

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

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;~~ Nicholson Investments, LLC;
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;
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

PROPOSED ORDER

Case No. 275

Claims: 318, 319 and 320

Contests: ~~2877, 2878, 2879~~¹, ~~3233,~~
~~3234, 3235, 3236~~², 3307,
3308, 3309³, 3641, 3642,
3643⁴, 3999, 4000, ~~4231,~~
~~4232, and 4233~~⁵

¹ WaterWatch of Oregon, Inc.'s Contests 2877, 2878, and 2879 were dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

² Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew from Contests 3233, 3234, 3235, and 3236 on March 3, 2003. Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3233, 3234, 3235, and 3236 on April 22, 2005.

³ Dave Wood voluntarily withdrew from Contests 3307-3309 on October 26, 2004. Change of Title Interest for Contests 3307-3309 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3307-3309 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3307-3309 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3307-3309 from Walter Seput to Wayne James, Jr. (5/2/05). Change of Title Interest for Contests 3307-3309 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3307-3309 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3307-3309 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3307-3309 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3307-3309 on September 13, 2005.

⁴ Don Vincent voluntarily withdrew from Contests 3641, 3642, and 3643 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3641, 3642, and 3643 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3641, 3642, and 3643 on January 16, 2004.

⁵ The Klamath Tribes voluntarily withdrew Contests 4231, 4232, and 4233 on February 13, 2005.

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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 318, 319, and 320, collectively "the Claims") on April 30, 1997. USFWS provided additional information supporting the Claims on October 1, 1999. The Claims assert Federal reserved water rights for the Tule Lake National Wildlife Refuge.

On October 4, 1999, OWRD issued its Preliminary Evaluation which only took into account information available as of August 10, 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.⁶, 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

⁶ Withdrew from contests 3641, 3642, and 3643 on January 16, 2004.

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Johnston & Son, Bradley S. Luscombe, Berlva Pritchard⁷, Don Vincent⁸, Randy Walthall, Inter-County Title Company, Winema Hunting Lodge, Inc., Van Brimmer Ditch Company, Plevna District Improvement Company, and Collins Products, LLC (hereafter Klamath Project Water Users or KPWU) filed Contests 3641, 3642, and 3643 on May 8, 2000.

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 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; William J. Rust; Ethel J. Rust; James R. Goold for Tillie Goold Trust; and Duane F. Martin (hereinafter Sprague River/Fort Klamath Groups⁹) filed Contests 3307, 3308, and 3309 on May 8, 2000.

The Klamath Tribes filed Contests 4231, 4232, and 4233 on May 8, 2000. The Klamath Tribes withdrew these contests on February 13, 2003.

WaterWatch of Oregon, Inc. filed Contests 2877, 2878, and 2879 on May 8, 2000. These contests were dismissed on May 20, 2003.

Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; and Rogue River Valley Irrigation District (Horsefly, *et al*) filed Contests 3233, 3234, 3235, and 3236 on May 8, 2000. Contests 3235 and 3236 both pertain to Claim 320, and appear to be identical. These contests were withdrawn by April 22, 2005.

The USFWS filed Contests 3999 and 4000 on May 8, 2000.

OWRD then referred these claims to the Office of Administrative Hearings (OAH), where they were consolidated as Case No. 275.

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. This order was amended several times on the motions of various parties.

Pursuant to that Scheduling Order, as amended, on September 26, 2003, the United States filed a Motion for Ruling on Legal Issues. On the same date, the Nicholson Group (now Sprague River/Fort Klamath Groups) and KPWU filed a Consolidated Motion for Ruling on Legal Issues. Responses and replies were filed to both motions.

⁷ Berlva Pritchard voluntarily withdrew from contests 3641, 3642, and 3643. See Notice of Withdrawal of Claimant dated June 24, 2002.

⁸ Don Vincent voluntarily withdrew from contests 3641, 3642, and 3643. See Notice of Withdrawal of Claimant dated November 28, 2000.

⁹ The members of these two groups filed these contests as "the Nicholson Group." Each group filed a separate Notice of Appearance on March 2, 2005.

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 Tule Lake National Wildlife Refuge, it impliedly reserved the water necessary to fulfill the specific purposes of the Refuge, *i.e.*, providing a refuge and breeding ground for 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 October 4, 1928; 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 2, 1932 and April 10, 1936.
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. Properties 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 November 8, 2005, before ALJ Dove Gutman. 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. Jesse Ratcliffe appeared for OWRD. David Mauser and Timothy Mayer appeared as witnesses on behalf of the United States.

Thereafter, the parties filed legal memoranda regarding the matters presented for hearing. The record closed on August 21, 2006. On October 16, 2006, Upper Basin Contestants¹⁰ filed a motion seeking a stay of proceedings, or, in the alternative, abatement by the ALJ of further action in these proceedings. On October 20, 2006, OWRD filed a response to this motion, noting

¹⁰ 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.

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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 decided¹¹:

1. **Whether the USFWS has provided sufficient evidence of year-round use or need for water to support the primary purpose of the refuge. (KPWU)**
2. **Whether 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 Tule Lake National Wildlife Refuge. (KPWU)**
3. **Whether 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. (KPWU)**
4. **The claim does not identify a place of use or rate of diversion. (KPWU)**
5. **Whether claimant can claim a federal reserved water right to water stored in Upper Klamath Lake. (KPWU)**
6. **Claimant cannot claim a federal reserved right to return flows. (KPWU)**
7. **Whether the Preliminary Evaluation incorrectly describes the place of use in part. (USFWS)**
8. **What is the amount of water necessary to fulfill the purpose of the reservation. (Nicholson Group/Sprague River-Fort Klamath Groups and KPWU)**

¹¹ The issues raised by Horsefly, Langell Valley, Medford and Rogue River Irrigation Districts have also been deleted, as these parties have withdrawn their contests.

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EVIDENTIARY RULINGS

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

a. OWRD's Exhibits.

During the hearing, OWRD Exhibit 1 was admitted into the evidence without objection.

b. United States' Exhibits.

The following United States' exhibits were admitted into evidence:

40002¹² Affidavit and Testimony of Dr. David M. Mauser

40003 through 40015 Exhibits accompanying Dr. Mauser's Affidavit and Testimony

40016 Affidavit and Testimony of Dr. Timothy B. Mayer

40017 through 40035 Exhibits accompanying Dr. Mayer's Affidavit and Testimony

40036 Map of Refuge and places of use – admitted for demonstrative purposes

Dr. David M. Mauser was recognized as an expert in the areas of wildlife ecology and wetland and waterfowl management, qualified to offer opinion testimony in those areas of expertise. Dr. Timothy B. Mayer was recognized as an expert in the areas of hydrology and water quality, qualified to offer opinion testimony in those areas of expertise.

c. KPWU's Exhibits.

At the commencement of the hearing, KPWU withdrew their offer of the exhibits identified in their Notice Concerning Evidence to be Relied Upon by Klamath Project Water Users, Ref. No. 275 F 000 30012 (Exhibit Nos. 274 E 000 30001 through 274 E 000 30262, consisting of 11 documents as identified in the Notice). However, in the course of considering argument regarding the admissibility of several of KPWU's remaining exhibits, the ALJ resolved the objections by admitting the following exhibits, including some previously withdrawn.

1. KPWU exhibits admitted into evidence without objection as pertinent to history and contractual/institutional arrangements underlying the Klamath Project:

30001

30002

30003 through 30005

30006 through 30013

¹² 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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30014 through 30041
30342 through 30344
30345 through 30348
30106 through 30145
30146 through 30147
30148 through 30150
30151 through 30152
30170
30171 through 30175
30176 through 30186
30187

2. KPWU exhibits objected to and provisionally admitted:
30148 through 30150 – admitted subject to ALJ’s reservation as to weight to be given
30151 through 30152 – admitted subject to ALJ’s reservation as to weight to be given
30171 through 30175 – admitted for limited purpose of showing legal relationships and subject to ALJ’s reservation as to weight, if any, to be given
30187 – admitted to show author’s beliefs as to importance of agricultural leased lands on Refuge, not the truth of the matters asserted
3. KPWU exhibit admitted for demonstrative purposes only:
30188
4. KPWU exhibits withdrawn by KPWU:
30049 through 30093
30094 through 30105
30153 through 30169

d. Sprague River/Fort Klamath Groups’ Exhibits.

1. Sprague River/Fort Klamath Groups exhibits admitted into evidence to show historical context of Klamath Project:
N1 through N12
N18
2. Sprague River/Fort Klamath Groups exhibits admitted into evidence to show how certain lands managed as explained in the context of a different claim and case (Case 003):
N13
N 16
3. Sprague River/Fort Klamath Groups exhibits objected to and provisionally admitted:
N14, N15 and N17 – admitted subject to ALJ’s reservation as to weight to be given based on posthearing briefing

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Sprague River/Fort Klamath contestants moved to strike portions of the Brief of the United States that cited to documents not in the record in this proceeding. In particular, these contestants sought to strike all references to the written testimony of Mr. Leslie and Mr. Van Camp that was filed in Case 003. The United States responded that the ALJ should take “judicial notice” of this testimony from a different case, citing OAR 137-003-0615. The United States is incorrect. Under OAR 137-003-0615, the ALJ may take judicial notice of “judicially cognizable facts.”

A fact may be judicially noticed and need not be proved if it is a fact not subject to reasonable dispute because it is generally known or can be accurately and readily determined by resort to sources whose accuracy cannot reasonably be questioned. For example, it may be judicially noticed that in 1985, September 7 fell on a Friday.

Oregon Attorney General’s Administrative Law Manual, January 1, 2006, at 148.

It is important in this context to make the distinction between facts and evidence. Specific facts may be judicially cognizable. *Evidence* cannot be. Thus, while some of the facts in the testimony in question may not be “subject to reasonable dispute” the testimony, itself, is not such a fact, and is open, at least in some aspects, to reasonable dispute. The written testimony of Leslie and Van Camp in Klamath Case 003 is not a proper subject for judicial notice.

In addition, the United States cited as evidence two other items which, while not opposed by the other parties, are not properly in the evidentiary record in this case. One of these items is an Affidavit that was attached to a Motion for Ruling on Legal Issues filed earlier in these proceedings, and referred to in the briefing as “Dr. Mayer’s 2004 Affidavit.” This affidavit was included as part of the support for a Motion for Ruling on Legal Issues, but was not offered into evidence at hearing on this case, and therefore is not part of the evidentiary record. The other document in this category is the Interim Order in Klamath Case 003. ALJs often cite to orders in other Klamath Cases for support for legal conclusions. It is not, however, appropriate to treat the fact-findings in orders in other cases as evidence.

In view of the foregoing, all references to the written testimony of Leslie and Van Camp, to Dr. Mayer’s 2004 Affidavit, and to fact-findings in the Interim Order in Klamath Case 003 are hereby stricken.

FACTS ESTABLISHED BY RULING ON LEGAL ISSUES

The following facts were established in the Order on Motion for Ruling on Legal Issues of July 29, 2004.

- 1) Claims 318 through 320 apply to several different tracts of land acquired by the United States and integrated into the Tule Lake National Wildlife Refuge at different times.
- 2) On October 4, 1928, President Calvin Coolidge signed Executive Order No. 4975 and thereby created the Tule Lake Bird Refuge (now known as the Tule Lake National Wildlife Refuge). The order stated in part:

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It is hereby ordered that the area in [legal description omitted] * *
* is hereby reserved and set apart for the use of the Department of
Agriculture *as a refuge and breeding ground for birds.* * * *

All of the lands involved have been withdrawn for reclamation purposes in connection with the Klamath irrigation project, Oregon-California, and are primarily under the jurisdiction of the Department of the Interior. The reservation of these lands as a bird refuge is subject to the use thereof by said Department for irrigation and other incidental purposes, and to any other valid existing rights.

Executive Order No. 4975 (emphasis added).

3) On November 3, 1932, President Coolidge's Executive Order was superseded and enlarged by President Herbert Hoover's Executive Order No. 5945, which created the Tule Lake Wild Life Refuge. The newly created refuge expanded the reservation purpose from "refuge and breeding ground for birds" to "refuge and breeding ground for wild birds and animals."

Executive Order No. 5945.

4) Later additions were made to the land which currently makes up the Tule Lake Refuge. Lands were transferred to the federal government, through the Department of the Interior, on November 2, 1932 and April 10, 1936. Both of the after-acquired parcels are contiguous to the original reserved lands and are being used as part of the Tule Lake Refuge, and were transferred to the federal government for that purpose.

Ruling on Legal Issues at 4-5.

FINDINGS OF FACT

1) Claim 318, with a claimed priority date October 4, 1928, is for a parcel of 8,168.8 acres that was originally within the boundaries of Tule Lake. (Testimony of Timothy Mayer at 6.) 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 Tule Lake, and gave title to the lands uncovered by the lowering. (*Id.* at 4, 5.) Attachment 1, Part A, attached hereto, describes the property subject to this claim. The claim is for 31,480.9 acre-feet of water per year, 100.4 cubic feet per second (cfs), from three points of diversion¹³ located as follows:

- a. Link River Dam, NW¼SE¼, Section 30, T 38 S, R 9 E.W.M.
- b. "A" Canal Headworks, SW¼NE¼, Section 30, T 38 S, R 9 E.W.M.

¹³ Although for all three claims the actual diversion of water directly for the Refuge is carried out at the Station 48 Diversion at the Lost River Diversion Channel, the Link River Dam and "A" Canal Headworks are necessary to cause the water to reach Station 48, or control the amount of water that reaches the refuge. (OWRD Ex. 1 at 44.)

c. Station 48 Diversion at Lost River Diversion Channel, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 31, T 39 S, R 10 E.W.M.

(OWRD Ex. 1 at 1, 2, 44, 47, 48, 66-68; Testimony of Mayer at 10.)

2) Claim 319 with a claimed priority date of November 3, 1932, covers a parcel of 766.4 acres acquired by the United States in 1932 for inclusion in the refuge. Attachment 1, Part B attached hereto describes the property subject to this claim. The claim is for 2,874.7 acre-feet of water per year, at 10 cfs from the same three diversion points;

a. Link River Dam, NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 30, T 38 S, R 9 E.W.M.

b. "A" Canal Headworks, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 30, T 38 S, R 9 E.W.M.

c. Station 48 Diversion at Lost River Diversion Channel, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 31, T39S, R10E.W.M.

(OWRD Ex. 1 at 178-182, 223, 224.)

3) Claim 320 with a claimed priority date of April 10, 1936, based upon acquisition of the property in question on that date (*Id.* at 482-484.) is a tract of 21,867.7 acres acquired in 1936 to be added to the Refuge. Attachment 1, Part C attached hereto describes the property subject to this claim. The claim is for 66,205.8 acre-feet of water per year, 278.3 cfs from the same three points of diversion;

a. Link River Dam, NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 30, T 38 S, R 9 E.W.M.

b. "A" Canal Headworks, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 30, T 38 S, R 9 E.W.M.

c. Station 48 Diversion at Lost River Diversion Channel, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 31, T39S, R10E.W.M.

(*Id.* at 334-352, 398.)

4) The Tule Lake National Wildlife Refuge is comprised of a mixture of seasonally flooded wetland, permanently (year-round) flooded wetlands, open water and agricultural cropland, either leased or farmed cooperatively. (Test. of Mauser at 14.) This combination of wetland, open water, and agricultural habitats supports a nearly identical assemblage of avian species as historically occupied Tule Lake and is intended to provide an appropriate mix of habitats to provide a preserve and breeding ground for native birds. (*Id.*)

5) 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 gulls; great and snowy egrets; Forster's, black and Caspian terns; and western and eared grebes. (*Id.* at 13.) Shorebird species include black-necked stilts, and least and western sandpipers. (*Id.*) Waterfowl species include snow, Ross and white-fronted geese, as well as duck species such as mallards, pintail, gadwall, green wing teal, and redheads. (*Id.*)

6) 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 15.) 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 17.) Both to provide an interspersed of emergent plants and open water habitats to wildlife species adapted to this habitat, the Refuge management floods some parts of the Refuge year-round. (*Id.* at 14.) The Refuge management plants other areas to agricultural habitats, which provide immediate benefits to grain-eating birds. (*Id.*) 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.*)

7) 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 26-28.) 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 27.) 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.* at 27-28.) White pelicans require the security of islands to nest and rear young but otherwise forage in open areas of marshes and lakes. (*Id.* at 28.) 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.* at 27-28.) 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.* at 28.)

8) 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 agricultural croplands. (*Id.* at 14.) The Refuge management begins applying water to seasonal marshes from September through November and stops applying water predominantly in May and June. (*Id.* at 14-15.) 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.* at 15, 20.) The Refuge management also applies water to agricultural crops at various times, depending on the location and crop type. Management pre-irrigates grains in spring and irrigates hay/pasture in spring and summer as needed. (*Id.* at 15.)

9) The Fish and Wildlife Service's Survey Division determined the places of use for Claim Nos. 318-320. (Test. of Mayer at 10.) This included delineation and mapping of the existing areas of seasonally flooded wetlands, permanently flooded wetlands, 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.*)

10) 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 "flushing

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.* at 11, 12.)

11) 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.*) The term ET includes both transpiration from plants and evaporation from open water surfaces. (*Id.* at 12.) The term freshening flow refers to flows intended to manage salt concentrations in wetlands. (*Id.*) The total water requirement for open water habitat consists of sufficient water to replace water lost through evaporation and water necessary for freshening flows. (*Id.*) 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 15.)

12) 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):	1.20 acre-feet per acre (an additional 21% of the total ET and evaporation requirement for permanent wetlands and open water habitats)
Cropland soil saturation and ET:	2.50 acre-feet per acre

(*Id.*)

13) The total water requirements and use under Claim Nos. 318 through 320 for the Refuge, as established by the evidence in the record are:

a.	Claim No. 318—	31,480.9 acre-feet per year
b.	Claim No. 319—	2,874.7 acre-feet per year
c.	Claim No. 320—	66,205.8 acre-feet per year
d.	TOTAL —	100,561.4 acre-feet per year

(*Id.* at 16-17.) The water requirement for the Refuge equates to an average duty of 3.26 acre-feet per acre. (*Id.* at 17.)

14) 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 28; 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 11, 15, 17.) 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 12-13.)

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15) Prior to European settlement, Tule Lake was located at the mouth of the Lost River, in California. It had no outlet, but was believed to be drained by sinkholes in the surrounding lava fields during times of high water. In time of flood, the Klamath River also supplied some water into the lake, through the Lost River Slough. (*Id.* at 4.) Beginning in 1912, control structures, including the Lost River Dam and the Lost River Diversion Channel were constructed. By 1917, these structures had significantly reduced water flow to Tule Lake, causing it to dry up. (*Id.* at 5, 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. As a result, although the natural connection between the Klamath River and Tule Lake has been severed, and flow from Lost River curtailed except during flood times, 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. (Cross-Examination of Dr. Timothy Mayer, Hearing Record, 2:36 *ff.*) 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. (*Id.*) 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.*) In addition, water from the Klamath system is mixed with water previously applied to farmland by upstream irrigators, and with water from the Lost River, perhaps released to Tule Lake during times of high flow. (*Id.*, Hearing Record, 2:43 *ff.*) Most of these diversion works were constructed and are owned by the United States, and operated by various entities under contracts. (*Id.*, Hearing Record, 3:07 *ff.*) Some of these contracts provide for delivery of water for wildlife purposes in Tule Lake. (Exs. 40009 at 32; 30145; 40010 at 3 *ff.*)

CONCLUSIONS OF LAW

1. **The USFWS has provided sufficient evidence of year-round use or need for water to support the primary purpose of the refuge.**
2. **The Claims do not rely on Exhibits 5-1 and 5-2 from claims 321-324.**
3. **The Claims identify facilities for diversion and conveyance of water which are lawfully used or relied upon for delivery of water to the asserted place of use, and claim rates of diversion in the amounts needed to serve the asserted place of use.**
4. **The Claims identify a place of use and rate of diversion.**
5. **Claimant can claim a federal reserved water right to water stored in Upper Klamath Lake.**
6. **The Claims can include a federal reserved right to “project return flows.”**
7. **It is irrelevant whether the Preliminary Evaluation incorrectly describes the place of use in part.**

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8. The amount of water necessary to fulfill the purpose of the reservation is the amount of water sufficient to provide a refuge and breeding ground for the protection of birds and their habitat, and no more.

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, as the quotation is to the statute as it was amended in 1987. The amended statute, as quoted by these contestants, is 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 was otherwise similar but did not refer to registration statements, can be applied to proceedings pending 20 years after its amendment, because, even if the pre-1987 statute 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, which includes 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

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.

Sprague River/Fort Klamath Groups (apparently composed of some, but not all, of the same persons as Upper Basin Contestants,) argue in their Response Brief 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 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 in California, 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 Lost River Slough and into Tule Lake in Oregon. When the Lost River Slough was closed, facilities were eventually developed that allowed water to be diverted from Upper Klamath Lake and the Klamath River in Oregon, to Tule Lake. Part of that water comes down the Lost River Diversion Channel to the channel of the Lost River and enters Tule Lake from there. 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. Claimant has provided sufficient evidence of year-round use or need for water to support the primary purpose of the refuge.

Sprague River/Fort Klamath Groups 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.

Sprague River/Fort Klamath Groups 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

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 River/Fort Klamath Groups 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.

2. The Claims do 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.

3. The Claims identify facilities for diversion and conveyance of water which are lawfully used or relied upon for delivery of water to the asserted place of use, and claim rates of diversion in the amounts needed to serve the asserted 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 Districts under their contracts for water, the United States is not prevented from using its works to divert water to the Refuge, for the Refuge's purposes.

Based upon a paraphrase of a portion of Judge Barber's Order, KPWU argues that claimant had the burden of showing a range of reasonable use of water, and that the amount claimed is in the lower half of that range. KPWU then argues that since claimant did not make such a showing, the claim fails. However, KPWU's paraphrase is not accurate. Judge Barber actually said:

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.

Order on Motions for Ruling on Legal Issues at 9. (*Emphasis added.*)

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Judge Barber did not impose on claimant the burden of showing a range of reasonable use, or that the claims fell within the lower half of that range. He suggested only that the right would be in the lower half of such a range, *if the range existed*. Since claimant did not put on evidence for a range of reasonable use, the “lower half” standard does not apply. None of the contestants put on evidence directly addressing the amount claimed, preferring to rely on collateral legal challenges. Had the contestants chosen to put on such evidence, they would have been free to show that such a range existed. At that point, it would have been appropriate to discuss where on such a range the claimed amounts should be placed, and whether that placement exceeded the amount necessary to fulfill the purpose of the reservation. On this record, however, the foundational requirement for that discussion has not been met.

4. The Claims identify 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 claims did so. Those documents, together with the evidence submitted in these proceedings, form the basis for the Proposed Order in this case.

5. Claimant can claim a federal reserved right to water stored in Upper Klamath Lake.

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 by a senior appropriator in Upper Klamath Lake, but asserts the right to water, whether “natural flow” or stored, to the extent it is not subject to a senior appropriation.

To the extent that water has been appropriated to storage in Upper Klamath Lake by a senior appropriator, 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 by a senior appropriator, including the storage for irrigation use by the United States Bureau of Reclamation for the Klamath Project. 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 Fish and Wildlife Service 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).

6. The Claims can include a federal reserved right to “project return flows.”

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

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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.

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 eventually come to Tule Lake. As these contestants put it, "The United States 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]." (Contestants Sprague River and Fort Klamath Response Brief, at 17.) This is not a correct statement of the law.

It is uncontested that in 1928, when the bulk of the Refuge was reserved, works had been constructed or were contemplated to divert water from the claimed points of diversion on the Klamath River, and send the water to the Refuge. Although most of the water diverted at those locations is appropriated for irrigation through the Klamath Project, 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. 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 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 River/Fort Klamath Groups 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, water diverted from most of the listed diversion points will pass through the Tule Lake system. 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 make a direct diversion from the Klamath River or Upper Klamath Lake to satisfy its needs. 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

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

In this respect, it is appropriate for the claim to include project return flows. Such return flows are not subject to call, and cannot, therefore, be administered by the watermaster as direct diversions may be. Nonetheless, including project return flows in the claim ensures that the United States has the right to apply project return flows for the primary purposes of the Refuge, to the extent the flows are available. Otherwise, the United States would be compelled to satisfy the needs of the Refuge solely by direct diversion from the sources, a process that would obviously lead to waste.

7. It is irrelevant that the Preliminary Evaluation incorrectly describes the place of use in part. The Claims 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 Preliminary 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.

8. 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);
- 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

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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 River/Fort Klamath Groups' 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.

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 refuge and breeding ground for birds and animals.
- 4. **Quantity:**

a. Annual volumes:

1.	Claim No. 318	–	31,480.9 acre-feet per year
2.	Claim No. 319	–	2,874.7 acre-feet per year
3.	Claim No. 320	–	66,205.8 acre-feet per year
4.	TOTAL	–	100,561.4 acre-feet per year

b. Diversion rates:

1.	Claim No. 318	
	Station 48 Diversion at Lost River Diversion Channel:	100.4 cfs
2.	Claim No. 319	
	Station 48 Diversion at Lost River Diversion Channel:	10.0 cfs
3.	Claim No. 320	
	Station 48 Diversion at Lost River Diversion Channel:	278.3 cfs

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4. Claims 318-320

- 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 rate 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. October 4, 1928, for the original area of the Refuge, as identified in Part A, Attachment 1;
- b. November 3, 1932, 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. April 10, 1936, 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;

7. Place of Use: Lands within the Tule Lake National Wildlife Refuge as identified in Attachment 1 (Parts A through C).

8. Points of Diversion:

- a. Link River Dam, NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 30, Township 38 South, Range 9 East, Willamette Meridian;
- b. “A” Canal Headworks, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 30, Township 38 South, Range 9 East, Willamette Meridian;
- c. Station 48 Diversion at Lost River Diversion Channel, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 31, Township 39 South, Range 10 East, Willamette Meridian.



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

Dated: March 14, 2007

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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 TULE LAKE NWR, Claim 318

Williamette Base and Meridian

Township N or S	Range E	Section	Qtr/Qtr-Sec	Lot #	Unit (if unsurv.)	Acres
46N	4	2		3		9.9
46N	4	2		4		9.5
46N	4	2		5		37.8
46N	4	2		6		40.0
47N	4	2		7		2.2
47N	4	3		11		
47N	4	3		14		
47N	4	3		15		
47N	4	3		16		
47N	4	3		18		
47N	4	3	SWSW			
47N	4	4		6		
47N	4	4		9		
47N	4	4		12		
47N	4	4	NWSE			
47N	4	4	NESW			
47N	4	4	NWSW			
47N	4	4	SWSW			
47N	4	4	SESW			
47N	4	4	SWSE			
47N	4	4	SESE			
47N	4	9	ALL			
47N	4	10	ALL			
47N	4	11	NW/NW			33.5
47N	4	11	SW/NW			34.0

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CASE 275
ATTACHMENT 1

PART A

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47N	4	11	NESW	40.0
47N	4	11	NWSW	34.0
47N	4	11	SWSW	34.0
47N	4	11	SESW	40.0
47N	4	14	NENW	39.5
47N	4	14	NWNW	34.0
47N	4	14	SWNW	34.0
47N	4	14	SENW	39.5
47N	4	14	SW	138.0
47N	4	15	ALL	
47N	4	16	ALL	
47N	4	20	NENE	
47N	4	20	NWNE	
47N	4	20	SWNE	
47N	4	20	SENE	
47N	4	20	NESE	
47N	4	20	NWSE	
47N	4	20	SWSE	
47N	4	20	SESE	
47N	4	21	ALL	
47N	4	22	ALL	
47N	4	23	NENW	40.0
47N	4	23	NWNW	34.0
47N	4	23	SWNW	30.0
47N	4	23	SENW	36.0
47N	4	23	NESW	36.2
47N	4	23	NWSW	31.4
47N	4	23	SWSW	34.7
47N	4	23	SESW	38.0
47N	4	26	NWNW	34.7
47N	4	26	SWNW	34.7

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 ATTACHMENT 1
 PART A

47N	4	26	NWSW
47N	4	26	SWSW
47N	4	27	ALL
47N	4	28	ALL
47N	4	29	NENE
47N	4	29	NWNE
47N	4	29	SWNE
47N	4	29	SENE
47N	4	29	NESE
47N	4	29	NWSE
47N	4	29	SWSE
47N	4	29	SESE
47N	4	32	NENE
47N	4	32	NWNE
47N	4	32	SWNE
47N	4	32	SENE
47N	4	33	NENE
47N	4	33	NWNE
47N	4	33	SWNE
47N	4	33	SENE
47N	4	33	NENW
47N	4	33	NWNW
47N	4	33	SWNW
47N	4	33	SENW
47N	4	34	NENE
47N	4	34	NWNE
47N	4	34	SWNE
47N	4	34	SENE
47N	4	34	NENW
47N	4	34	NWNW
47N	4	34	SWNW

34.7
34.7

11.2
2.7
25.4

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47N	4	34	SENW	17.6
47N	4	34	NESE	
47N	4	35	NWNNW	34.7
47N	4	35	SWNNW	34.7
47N	4	35	NESW	40.0
47N	4	35	NWWSW	34.7
47N	4	35	SWSW	34.7
47N	4	35	SESW	40.0

Total irrigated acreage outside of Sumpp 1A that is included in Claim 318

1294.7

Total acreage in Sumpp 1A for Claim 318 (given on FWS Supplemental map for Federal Reserved Claims)

6874.1

Total Acreage for Claim 318

8168.8

Total Acres in all Fed Reserved Claims: 30793.6

(see spreadsheet for Tule Lake POU Claim 317 for differences between federal reserved claim totals and vested claim totals)

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PLACE OF USE FOR TULE LAKE NWR, Claim 319

Claim 319	Township N or S	Range E	Section	Qtr/Qtr-Sec	Lot #	Unit (if unsurv.)	Acres
1	47N	4	3		11		14.6
1	47N	4	5	SENE			
1	47N	4	5	NESE			
1	47N	4	5	SESE			
1	47N	4	8	SENE			
1	47N	4	8	NENE			
1	47N	4	8	SENE			
1	47N	4	8	NESE			
1	47N	4	8	SWSE			
1	47N	4	8	SESE			
1	47N	4	11		4		29.0
1	47N	4	11	SENW			40.0
1	47N	4	17	NENE			
1	47N	4	17	NWNE			
1	47N	4	17	NENW			
1	47N	4	17	SENW			
1	47N	4	17	SWNE			
1	47N	4	17	SENE			
1	47N	4	17	NESE			
1	47N	4	17	NWSE			
1	47N	4	17	NESE			
1	47N	4	17	SESW			
1	47N	4	17	SWSE			
1	47N	4	17	SESE			
1	47N	4	20	NENW			
1	47N	4	26	NENW			
1	47N	4	26	SENW			
1	47N	4	26	SENW			

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1	47N	4	26	NESW	40.0
1	47N	4	26	SESW	40.0
1	47N	4	35	NENW	40.0
1	47N	4	35	SENW	40.0

Total irrigated acreage outside of Sump 1A that is included in Claim 319

323.6

Total acreage in Sump 1A for Claim 319
(given on FWS Supplemental map for Federal Reserved Claims)

442.8

Total Acreage for Claim 319

766.4

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1	46N	4	2	SENW	37.0
1	46N	4	2	NESW	
1	46N	4	2	NWSW	2.3
1	46N	4	2	SWSW	22.0
1	46N	4	2	SESW	
1	46N	4	2	NESE	
1	46N	4	2	NWSE	
1	46N	4	2	SWSE	
1	46N	4	2	SESE	
1	46N	4	3	SENW	4.2
1	46N	4	3	NESW	10.0
1	46N	4	3	NWSW	9.9
1	46N	4	3	SWSW	9.8
1	46N	4	3	SESW	38.0
1	46N	4	3	NESE	36.0
1	46N	4	3	NWSE	38.0
1	46N	4	3	SWSE	14.0
1	46N	4	3	SESE	38.0
1	46N	4	3	SENW	14.0
1	46N	4	3	NESW	38.0
1	46N	4	3	NWSW	36.0
1	46N	4	3	SWSW	38.0
1	46N	4	3	SESW	34.6
1	46N	4	3	NESE	37.0
1	46N	4	3	NWSE	23.3
1	46N	4	3	SWSE	38.0
1	46N	4	3	SESE	36.1
1	46N	4	4	SENW	38.3
1	46N	4	4	NESW	
1	46N	4	4	NWSW	
1	46N	4	4	SWSW	
1	46N	4	4	SESW	
1	46N	4	4	NESE	
1	46N	4	4	NWSE	
1	46N	4	4	SWSE	
1	46N	4	4	SESE	

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46N	4	4	4	4	SWNE	2	9.8
46N	4	4	4	4	SENE	3	9.8
46N	4	4	4	4	SWNW	4	9.8
46N	4	4	4	4	SENW	5	40.0
46N	4	4	4	4	SENW	6	40.0
46N	4	4	4	4	SESE	7	39.7
46N	4	4	4	4	SENE	8	40.0
46N	4	4	4	4	SWNE		39.4
46N	4	4	4	4	SENE		40.0
46N	4	4	4	4	SWNW		38.0
46N	4	4	4	4	SENW		40.0
46N	4	4	4	4	SESW		40.0
46N	4	4	4	4	NESW		40.0
46N	4	4	4	4	NWSW		40.0
46N	4	4	4	4	SWSW		36.1
46N	4	4	4	4	SESW		36.0
46N	4	4	4	4	NESE		40.0
46N	4	4	4	4	NWSE		39.0
46N	4	4	4	4	SWSE		36.0
46N	4	4	4	4	SESE		40.0
46N	4	4	4	5		1	9.9
46N	4	4	4	5		2	9.9
46N	4	4	4	5		3	10.0
46N	4	4	4	5		4	10.0
46N	4	4	4	5		5	39.6
46N	4	4	4	5		6	40.0
46N	4	4	4	5		7	40.0
46N	4	4	4	5		8	40.0
46N	4	4	4	5	SWNE		38.2
46N	4	4	4	5	SENE		38.0
46N	4	4	4	5	SWNW		39.6
46N	4	4	4	5	SENW		40.0

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1	46N	4	5	NESW	1	37.9
1	46N	4	5	NWSW	1	37.0
1	46N	4	5	SWSW	1	38.9
1	46N	4	5	SESW	1	39.9
1	46N	4	5	NESE	1	40.0
1	46N	4	5	NWSE	1	40.0
1	46N	4	5	SWSE	1	36.0
1	46N	4	5	SESE	1	36.4
1	46N	4	6	SESE	1	7.2
1	46N	4	6	SESE	6	35.8
1	46N	4	6	SWNE	1	2.1
1	46N	4	6	SENE	1	38.0
1	46N	4	6	NESE	1	40.0
1	46N	4	6	NWSE	1	10.4
1	46N	4	6	SWSE	1	5.1
1	46N	4	6	SESE	1	39.0
1	46N	4	7	SESE	1	37.0
1	46N	4	7	SESE	2	8.7
1	46N	4	7	SWNE	1	1.1
1	46N	4	7	SENE	1	37.0
1	46N	4	7	NESE	1	27.2
1	46N	4	7	SESE	1	21.8
1	46N	4	8	SESE	1	34.5
1	46N	4	8	SESE	2	40.0
1	46N	4	8	SESE	3	40.0
1	46N	4	8	SESE	4	40.0
1	46N	4	8	SWNE	1	38.4
1	46N	4	8	SENE	1	34.3
1	46N	4	8	SWNW	1	38.4
1	46N	4	8	SENW	1	38.4
1	46N	4	8	NESW	1	40.0

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1	46N	4	8	NWSW	40.0
1	46N	4	8	SWSW	38.3
1	46N	4	8	SESW	38.0
1	46N	4	8	NESE	35.3
1	46N	4	8	NWSE	38.5
1	46N	4	8	SWSE	34.7
1	46N	4	8	SESE	32.2
1	46N	4	9		34.8
1	46N	4	9		37.0
1	46N	4	9		37.0
1	46N	4	9		36.9
1	46N	4	9		1.5
1	46N	4	9		30.1
1	46N	4	9	SWNE	40.0
1	46N	4	9	SENE	38.3
1	46N	4	9	SWNW	38.0
1	46N	4	9	SENNW	38.2
1	46N	4	9	NESW	39.4
1	46N	4	9	NWSW	40.0
1	46N	4	9	SWSW	37.0
1	46N	4	9	SESW	38.0
1	46N	4	9	NESE	26.0
1	46N	4	9	NWSE	37.8
1	46N	4	10		37.0
1	46N	4	10		33.6
1	46N	4	10		37.0
1	46N	4	10		34.4
1	46N	4	10	SWNE	35.9
1	46N	4	10	SENE	40.0
1	46N	4	10	SWNW	37.0
1	46N	4	10	SENNW	40.0

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1	46N	4	10	NESW	40.0
1	46N	4	10	NWSW	24.2
1	46N	4	10	SESW	30.9
1	46N	4	10	NESE	40.0
1	46N	4	10	NWSE	37.6
1	46N	4	10	SWSE	33.8
1	46N	4	11	SESE	35.2
1	46N	4	11		
1	46N	4	11		
1	46N	4	11		
1	46N	4	11		
1	46N	4	11		
1	46N	4	11		
1	46N	4	11		
1	46N	4	11	NESE	
1	46N	4	11	NWSE	
1	46N	4	11	SWNE	
1	46N	4	11	SENE	
1	46N	4	11	SWNW	11.8
1	46N	4	11	SENW	
1	46N	4	11	NESW	
1	46N	4	11	NWSW	11.8
1	46N	4	12		
1	46N	4	12		
1	46N	4	12		
1	46N	4	12		
1	46N	4	12		
1	46N	4	12		
1	46N	4	12		
1	46N	4	12		
1	46N	4	12		
1	46N	4	12		

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46N	1	4	12		18	24.6
46N	1	4	14		18	15.7
46N	1	4	15		9	26.0
46N	1	4	15		10	0.2
46N	1	4	15		17	28.1
46N	1	4	15		18	6.5
46N	1	4	15		19	1.2
46N	1	4	15		20	10.3
46N	1	4	15		22	2.8
46N	1	4	15		23	2.4
46N	1	4	15		24	40.0
46N	1	4	15	NWNE	25	38.0
46N	1	4	15	SWNE		33.5
46N	1	4	15	NENW		17.6
46N	1	4	16		7	35.7
46N	1	4	16		8	37.2
46N	1	4	16		9	38.7
46N	1	4	16		10	36.3
46N	1	4	16		11	0.8
46N	1	4	16		12	38.6
46N	1	4	16		15	31.6
46N	1	4	16		16	35.2
46N	1	4	16		25	13.3
46N	1	4	17		26	36.8
46N	1	4	17		1	33.5
46N	1	4	17		2	37.3
46N	1	4	17		3	35.3
46N	1	4	17		4	14.2
46N	1	4	17		5	42.9
46N	1	4	17		7	

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1	46N	4	17		8	28.6
1	46N	4	17		13	11.7
1	46N	4	17	NWNE		38.2
1	46N	4	17	SWNE		35.3
1	46N	4	17	NENW		40.0
1	46N	4	17	NWNW		38.7
1	46N	4	18		5	2.7
1	46N	4	18	NENE		17.4
1	46N	4	20		5	27.1
1	46N	4	20		6	7.2
1	46N	4	21		6	0.9
1	46N	4	21		7	34.0
1	46N	4	21		8	1.5
1	46N	5	4		12	13.0
1	46N	5	4		18	1.3
1	46N	5	4		19	67.0
1	46N	5	4		20	19.8
1	46N	5	4	SWNW		27.0
1	46N	5	5		1	10.0
1	46N	5	5		2	9.7
1	46N	5	5		3	11.0
1	46N	5	5		4	8.2
1	46N	5	5		5	38.1
1	46N	5	5		6	37.0
1	46N	5	5		7	40.0
1	46N	5	5		8	36.2
1	46N	5	5		9	31.5
1	46N	5	5		10	32.0
1	46N	5	5	SWNE		23.6
1	46N	5	5		11	32.4

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46N	1	5	5	5	5	5	5	SWNW	35.9
46N	1	5	5	5	5	5	5	SENW	30.1
46N	1	5	5	5	5	5	5	NESW	18.6
46N	1	5	5	5	5	5	5	NWSW	
46N	1	5	5	5	5	5	5	SWSW	
46N	1	5	5	5	5	5	5	SESW	9.2
46N	1	5	5	5	5	5	5	NWSE	34.0
46N	1	5	5	5	5	5	5	SWSE	26.1
46N	1	5	5	5	5	5	5		9.8
46N	1	5	5	5	5	5	5		9.5
46N	1	5	5	5	5	5	5		10.7
46N	1	5	5	5	5	5	5		10.3
46N	1	5	5	5	5	5	5		41.0
46N	1	5	5	5	5	5	5		40.0
46N	1	5	5	5	5	5	5		37.4
46N	1	5	5	5	5	5	5		40.0
46N	1	5	5	5	5	5	5		35.9
46N	1	5	5	5	5	5	5		32.3
46N	1	5	5	5	5	5	5	SWNE	34.0
46N	1	5	5	5	5	5	5	SENE	34.8
46N	1	5	5	5	5	5	5	SENW	
46N	1	5	5	5	5	5	5	NESW	
46N	1	5	5	5	5	5	5	NWSW	
46N	1	5	5	5	5	5	5	SWSW	
46N	1	5	5	5	5	5	5	SWSE	
46N	1	5	5	5	5	5	5	NESE	
46N	1	5	5	5	5	5	5	NWSE	
46N	1	5	5	5	5	5	5	SWSE	
46N	1	5	5	5	5	5	5	SESE	
46N	1	5	5	5	5	5	5		
46N	1	5	5	5	5	5	5		
46N	1	5	5	5	5	5	5		
46N	1	5	5	5	5	5	5		

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1	46N	5	7	NWNE	8
1	46N	5	7	SWNE	9
1	46N	5	7	NENW	10
1	46N	5	7	NWNW	11
1	46N	5	7	SWNW	12
1	46N	5	7	SESW	13
1	46N	5	7	NWSE	14
1	46N	5	7	SWSE	15
1	46N	5	7	SESE	16
1	46N	5	7	SESE	19
1	46N	5	7	SESE	20
1	46N	5	8	SESE	1
1	46N	5	8	SESE	2
1	46N	5	8	SESE	3
1	46N	5	8	SESE	11
1	46N	5	8	SESE	12
1	46N	5	8	SESE	18

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1	46N	5	9	SWNW	6	2.4
1	46N	5	9	NESW	8	3.7
1	46N	5	9	NWSW	10	12.0
1	46N	5	9	SWSW		9.1
1	46N	5	16	SESW		
1	46N	5	16			
1	46N	5	16	SWNE		
1	46N	5	16	NWNW		
1	46N	5	16	NENW		
1	46N	5	16	SWNW		30.0
1	46N	5	16	SENW		30.8
1	46N	5	16	NESW		12.0
1	46N	5	16	NESE		
1	46N	5	17		5	
1	46N	5	17		6	
1	46N	5	17		7	
1	46N	5	17		8	
1	46N	5	17	NWNE		20.4
1	46N	5	17	SWNE		32.4
1	46N	5	17	NENW		34.0
1	46N	5	17	SENW		30.2
1	47N	4	3			
1	47N	4	5	SWNE	6	
1	47N	4	5	SENE		
1	47N	4	5	SWNW		35.0
1	47N	4	5	SENW		28.1
1	47N	4	5	NESE		
1	47N	4	5	NWSE		

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1	47N	4	5	SWSE			
1	47N	4	5	SESE			
1	47N	4	6				
1	47N	4	6				
1	47N	4	6	SWNE		3.8	
1	47N	4	6	SENE		1.7	
1	47N	4	6			33.0	
1	47N	4	6			35.0	
1	47N	4	7			13.8	
1	47N	4	7			11.3	
1	47N	4	7			10.0	
1	47N	4	7			2.5	
1	47N	4	8	NENE			
1	47N	4	8	NWNE			
1	47N	4	8	SWNE			
1	47N	4	8	SENE			
1	47N	4	8	NESE			
1	47N	4	8	NWSE			
1	47N	4	8	SWSE			
1	47N	4	8	SESE			
1	47N	4	11				
1	47N	4	11				
1	47N	4	11	SWNE		2.9	
1	47N	4	11	SENE		16.6	
1	47N	4	11	NESE		40.0	
1	47N	4	11	NWSE		35.6	
1	47N	4	11	SWSE		36.6	
1	47N	4	11	SESE		40.0	
1	47N	4	12			40.0	
1	47N	4	12			32.8	
1	47N	4	12			13.3	
1	47N	4	12			2.0	
1	47N	4	12			16.7	
1	47N	4	12	NESW		40.0	

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1	47N	4	12	NWSW	40.0
1	47N	4	12	SWSW	40.0
1	47N	4	12	SESW	40.0
1	47N	4	12	NWSE	36.6
1	47N	4	12	SWSE	40.0
1	47N	4	12	SESE	36.9
1	47N	4	13	NENE	36.4
1	47N	4	13	NWNE	40.0
1	47N	4	13	SWNE	40.0
1	47N	4	13	SENE	36.4
1	47N	4	13	NENW	37.0
1	47N	4	13	NW ^W NW	40.0
1	47N	4	13	SWNW	40.0
1	47N	4	13	SE ^W NW	37.7
1	47N	4	13	NESW	38.0
1	47N	4	13	NWSW	40.0
1	47N	4	13	SWSW	40.0
1	47N	4	13	SESW	34.8
1	47N	4	13	NESE	36.4
1	47N	4	13	NWSE	40.0
1	47N	4	13	SWSE	40.0
1	47N	4	13	SESE	36.4
1	47N	4	14	NENE	36.6
1	47N	4	14	NWNE	40.0
1	47N	4	14	SWNE	39.5
1	47N	4	14	SENE	36.6
1	47N	4	14	NESE	36.6
1	47N	4	14	NWSE	40.0
1	47N	4	14	SWSE	40.0
1	47N	4	14	SESE	40.0
1	47N	4	17	NENW	36.6

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1	47N	4	17	NWNW
1	47N	4	17	SWNW
1	47N	4	17	SENNW
1	47N	4	17	NESW
1	47N	4	17	NWSW
1	47N	4	17	SWSW
1	47N	4	17	SESW
1	47N	4	18	NESE
1	47N	4	18	NWSE
1	47N	4	18	SWSE
1	47N	4	18	SESE
1	47N	4	19	
1	47N	4	19	NENE
1	47N	4	19	NWNE
1	47N	4	19	SWNE
1	47N	4	19	SENE
1	47N	4	19	NESE
1	47N	4	19	NWSE
1	47N	4	19	SWSE
1	47N	4	19	SESE
1	47N	4	20	NENW
1	47N	4	20	NWNW
1	47N	4	20	SWNW
1	47N	4	20	SENNW
1	47N	4	20	NESW
1	47N	4	20	NWSW
1	47N	4	20	SWSW
1	47N	4	20	SESW
1	47N	4	23	NENE

1
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36.6

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1	47N	4	23	NWNE	40.0
1	47N	4	23	SWNE	36.0
1	47N	4	23	SENE	33.0
1	47N	4	23	NESE	32.4
1	47N	4	23	NWSE	36.0
1	47N	4	23	SWSE	40.0
1	47N	4	23	SESE	36.0
1	47N	4	24	NENE	35.8
1	47N	4	24	NWNE	40.0
1	47N	4	24	SWNE	36.0
1	47N	4	24	SENE	31.5
1	47N	4	24	NENW	38.0
1	47N	4	24	NWNW	40.0
1	47N	4	24	SWNW	36.0
1	47N	4	24	SENW	34.8
1	47N	4	24	NESW	32.0
1	47N	4	24	NWSW	36.0
1	47N	4	24	SWSW	40.0
1	47N	4	24	SESW	38.1
1	47N	4	24	NESE	30.4
1	47N	4	24	NWSE	34.5
1	47N	4	24	SWSE	40.0
1	47N	4	24	SESE	35.7
1	47N	4	25	NENE	36.0
1	47N	4	25	NWNE	40.0
1	47N	4	25	SWNE	40.0
1	47N	4	25	SENE	36.0
1	47N	4	25	NENW	37.8
1	47N	4	25	NWNW	40.0
1	47N	4	25	SWNW	40.0
1	47N	4	25	SENW	38.2

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1	47N	4	25	NESW	38.2
1	47N	4	25	NWSW	40.0
1	47N	4	25	SWSW	40.0
1	47N	4	25	SESW	37.8
1	47N	4	25	NESE	36.0
1	47N	4	25	NWSE	40.0
1	47N	4	25	SWSE	40.0
1	47N	4	25	SESE	36.0
1	47N	4	26	NENE	36.0
1	47N	4	26	NWNE	40.0
1	47N	4	26	SWNE	40.0
1	47N	4	26	SENE	36.0
1	47N	4	26	NESE	36.0
1	47N	4	26	NWSE	40.0
1	47N	4	26	SWSE	40.0
1	47N	4	26	SESE	34.9
1	47N	4	29	NENW	
1	47N	4	29	NWNW	
1	47N	4	29	SWNW	
1	47N	4	29	SENW	
1	47N	4	29	NESW	
1	47N	4	29	NWSW	
1	47N	4	29	SWSW	
1	47N	4	29	SESW	
1	47N	4	30	NENE	
1	47N	4	30	NWNE	
1	47N	4	30	SWNE	
1	47N	4	30	SENE	
1	47N	4	30	NESE	
1	47N	4	30	NWSE	

1	47N	4	30	SWSE	21.0
1	47N	4	30	SESE	18.7
	47N	4	31	NENE	24.7
	47N	4	31	SENE	28.7
	47N	4	31	NESE	20.0
	47N	4	32	SESE	26.4
	47N	4	32	SWNE	34.6
	47N	4	32	SENE	38.0
	47N	4	32	NENW	40.0
	47N	4	32	NWNW	38.1
	47N	4	32	SWNW	40.0
	47N	4	32	SENW	40.0
	47N	4	32	NESW	40.0
	47N	4	32	NWSW	36.1
	47N	4	32	SWSW	36.4
	47N	4	32	SESW	38.0
	47N	4	32	NESE	33.7
	47N	4	32	NWSE	33.7
	47N	4	32	SWSE	38.0
	47N	4	32	SESE	27.0
	47N	4	33	SWNE	25.7
	47N	4	33	SENE	26.3
	47N	4	33	SWNW	27.0
	47N	4	33	SENW	37.2
	47N	4	33	NESW	35.6
	47N	4	33	NWSW	35.9
	47N	4	33	SWSW	38.0
	47N	4	33	SESW	38.9
	47N	4	33	NESE	34.2
	47N	4	33	NWSE	36.6
	47N	4	33	SWSE	

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47N	4	33	SESE	37.1
47N	4	34	NESW	40.0
47N	4	34	NWSW	37.1
47N	4	34	SWSW	34.8
47N	4	34	SESW	36.2
47N	4	34	NESE	15.6
47N	4	34	NWSE	40.0
47N	4	34	SWSE	35.8
47N	4	34	SESE	15.2
47N	4	35	NENE	35.2
47N	4	35	NWNE	40.0
47N	4	35	SWNE	40.0
47N	4	35	SENE	35.5
47N	4	35	NESE	37.2
47N	4	35	NWSE	40.0
47N	4	35	SWSE	40.0
47N	4	35	SESE	37.2
47N	4	36	NENE	36.0
47N	4	36	NWNE	40.0
47N	4	36	SWNE	40.0
47N	4	36	SENE	36.0
47N	4	36	NENW	37.0
47N	4	36	NWNW	40.0
47N	4	36	SWNW	40.0
47N	4	36	SENW	37.0
47N	4	36	NESW	36.6
47N	4	36	NWSW	40.0
47N	4	36	SWSW	40.0
47N	4	36	SESW	37.8
47N	4	36	NESE	35.8
47N	4	36	NWSE	40.0

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WATER RESOURCES DEPT
SALEM, OREGON

47N	4	36	SWSE			40.0
47N	4	36	SESE			36.6
<hr/>						
47N	5	7			17	14.4
47N	5	17	NWWSW			1.6
47N	5	17	SWSW			30.6
47N	5	17	SESW			2.8
47N	5	18			1	37.2
47N	5	18			2	40.0
47N	5	18			3	40.2
47N	5	18			4	40.6
47N	5	10			5	24.1
47N	5	18			10	31.6
47N	5	18			11	27.9
47N	5	18	SENE			0.5
47N	5	18	SENW			38.0
47N	5	18	NESW			38.0
47N	5	18	SESW			38.0
47N	5	18	NWSE			40.0
47N	5	18	SWSE			39.6
47N	5	18	SESE			38.0
47N	5	19			1	40.8
47N	5	19			2	37.7
47N	5	19			3	40.8
47N	5	19			4	40.9
47N	5	19	NENE			38.0
47N	5	19	NWNE			40.0
47N	5	19	SWNE			37.0
47N	5	19	SENE			35.3
47N	5	19	NENW			38.2
47N	5	19	SENW			35.5

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47N	5	19	NESW	38.2
47N	5	19	SESW	38.4
47N	5	19	NESE	40.0
47N	5	19	NWSE	40.0
47N	5	19	SWSE	39.0
47N	5	19	SESE	38.8
47N	5	20		35.3
47N	5	20		5.5
47N	5	20	SWNE	36.2
47N	5	20	SENE	6.6
47N	5	20	NWNNW	40.0
47N	5	20	SWNNW	40.0
47N	5	20	SENNW	37.0
47N	5	20	NESW	38.6
47N	5	20	NWNSW	40.0
47N	5	20	SWNSW	38.6
47N	5	20	SESW	36.6
47N	5	20	NESE	35.9
47N	5	20	NWSE	40.0
47N	5	20	SWSE	39.0
47N	5	20	SESE	33.6
47N	5	29	NENE	33.6
47N	5	29	NWNE	38.0
47N	5	29	SWNE	34.6
47N	5	29	SENE	34.0
47N	5	29	NENW	35.5
47N	5	29	NWNNW	35.3
47N	5	29	SWNNW	37.4
47N	5	29	SENNW	34.6
47N	5	29	NESW	35.7
47N	5	29	NWNSW	36.1

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47N	5	29	SWSW	38.2
47N	5	29	SESW	37.6
47N	5	29	NESE	34.8
47N	5	29	NWSE	37.8
47N	5	29	SWSE	40.0
47N	5	29	SESE	36.4
47N	5	30	NENE	37.5
47N	5	30	NWNE	39.6
47N	5	30	SWNE	37.0
47N	5	30		41.0
47N	5	30		41.6
47N	5	30		40.8
47N	5	30		40.8
47N	5	30	SENE	37.0
47N	5	30	NENW	39.6
47N	5	30	SENW	38.2
47N	5	30	NESW	39.6
47N	5	30	SESW	40.0
47N	5	30	NESE	38.6
47N	5	30	NWSE	40.0
47N	5	30	SWSE	40.0
47N	5	30	SESE	40.0
47N	5	31		40.8
47N	5	31		39.0
47N	5	31		39.3
47N	5	31		40.6
47N	5	31	NENE	39.0
47N	5	31	NWNE	39.0
47N	5	31	SWNE	38.8
47N	5	31	SENE	38.8
47N	5	31	NENW	40.0

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47N	5	31	SENW	36.9
47N	5	31	NESW	38.9
47N	5	31	SESW	40.0
47N	5	31	NESE	39.3
47N	5	31	NWSE	38.0
47N	5	31	SWSE	38.8
47N	5	31	SESE	38.8
47N	5	32	NENE	35.5
47N	5	32	NWNE	39.0
47N	5	32	SWNE	39.0
47N	5	32	SENE	34.1
47N	5	32	NENW	33.7
47N	5	32	NWNW	33.5
47N	5	32	SWNW	35.7
47N	5	32	SENW	36.8
47N	5	32	NESW	36.1
47N	5	32	NWSW	38.0
47N	5	32	SWSW	37.3
47N	5	32	SESW	35.9
47N	5	32	NESE	30.3
47N	5	32	NWSE	39.8
47N	5	32	SWSE	39.5
47N	5	32	SESE	37.2

Total irrigated acreage outside of Sump 1A that is included in Claim 320 16354.3

Total acreage in Sump 1A and 1B for Claim 320 5504.1
 (given on FWS Supplemental map for Federal Reserved Claims)

Total Acreage for Claim 320 21858.4

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2006, I mailed a true copy of the following:
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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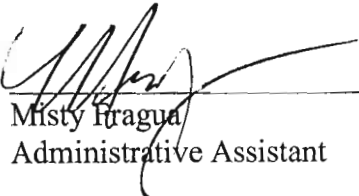
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