claim: 300
Contests: 2866, 3112,
3289, 3660,
and 3992

vs.

Unites States of America, Fish and Wildlife Service,
Claimant/Contestant

Claimant, the United States of America, on behalf of the Department of the Interior, Fish

and Wildlife Service (the “United States”), Contestants, John M. Mosby and Marilyn Mosby, Robert M. Cook, TPC, LLC, those members of the Nicholson Group^{1/} identified on page 15 below, and the Klamath Project Water Users^{2/} (the United States and Contestants referred to as the “Parties”), and the Oregon Water Resources Department (“OWRD”), file this [Stipulated Suggested] Proposed Order on United States’ Federal Reserved Water Right Claim for Klamath Marsh National Wildlife Refuge (sometimes referred to herein as the “Refuge”) and hereby move the Administrative Law Judge to resolve this matter by entering this [Stipulated Suggested] Proposed Order.

[STIPULATED SUGGESTED] PROPOSED ORDER

^{1/} The group of contestants generally known as the Nicholson Group includes Roger Nicholson, Roger Nicholson Cattle Co., Lloyd Nicholson Trust, Dorothy Nicholson Trust, Richard Nicholson, Jim McAuliffe, McAuliffe Ranches, Maxine Kizer, Ambrose McAuliffe, Susan McAuliffe, Joe McAuliffe Company, Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch, Dave Wood, Kenneth Zamzow, Anita Nicholson, Wm. S. Nicholson, John B. Owens, Kenneth Owens, Wm. L. Brewer, Mary Jane Danforth, Jane M. Barnes, Franklin Lockwood Barnes, Jr., Jacob D. Wood, Elmore E. Nicholson, Mary Ann Nicholson, Gerald H. Hawkins, Hawkins Cattle Co., Owens & Hawkins, Harlowe Ranch, Terry M. Bengard, Tom Bengard, Dwight T. Mebane, Helen Mebane, Walter Seput, Clifford Rabe, Tom Griffith, William Gallagher, Thomas William Mallams, River Springs Ranch, Pierre A. Kern Trust, William V. Hill, Lillian M. Hill, Carolyn Obenchain, Lon Brooks, Newman Enterprise, William C. Knudtsen, Wayne Jacobs, Margaret Jacobs, Robert Bartell, Rodney Z. James, Hilda Francis for Francis Loving Trust, William J. Rust, Ethel J. Rust, James R. Goold for Tillie Goold Trust, and Duane F. Martin.

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HISTORY OF THE CASE

This proceeding under the provisions of ORS Ch. 539 is a general stream adjudication to determine the relative rights of the parties to various streams and reaches within the Klamath Basin. On April 30, 1997, the United States of America, Department of the Interior, Fish and Wildlife Service, filed this Claim No. 300 for an implied federal reserved water right in and for the Klamath Marsh National Wildlife Refuge. On May 4, 1999, the United States filed an amended claim for the same water right.

Contestant WaterWatch of Oregon, Inc. ("WaterWatch") filed Contest No. 2866 in support of the water right claimed and appeared through its attorney Robert G. Hunter. On May 20, 2003, WaterWatch's Contest No. 2866 was dismissed. *See Order Dismissing WaterWatch of Oregon, Inc's Contests*, May 20, 2003.

Contestants John M. Mosby and Marilyn Mosby filed Contest No. 3112 opposing the water right claimed and appeared through their attorney, Ronald S. Yockim.

Contest No. 3112 was also filed on behalf of Boyd P. Braren and the Boyd P. Braren Trust ("Braren"). The water rights claim identified in Contest No. 3112 as the basis of Braren's interest in contesting this Claim No. 300 were subsequently sold to Robert M. Cook, TPC, LLC ("TPC"), and TPC appeared through its attorney, Carol DeHaven Skerjanec.

Contestants the Nicholson Group filed Contest No. 3289 opposing the water right claimed. The members of the Nicholson Group listed on page 15 below appeared through their attorney, Carol DeHaven Skerjanec, and have agreed to this [Stipulated Suggested] Proposed Order. The remaining members of that group of Contestants, i.e., Dave Wood, Mary Jane Danforth, Jacob D. Wood, Dwight T. Mebane, Helen Mebane, Walter Seput, William C.

Knudsen, William J. Rust and Ethel J. Rust, have not further appeared or participated in these proceedings and have not agreed to or opposed the [Stipulated Suggested] Proposed Order.

Contestants Klamath Project Water Users filed Contest No. 3660 opposing the water right claimed and appeared through their attorney, William M. Ganong.

The Oregon Water Resources Department (OWRD) participated in this matter to help develop the hearing record and appeared through its attorney, Justin Wirth.

FINDINGS OF UNDISPUTED FACT AND LEGAL RULINGS

On September 26, 2003, the United States filed a Motion for Ruling on Legal Issues ("Motion"). A response and reply were also filed to the motion and, on July 15, 2004, Administrative Law Judge Rick D. Barber entered an Order on Motion for Ruling on Legal Issues ("ALJ's Order on Legal Issues").

FINDINGS OF UNDISPUTED FACT

The ALJ's Order on Legal Issues made the following findings of undisputed fact:

1. Congress authorized the creation of the Klamath Marsh National Wildlife Refuge in 1958, the intent being to have the Refuge administered by the United States as a migratory bird sanctuary. Transfer of the lands in the Marsh occurred on September 7, 1960, at which time United States Fish and Wildlife Service began to manage the area. Congress' 1958 act occurred pursuant to the Migratory Bird Conservation Act of 1929 and the Migratory Bird Hunting Stamp Act of 1934. The earlier legislation created a comprehensive program of protection for migratory birds, while the later legislation provided a method of funding to enable the acquisition of designated areas as bird sanctuaries.

2. The United States later acquired other lands which it added to the Refuge. In 1972, landowners named Lampe transferred approximately 200 acres to the United States. The deed stated in part that the "*lands are acquired for administration by the Secretary of the Interior through the United States Fish and Wildlife Service.*" (Motion, Attachment 12). On February 21, 1977, the principals of Nicol Land and Cattle deeded 40 acres to the United States. The deed specifically referred to the Migratory Bird Stamp Act of 1934. (Motion, Attachment 13). On January 20, 1980, John Horton deeded approximately 240

acres to the United States, again to the United States, again to be administered by Fish and Wildlife. (Motion, Attachment 14).

3. On July 23, 1985, the United States filed a Second Amended Complaint in the *United States v. Adair* matter, in the United States District Court. On October 16, 1986, District Judge Solomon issued a Supplemental Declaratory Judgment and Stipulation of Consent which included (among others) the following provision: "*The plaintiff, United States of America (hereinafter Government) has a water right of a quantity of water for the proper mix of free water surfaces, emerging vegetation, and meadow essential to the operation of the Refuge for the purposes set forth in the Orders and Laws creating the Klamath Forest National Wildlife Refuge.*" It was concluded that, as to the parties to the *Adair* litigation, the priority date of the water right is July 23, 1985, but the United States reserved the right to argue for an earlier date of priority with regard to any parties not in the *Adair* litigation. (Motion, Attachment 4). The quantity of the actual water right was left for the Klamath adjudication.

ALJ's Order on Legal Issues at 3-4.

LEGAL RULINGS

The ALJ's Order on Legal Issues made the following legal rulings:

1. The parties to the *United States v. Adair* are bound by the U.S. District Court's Supplemental Declaratory Judgment and Stipulation of Consent which decreed that the United States has a reserved water right for the Klamath Marsh National Wildlife Refuge to maintain the Refuge as a marsh consisting of the proper mix of free water surfaces, emerging vegetation, and meadow for protection of migratory birds and their habitat.

2. When the United States established the Refuge, it impliedly reserved the water necessary to fulfill the specific purposes of the Refuge, i.e., providing a refuge for the protection of migratory birds and their habitat. The United States has an implied reserved water right in an amount which reasonably meets the purposes of the reservation, and no more.

3. The priority dates for the reserved water rights of the Refuge are the dates of creation of the Refuge and of addition of lands to the Refuge and, as to parties to *United States v. Adair*, the date set forth in the Supplemental Judgment entered by the U.S. District Court in that case:

a. the priority date for the reserved water right for the original area of the Refuge is September 7, 1960;

b. The priority dates for the portion of the water right pertaining to the lands subsequently added to the Refuge are the dates of those respective additions, August 10, 1972, February 21, 1977, and January 22, 1980;

c. as to the parties to *United States v. Adair*, the priority date is July 23, 1985, for the entire Refuge (for all water rights claimed in this Case No. 271, Claim No. 300).

ALJ's Order on Legal Issues at 4-6.

THE RECORD

On February 28, 2003, subsequent to a Prehearing Conference in this matter, Administrative Law Judge William D. Young issued a Prehearing Order informing the parties that this matter was set for a contested case hearing on October 5-8, 2004, and of the dates that written direct and rebuttal testimony, and requests for cross-examination, were required to be filed. (Ref. No. 271 F 0001 0001).

Pursuant to the Prehearing Order, on April 11, 2003, OWRD filed OWRD's Exhibit 1, consisting of 298 pages, which constitutes OWRD's record of the documents officially filed with OWRD in this matter.

Pursuant to the Prehearing Order, on August 6, 2004, the United States submitted written direct testimony supporting its Claim No. 300 from three witnesses: Dr. Timothy D. Mayer (Ref. No. 271 E 000 40001), together with Exhibit Nos. 271 E 000 40002 through 271 E 000 40010; Dr. Bertie Josephson Weddell (Ref. No. 271 E 000 40011), together with Exhibit Nos. 271 E 000 40012 through 271 E 000 40019; and Walter E. Ford (Ref. No. 271 E 000 40020), together with Exhibit Nos. 271 E 000 40021 through 271 E 000 40024.

None of the Contestants filed any written testimony or exhibits. Nor did any of the contestants request cross-examination of any of the United States' witnesses.

The hearing on this matter was held on October 5, 2004. During the hearing OWRD Exhibit I was admitted into evidence without objection. The written direct testimony of the United States' three witnesses and the accompanying exhibits, Ref. Nos. 271 E 40001 through 271 E 40024, were also admitted into evidence without objection. No cross-examination was conducted of the United States' three witnesses.

During the hearing, the United States requested that its three witnesses be recognized as experts in the following areas of expertise, based on the qualifications set forth in each of the witnesses' written testimony:

Dr. Timothy D. Mayer	– hydrology, water resources and water quality
Dr. Bertie Josephson Weddell	– plant and wildlife ecology
Mr. Walter E. Ford	– refuge and wildlife management

Contestants did not object to the United States' proffer of these witnesses as expert witnesses qualified in the identified areas of expertise, although counsel for the Nicholson Group requested that I read the testimony of the United States' witnesses before ruling on the United States' request. Having read that testimony, I hereby grant the United States' request and accept these three witnesses as expert witnesses in the above-described fields of expertise, qualified to offer testimony in the form of opinion in those subject areas in this case.

STIPULATION TO PROPOSED ORDER

At the conclusion of the hearing a schedule was established for the filing of a stipulation resolving the contests to this claim and, in the event such a stipulation could not be reached, for post-hearing briefing. On February 1, 2005, the Parties and OWRD filed a Stipulation to Entry of [Suggested] Proposed Order (Ref. No. 271 F 40007) and [Stipulated Suggested] Proposed

Order on United States' Federal Reserved Water Right Claim for the Klamath Marsh National Wildlife Refuge (Ref. No. 271 F 40008).

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS

Having reviewed the Stipulation and the [Stipulated Suggested] Proposed Order on United States' Federal Reserved Water Right Claim for the Klamath Marsh National Wildlife Refuge, and based on the record herein, including the documents filed by the United States and OWRD and admitted into the evidence as recited above, I hereby find as follows:

Claim No. 300 - Federal Reserved Water Right Claim for Klamath Marsh National Wildlife Refuge

ISSUE:

Does the United States have an implied federal reserved water right as claimed in Claim No. 300 and, if so, what is the amount of that water right?

ADDITIONAL FINDINGS OF FACT

In addition to the Findings of Undisputed Fact made in the ALJ's Order on Legal Issues, as set forth above, I find as follows:

1. The Klamath Marsh National Wildlife Refuge was authorized by Congress in the 1958 amendment to the 1954 Klamath Termination Act, Pub. L. No. 85-731, § 28, 72 Stat. 816 (1958). The Refuge was established under the provisions of the Migratory Bird Conservation Act of 1929 and the Migratory Bird Hunting Stamp Act of 1934. The transfer of lands creating the Refuge and the commencement of management of the Refuge by the Fish and Wildlife Service occurred on September 7, 1960. Additions were made to the Refuge, pursuant to the 1958 Amendment to the Klamath Termination Act, on August 10, 1972, February 21, 1977, and January 22, 1980.

2. Claim No. 300 is for the use of water from the Williamson River on the portion of the Klamath Marsh National Wildlife Refuge identified in Attachments 1 and 2 hereto.
3. The period of use for Claim No. 300 is year-round, with a diversion period of October 1 through June 30.
4. The water uses for the Klamath Marsh National Wildlife Refuge include both the consumptive use requirements, i.e., evapotranspiration and evaporation, and the freshening flow requirements for maintenance of seasonal marsh, permanent marsh and open water areas.
5. The total water use under Claim No. 300 for the portion of the Klamath Marsh National Wildlife Refuge identified in Attachment 1 is 59,549.4 acre-feet per year with the priority dates set forth herein.
6. The place of use of the federal reserved water right for the Klamath Marsh National Wildlife Refuge is the 15,594 acres of the Refuge identified in Attachments 1 and 2.

CONCLUSIONS

In addition to the Rulings made in the ALJ's Ruling on Legal Issues, as set forth above, I conclude as follows:

The United States has an implied federal reserved water right as claimed in Claim No. 300. The purposes of the reserved water right for the Klamath Marsh National Wildlife Refuge are to provide a refuge for the protection of migratory birds and their habitat. The priority dates for the reserved water rights of the Refuge are the dates of creation of the Refuge and of addition of lands to the Refuge and, as to parties to *United States v. Adair*, the date set forth in the Supplemental Judgment entered by the U.S. District Court in that case. ALJ's Order on Legal

Issues at 5-6. More specifically, the priority dates of the reserved water rights of the Refuge are as follows:

1. The priority date for the reserved water right for the original area of the Refuge, as identified in Part A of Attachment 1, is September 7, 1960.
2. The priority dates for the portion of the water right pertaining to the lands subsequently added to the Refuge are the dates of those respective additions, August 10, 1972, February 21, 1977, and January 22, 1980, as identified in Parts B, C and D of Attachment 1, respectively.
3. As to the parties to *United States v. Adair*, the priority date is July 23, 1985, for the entire portion of the Refuge as identified in Attachment 1 (Parts A through D).

The implied federal reserved water right for the Klamath Marsh National Wildlife Refuge reserves the amount of water which reasonably meets the purposes of the reservation, and no more. ALJ's Ruling at 5. There being no evidence to the contrary, I relied upon the direct testimony and exhibits received from the United States and the documents in OWRD Exhibit 1. On this record, the greater weight of the evidence establishes as follows: the United States has an implied reserved water right for the Klamath Marsh National Wildlife Refuge in Oregon, with the priority dates described herein; the amount claimed for the implied reserved water right is the amount of water which reasonably meets the purposes of the reservation, i.e., providing a refuge for the protection of migratory birds and their habitat, and no more; habitat for migratory birds reasonably includes seasonal marsh, permanent marsh, and open water areas; and the water reasonably necessary to maintain these habitats on the Refuge includes both the consumptive water requirements, i.e., evapotranspiration and evaporation, and the freshening flow

requirements of these habitats.

I recommend that the Adjudicator for the Klamath Basin Adjudication enter a Final Order which adopts the Findings of Fact and Conclusions herein and which approves Claim No. 300, as amended, as follows:

1. **Basis of Right:** Federal reserved water right.
2. **Source:** Williamson River.
3. **Use:** Providing water for the purposes of the refuge, including maintenance of seasonal marsh, permanent marsh and open water areas by providing both the consumptive water requirements, i.e., evapotranspiration and evaporation, and the freshening flow requirements of these habitats.
4. **Quantity:** 59,549.4 acre-feet per year.
 - a. 55,621.9 acre-feet per year with a priority date of September 7, 1960, for the original area of the Refuge, as identified in Part A of Attachment 1;
 - b. 202.4 acre-feet per year with a priority date of August 10, 1972, for the portion of the Refuge added on that date, as identified in Part B of Attachment 1.
 - c. 87.8 acre-feet per year with a priority date of February 21, 1977, for the portion of the Refuge added on that date, as identified in Part C of Attachment 1.
 - d. 3,637.3 acre-feet per year with a priority date of January 22, 1980, for the portion of the Refuge added on that date, as identified in Part D of Attachment 1.
 - e. The entire 59,549 acre-feet per year with a priority date of July 23, 1985, for the entire portion of the Refuge identified in Attachment 1 (Parts A through D), as to the parties to *United States v. Adair* identified in Attachment 3.
5. **Period of Use:** Year-round use, with a diversion period of October 1 through June 30.
6. **Priority Dates:**

- a. September 7, 1960, for the original area of the Refuge, as identified in Part A of Attachment 1;
 - b. August 10, 1972, for the portion of the water right pertaining to the lands added to the Refuge on that date, as identified in Part B of Attachment 1;
 - c. February 21, 1977, for the portion of the water right pertaining to the lands added to the Refuge on that date, as identified in Part C of Attachment 1;
 - d. January 22, 1980, for the portion of the water right pertaining to the lands added to the Refuge on that date, as identified in Part D of Attachment 1;
 - c. As to the parties to *United States v. Adair*, as identified in Attachment 3, July 23, 1985, for the entire portion of the Refuge identified in Attachment 1 (Parts A through D).
7. **Place of Use:** Lands within the Klamath Marsh National Wildlife Refuge as identified in Attachment 1 (Parts A through D) and in Attachment 2.
8. **Point of Diversion:** No point of diversion as of date of this Order; however water right includes the right to utilize, at the discretion of the United States, a control structure in the NW1/4NE1/4, Section 33, T. 31 S., R. 8 E., W.M.

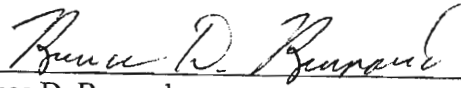
DATED this _____ day of _____, 2004.

Daina Upite
Administrative Law Judge
Office of Administrative Hearings

Stipulated this ____ day of December, 2004.

Bruce D. Bernard
U.S. Department of Justice
Environment & Natural Resources Division
999 18th Street, Suite 945

Stipulated this 1st day of ~~December~~ ^{February, 2005} 2004.

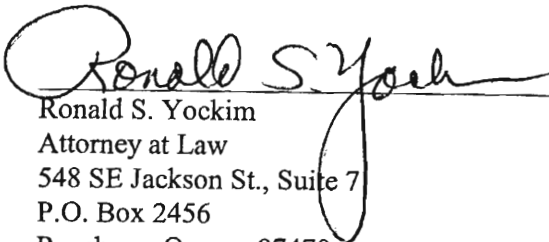


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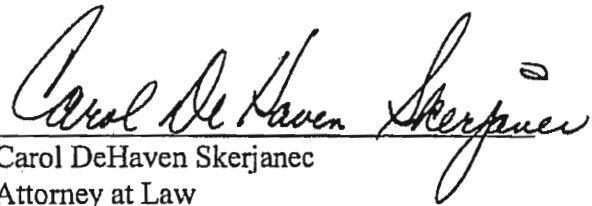
ATTORNEYS FOR CLAIMANT,
UNITED STATES OF AMERICA,
on behalf of the Department of the Interior,
Fish and Wildlife Service

Stipulated this 23rd day of December, 2004.


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ATTORNEY FOR CONTESTANTS, JOHN
M. MOSBY AND MARILYN MOSBY

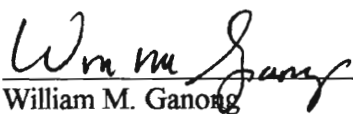
Stipulated this 31 day of ~~December~~ ^{January} 200~~4~~⁵.



Carol DeHaven Skerjanec
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(541) 473-3141

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FOLLOWING MEMBERS OF THE
NICHOLSON GROUP: Roger Nicholson,
Roger Nicholson Cattle Co., Lloyd
Nicholson Trust, Dorothy Nicholson Trust,
Richard Nicholson, Jim McAuliffe,
McAuliffe Ranches, Maxine Kizer,
Ambrose McAuliffe, Susan McAuliffe, Joe
McAuliffe Company, Kenneth L. Tuttle and
Karen L. Tuttle dba Double K Ranch,
Kenneth Zamzow, Anita Nicholson, Wm. S.
Nicholson, John B. Owens, Kenneth Owens,
Wm. L. Brewer, Jane M. Barnes, Franklin
Lockwood Barnes, Jr., Elmore E. Nicholson,
Mary Ann Nicholson, Gerald H. Hawkins,
Hawkins Cattle Co., Owens & Hawkins,
Harlowe Ranch, Terry M. Bengard, Tom
Bengard, Walter Seput, Clifford Rabe, Tom
Griffith, William Gallagher, Thomas
William Mallams, River Springs Ranch,
Pierre A. Kern Trust, William V. Hill,
Lillian M. Hill, Carolyn Obenchain, Lon
Brooks, Newman Enterprise, Wayne Jacobs,
Margaret Jacobs, Robert Bartell, Rodney Z.
James, Hilda Francis for Francis Loving
Trust, James R. Goold for Tillie Goold
Trust, and Duane F. Martin

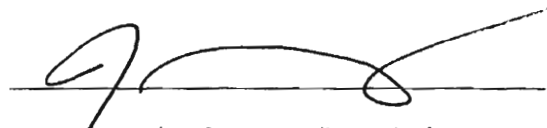
Stipulated this 24th day of December, 2004.



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ATTORNEY FOR CONTESTANTS,
KLAMATH PROJECT WATER USERS

Stipulated this 27th day of ~~December, 2004.~~ ^{January, 2005}



Justin Wirth OJD # 00426
Oregon Department of Justice
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Salem, Oregon 97301
(503) 378-4009

ATTORNEY FOR OREGON WATER
RESOURCES DEPARTMENT

ATTACHMENT 1
Place of Use Table

PART A (9/7/1960)

Township	Range	Section	Subdivision
30	8	25	SESE
30	8	36	NESE
30	8	36	LOT 4 (SESE)
30	8	36	LOT 5 (SESE)
30	9	29	Lot 1
30	9	29	Lot 5
30	9	31	ALL
30	9	32	ALL
30	9	33	Lot 7
30	9	33	Lot 8
30	9	33	LOT 9
30	9	33	LOT 10
30	9	33	LOT 11
30	9	33	NWSW
31	8	11	SE 1/4
31	8	12	ALL
31	8	13	ALL
31	8	14	LOT 1
31	8	14	LOT 7
31	8	14	LOT 8
31	8	14	SENE
31	8	14	S 1/2
31	8	22	SE 1/4
31	8	23	ALL
31	8	24	ALL
31	8	25	N 1/2
31	8	25	SW 1/4
31	8	25	LOT 4 (NESE)
31	8	25	NWSE
31	8	25	LOT 3
31	8	25	LOT 2

Township	Range	Section	Subdivision
31	8	26	ALL
31	8	27	ALL
31	8	28	SE 1/4
31	8	33	LOT 2 (NENE)
31	8	33	LOT 3 (NENE)
31	8	33	LOT 1 (NENE)
31	8	33	LOT 4 (NENE)
31	8	34	LOT 1 (NENE)
31	8	34	LOT 8 (NENE)
31	8	34	LOT 2 (NENE)
31	8	34	LOT 7 (NENE)
31	8	34	LOT 3 (NENE)
31	8	34	LOT 6 (NENE)
31	8	34	LOT 4 (NENE)
31	8	34	LOT 5 (NENE)
31	8	35	NE 1/4
31	8	35	NENE
31	8	35	LOT 1 (NENE)
31	8	35	LOT 10 (NENE)
31	8	35	LOT 11 (NENE)
31	8	35	LOT 9
31	8	35	LOT 3 (NENE)
31	8	35	LOT 12 (NENE)
31	8	35	NESE
31	8	35	LOT 8 (NENE)
31	8	35	LOT 7
31	8	36	LOT 8
31	8	36	LOT 7 (NENE)
31	8	36	W 1/2
31	8	36	LOT 5
31	8	36	LOT 6
31	9	4	LOT 9 (NENE)
31	9	4	LOT 10 (NENE)
31	9	4	SWNW
31	9	4	LOT 11

Township	Range	Section	Subdivision
31	9	4	SW 1/4
31	9	4	LOT 12
31	9	4	SWSE
31	9	4	LOT 13 (SESE)
31	9	5	ALL
31	9	6	ALL
31	9	7	ALL
31	9	8	N 1/2
31	9	8	SW 1/4
31	9	8	LOT 3 (NESE)
31	9	8	NWSE
31	9	8	SWSE
31	9	8	LOT 2 (SESE)
31	9	9	LOT 21 (NENE)
31	9	9	NWNE
31	9	9	LOT 19 (SWNE)
31	9	9	LOT 20 (SENE)
31	9	9	N 1/2 NW 1/4
31	9	9	LOT 17 (SWNW)
31	9	9	LOT 18 (SENW)
31	9	9	LOT 16
31	9	9	LOT 14
31	9	9	LOT 13
31	9	9	LOT 12
31	9	9	LOT 15
31	9	9	LOT 5
31	9	9	LOT 6
31	9	9	LOT 4
31	9	17	LOT 8 (NENE)
31	9	17	NWNE
31	9	17	LOT 7
31	9	17	W 1/2
31	9	17	LOT 6
31	9	17	LOT 5 (SWSE)
31	9	18	ALL

Township	Range	Section	Subdivision
31	9	19	ALL
31	9	20	LOT 8 (NWNE)
31	9	20	LOT 7 (SWNE)
31	9	20	W 1/2
31	9	20	LOT 6 (NWSE)
31	9	20	LOT 5
31	9	29	LOT 10
31	9	29	SWNE
31	9	29	LOT 9 (SENE)
31	9	29	NW 1/4
31	9	30	N 1/2 NE 1/4
31	9	30	LOT 10 (SWNE)
31	9	30	SENE
31	9	30	NENW
31	9	30	LOT 8 (NWNW)
31	9	30	LOT 7
31	9	30	LOT 9 (SENW)
32	8	1	LOT 7 (SWNW)
32	8	1	LOT 8
32	8	1	LOT 9
32	8	1	LOT 10
32	8	1	LOT 11
32	8	1	LOT 12
32	8	1	N 1/2 NW 1/4
32	8	1	SE NW
32	8	2	LOT 7 (NENE)
32	8	2	LOT 6 (SENE)

PART B (8/10/1972)

Township	Range	Section	Subdivision
31	8	36	LOT 2
31	8	36	LOT 3 (NESE)
31	8	36	LOT 4 (SESE)
32	8	1	LOT 1 (NENE)
32	8	1	LOT 2
32	8	1	LOT 13

PART C (2/21/1977)

Township	Range	Section	Subdivision
30	8	36	E 1/2 E 1/2 NE 1/4

PART D (1/22/1980)

Township	Range	Section	Subdivision
32	9	4	LOT 15 (NWNW)
32	9	4	LOT 16 (SWNW)
32	9	4	LOT 14 (NENW)
32	9	4	LOT 17 (SENW)
32	9	4	LOT 20 (NESW)
32	9	4	LOT 13 (NWNW)
32	9	4	SWNE
32	9	4	NWSE
32	9	4	LOT 21 (SWSE)
32	9	4	LOT 12 (NENE)
32	9	4	LOT 18 (SENE)
32	9	4	LOT 19 (NESE)
32	9	4	LOT 22 (SESE)
31	9	30	LOT 11
31	9	28	LOT 4 (NWSW)
31	9	28	LOT 3 (SWSW)
31	9	29	LOT 4
31	9	29	NESW
31	9	29	LOT 5 (SESW)
31	9	29	NWSE
31	9	29	LOT 6 (SWSE)
31	9	29	LOT 8 (NESE)
31	9	29	LOT 7 (SESE)
31	9	32	LOT 5
31	9	32	LOT 6 (SENE)
31	9	32	LOT 7 (NESE)
31	9	32	LOT 8 (SESE)
31	9	33	LOT 8 (NWNW)
31	9	33	LOT 7
31	9	33	LOT 6
31	9	33	SWSW
31	9	33	LOT 5

ATTACHMENT 3

Parties to United States v. Adair

The parties to *United States v. Adair* are listed below for purposes of administering the water rights adjudicated in Case No. 271, Claim No. 300. The priority date of July 23, 1985 shall apply to these parties and their successors-in-interest.

Klamath County
Jeld-Wen, Inc.
Marion B. Pinneo
Mary Ann Robinson
Richard W. Robinson
Brian Daniel Sherrill
Gregory Clay Sherrill
Leslie Ann Sherrill
Cavenham Forest Industries, Inc.
Celine Kapiolani Souza, fka Celine Kapiolani Toledo
Yamsey Duck Club, Inc.
Lura Martin
Hilda Francis
Jesse F. Francis
Ida Givan (Cunningham)
Grupe Company
Howard Lightner (deceased)
Darlene Lightner (Wolff), Trustee
Clifford Osborn
Jeannie Riffey
Sand Creek Ranch
Maureen Smith (Harrison)
James Glessner
Estate of Harry Clarkson (deceased)
David E. Wyman
Max H. Wyman
Weyerhaeuser Company, a Washington Corporation
Cliff L. Ambers, Jr.
Dorothy G. Bell
Estate of Hugh T. Bell (deceased)
Kristine Bush
Jack R. Chapman
James L. Chapman, Trustee
Sandra L. Chapman, Trustee
Donal H. Dean
Donal M. Dean

Ernest E. Dennis
Everett R. Dennis (deceased)
Frances M. Dennis
Bruce Emery
Dorothy Emery
Kenneth Lester Emery
Tina Kay Emery
Ehrman Danell Giustina
Viola M. Gouldin
Estate of Viola M. Gouldin
John C. Horton, Trustee
Dayton O. Hyde
Gerda V. Hyde
Carolyn J. Johnson
James B. Lawrence
Steven E. Lawrence
Lloyds Bank of California, Trustee (Mathis Trust)
John M. Mosby
Marilyn J. Mosby
The Bank of California, Trustee (Mt. Scott Properties)
Richard A. Myers, Trustee
Dana Marie (Nicol) Morasch
Donovan L. Nicol
Mark Edward Nicol
Nicol Land and Cattle Company
Oscar Nicol Kittredge
William A. Pingley
Diane F. Taylor
Margie B. Runels
Scott Lee Runels
Edward Donal Tompkins, Trustee (under the Will of H. Willis Tompkins)
Willis Stanley Tompkins, Trustee (under the Will of H. Willis Tompkins)
Mabel L. Tompkins
Edward D. Tompkins
Merrie Linda Tompkins
Willis Stanley Tompkins
Jose T. Agustin
Ana B. Agustin
Joselito B. Agustin
Erlinda A. Agustin
Miriam Bicoy
Rannier Prynne Bicoy
William Davies
Constance Wolverton

State of Oregon
Byron J. Gardner
Aloysius J. Zoeller
Bitty L. Zoeller
Shane D. Hostbjor
Debora A. Hostbjor
Steven Brooks Anderson
Terri Lynn Anderson
C. E. Asher, Jr.
Glenna M. Asher
G. P. Beauchaine
Lois J. Beauchaine
Sandra J. Beeman
Thomas M. Beeman
Petra G. Bendele
Ronald W. Bendele
Dennis Betzer
Earlynn Betzer
Lucy A. Breeden
William L. Breeden
Estrella E. Bright
R. C. Bright
J. N. Brogger
Michael J. Brown
Rodney G. Bybee
Jill Anne Cable
Alfredo S. Callo
Ida G. Callo
Lina M. Cardinal
Thomas C. Cardinal
Grant A. Christiansen
Anna S. Clark
Janice E. Clark
R. J. Clark
Russell Clark, Jr.
Patrick J. Cooper
Vickie L. Cooper
Margaret A. Cozart
R.W. Cozart
Elva M. Creel
John B. Creel
Sunday N. Dargel
Thomas K. Dargel
Lauren M. De Laura

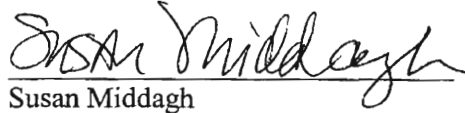
Richard A. De Laura
Charlene A. DeWeese
Paul M. DeWeese
James P. Dunn
Thelma M. Dunn
Darrell A. Elliot
Margorie H. Elliot
B. Esquerra
Vicencia Esquerra
Anita P. Friday
Kenneth E. Friday
Barrie O. Fyfe
J. K. Fyfe
J. E. Gilbert
Charles K. Giudice
R. G. Hodges
Earle N. Jones, Jr.
Lianne P. Jones
Becky L. Kersch
Dan O. Kersch
C. Kircher
Yu Cha Kircher
Russel P. La Guardia
Terry La Guardia
Glendia G. Lomoiné
Alecia Liles
Curt Liles
A. U. Manibusan
Ramona C. Manibusan
Jennifer F. Means
Deborah J. Meisner
Thomas J. Mich
Donna Morton
Donald R. Mulkey
Mary F. Mulkey
Peter E. Muller
Lynne M. Patton
Micheal L. Patton
Melvin J. Perricone
J. R. Power
Marsha Ann Power
Clayton Franklin Putman, Jr.
O. Reams
Quelle Reams

F. J. Rising
Terry A. Rising
B. J. Roethle
Conni L. Roethle
John C. Ruane
Julia A. Ruane
R. G. Runne
Rebecca E. Runne
Gary D. Runyan
Theresa M. Runyan
Cheryl D. Ruska
R. W. Ruska
Johnny R. Smith
Katherine L. Smith
Lydia F. Stifle
Richard L. Stifle
Debra S. Troen
Kirk E. Troen
Francisco O. Valdez
Sylvia R. Valdez
Lawrence E. Veerkamp
Thomas B. Vergne
Daniel J. West
Bonnie L. Wilson
Steven R. Wilson
Marian E. Yancey
R. T. Yancey
E. R. Young
Rose Young
Nobuo Suzuki

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2005, I served a true copy of the following documents: **STIPULATION TO ENTRY OF [SUGGESTED] PROPOSED ORDER ON UNITED STATES' FEDERAL RESERVED WATER RIGHT CLAIM FOR KLAMATH MARCH NATIONAL WILDLIFE REFUGE and [STIPULATED SUGGESTED] PROPOSED ORDER ON UNITED STATES' FEDERAL RESERVED WATER RIGHT CLAIM FOR KLAMATH MARSH NATIONAL WILDLIFE REFUGE including Attachment 1, 2, and 3**, via email (as pdf only) and regular first class mail to Administrative Law Judge, Daina Upite and to the Office of Administrative Hearings.

I further certify that on this 1st day of February, 2005, I sent via email, **STIPULATION TO ENTRY OF [SUGGESTED] PROPOSED ORDER ON UNITED STATES' FEDERAL RESERVED WATER RIGHT CLAIM FOR KLAMATH MARCH NATIONAL WILDLIFE REFUGE and [STIPULATED SUGGESTED] PROPOSED ORDER ON UNITED STATES' FEDERAL RESERVED WATER RIGHT CLAIM FOR KLAMATH MARSH NATIONAL WILDLIFE REFUGE including Attachment 1, 2, and 3** where the email address is indicated below.


Susan Middagh

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