

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
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

~~Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; Rogue River Valley Irrigation District; John M. Mosby; Marilyn Mosby; Boyd P. Braren; Boyd P. Braren Trust; Roger Nicholson; Richard Nicholson; Agri Water, LLC; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch; Dave Wood; Kenneth Zamzow; Anita Nicholson; William S. Nicholson; John B. 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; Sevenmile Creek Ranch, LLC; James G. Wayne, Jr.; Clifford Rabe; Tom Griffith; William Gallagher;~~

**CORRECTED¹ PROPOSED
ORDER**

Case No. 274

Claims: 313, 314, 315, and 316

Contests: 2872, 2873, 2874, 2875²,
~~3228, 3229, 3230, 3231~~³,
3302, 3303, 3304, 3305⁴,
3636, 3637, 3638, 3639⁵,
3996, 3997, ~~4226, 4227,~~
~~4228, and 4229~~⁶

¹ This Corrected Proposed Order is issued pursuant to OAR 137-003-0655(1) to include Attachment 1, Parts A, B, C, and D, which were inadvertently omitted from the original order.

² WaterWatch of Oregon, Inc.'s Contests 2872, 2873, 2874, and 2875 were dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

³ Medford and Rogue River Valley Irrigation Districts voluntarily withdrew from Contests 3228, 3229, 3230, and 3231 on March 3, 2003. Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3228, 3229, 3230, and 3231 on April 22, 2005.

⁴ On October 26, 2004, Dave Wood voluntarily withdrew from Contests 3302-3305. Change of Title Interest for Contests 3302-3305 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3302-3305 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3302-3305 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3302-3305 from Walter Seput to Wayne James, Jr. (5/2/05). Change of Title Interest for Contests 3302-3305 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3302-3305 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3302-3305 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3302-3305 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3302-3305 on September 13, 2005.

⁵ Don Vincent voluntarily withdrew from Contests 3639, 3637, 3638, and 3639 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3639, 3637, 3638, and 3639 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3639, 3637, 3638, and 3639 on January 16, 2004.

⁶ The Klamath Tribes voluntarily withdrew from Contests 4226, 4227, 4228, and 4229 on February 13, 2003.

Thomas William Mallams, River Springs Ranch, Pierra 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; David M. Cowan; 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; 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; Bradley S Luscombe; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Reames Golf and Country Club; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC;

Contestant(s)

vs.

United States Department of Interior, Fish and Wildlife Service
Claimant/Contestant.

HISTORY OF THE CASE

This is a proceeding under ORS Chapter 539, involving a general stream adjudication to determine the relative water rights of the various parties to various streams and reaches within the Klamath Basin. This particular case was commenced by claims and contests filed as follows:

The United States of America, Department of Interior, Fish and Wildlife Service (USFWS or United States) filed these claims (Claims 313, 314, 315, and 316, collectively "the Claims") on April 30, 1997. USFWS amended the Claims on May 7, 1999, and provided additional information supporting the Claims on October 1, 1999. The Claims assert Federal reserved water rights for the Lower Klamath National Wildlife Refuge based upon Executive Order Nos. 924⁷ and 2200, and subsequent additions to the Refuge.⁸

⁷ E.O. 924 created the Lower Klamath National Wildlife Refuge on August 8, 1908.

⁸ The purpose of the reservation is explained in the Migratory Bird Conservation Act (45 Stat. 1222) as amended by the Kuchel Act (78 Stat. 850).

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On October 4, 1999, Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation which only took into account information available as of August 5, 1999. The Preliminary Evaluation preliminarily approved the Claims.

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, Bradley S. Luscombe, Berlva Pritchard⁹, Don Vincent¹⁰, Randy Walthall, Inter-County Title Company, Winema Hunting Lodge, Inc., Van Brimmer Ditch Company, Plevna District Improvement Company, and Collins Products, LLC (hereafter collectively called Klamath Project Water Users or KPWU) filed Contests 3636, 3637, 3638, and 3639 on May 8, 2000. KPWU filed an amended contest on December 17, 2004.

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 Wood¹¹; Kenneth Zamzow¹²; 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 Springs Ranch; Pierra A. Kern Trust; William V. Hill; Lillian M. Hill; Carolyn Obenchain; Lon Brooks; Newman Enterprise; William C. Knudtsen¹³; 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 (Nicholson, *et al*) filed Contests 3302, 3303, 3304, and 3305 on May 8, 2000.¹⁴

The Klamath Tribes filed Contests 4226, 4227, 4228, and 4229 on May 8, 2000. The Klamath Tribes withdrew these contests on February 13, 2003.

WaterWatch of Oregon, Inc. (WaterWatch) filed Contests 2872, 2873, 2874, and 2875 on May 8, 2000. All contests of WaterWatch were dismissed on May 21, 2003.

Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; and Rogue River Valley Irrigation District (Horsefly, *et al*) filed Contests 3228, 3229, 3230, and 3231 on May 8, 2000. Medford and Rogue River Valley Irrigation Districts

⁹ Berlva Pritchard voluntarily withdrew from contests 3631, 3632, 3633, and 3634. See Notice of Withdrawal of Claimant dated June 24, 2002.

¹⁰ Don Vincent voluntarily withdrew from contests 3631, 3632, 3633, and 3634. See Notice of Withdrawal of Claimant dated November 28, 2000.

¹¹ Dave Wood voluntarily withdrew from these contests on October 26, 2004.

¹² Kenneth Zamzow voluntarily withdrew from these contests on September 2, 2005.

¹³ William Knudtsen voluntarily withdrew from these contests on September 13, 2005.

¹⁴ These parties filed originally as "the Nicholson Group." By the time post-hearing briefing was complete, the remaining contestants were styled "Sprague River Group" and "Fort Klamath Group" or, collectively "'Contestants Sprague and Fort Klamath").

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voluntarily withdrew from these contests on March 3, 2003. Horsefly and Langell Valley Irrigation Districts voluntarily withdrew the contests on April 22, 2005.

The USFWS filed Contests 3396 and 3397 on May 8, 2000.

OWRD then referred these claims to the Office of Administrative Hearings, (OAH) where they were consolidated as Case No. 274.

On March 10, 2003 a prehearing conference was conducted, after which a Scheduling Order was issued setting the times for various proceedings in this case.

Pursuant to that Scheduling Order, on September 26, 2003, the United States filed a Motion for Ruling on Legal Issues. On the same date, the Nicholson Group and KPWU filed a Consolidated Motion for Ruling on Legal Issues. Responses and replies were filed to both motions.

On July 29, 2004, Administrative Law Judge (ALJ) Rick D. Barber of the OAH issued an Order on Motions for Ruling on Legal Issues deciding the various motions then before him.

ALJ Barber ruled as follows:

1. When the United States established the Lower Klamath National Wildlife Refuge, it impliedly reserved the water necessary to fulfill the specific purposes of the Refuge, *i.e.*, providing a preserve and breeding ground for native birds.

2. The priority dates for the reserved water rights of the Refuge are dates of creation of the Refuge and of addition of lands to the Refuge:

i. the priority date for the reserved water right for the original area of the Refuge is August 8, 1908; and

ii. 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, November 30, 1944, July 14, 1989 and September 2, 1964.

3. A federal reserved right to water can exist only for the primary purpose of a federal reservation; there is no federal reserved right for the secondary purposes of a reservation.

4. The United States is entitled to sufficient water to fulfill the purpose of the reservation and no more. A sufficient amount is enough to fulfill the purpose at a level where the Refuge is functional—more than eking out an existence but less than lavish amounts of water.

5. The reserved right is only for water unappropriated at the time of the reservation, whether that be the initial reservation or, in the case of later-acquired parcels, at the time of their acquisition.

6. Property acquired after the initial reservation which have become part of the Refuge are also entitled to a reserved water right based upon water unappropriated at the time of their acquisition and inclusion in the Refuge.

A hearing was conducted on May 17, 2005, before ALJ Michael Francis. Claimant, United States, appeared through Barbara Scott-Brier and Bruce Bernard. Klamath Project Water Users appeared by telephone through Paul Simmons. Nicholson Group/Sprague-Fort Klamath Contestants appeared through Laura Schroeder and Courtney Duke. Stephen Sanders appeared for OWRD. David Mauser and Timothy Mayer appeared as witnesses.

Thereafter, the parties filed legal memoranda regarding the matters presented for hearing. The record closed on April 14, 2006. On October 17, 2006, the OAH received a Motion by Upper Basin Contestants¹⁵ seeking a stay of proceedings, or, in the alternative, abatement by the ALJ of further action in these proceedings. On October 23, 2006, OWRD filed a response to this motion, noting that the Stay Motion was directed to the Department, but that there was no basis for the ALJ to abstain from deciding this case pending a determination by the Department on the Motion. OWRD's response also noted that the Motion was untimely, and attempted to present new evidence after the close of the record. The United States and Klamath Project Water Users also filed responses opposing the Motion. For the reasons stated in the Opinion section, below, the Motion is hereby denied to the extent it was directed to the ALJ.

Having been assigned to complete proceedings in this case, I have reviewed the entire record, including the recording of the hearing in this matter, prior to preparation of this Proposed Order.

ISSUES

After ALJ Barber issued his Order on Motions for Ruling on Legal Issues, the following issues remained to be decided¹⁶:

1. Whether the Preliminary Evaluation for Claims 313 and 315 incorrectly describes the place of use in part. (United States)

2. Pursuant to 1905 Or. Laws Ch. 228 and the May 17, 1905 notice by the Reclamation Service of the appropriation of all waters of the Klamath River, Upper

¹⁵ Since this motion was filed by the same attorney firm as had previously appeared for Sprague River/Fort Klamath Groups, I assume that there is a substantial identity between these groups, although this is not stated in the motion. Given the disposition of the motion, however, it is unnecessary to explore this question further.

¹⁶ The issues raised by Horsefly and Langell Valley Irrigation Districts have also been deleted, as these parties have withdrawn their contests.

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Klamath Lake, and tributaries (filed with State Engineer on May 19, 1905), there was no unappropriated water on the date for which the right is claimed. Accordingly, there was no federal reserved right created. (KPWU)

3. The lands for which the right is claimed were not withdrawn from the public domain. Accordingly, no federal reserved right was created by Executive Order 924. (KPWU)

4. To the extent any federal reserved right exists, the scope of the right is limited to the minimum amount of water necessary for the primary purpose of the reservation, without which the reservation would be entirely defeated. (KPWU, Sprague/Fort Klamath Contestants)

5. Contestee has provided insufficient evidence of year-round use or need for water to support the primary purpose of the refuge. (KPWU)

6. There is insufficient evidence to support the claim. (KPWU)

7. The claim relies on Exhibits 5-1 and 5-2 from claims 321-324, which, other than certain facilities delivering water for agricultural irrigation, do not pertain to water delivery for Lower Klamath National Wildlife Refuge. (KPWU)

8. The area of use is not appurtenant to the source from which the right is claimed. (KPWU)

9. There is no federal reserved right for any lands within the claim which are identified as within the area of use in Exhibit 7-4 to claims 321 and 323, as the reservation of lands under the executive order is subject to agricultural use. This basis for contest is applicable to the extent such lands are identified within the contested claim. (KPWU)

10. The claim identifies facilities for diversion and conveyance of water which are not used or relied upon for delivery of water to the asserted place of use, and claims rates of diversion in excess of the amounts needed to serve the asserted place of use. The claim relies on Exhibits 5-1 and 5-2 from claims 321-324, which do not pertain to water delivery to Lower Klamath National Wildlife Refuge. (KPWU)

11. The claim does not identify a place of use or rate of diversion. (KPWU)

12. Claimant cannot claim a federal reserved right to water stored in Upper Klamath Lake. (KPWU)

13. The United State does not own the claimed place of use. (KPWU)

14. At the time of the reservation, the United States did not own land for which a reserved right is now claimed. No federal reserved right was created by the reservation

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with respect to such lands. In the alternative, the priority date for any right to be recognized is the date of acquisition of title. (KPWU)

EVIDENTIARY RULINGS

In addition to the testimony at hearing, the following evidence was admitted into the record:

OWRD Exhibit 1.

Claimant United States' Evidence:

Affidavit and Testimony of Dr. David M. Mauser (Ex. 40002¹⁷), except as to the first sentence of page 7, Part 11, a decision on which was reserved and will be discussed below.

Affidavit and Testimony of Dr. Timothy D. Mayer (Ex. 40016), except as to Page 4, second sentence of part 7, a decision on which was reserved, and will be discussed below.

Exhibits 40003 through 40015, and 40017 through 40030 were offered and admitted into evidence without objection.

The objections to the portions of the Affidavit and Testimony of Dr. David Mauser and Dr. Timothy Mayer, reserved as stated above, are hereby overruled. The statements under consideration are admitted as providing the context for the expert testimony, but not for the truth of the matter asserted.

KPWU's Evidence:

Exhibits 30021 through 30027, 30030 through 30037, 30041 through 30044, 30045 through 30070, 30074 through 30085, 30310 through 30312, 30313 through 30314, 30315 through 30332, 30351 through 30353, 30354 through 30354-14, 30357 through 30358, offered by KPWU were admitted into the record, without objection.

Exhibit 30359 was admitted for demonstrative purposes, only.

Exhibits 30001 through 30002, 30003 through 30003-7, 30004 through 30020, 30028 through 30029-1, 30038 through 30039-10, 30040 through 30040-8, 30071 through 30073, 30086 through 30090, 30391 through 30116, 30117 through 30190, 30191 through 30201, 30202 through 30204, 30205 through 30221, 30222 through 30225, 30226 through 30242, 30246 through 30262, 30263 through 30264, 30267 through 30270, 30271, 30272, 30273 through 30309, 30350, and 30355 through 30356 were either withdrawn or excluded from the record after objection.

Sprague River/Fort Klamath Groups' Evidence:

The Affidavit of Courtney Duke, together with excerpts from the Transcript of Hearing in Klamath Adjudication Case 003 was offered, but excluded. The ALJ ordered the Sprague River/Fort Klamath groups to submit the entire Transcript of Hearing in Case 003, which was submitted and admitted into evidence after the hearing.

¹⁷ For ease of use, only the last five digits of the 12-digit reference number will be used in this order. The remainder of the number was used to identify the case to which the exhibit was assigned in the event of confusion.

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The Affidavit of Brooke Clifford was also offered into evidence, together with Exhibits N1 through N21, attached thereto. After Objection, Exhibits N1 and N2 were withdrawn, and the record held open for consideration of substitute exhibits.

Exhibits N3, N5, N8, N10, N11, N16, N18, N19, N20, N21 were admitted into the record at hearing without objection.

After the hearing, the Sprague River/Fort Klamath Groups submitted Exhibits N22 and N23, which were offered to substitute for Exhibits N1 and N2, previously withdrawn. These exhibits were admitted without objection.

Exhibits N1, N2, N4, N7, N9, N12, N13, N14, N15, N17 were either withdrawn or not admitted into evidence.

Exhibit N6 was not admitted, but was ordered to remain in the file as an offer of proof.

In the course of briefing this case, both the United States and KPWU cited to material that was not admitted into evidence in this case. The United States, for example, cited to written testimony in Case 003, and even recited, to prove a question of fact, factual recitals from the Interim Order in that case. While orders in other cases within the Klamath Adjudication may be considered as persuasive on legal questions, it is inappropriate to rely upon them on questions of fact. Indeed, ORS 183.450 forbids me from considering any material not admitted into the record. Although both KPWU and the United States cited to items in the record in other cases, Sprague/Fort Klamath did not, and the citations to Case 003 were for a point in which the Sprague/Fort Klamath Contestants were interested. I therefore have not considered the material so cited in this Proposed Order.

However, KPWU attached two agreements to its Response brief, and both KPWU and the United States relied upon those contracts during argument. Since they relate to a point not at issue between the United States and the Sprague/Fort Klamath Contestants, and were used by the remaining parties in this case, I conclude that any right to object to inclusion of these documents in the record has been waived, and admit them into the record at this time, as Exhibits A and B, respectively.

FINDINGS OF FACT

- 1) Claims 313 through 316 apply to several different tracts of land acquired by the United States and integrated into the Lower Klamath National Wildlife Refuge at different times.
- 2) On August 8, 1908, President Theodore Roosevelt promulgated Executive Order 924, which reserved lands within Lower Klamath Lake as a preserve and breeding ground for native birds. (OWRD Ex. 1 at 18, 19.) This Order stated in part as follows:

It is hereby ordered that all islands situated in Lower Klamath Lake, and the marsh and swamp lands unsuitable for agricultural purposes [in certain listed locations] * * * and situated within the area segregated by a broken line, as shown upon the diagram hereto attached and made a part of this order, are hereby reserved and set aside for the use of the Department of Agriculture as a preserve and breeding ground for native birds. The taking or the destruction of birds' eggs and nests * * * is prohibited * * *. This

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order is made subject to and is not intended to interfere with the use of any part of the reserved area by the Reclamation Service acting under the provisions of the act approved June 17, 1902
* * * .

(OWRD Ex. 1 at 18.)

Thereafter, on May 14, 1915, President Woodrow Wilson issued Executive Order 2200, which stated in part as follows:

It is hereby ordered that the Klamath Lake Reservation, in California and Oregon, for the protection of native birds is hereby reduced in area by the elimination therefrom of all lands lying between the boundary established by the said Executive Order [Executive Order 924] and the new boundary thereof, established by this Order, which is described as follows:

* * * * *

The Klamath Reservation hereby reduced in area embraces the lands segregated by the broken line upon the diagram hereto attached and made a part of this order. The shaded portion shows the lands eliminated.

(*Id.* at 20-22.)

Both Executive Orders used copies of the same diagram, with the “broken line” in the same area. The only significant differences between the two diagrams are the caption, and the shading on the second diagram noting the land excluded. (*Id.* at 19, 22.)

Additional Executive Orders further reduced the Refuge in 1921 (Executive Order 3422, March 28, 1921) (*Id.* at 23.), and 1940 (Executive Order 8475, July 10, 1940) (*Id.* at 24.)

3) Claim 313, with a claimed priority date of August 8, 1908, is for a parcel of 36,099.6 acres that was originally within the boundaries of Lower Klamath Lake or marshes watered by the lake. (*Id.* at 19.) The claimed acreage includes land that was ceded to the United States by the states of Oregon and California in 1905. (General Laws of Oregon Laws 1905, page 63; Statutes of California 1905, page 4.) By these state “cession laws” the states authorized the United States to lower the level of a number of lakes in the Klamath Basin, including Lower or Little Klamath Lake, and gave title to the lands uncovered by the lowering. (*Id.*) Attachment 1, Part A, attached hereto, describes the property subject to this claim. The claim is for 108,229.4 acre-feet of water per year, 584.4 cubic feet per second (cfs), from four points of diversion located as follows:

- a. Link River Dam, NW ¼ SE ¼, Section 30, T 38 S, R 9 E.W.M.
- b. “A” Canal Headworks, SW ¼ NE ¼, Section 30, T 38 S, R 9 E.W.M.
- c. Ady and Central Canal Diversion at Klamath River, NE ¼ NW ¼, Section 15, T 40 S, R 8 E.W.M.

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d. Station 48 Diversion at Lost River Diversion Channel, NE ¼ NW ¼, Section 31, T 39 S, R 10 E.W.M.

(*Id.* at 78.)

4) Claim 314, with a claimed priority date of September 2, 1964, covers a parcel of 1,027.8 acres owned by the United States and reserved by Congress under Public Law 88-367, September 2, 1964, for the purpose of Wildlife Management as part of the Lower Klamath National Wildlife Refuge. (*Id.* at 285; Affidavit and Testimony of Dr. Timothy D. Mayer, at 16.) Attachment 1, Part B attached hereto describes the property subject to this claim. The claim is for 3,680.1 acre-feet of water per year, at 25 cfs from a diversion point at Station 48 Diversion at Lost River Diversion Channel, NE ¼ NW ¼, Section 31, T 39 S, R 10 E.W.M. (*Id.* at 78.)

5) Claim 315, with a claimed priority date of November 30, 1944, based upon acquisition of the property in question on that date (*Id.* at 482-484.) is a tract of 356.4 acres added to the Refuge pursuant to the provisions of the Migratory Bird Conservation Act, 16 U.S.C. 715 *et seq.* and the Executive Orders noted above, for the purpose of promoting the conservation of migratory waterfowl and to offset or prevent the serious loss of important wetlands and other waterfowl habitat essential to the preservation of such waterfowl. Attachment 1, Part C attached hereto describes the property subject to this claim. The claim is for 1,141.7 acre-feet of water per year, 9.0 cfs from the following diversion.

a. Ady and Central Canal Diversion at Klamath River, NE ¼ NW ¼, Section 15, T 40 S, R 8 E.W.M.

b. Station 48 Diversion at Lost River Diversion Channel, NE ¼ NW ¼, Section 31, T 39 S, R 10 E.W.M.

(*Id.* at 78-79.)

6) Claim 316, with a claimed priority date of July 14, 1949, based upon acquisition of the property by the United States pursuant to a Final Judgment entered in *United States v. 520 acres of land in Siskiyou County* Case 4574 (N.D. Cal. August 22, 1949), covers a tract of 25.9 acres added to the refuge pursuant to the provisions of the Migratory Bird Conservation Act, 16 U.S.C. 715 *et seq.*, for the purpose of promoting the conservation of migratory waterfowl and to offset or prevent the serious loss of important wetlands and other waterfowl habitat essential to the preservation of such waterfowl. Attachment 1, Part D describes the property subject to this claim. The claim is for 87.8 acre-feet of water per year at 0.6 cfs from the following diversion points:

a. Ady and Central Canal Diversion at Klamath River, NE ¼ NW ¼, Section 15, T 40 S, R 8 E.W.M.

b. Station 48 Diversion at Lost River Diversion Channel, NE ¼ NW ¼, Section 31, T 39 S, R 10 E.W.M.

(*Id.* at 79.)

7) The Lower Klamath National Wildlife Refuge is comprised of a mixture of seasonally flooded marsh, permanently (year-round) flooded marsh, open water, and lease land and cooperative farm lands. (Test. of Mauser at 9.) This combination of wetland, open water, and agricultural habitats supports a nearly identical assemblage of avian species as historically

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occupied Lower Klamath Lake and is intended to provide an appropriate mix of habitats to provide a preserve and breeding ground for native birds. (*Id.* at 12.)

8) The native birds supported by the Refuge include those species endemic to western North America including many species of waterfowl, shorebirds, and colonial nesting waterbirds. (*Id.*) Common species on the Refuge both historically and at present include white pelicans, ring-billed and California gulls, great and snowy egrets, black-crowned night herons, Forster's, black and Caspian terns, western and eared grebes, and great blue herons. (*Id.*) Shorebird species include American avocet, black-necked stilts, long-billed dowitchers, and least and western sandpipers. (*Id.*) Waterfowl species include snow, Ross, Canada, and white-fronted geese as well as duck species such as mallards, pintail, gadwall, green wing teal, and redheads. (*Id.*)

9) A diversity of habitat types, including wetland, open water, and agricultural habitats, is required to meet the diverse annual energy and food requirements of these waterfowl. (*Id.* at 14.) In order to establish and maintain this diversity, the Refuge management rotates habitat types among Refuge units over time. This system is considered an efficient method of maintaining wetland productivity, diversity, and the desired juxtaposition of different serial stages within wetland habitats. (*Id.* at 14-15.) Both to provide an interspersed of emergent plants and open water habitats to wildlife species adapted to this habitat, as well as to control certain plant species which are eliminated by such flooding, the Refuge management floods some parts of the Refuge year-round. (*Id.*) The Refuge management plants other areas to agricultural habitats, which provide immediate benefits to grain-eating birds and sets the marsh habitat back in succession, thus producing more seed-producing annual plants. (*Id.* at 15.) Due to this rotational management, each habitat type occupies a range of acreage with both the location and total acreage of each habitat type varying over time. (*Id.*)

This wetland management system, utilizing natural successional patterns, is intended to produce ecologically and economically sound results. (*Id.*)

10) Managing the water depths on the Refuge such that depths change both geographically and temporally is also important and necessary in maintaining the Refuge's diverse assemblage of native birds. (*Id.* at 25-26.) The Refuge management varies the depths of the water over time and between parts of the Refuge, to create a diversity in aquatic plants which, in turn, increases the diversity of the wildlife that feed and otherwise depend upon them. (*Id.* at 26.) Because most aquatic wildlife species have different habitat requirements at different times of year, the Refuge management also creates complexity of habitat and hydrology to accommodate the different needs of the different species at different times. (*Id.*) For example, diving ducks nest in thick emergent vegetation but feed in open lakes and bays. (*Id.*) White pelicans require the security of islands to nest and rear young but otherwise forage in open areas of marshes and lakes. (*Id.*) Varying the range of water levels through the season creates diverse habitats in terms of both depth and vegetative complexity, both of which result in a diverse productive wetland habitat on the Refuge. (*Id.*) This diverse wetland habitat is necessary for the protection of wildlife on the Refuge and is needed to maintain a preserve and breeding ground for native birds. (*Id.*)

11) The Refuge management applies water to the Refuge through a system of canals, drains, and diversion structures, in order to maintain the necessary combination of habitats, including seasonally flooded wetlands, permanently flooded wetlands and open water and agricultural croplands. (*Id.* at 13.) The Refuge applies water to seasonal marshes from September through

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November and stops applying water predominantly in May and June. (*Id.* at 13.) The Refuge management applies water to permanent wetlands year-round or as needed to maintain elevations against seepage and evapotranspiration. This is also necessary to maintain sufficient replacement water to prevent a damaging accumulation of salts. (*Id.*) The Refuge management also applies water to agricultural crops at various times, depending on the location and crop type. Management pre-irrigates grains in fall and winter and irrigates hay/pasture in winter as well as during spring and summer as needed. (*Id.*)

12) The Fish and Wildlife Service's Survey Division determined the places of use for Claim Nos. 313-316. (Test. of Mayer at 9.) This included delineation and mapping of the existing areas of seasonally flooded wetlands, permanently flooded wetlands, open water, and agricultural croplands on the Refuge. (*Id.*) The maps were used to determine the wetland area and habitat type within each claim. (*Id.*) The place of use for each claim includes only those areas to which water is delivered during some time of the year. (*Id.*)

13) The amount of water necessary to support Refuge habitats was quantified by determining the evapotranspiration requirements, derived by the U.S. Geological Survey and the Fish and Wildlife Service, for these habitat types (seasonally flooded wetlands, permanently flooded wetlands, open water, and agricultural croplands), the flushing flow (also known as "freshening flow") necessary to ensure that salt concentrations do not increase in permanent wetland and open water areas, and the soil saturation and flooding requirements for seasonal wetlands and croplands. (*Id.*)

14) The total water requirement for permanent wetlands consists of sufficient water to replace water lost through evapotranspiration ("ET"), and water necessary for freshening flows. (*Id.* at 10.) The term ET includes both transpiration from plants and evaporation from open water surfaces. (*Id.*) The term freshening flow refers to flows intended to manage salt concentrations in wetlands. (*Id.*) The total water requirement for open water habitat consists sufficient water to replace water lost through evaporation and water necessary for freshening flows. (*Id.* at 11.) The total water requirement for seasonally flooded wetlands and agricultural croplands consists of the volume of water required to saturate the underlying soils and flood the surface of the wetland units and sufficient water to replace the ET losses. (*Id.* at 14.)

15) The Refuge water requirements for permanent wetland, open water; seasonal wetland, and agricultural cropland habitats are as follows:

Permanent wetland ET:	2.43 acre-feet per acre
Open water evaporation:	3.83 acre-feet per acre
Freshening flow (permanent wetland/open water):	1.21 acre-feet per acre (an additional 21% of the total ET and evaporation requirement for permanent wetlands and open water habitats)
Seasonal wetland soil saturation and ET:	3.08 acre-feet per acre
Cropland soil saturation and ET:	2.50 acre-feet per acre

(*Id.*)

16) The total water requirements and use under Claim Nos. 313 through 316 for the Refuge, as established by the evidence in the record are:

a.	Claim No. 313—	108,229.4 acre-feet per year
b.	Claim No. 314—	3,680.1 acre-feet per year
c.	Claim No. 315—	1,141.7 acre-feet per year
d.	Claim No 316 —	87.7 acre-feet per year
e.	TOTAL —	113,138.9 acre-feet per year

(*Id.* at 15-17.) The water requirement for the Refuge equates to an average duty of 3.02 acre-feet per acre. (*Id.* at 17.)

17) The above-stated quantities of water are the amounts reasonably necessary to fulfill the specific purpose of the Refuge, *i.e.*, providing a preserve and breeding ground for the protection of native birds and their habitat. (Test. of Mauser at 26; Test. of Mayer at 17.) These amounts of water have been quantified as the amounts that are necessary and that are being efficiently used to maintain the existing wetlands habitat on the Refuge. (Test. of Mayer at 9.) The calculations, based on a 30-year record, include a 20% “exceedance value” for evapotranspiration, meaning that in one year out of five the amount of water evaporated or transpired by plants into the atmosphere will, in combination with other more predictable water uses on the Refuge, exceed the amount of water claimed. (*Id.* at 11.)

18) Prior to European settlement, Lower Klamath Lake straddled the California and Oregon boundary, and was supplied with water during times of high water by overflow through the Klamath Straits from the Klamath River. (*Id.* at 3-4.) As the level of the river receded in the spring and summer, water would flow back out of the lake into the Klamath River, until the two reached equilibrium. (*Id.*) Beginning in 1907, control structures, including levies constructed across the Klamath Straits, were constructed. By 1917, these structures had closed off the connection between Lower Klamath Lake and the Klamath River. (*Id.* at 6.) At the same time, the Klamath Reclamation Project, in conjunction with private developers and power companies, built diversion facilities elsewhere on the Klamath River and from Upper Klamath Lake. (*Id.* at 10; Ex. 30359.) As a result, although the natural connection between Lower Klamath Lake and the Klamath River has been severed, other works divert water from the Klamath River, and Upper Klamath Lake, to the Refuge, where it is applied to establish the required habitats for birds. (*Id.*; Cross-Examination of Dr. Timothy Mayer Hearing Record, p.m. at 29:10 *ff.*¹⁸) The Lost River Diversion Channel, for example, connects the Upper Klamath Lake with the channel of the Lost River, allowing water to pass between the two basins. (Cross-Examination of Dr. Timothy Mayer Hearing Record, a.m. at 2:12:00 *ff.*) Water is diverted from the Klamath River system to the Lost River system through this diversion channel. (*Id.*) Some of this water flows down the channel of the Lost River into Tule Lake. (*Id.*)

19) Beginning in 1941, works were constructed to allow water to be pumped from Tule Lake to the Refuge. (Ex. N23.) At times, this water from the Klamath system is mixed with return flow from upstream irrigators, and with water from the Lost River, perhaps released to Tule Lake during times of high flow. (Cross-Examination of Dr. Timothy Mayer Hearing Record Hearing

¹⁸ References to testimony that was digitally recorded at hearing but not transcribed will be cited as “Cross-Examination of [witness’ name], a.m. [or p.m., denoting morning or afternoon session] at [elapsed time since beginning of session].”

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Record p.m. at 29:10 *ff.*). Most of these diversion works were constructed and are owned by the United States, and operated by various entities under contracts. (Cross-Examination of Dr. Timothy Mayer Hearing Record Hearing Record a.m. at 2:20:00 *ff.*; p.m. at 31:20 *ff.*) Some of these contracts provide for delivery of water for wildlife purposes in Lower Klamath Lake. (Ex. 30041, 30059, 30060.) Others provide for delivery of water to land owned by the United States, without limitation as to its use. (Ex. A at 35.)

CONCLUSIONS OF LAW

1. **It is irrelevant that the Preliminary Evaluation for Claims 313 and 315 incorrectly describes the place of use in part. The claim and hearing record control.**
2. **The question of whether there was or was not unappropriated water on the date for which the right is claimed is not a proper subject for adjudication in these proceedings.**
3. **The lands for which the right is claimed were not in the public domain at the time they were reserved.**
4. **The quantity of water claimed is “only that amount of water necessary to fulfill the purpose of the reservation, no more.”**
5. **Claimant has provided sufficient evidence of year-round use or need for water to support the primary purpose of the refuge.**
6. **There is sufficient evidence to support the claim.**
7. **The claim does not rely on Exhibits 5-1 and 5-2 from claims 321-324, which, other than certain facilities delivering water for agricultural irrigation, do not pertain to water delivery for Lower Klamath National Wildlife Refuge.**
8. **Water right claimed is appurtenant to the claimed place of use.**
9. **Exhibit 7-4 to claims 321 and 323 is not in evidence in this case.**
10. **The facilities for diversion and conveyance of water are used and relied upon for delivery of water to the place of use, and the claimed rates of diversion are not in excess of the amounts needed to serve the place of use.**
11. **The claim identifies a place of use and rate of diversion.**
12. **Claimant does not claim a federal reserved right to water lawfully stored in Upper Klamath Lake under a senior right.**
13. **The United State owns the claimed place of use.**

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14. At the time of the reservation, the United States owned land for which a reserved right is now claimed. The priority date for some of the lands acquired after the original reservation is the date of acquisition.

OPINION

Jurisdictional Challenges:

At the outset, the Upper Basin Contestants have sought a stay from the Department, and asked that I abstain from deciding this case until it is shown that the Department has complied with the requirements of ORS 539.120. The Department has objected to this request, and the other parties concur with the Department.

The motion was filed more than three years after the first proceedings in this case, and almost two years after the deadline set for amendment of contests (December 17, 2004-see Scheduling Order dated March 14, 2003) Indeed, it was filed more than a year after the hearing in this case, and approximately six months after the record closed. Under the circumstances, it is more than untimely. Unless the motion challenges subject matter jurisdiction, which can be raised at any time (*State v. Belzon*, 140 Or App 198 (1996)) it will not be considered. In this case, however, the motion challenges the authority of the Department to proceed with this adjudication because of an asserted failure of the Department's duty. I will therefore consider whether the defect alleged by these contestants deprives me of jurisdiction to consider this matter further.

In its current form, as quoted *verbatim* by the Upper Basin Contestants in their Motion (at page 3), ORS 539.120 does not control in the Klamath Basin Adjudication. In 1987 this statute was amended to make it only effective "in connection with water rights subject to this chapter, for which a registration statement has been filed as provided in ORS 539.240." ORS 539.120 (*emphasis added*). Since no registration statement has been filed in any of the proceedings under consideration, the statute in its present form does not apply to them. I do not decide here whether the pre-1987 statute, which did not refer to registration statements, can be applied to proceedings pending 20 years after its amendment, because, even if it does apply, it does not deprive me of authority to hear and decide this case.

The position of ORS 539.120 among the other provisions of ORS chapter 539 may have contributed to some confusion. ORS 539.040, the first reference to ORS 539.120, provides in pertinent part as follows:

(1) As soon as practicable after the examination and measurements are completed, as described in ORS 539.120, the Water Resources Director shall prepare a notice setting forth a place and time certain when the director or the authorized assistant of the director shall begin taking testimony as to the rights of the various claimants to the use of the waters of the stream or its tributaries. The notice shall be published in two issues of one or more newspapers having general circulation in the counties in which the stream is situated, the last publication of the notice to be at least

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30 days prior to the beginning of taking testimony by the director or the authorized assistant of the director.

(2) The director shall also send by registered mail or by certified mail with return receipt to each claimant or owner who filed with the director a registration statement as provided in ORS 539.240 and to the Attorney General of the United States or the designated representative of the Attorney General of the United States, on behalf of the United States and its agencies and as trustee for the Indian tribes, a notice similar to that provided in subsection (1) of this section setting forth the date when the director or the authorized assistant of the director will take testimony as to the rights to the use of the water of the stream. The notice must be mailed at least 30 days prior to the date set therein for taking testimony.

(3)(a) For purposes of the Klamath Basin adjudication, the Water Resources Department will provide notice, substantially like that specified in subsection (2) of this section, to claimants or owners who desire to claim a water right under this chapter, or to contest the claims of others, and have so notified the director. The notice shall be accompanied by a blank form on which the claimant or owner shall present in writing all of the particulars necessary for determination of the right of the claimant or owner to contest the claims of others or to the use of the waters of a stream to which the claimant or owner lays claim. That form shall require substantially the same information required in a registration statement, as provided in ORS 539.240 (2), except that the map need not be prepared by a certified water rights examiner, as required by ORS 539.240 (2)(d).

It is apparent from the foregoing that the “examination and measurement” required under ORS 539.120 was required to take place before the Director sent notices to potential claimants enclosing the claim form. In other words, the Department was required to make the examination before there were any claims in the adjudication to which the examination could be referenced, or any cases on contested claims in which such an examination could be filed. It is at that time, prior to any claim having been filed, that the Department is required to make the results of the examination and measurement a matter of public record. The unfortunate placement of this statute immediately after ORS 539.110, which describes the contested case hearings conducted by ALJs of which this case is a part, and before ORS 539.130, which describes the Order of Determination to be filed by the Director with the Circuit Court, may have confused the parties.

Nonetheless, the text of the statute controls, not its placement. There is no question that the examination and measurement required by ORS 539.120-if, indeed, it is required in this adjudication-and the filing of the results of that examination and measurement as therein described, must necessarily have occurred at a very early stage in the adjudication when there was no way to differentiate between claims or determine how to conveniently divide the information produced by the study so that it could be usefully considered in a contested case. There is, to put it simply, nothing in that statute that refers to contested case proceedings, or imposes any requirement on the Department in connection with them. Insofar as can be determined from the language of the statute, or the true temporal position in the adjudication of

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the steps it requires, the examination and measurement is chiefly useful to the Department in connection with the investigation and evaluation of the various claims once they have been filed. Obviously, OWRD is free to offer information it has garnered in the course of its examination and measurement, but there is no provision of statute that compels it to do so. I conclude that compliance with ORS 539.120 is not a condition for jurisdiction of the OAH over the subject-matter of this case.

Contestant Sprague River also argues that OWRD does not have jurisdiction over this case at all. These contestants argue, essentially, that the evidence shows that water from the Lost River system, and return flows that collect in Tule Lake, comprise a large portion, if not all, of the water used by the Refuge, that the point of diversion from the Lost River for that water is Tule Lake, in California, and that OWRD does not have jurisdiction over water diverted from a diversion point in California. These contestants are partly correct. OWRD does not have jurisdiction to adjudicate a water right based on water diverted from a point in California. To the extent the United States claimed water from a diversion point at Tule Lake, I would not have the authority to decide the case.

The United States does not claim the water of the Lost River or return flow from a diversion point at Tule Lake. The United States claims water from Klamath River and Upper Klamath Lake that originally flowed from the Klamath River in Oregon through the Klamath Straits and into Lower Klamath Lake in Oregon. When the Klamath Straits were closed, facilities were eventually developed that allowed water to be diverted from Upper Klamath Lake and the Klamath River in Oregon, to the Lower Klamath Lake. Part of that water comes down the Lost River Diversion Channel to the channel of the Lost River, enters Tule Lake and is pumped to Lower Klamath Lake. To the extent that it does so, that water is diverted from points in Oregon, and is under OWRD's jurisdiction. Therefore, OWRD, and the OAH, still have jurisdiction over this case.

Having considered the jurisdictional challenges to these claims, I will proceed to the substantive contest issues remaining.

1. It is irrelevant that the Preliminary Evaluation for Claims 313 and 315 incorrectly describes the place of use in part. The claim and hearing record control.

When contests are filed in an adjudication, the Preliminary Evaluation loses any effect, as the Claimant is required to put on evidence to prove its claim under ORS 539.110. The file that OWRD considered in preparing the Evaluation is included as part of the record in each case, and additional evidence may be submitted in the course of contested case proceedings. Consequently, the Preliminary Evaluation itself would have no evidentiary effect, except as setting the context for the contests filed in the case.

2. The question of whether there was or was not unappropriated water on the date for which the right is claimed is not a proper subject for adjudication in these proceedings.

As ALJ Young noted in Klamath Case 006, the Supreme Court's reference to "unappropriated" water in *Cappaert v United States*, 426 U.S. 128 (1976) "* * * merely acknowledges that federal reserve water rights do not usurp rights of senior rights holders.

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Implicit in the court's statement is an understanding and acknowledgement of the prior appropriation doctrine." Klamath Case 006, Order on Motions for Summary Judgment, at 12.

Oregon, like most western states, follows the "prior appropriation" doctrine, which addresses which water rights are honored in times of shortage. Under this principle, holders of water rights with later (junior) priority dates may not exercise their rights if to do so would interfere with the rights of those who have earlier (senior) priority dates. Thus, a water right is not an absolute right to use water, but a relative right which may only be exercised within the priority system. See ORS 540.045 (watermasters regulate and distribute water in accordance with rights of record).

* * * * *

There is no requirement that the claim include a statement that the amount of water claimed was unappropriated at the time of designation, or that the BLM establish in the claim materials that the amount of water claimed was available for reservation.

Id.

I am persuaded by ALJ Young's reasoning. Whether there was unappropriated water available for appropriation when this reservation occurred is not a proper subject for the Klamath Adjudication, and is best left to regulation after the Adjudication is complete.

3. The lands for which the right is claimed were not in the public domain at the time they were reserved.

KPWU asserted that the lands that were reserved by Executive Order 924 had not been withdrawn from the public domain at the time of the reservation. However, given the laws under which the bottom of the lake was ceded by the states of Oregon and California to the United States, there is no evidence that the land was opened to settlement before the reservation.

4. The quantity of water claimed is "only that amount of water necessary to fulfill the purpose of the reservation, no more."

In his Order on Motions for Ruling on Legal Issues, ALJ Barber considered different formulations used by the courts in deciding how much water was reserved under a federal reservation. He listed these formulations as follows:

- The United States is entitled to an amount of water "sufficient for its future requirements." *Arizona v. California*, 373 US at 601;
- It is entitled to "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 at 141; *United States v. New Mexico*, 438 US 696, 700 (1978);

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- The amount is limited to the level without which “the purposes of the reservation would be entirely defeated.” *New Mexico* at 700.

Order on Motions for Ruling on Legal Issues at 11.

ALJ Barber concluded that:

[T]he *Cappaert* language (the water necessary to fulfill the purpose and no more) is the correct standard. The United States is entitled to enough water to fulfill the purpose. That amount is more than an amount that would allow the Refuge to eke out an existence; it is less than all the water wanted in the Refuge. If there is a range of what would be considered reasonable use of water in the Refuge, the reserved water right would be in the lower half of that range.

Id.

In coming to that conclusion, ALJ Barber expressly rejected the standard as repeatedly recited in Sprague/Fort Klamath Contestants’ argument, that is, the level without which “the purposes of the reservation would be entirely defeated.”

The standard ALJ Barber adopted is the law for this case.

5. Claimant has provided sufficient evidence of year-round use or need for water to support the primary purpose of the refuge.

Sprague/Fort Klamath Contestants¹⁹ argue that the evidence does not show that the season of use should be year-round. This is incorrect. The activities evidenced in the testimony of Claimant’s witnesses, as discussed in the Findings of Fact, above, are all activities related to management of a preserve and breeding ground for native birds. Not all of those activities are conducted in the same seasons. Some are, or can be, conducted in all seasons, while others occur at different times. For example, Claimant demonstrated that it was necessary to change the water levels in the part of the Refuge that is flooded year-round, either to replenish water that has evaporated, or to encourage different vegetation needed at different times of the year for different parts of the birds’ life-cycle. The Season of Use should be year-round.

6. There is sufficient evidence to support the claim.

The underlying task in each case in the Klamath Adjudication is to determine whether a claimant has the right to call upon the watermaster to release water for use by the claimant, and, if so, to determine the priority of that claim relative to other users. ORS 539.021; 540.045. ALJ Barber has already established that the United States has the right to call upon the Klamath River and Upper Klamath Lake, based on specified priority dates that were the subject of extensive argument.

¹⁹ Although the only remaining issue presented by these contestants in their statements of contest was issue 4, stated as “To the extent any federal reserved right exists, the scope of the right is limited to the minimum amount of water necessary for the primary purpose of the reservation, without which the reservation would be entirely defeated,” they presented argument on this, among other issues, in their brief. I have addressed their argument on that basis.

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Sprague River/Fort Klamath Groups argue that the United States is precluded from claiming water from the Klamath River because the needs of the Refuge are satisfied from water released in the Lost River system and return flow, both of which are gathered at Tule Lake and pumped to the Refuge. As these contestants put it, "The Service must demonstrate by a preponderance of evidence that its claim is satisfied with waters from these two sources [*i.e.* Klamath River and Upper Klamath Lake]." This is not a correct statement of the law.

It is uncontested that in 1908 when the bulk of the Refuge was reserved, the Klamath River was the source of water for Lower Klamath Lake. Thus, when the Refuge was created, water was reserved from the only possible source at the time, the Klamath River. By the time the three smaller reservations occurred, beginning in 1944, works were under construction to divert water from the claimed points of diversion on the Klamath River, and send the water to the Refuge. Although the location of the diversion of water has changed, the United States still retains the ability to draw on the Klamath River to satisfy the requirements of the Refuge.

I do not doubt that water from return flow and from the Lost River system makes its way to Tule Lake, whence it is pumped to the Refuge. To the extent this water would otherwise go to waste, the United States should, and does, make use of it when the opportunity presents. Nonetheless, this incidental or opportunistic supply of water is neither predictable nor subject to call.

No contestant has provided me with a citation to authority for the proposition that the United States may be compelled to reduce its original claim on Klamath River water based on the possibility that from time to time water may be available from another source upon which the United States has no right to make a call. Under the various executive orders and acts of Congress that established and authorized the Refuge, the United States reserved and is entitled to a supply of water from the Klamath River in quantities that are necessary to fulfill the primary purpose of the reservation. It is irrelevant that sometimes some of the water needs may be satisfied by other sources. That incidental supply is not a matter of right, and therefore cannot be adjudicated as such. The United States' reservation was from the Klamath River, and water from the Klamath River remains reserved, to the full extent of the claim, if needed to fulfill the purposes of the reservation.

Sprague/Fort Klamath Contestants have asserted that to allow the claim from the Klamath River would be to encourage waste of the water. This is not correct. Given the manner in which water is collected in Tule Lake and pumped to the Refuge, water diverted from most of the listed diversion points will pass through this Tule Lake system on its way to the Refuge. Obviously, if there is already sufficient water in the Tule Lake system from other sources to satisfy the Refuge's requirements, there would be no reason for the Refuge to draw on the water subject to its claim. But to the extent that water from these other sources is not sufficient to satisfy the needs of the Refuge, it is entitled to divert water from the Klamath River and Upper Klamath Lake to make up the difference. If, in the extreme case, the incidental sources fail completely, the entire amount required by the Refuge could come from its claimed diversions, as a matter of right. Thus, far from encouraging waste, allowance of the claim will allow the Refuge to use water whose availability cannot be compelled, but that might otherwise be wasted, while

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assuring that if those incidental sources should fail, there will be sufficient water to fulfill the primary purposes of the Refuge.

Sprague/Fort Klamath Contestants also argue that managing salt concentrations in the water is not a primary purpose of the reservation, so that “freshening flow” introduced into the Refuge for that purpose would not be part of the right. These contestants also argued that this is a novel management practice not contemplated when the Refuge was created. However, Claimant showed that elevated salt concentrations in water in the Refuge reduce the ability to fulfill its primary purpose, as a preserve and breeding ground for birds. As such, practices such as freshening flow to reduce salt concentrations are an appropriate use of water for the Refuge, and a proper subject of its claim.

Sprague/Fort Klamath Contestants also argue that the growing of crops is an agricultural use that is not the primary purpose of the reservation. However, the evidence shows that the irrigation and farming of some of the property within the Refuge is intended to provide food and a necessary habitat for birds in the Refuge. As such, it serves the primary purpose of the Refuge as a preserve and breeding ground for native birds.

7. The claim does not rely on Exhibits 5-1 and 5-2 from claims 321-324.

Since this issue was not briefed, it is difficult to discern precisely what was argued. It suffices to state that whatever water may be delivered to the Refuge for uses not connected with wildlife management would not be subject to these claims. In any event, the exhibits noted are not in evidence.

8. Water right claimed is appurtenant to the claimed place of use.

ALJ Barber decided this question in the Order on Motions for Ruling on Legal Issues. No further discussion is required.

9. Exhibit 7-4 to claims 321 and 323 is not in evidence in this case.

Exhibit 7-4 to claims 321 and 323 was not placed in evidence as such in this case. Consequently, this contest ground cannot be considered further.

10. The facilities for diversion and conveyance of water are lawfully used and relied upon for delivery of water to the place of use, and the claimed rates of diversion are not in excess of the amounts needed to serve the place of use.

KPWU suggests that the diversion points listed cannot be used for this claim, because they are managed by irrigation districts under contracts that do not give the United States the right to divert water through them except for irrigation. The United States, however, points to the fact that it owns the works in question, and that the contracts do not limit use of its own property to diversion of water for irrigation. Rather, the United States argues that the contracts in question merely prevent it from using water that the Districts have contracted for, for other than irrigation. Having considered the contracts, to the extent they are in the record in this case, I agree with the United States. Subject to the rights of the District under their contracts for

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water, the United States is not prevented from using its works to divert water to the Refuge, for the Refuge's purposes.

KPWU also argued that Claimants have not proved that the amount of water claimed does not exceed the amount needed, citing testimony from Claimant's witnesses that in years where less water was available, the Refuge was able to continue functioning by flooding fewer acres. However, the United States is entitled to use all the land that it has reserved to further the primary purpose of the reservation. To hold otherwise would be to effectively vacate a portion of the reservation itself.

11. The claim identifies a place of use and rate of diversion.

The claims include an extensive list of locations identified as the place of use for each claim. That list is attached as Attachment 1.

Although the Preliminary Evaluation did not specify a rate of diversion, the documents submitted in support of the claim did so. Those documents, together with the evidence submitted in these proceedings, form the basis for the Proposed Order in this case.

12. Claimant does not claim a federal reserved right to water lawfully stored in Upper Klamath Lake under a senior right.

KPWU also argued that the water claimed is limited to "natural flow" within the Klamath River, and cannot be satisfied through diversion of water stored in Upper Klamath Lake. The United States has disclaimed any intention to claim water stored in Upper Klamath Lake, but expresses some confusion as to precisely what water is the subject of KPWU's argument.

To the extent that water has been appropriated to storage in Upper Klamath Lake by a senior appropriator, there is no question that it cannot be diverted by the United States to satisfy this claim. However, one of the tasks of the Klamath Adjudication is to quantify the water rights of users in the basin, including storage rights. Once those storage rights have been quantified, it seems possible that water may be found in fact to have been stored in Upper Klamath Lake in excess of the quantity appropriated to storage. If this occurs, that portion of the water held in Upper Klamath Lake that is not subject to a senior appropriation should be available to the United States to satisfy these claims.

In any event, since the United States has not claimed a right to divert water lawfully stored in Upper Klamath Lake by a senior appropriator, there is no justiciable controversy before me, and I have no authority to decide the matter. *Barcik v. Kubiaczyk*, 321 Or 174 (1995).

13. The United State owns the claimed place of use.

KPWU argues that the United States has not shown that it acquired title to the property that is subject to claim 313 in 1908, or at any time, and therefore cannot claim water to be used on that property. Specifically, KPWU's argument runs as follows:

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In 1905, the States of Oregon and California ceded to the United States the lands under Lower Klamath Lake that were to be uncovered in the course of reclamation. In 1908, President Theodore Roosevelt issued an executive order that reserved the islands and marshlands located in Lower Klamath Lake within specified boundaries. However, the United States did not acquire those islands and marshes by cession from the states, and President Roosevelt did not reserve the property on the bottom of the lake that was ceded. Moreover, the United States did not actually acquire title to the bottom-land that was ceded until after it was uncovered, which occurred over a number of years starting in 1917. Consequently, KPWU suggests, the United States cannot show that it owns the land that was subject to the reservation, that it reserved the lands ceded by the states, or in any event that it is entitled to a 1908 priority date. KPWU's assertions cannot stand for several reasons.

First, the standard of proof in these proceedings is by a preponderance of the evidence. Therefore, it is not necessary to have documents of title in the record to prove the ownership of the United States to these properties, so long as it is shown that more likely than not the United States owns them. The United States has asserted exclusive control over the property under claim of right for nearly 100 years. During that period, the states have never challenged the United States' ownership of the property. This is sufficient to show by a preponderance of the evidence that the United States acquired the property.

Second, KPWU confuses title with ownership. It may well be that legal title did not pass to the United States under the cession acts until the bottom of the lake was uncovered. However, the evidence shows that the United States was successfully asserting a claim of right to the property in 1908, regardless of when title actually passed. In other cases, including those involving Indian allotments that ultimately derive from a federal reservation, a claim of right has been held to be sufficient to establish a water right appurtenant to the property.²⁰ KPWU has shown no reason to depart from that principle in this case.

Additionally, the phrasing of Executive Order 2200 by President Wilson in 1915, only seven years after the first Executive Order, makes it clear that the United States believed that it had previously reserved the entire land-area within the boundaries of the earlier reservation. That reservation stated: "The Klamath Reservation hereby reduced in area embraces the lands segregated by the broken line upon the diagram hereto attached and made a part of this order. The shaded portion shows the lands eliminated." It is clear by this language that, at least in 1915, President Wilson did not believe that President Roosevelt had only reserved the islands and marshes in the area.

14. At the time of the reservation, the United States owned land for which a reserved right is now claimed. The priority date for some of the lands acquired after the original reservation is the date of acquisition.

As discussed above, the United States has held the land subject to Claim 313 for nearly 100 years, under claim of right. Judge Barber held that the priority dates for claims 314 through

²⁰ Cf. Proposed Order, Case 124 at 15; Proposed Order, Case 160 at 14.

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316, for the parcels later acquired, were their respective dates of acquisition. This Proposed Order has followed that conclusion.

ORDER

Based upon the foregoing, I propose that the Department allow the rights claimed as follows:

1. **Basis of Right:** Federal reserved water right.
2. **Source:** Upper Klamath Lake and Klamath River, tributary to Link River and Pacific Ocean respectively
3. **Use:** Providing a preserve and breeding ground for the protection of native birds and their habitat, including maintenance of permanent wetland, open water, seasonal wetland, and cropland habitats, by satisfying the consumptive water requirements of these habitats, *i.e.*, evapotranspiration requirements (transpiration from plants, as well as evaporation from open water surfaces), freshening flow requirements (to ensure that salt concentrations in permanent wetlands and open water habitats are maintained at reasonable levels), and soil saturation and flooding requirements (for seasonal wetlands and cropland habitats).

4. Quantity:

a. Annual volumes:

- | | | |
|----|----------------|------------------------------|
| 1. | Claim No. 313— | 108,229.4 acre-feet per year |
| 2. | Claim No. 314— | 3,680.1 acre-feet per year |
| 3. | Claim No. 315— | 1,141.7 acre-feet per year |
| 4. | Claim No. 316— | 87.7 acre-feet per year |
| 5. | TOTAL — | 113,138.9 acre-feet per year |

b. Diversion rates:

1. Claim No. 313

Ady and Central Canal Diversion at Klamath River:	284.4 cfs
Station 48 Diversion at Lost River Diversion Channel:	300.0 cfs
Combined instantaneous diversion:	584.4 cfs

2. Claim No. 314

Station 48 Diversion at Lost River Diversion Channel:	25.0 cfs
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3. Claim No. 315

Ady and Central Canal Diversion at Klamath River:	9.0 cfs
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Station 48 Diversion at Lost River Diversion Channel: 9.0 cfs
Combined instantaneous diversion: 9.0 cfs

4. Claim No. 316

Ady and Central Canal Diversion at Klamath River: 0.6 cfs
Station 48 Diversion at Lost River Diversion Channel: 0.6 cfs
Combined instantaneous diversion: 0.6 cfs

5. Claims 313-315

Link River Dam — no specified diversion rate adjudicated;
structure utilized to deliver water to Refuge,
but does not directly divert water to the
places of use.

“A” Canal headworks— no specified diversion adjudicated;
structure utilized to deliver water to Refuge,
but does not directly divert water to the
places of use.

5. Period of Use: Year-round use, January 1 through December 31.

6. Priority Dates:

- a. August 8, 1908, for the original area of the Refuge, as identified in Part A of Attachment 1;
- b. September 2, 1964, 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. November 30, 1944, 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. July 14, 1949, 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

7. Place of Use:

Lands within the Lower Klamath National Wildlife Refuge as identified in Attachment 1 (Parts A through D).

8. Points of Diversion:

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- a. Link River Dam, NW1/4SE1/4, Section 30, Township 38 South, Range 9 East, Willamette Meridian;
- b. "A" Canal Headworks, SW1/4NE1/4, Section 30, Township 38 South, Range 9 East, Willamette Meridian;
- c. Ady and Central Canal Diversion at Klamath River, NE1/4NW1/4, Section 15, Township 40 South, Range 8 East, Willamette Meridian;
- d. Station 48 Diversion at Lost River Diversion Channel, NE1/4NW1/4, Section 31, Range 10 East, Willamette Meridian.



Maurice L. Russell, II, Administrative Law Judge
Office of Administrative Hearings

Dated: February 6, 2007

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Administrative Law Judge. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Proposed Order.

Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dwight W. French, Adjudicator
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301

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PLACE OF USE FOR LOWER KLAMATH FEDERAL RESERVED CLAIM 313
EXECUTIVE ORDER NO. 924

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
Willamette Base and Meridian						
41S	8	1	NENE	1		34.2
41S	8	1	NWNE	2		36.4
41S	8	1	SWNE	3		40.5
41S	8	1	SENE	4		38
41S	8	1	NESE	5		38
41S	8	1	NWSE	6		40.5
41S	8	1	SWSE	7		40.5
41S	8	1	SESE	8		38
41S	8	11	SWSW			8
41S	8	12	NENE	1		31.5
41S	8	12	NWNE	2		35
41S	8	12	SWNE	3		40.5
41S	8	12	SENE	4		36
41S	8	12	NESE	5		36
41S	8	12	NWSE	6		40.5
41S	8	12	SWSE	7		40.5
41S	8	12	SESE	8		36
41S	8	13	NENE	1		36
41S	8	13	NWNE	2		40.2
41S	8	13	SWNE	5		39.8
41S	8	13	SENE	6		38.7
41S	8	14	NWNW			4.9
41S	9	3	NENW	1		37.4
41S	9	3	NWNW	2		38
41S	9	3	SWNW	3		37.4
41S	9	3	SENW	4		37.1
41S	9	3	NWSE	5		37
41S	9	3	NESW	6		39.4
41S	9	3	NWSW	7		39.4
41S	9	3	SWSW	8		36.1
41S	9	3	SESW	9		35.3
41S	9	3	SWSE	10		34.2
41S	9	4	NENE	1		38
41S	9	4	NWNE	2		38.4
41S	9	4	NENW	3		39.3
41S	9	4	NWNW	4		36.9
41S	9	4	SWNW	5		37.8
41S	9	4	SENW	6		40
41S	9	4	SWNE	7		37.2
41S	9	4	SENE	8		37.1
41S	9	4	NESE	9		38.4
41S	9	4	NWSE	10		39.2
41S	9	4	NESW	11		40.5
41S	9	4	NWSW	12		38
41S	9	4	SWSW	13		36.6
41S	9	4	SESW	14		38.6
41S	9	4	SWSE	15		37.6
41S	9	4	SESE	16		37.6
41S	9	5	NENE	1		36.1
41S	9	5	SWNW	2		25.2
41S	9	5	SENW	3		37.7
41S	9	5	SWNE	4		37.2
41S	9	5	SENE	5		37.2
41S	9	5	NESE	6		36.4
41S	9	5	NWSE	7		32.9

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<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if Unsurv.)</u>	<u>Acres</u>
41S	9	5	NESW	8		34.3
41S	9	5	SWSE	9		34.4
41S	9	5	SESE	10		30.3
41S	9	6	NENE	1		35.2
41S	9	6	NWNE	2		39.6
41S	9	6	NENW	3		39.6
41S	9	6	NWNW	4		39.2
41S	9	6	SWNW	5		40.5
41S	9	6	SENW	6		40.5
41S	9	6	SWNE	7		40.5
41S	9	6	SENE	8		40.5
41S	9	6	NWSW	9		40.5
41S	9	8	NENE	1		33.1
41S	9	8	NWNE	2		36
41S	9	8	SWNW	3		34.2
41S	9	8	SENW	4		39.8
41S	9	8	SWNE	5		40.5
41S	9	8	SENE	6		33.1
41S	9	8	NESE	7		33.1
41S	9	8	NWSE	8		40
41S	9	8	NESW	9		40.5
41S	9	8	NWSW	10		36
41S	9	8	SWSW	11		36.1
41S	9	8	SESW	12		40.5
41S	9	8	SWSE	13		40.5
41S	9	8	SESE	14		33.1
41S	9	9	NENE	1		38
41S	9	9	NWNE	2		39
41S	9	9	NENW	3		40.5
41S	9	9	NWNW	4		40.5
41S	9	9	SWNW	5		40.5
41S	9	9	SENW	6		40.5
41S	9	9	SWNE	7		36.1
41S	9	9	SENE	8		38.4
41S	9	9	NESE	9		38
41S	9	9	NWSE	10		36.8
41S	9	9	NESW	11		39.2
41S	9	9	NWSW	12		39
41S	9	9	SWSW	13		40.5
41S	9	9	SESW	14		40.5
41S	9	9	SWSE	15		39.4
41S	9	9	SESE	16		39.6
41S	9	10	NENE	1		38.4
41S	9	10	NWNE	2		37.1
41S	9	10	NENW	3		38.2
41S	9	10	NWNW	4		38.4
41S	9	10	SWNW	5		36.3
41S	9	10	SENW	6		36.1
41S	9	10	SWNE	7		35.2
41S	9	10	SENE	8		36.1
41S	9	10	NESE	9		36.3
41S	9	10	NWSE	10		36.1
41S	9	10	NESW	11		34.8
41S	9	10	NWSW	12		34.5
41S	9	10	SWSW	13		39.2
41S	9	10	SESW	14		38
41S	9	10	SWSE	15		39.4
41S	9	10	SESE	16		37
41S	9	14	NENE			35.7

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<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
41S	9	14	NWNE			38
41S	9	14	NENW			38
41S	9	14	NWNW			38
41S	9	14	SWNW			40
41S	9	14	SENW			40
41S	9	14	SWNE			40
41S	9	14	SENE			37.6
41S	9	14	NESE	5		17
41S	9	14	NWSE	6		18
41S	9	14	NESW	7		17
41S	9	14	SWSW	8		16.4
41S	9	15	NENE	5		34.2
41S	9	15	NWNE	6		35.2
41S	9	15	NENW	7		34.8
41S	9	15	NWNW	8		36.8
41S	9	15	SWNW	9		39
41S	9	15	SENW	10		37
41S	9	15	SWNE	11		37.4
41S	9	15	SENE	12		37
41S	9	15	NESE	13		12.9
41S	9	15	NWSE	14		12.1
41S	9	15	NESW	15		11
41S	9	15	NWSW	16		10.8
41S	9	16	NENE	5		37
41S	9	16	NWNE	6		36.8
41S	9	16	NENW	7		38
41S	9	16	NWNW	8		39.6
41S	9	16	SWNW	9		40.5
41S	9	16	SENW	10		40.5
41S	9	16	SWNE	11		36.1
41S	9	16	SENE	12		39
41S	9	16	NESE	13		9.5
41S	9	16	NWSE	14		8.1
41S	9	16	NESW	15		7.8
41S	9	16	NWSW	16		7
41S	9	17	NENE	5		33.1
41S	9	17	NWNE	6		40.5
41S	9	17	NENW	7		38
41S	9	17	NWNW	8		36
41S	9	17	SWNW	9		36.2
41S	9	17	SENW	10		40.5
41S	9	17	SWNE	11		40.5
41S	9	17	SENE	12		33.1
41S	9	17	NESE	13		5.5
41S	9	17	NWSE	14		6.4
41S	9	17	NESW	15		6
41S	9	17	NWSW	16		5.7
41S	9	18	NENE	5		36.1
41S	9	18	NWNE	6		36.1
41S	9	18	NENW	7		36.1
41S	9	18	NWNW	8		36.6
41S	9	18	SWNW	9		40.5
41S	9	18	SENW	10		40.5
41S	9	18	SWNE	11		40.5
41S	9	18	SENE	12		40.5
41S	9	18	NESE	13		6.4
41S	9	18	NWSE	14		5.5
41S	9	18	NESW	15		4.6
41S	9	18	NWSW	16		3.7

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<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
Mount Diablo Base and Meridian						
47N	2	4	NWNE	2		46.6
47N	2	4	NENW	3		46.6
47N	2	4	NWNW	4		46.6
47N	2	4	SWNW			40
47N	2	4	SENW			40
47N	2	4	SWNE			40
47N	2	4	NWSE			40
47N	2	4	NESW			40
47N	2	4	NWSW			40
47N	2	4	SWSW			40
47N	2	4	SESW			40
47N	2	4	SWSE			40
47N	2	5	NENE	1		46.6
47N	2	5	NWNE	2		46.6
47N	2	5	NENW	3		45.7
47N	2	5	NWNW	4		46.5
47N	2	5	SWNW			40
47N	2	5	SENW			40
47N	2	5	SWNE			40
47N	2	5	SENE			40
47N	2	5	NESE			40
47N	2	5	NWSE			40
47N	2	5	NESW			40
47N	2	5	NWSW			40
47N	2	5	SWSW			39.7
47N	2	5	SESW			40
47N	2	5	SWSE			40
47N	2	5	SESE			40
47N	2	6	NENE	1		46.5
47N	2	6	NWNE	2		46.5
47N	2	6	NENW	3		46.5
47N	2	6	SENW			40
47N	2	6	SWNE			40
47N	2	6	SENE			40
47N	2	6	NESE			40
47N	2	6	NWSE			40
47N	2	6	NESW			40
47N	2	6	SESW			40
47N	2	6	SWSE			40
47N	2	6	SESE			37.4
47N	2	7	NENE			23.1
47N	2	7	NWNE			40
47N	2	7	NENW			30
47N	2	7	SENW			11.1
47N	2	7	SWNE			24.1
47N	2	7	SENE			10.5
47N	2	8	NENE			40
47N	2	8	NWNE			40
47N	2	8	NENW			40
47N	2	8	NWNW			36.4
47N	2	8	SWNW			15.7
47N	2	8	SENW			25.1
47N	2	8	SWNE			39.7
47N	2	8	SENE			29.4
47N	2	9	NWNE			40
47N	2	9	NENW			40
47N	2	9	NWNW			40

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<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if UNSURV.)</u>	<u>Acres</u>
47N	2	9	SWNW			14.6
47N	2	9	SENE			20.2
47N	2	9	SWNE			38.3
47N	2	9	SENE			4.8
47N	2	9	NESE			10.7
47N	2	9	NWSE			10.6
47N	2	10	SWSW			0.4
47N	2	UNSURV.			5B	196.1
47N	2	UNSURV.			6A	62.3
47N	2	UNSURV.			6B2	785.6
47N	2	UNSURV.			6C	558.4
47N	2	UNSURV.			7A	1.4
47N	2	UNSURV.			7B	556.1
47N	2	UNSURV.			10B	538.7
47N	2	UNSURV.			10C	110.3
47N	2	UNSURV.			11AN	379.8
47N	2	UNSURV.			11AS	539.6
47N	2	UNSURV.			11B	621
47N	2	UNSURV.			11C	643
47N	2	UNSURV.			13A	1684.1
47N	2	UNSURV.			13B	438.4
47N	3	4	NENW	1		43.9
47N	3	4	NWNW	2		32.5
47N	3	4	SWNW	3		36.7
47N	3	4	SENE	4		37.1
47N	3	4	NESW	5		26
47N	3	4	NWSW	6		39.3
47N	3	4	SWSW	7		39.4
47N	3	4	SESW	8		15.9
47N	3	5	NENE	1		36.3
47N	3	5	NWNE	2		36
47N	3	5	NENW	3		34.8
47N	3	5	SWNE			38.2
47N	3	5	SENE			40
47N	3	5	NESE			38.7
47N	3	5	SESE			33.5
47N	3	8	NENE			37
47N	3	8	SENE			40
47N	3	9	NWNW	1		40.9
47N	3	9	SWNW	2		27.3
47N	3	9	NWSW	3		19.6
47N	3	9	SWSW	4		8
47N	3	16	NWNW	1		0.1
47N	3	UNSURV.			4C	0.5
47N	3	UNSURV.			7A	14.5
47N	3	UNSURV.			7B	141.2
47N	3	UNSURV.			8B	665.6
47N	3	UNSURV.			9A	266.8
47N	3	UNSURV.			9B	7.4
47N	3	UNSURV.			11B	84
47N	3	UNSURV.			11C	97.7
47N	3	UNSURV.			12A	700.6
47N	3	UNSURV.			12B	757.1
47N	3	UNSURV.			12C	848.2
47N	3	UNSURV.			13A	48.1
47N	3	UNSURV.			13B	67.7
48N	1	22	NESE	6		5.2
48N	1	22	SESE	11		25.8
48N	1	23	NENE	1		6.6

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<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
48N	1	23	NWNE			40
48N	1	23	NENW			33.9
48N	1	23	NWNW			1.2
48N	1	23	SWNW			8.6
48N	1	23	SENW			39.6
48N	1	23	SWNE			40
48N	1	23	SENE	2		17.1
48N	1	23	NESE	3		35.2
48N	1	23	NWSE			38.6
48N	1	23	NESW			32.3
48N	1	23	NWSW			22.2
48N	1	23	SWSW			27.7
48N	1	23	SESW			17.1
48N	1	23	SWSE			12.8
48N	1	23	SESE			35.9
48N	1	24	SWSE	1		13.2
48N	1	24	SESW	2		37.7
48N	1	24	SWSW	3		53.6
48N	1	25	NWNE	5		7.4
48N	1	25	NENW			19.8
48N	1	25	NWNW			25.3
48N	1	25	SWNW			33.4
48N	1	25	SENW			40
48N	1	25	SWNE	6		30.3
48N	1	25	NESE	8		9.8
48N	1	26	NENE			28.8
48N	1	26	NWNE			32
48N	1	26	NENW	7		37.6
48N	1	26	NWNW	8		16.4
48N	1	26	SENW	10		2.5
48N	1	26	SWNE			7.7
48N	1	26	SENE			37.5
48N	1	UNSURV.			2	881.2
48N	2	13	NESE	1		28.7
48N	2	13	NWSE	2		28.6
48N	2	13	NESW	3		27.8
48N	2	13	NWSW	4		18.4
48N	2	13	SWSW			6.8
48N	2	13	SESW			35.9
48N	2	13	SWSE			38.1
48N	2	13	SESE			40
48N	2	14	NWSE	2		8.8
48N	2	14	SESE			20.1
48N	2	23	NENE			40
48N	2	24	NENE			39.1
48N	2	24	NWNE			39.3
48N	2	24	NENW			40
48N	2	24	NWNW			35.2
48N	2	24	SENW			32.4
48N	2	24	SWNE			40
48N	2	24	SENE			39.4
48N	2	24	NESE			40
48N	2	24	NWSE			33.7
48N	2	24	NESW			39.8
48N	2	24	SWSE			39.8
48N	2	24	SESE			34.2
48N	2	25	NENE			39.9
48N	2	28	SENW			40
48N	2	28	SWNW			40

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WATER RESOURCES DE
SALEM, OREGON

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
48N	2	28	NWSW			35
48N	2	28	NESW			38.2
48N	2	28	NWSE			26.1
48N	2	28	SWSE			32.6
48N	2	28	SESW			37.4
48N	2	28	SWSW			40
48N	2	29	SENE			40
48N	2	29	NESE			36.8
48N	2	29	NWSE			40
48N	2	29	SESW			40
48N	2	29	SWSE			39.3
48N	2	29	SESE			37.7
48N	2	30	SWSW	1		27.3
48N	2	31	NENW	1		15.2
48N	2	31	NESW			38.8
48N	2	31	SESW			37.9
48N	2	31	SWSE			38.8
48N	2	31	SESE			39.7
48N	2	32	NENE			40
48N	2	32	NWNE			34.9
48N	2	32	NENW			40
48N	2	32	SENW			39.7
48N	2	32	SWNE			36.3
48N	2	32	SENE			40
48N	2	32	NESE			40
48N	2	32	NWSE			40
48N	2	32	NESW			37.1
48N	2	32	SWSW			25.9
48N	2	32	SESW			23.2
48N	2	32	SWSE			9.4
48N	2	32	SESE			3.1
48N	2	33	NWNE			36.1
48N	2	33	NENW			40
48N	2	33	NWNW			40
48N	2	33	SWNW			40
48N	2	33	SENW			40
48N	2	33	SWNE			36.4
48N	2	33	NWSE			36.5
48N	2	33	NESW			40
48N	2	33	NWSW			40
48N	2	33	SWSW			22.1
48N	2	33	SESW			36.5
48N	2	33	SWSE			33.3
48N	2	UNSURV.			1	866.8
48N	2	UNSURV.			2	2743.3
48N	2	UNSURV.			3A	1786.7
48N	2	UNSURV.			3B1	283.2
48N	2	UNSURV.			3B2	352.2
48N	2	UNSURV.			3B3	70.2
48N	2	UNSURV.			4A	950.9
48N	2	UNSURV.			4B	425.7
48N	2	UNSURV.			4C	101.5
48N	2	UNSURV.			5B	42.8
48N	2	UNSURV.			6A	1119
48N	2	UNSURV.			6B1	241.7
48N	2	UNSURV.			6B2	32.2
48N	2	UNSURV.			6C	74.5
48N	2	UNSURV.			7A	357.8
48N	2	UNSURV.			7B	229.9

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WATER RESOURCES D
SALEM, OREGON

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
48N	3	18	SWSW	1		31.5
48N	3	19	NENW	1		13.5
48N	3	19	NWNW			39.8
48N	3	19	SWNW			36.7
48N	3	19	SENW	2		36.9
48N	3	19	SWNE	3		9.8
48N	3	19	NESE	5		5.7
48N	3	19	NWSE	4		37.2
48N	3	19	NESW			38.5
48N	3	19	NWSW			35.8
48N	3	19	SWSW			40
48N	3	19	SESW			36.9
48N	3	19	SWSE			39.4
48N	3	19	SESE	6		33.7
48N	3	29	NWNW	1		35.6
48N	3	29	SWNW	2		37.9
48N	3	29	SENW	3		18
48N	3	29	NWSE	4		8.6
48N	3	29	NESW	5		38.1
48N	3	29	NWSW	6		43.4
48N	3	29	SWSW	7		40.8
48N	3	29	SESW			38.6
48N	3	29	SWSE	8		32.7
48N	3	29	SESE	9		5.2
48N	3	30	NENE	1		40.1
48N	3	30	NWNE	2		36.4
48N	3	30	NENW	3		39.6
48N	3	30	NWNW	4		24.8
48N	3	30	SWNW	5		32.2
48N	3	30	SENW			33.7
48N	3	30	SWNE			36.3
48N	3	30	SENE			31.6
48N	3	30	NESE			36.7
48N	3	30	NWSE			36.1
48N	3	30	NESW			40
48N	3	30	SWSE			39.9
48N	3	30	SESE			38.3
48N	3	31	NENE			39.4
48N	3	32	NENE	1		33.7
48N	3	32	NWNE			36
48N	3	32	NENW			39.1
48N	3	32	NWNW			40
48N	3	32	SWNW			36.5
48N	3	32	SENW			38.2
48N	3	32	SWNE			40
48N	3	32	SENE			37.5
48N	3	32	NESE			38.2
48N	3	32	NWSE			38.2
48N	3	32	NESW			38.9
48N	3	32	SWSE			38.5
48N	3	32	SESE			36.9
48N	3	33	SWNW	1		28.8
48N	3	33	NWSW			40
48N	3	33	NESW	2		13.7
48N	3	33	SWSE	4		3.4
48N	3	33	SESW	3		35.5
48N	3	33	SWSW			38.2
48N	3	UNSURV.			4A	43.9
48N	3	UNSURV.			4C	395.1

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WATER RESOURCES DEF
SALEM, OREGON

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
48N	3	UNSURV.			4D	18.8
48N	3	UNSURV.			4E	36.5
48N	3	UNSURV.			4F	3.3
48N	3	UNSURV.			7A	137.3
48N	3	UNSURV.			7B	5.7
48N	3	UNSURV.			8A	50.1
48N	3	UNSURV.			8B	40.1
					Total:	36099.6

Total Acres in all Fed Reserved Claims: 37509.9

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SALEM, OREGON

PLACE OF USE FOR LOWER KLAMATH FEDERAL RESERVED CLAIM 314
PUBLIC LAW 88-567

Township N or S	Range E	Section	Qtr/Qtr-Sec	Lot #	Unit (if unsurv.)	Acres
Willamette Base and Meridian						
41S	10	15		5		6.8
41S	10	15		7		8.2
41S	10	15		8		23.7
41S	10	15		9		26.9
41S	10	16		5		11.4
41S	10	16	SWNE			1.8
41S	10	16		7		3.7
41S	10	16	NWSE			19.3
41S	10	16		6		27.2
Mt. Diablo Base and Meridian						
47N	3	2		4		0.1
47N	3	2	SWNW			0.2
47N	3	2	NWSW			10.7
47N	3	2	SWSW			15.2
47N	3	3		1		9.5
47N	3	3		2		7.6
47N	3	9	SESE			23.6
47N	3	10	SWSW			2.4
47N	3	10	SESW			2.3
47N	3	10	SWSE			18.6
47N	3	11	NWNW			12.4
48N	3	15		7		20.7
48N	3	16		2		11.8
48N	3	16		3		20.1
48N	3	16		4		21.7
48N	3	16		5		23.3
48N	3	16	SWSW			40
48N	3	16	SESW			40
48N	3	16	SWSE			40
48N	3	16	SESE			40
48N	3	17		5		17.1
48N	3	17		6		9.3
48N	3	17		8		21.3
48N	3	17		9		46
48N	3	20		3		16.2
48N	3	21	NENE			40
48N	3	21	NWNE			40
48N	3	21	NENW			39.9
48N	3	21	NWNW	2		32.8
48N	3	21		4		23.5
48N	3	21	SWNE			40
48N	3	21	SENE			38.2
48N	3	21	NESW			21
48N	3	22		4		1.4
48N	3	22	NWNW			38.4
48N	3	22	SWNW			40
48N	3	22		5		5.4
48N	3	22		6		2.6
48N	3	22	NWSW			3.1
48N	3	22	SWSE			2.7
48N	3	26	NWSW			1.2
48N	3	27	NWNE			18.2
48N	3	27	SENE			8.1
48N	3	35	NENW			8.2
48N	3	35	SENE			8.3
48N	3	35	NESW			0.7
48N	3	35	SWSW			15
				Total:		1027.8

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SALEM, OREGON

PLACE OF USE FOR LOWER KLAMATH FEDERAL RESERVED CLAIM 315
TRACT NO. 20

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
Mt. Diablo Base and Meridian						
47N	3	9	NENW			10.6
47N	3	9	SENW			26.3
47N	3	9	NWSE			6.1
47N	3	9	NESW			39.1
47N	3	9	NWSW			15.2
47N	3	9	SWSW			32.1
47N	3	9	SESW			35.3
47N	3	9	SWSE			23.2
47N	3	16	NENW			27.2
47N	3	16	NWNW			39.9
47N	3	16	SWNW			35.5
47N	3	17	NENE		12B	
						(combined area for NENE and SENE)19.5
47N	3	17	SENE			16.1
47N	3	17	NESE			19.4
47N	3	17	SESE			11.1
47N	3	20	NWNE			
Total:						337.1

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WATER RESOURCES DEPT
SALEM, OREGON

PLACE OF USE FOR LOWER KLAMATH FEDERAL RESERVED CLAIM 31E
TRACT NOS. 2, 2A & 2B

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot #</u>	<u>Unit (if unsurv.)</u>	<u>Acres</u>
Mt. Diablo Base and Meridian						
47N	3	4	SESW	8		1.3
47N	3	9	SWNW			7.4
47N	3	16	NWNE			5.7
47N	3	16	SENW			4.9
47N	3	16	NWSW			6.6
					Total:	25.9

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WATER RESOURCES DEPT
SALEM, OREGON

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2007, I served a true copy of the following: **CORRECTED PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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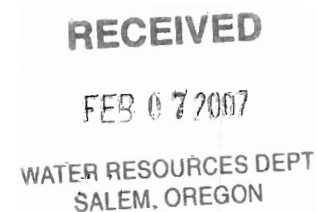
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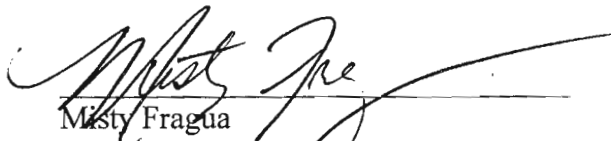
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