

L. U. B. A.
Aug 24 3 36 PM '88

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

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LEAGUE OF WOMEN VOTERS OF)
OREGON and SAVE OUR KLAMATH)
RIVER,)

Petitioners,)

vs.)

KLAMATH COUNTY,)

Respondent,)

and)

CITY OF KLAMATH FALLS,)

Intervenor-)
Respondent.)

-----)
DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT and STATE PARKS)
AND RECREATION DIVISION,)

Petitioners,)

vs.)

KLAMATH COUNTY,)

Respondent,)

and)

CITY OF KLAMATH FALLS,)

Intervenor-)
Respondent.)

LUBA No. 88-010

FINAL OPINION
AND ORDER

LUBA No. 88-012

Appeal from Klamath County.

Neil S. Kagan, Portland, filed a petition for review and
reply brief and argued on behalf of petitioners League of Women
Voters and Save Our Klamath River.

1 Gabriella I. Lang, Salem, filed a petition for review and
2 reply brief and argued on behalf of petitioners Department of
3 Land Conservation and Development and State Parks and
4 Recreation Division. With her on the briefs were Dave
5 Frohnmayer, Attorney General; William F. Gary, Deputy Attorney
6 General; and Virginia L. Linder, Solicitor General.

7 Michael L. Spencer, Klamath Falls, filed a response brief
8 and argued on behalf of respondent.

9 Lawrence R. Derr, Portland, filed a response brief and
10 argued on behalf of intervenor-respondent.

11 Gabriella I. Lang, Salem, filed a brief pursuant to
12 ORS 197.830(6) on behalf of the Oregon Department of Energy and
13 Water Resources Department. With her on the brief were Dave
14 Frohnmayer, Attorney General; William F. Gary, Deputy Attorney
15 General; and Virginia L. Linder, Solicitor General.

16 BAGG, Chief Referee; SHERTON, Referee, participated in the
17 decision.

18 REMANDED

08/24/88

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of ORS 197.850.
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1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners League of Women Voters of Oregon and Save Our
4 Klamath River (LUBA No. 88-010) and Department of Land
5 Conservation and Development and State Parks and Recreation
6 Division (LUBA No. 88-012) appeal Klamath County Ordinance
7 No. 44.15. The ordinance amends Klamath County Comprehensive
8 Plan (plan) and Klamath County Land Development Code (code)
9 provisions affecting an 11 mile portion of the Klamath River
10 Canyon from the J.C. Boyle Dam to the California/Oregon
11 border. The ordinance adopts an inventory update and
12 management plan for Statewide Planning Goal 5 resources.¹
13 Petitioners ask that we remand the decision.

14 MOTION TO INTERVENE

15 The city of Klamath Falls moves to intervene in this
16 consolidated proceeding. The motion is allowed.

17 SCOPE OF REVIEW

18 During oral argument, both petitioners claimed the county
19 decision should be regarded as quasi-judicial. This
20 characterization, according to petitioners, is necessary
21 because the decision on review applies particular policies to a
22 particular stretch of land. See Estate of Paul Gold v. City of
23 Portland, 87 Or App 45, 740 P2d 812, rev den 304 Or 405
24 (1987). Because the decision is quasi-judicial, petitioners
25 argue the county was responsible for making adequate findings
26 of fact supported by substantial evidence. This task,

1 according to both petitioners, was not fulfilled.

2 Respondents² argue the decision is legislative in
3 nature. Respondents say there is no need for findings or
4 substantial evidence to support a legislative enactment.
5 Wallowa Lake Forest Industries v. Wallowa County, 13 Or LUBA
6 172 (1985); Lima v. Jackson County, 56 Or App 619, 643 P2d 355
7 (1982). Respondent City of Klamath Falls claims the only
8 source of a findings requirement is the provision of
9 OAR 660-16-010 requiring a statement of reasons supporting
10 respondent county's Goal 5 management program.³ Goal 5
11 itself, according to the city's argument, contains no
12 requirement for inclusion of a statement of reasons or
13 findings. Further, respondent city argues there is no
14 requirement that a legislative decision be supported by
15 substantial evidence. The city says that to the extent the
16 rule imposes requirements not in the goal, the rule is invalid.

17 We do not believe that classifying the appealed decision as
18 quasi-judicial or legislative is particularly fruitful. The
19 county, when adopting Ordinance 44.15, adopted a new "Inventory
20 Update and Management Plan for Klamath River Canyon Goal 5
21 resources: An element of the Klamath County Comprehensive
22 Plan." Record 8-84. This document includes a statement of
23 reasons justifying changes in its Goal 5 inventory and
24 treatment of the Klamath River Canyon. We regard this document
25 as a statement of reasons and facts supporting the decision.
26 In other words, this document may be characterized as

1 "findings" supporting the decision. The county adopted this
2 document attempting to show compliance with a particular
3 statewide land use planning goal and certain rules adopted by
4 the Land Conservation and Development Commission. Compliance
5 with these rules may only be effectively shown by the county's
6 recitation of fact and its understanding of how the facts show
7 compliance with the particular goal and rule. This
8 circumstance exists whether the particular county action is
9 called legislative or quasi-judicial. See, i.e., Tides Unit
10 Owners v. City of Seaside, 11 Or LUBA 84, 91-93 (1984);
11 Prentice v. Clackamas County, 9 Or LUBA 183, 188-190 (1983) and
12 Twin Rocks v. Rockaway, 2 Or LUBA 36, 44, 1980. In other
13 words, we do not believe the county is able to show compliance
14 with the goal and the rule without adopting findings.
15 Therefore, the requirement for findings appears to come from
16 Goal 5 and OAR 660-10-000 et seq.

17 We need not address the city's claim that OAR 660-16-010,
18 insofar as it requires findings, exceeds the goal. In any
19 case, compliance with the goal itself must be evident either in
20 findings or in the county's record. In this case, the county
21 adopted findings in support of its plan amendment. The city's
22 argument is moot.

23 We do not agree with respondent's claim that there is no
24 requirement that the decision be supported by substantial
25 evidence. Statewide Planning Goal 2 (Land Use Planning)
26 requires that there be an "adequate factual base" for any land

1 use decision. Arguably, this adequate factual base may be
2 different than substantial evidence. However, the parties do
3 not argue that there is any such difference, and we do not see
4 much point in making any such distinction. We conclude, for
5 the purposes of this review proceeding, that our responsibility
6 is to review the decision for substantial evidence.⁴

7 ASSIGNMENTS OF ERROR: GOAL 5

8 Petitioners League of Women Voters and Save Our Klamath
9 River make the following assignments of error:

10 FIRST ASSIGNMENT OF ERROR

11 "In deciding whether to include potential Goal 5
12 resource sites on the plan inventory, the county
13 misconstrued the applicable law, made insufficient
14 findings, and made decisions not supported by
15 substantial evidence in the whole record."

14 SECOND ASSIGNMENT OF ERROR

15 "In identifying potential conflicts with Goal 5
16 resource sites included in the plan inventory, the
17 county misconstrued the applicable law, made
18 insufficient findings, and made decisions not
19 supported by substantial evidence in the whole record."

18 THIRD ASSIGNMENT OF ERROR

19 "In assessing the economic, social, environmental, and
20 energy consequences of conflicting uses in the Klamath
21 River canyon planning area, the county misconstrued
22 the applicable law, made insufficient findings, and
23 made decisions not supported by substantial evidence
24 in the whole record."

23 Petitioners DLCD and State Parks and Recreation Division
24 make the following assignment of error:

25 FIRST ASSIGNMENT OF ERROR

26 "The county's decision violates Goal 5 and the goal's

1 rules at OAR 660, Division 16. First, it fails to
2 provide protection for an identified Goal 5 resource
3 by precluding future scenic waterway designations.
4 Second, the ESEE analysis required by OAR 660-16-005
5 for identified conflicting uses is not based on
6 presently available information, does not sufficiently
7 analyze all consequences and does not weigh the
8 significant values of each resource sites [sic].
9 third, the county's program for managing sites with
10 limited conflicting uses does not contain clear and
11 objective conditions or standards as required by
12 OAR 660-16-010. The county failed to protect a Goal 5
13 resource and violated that Goal."

14 Petitioners' challenges based on Goal 5 are similar. For
15 convenience only, we will consider the challenges made by
16 petitioners League of Women Voters, et al. Included within our
17 discussion will be the Goal 5 challenges presented by
18 petitioner DLCD, et al. We will then address separately the
19 non-Goal 5 challenges raised by petitioners DLCD, et al.

20 A. Inventory of Resources

- 21 1. "The county's decision to include the Klamath
22 River on the plan inventory as a hydro-electric
23 energy resource misconstrued the applicable law,
24 was unjustified, and was not supported by
25 substantial evidence in the whole record."

26 Petitioners advise that the Goal 5 inventory update is not
adequate if it is based on inaccurate data or if it does not
adequately address not only the location and quantity of the
resource, but also its quality. See OAR 660-16-000(4).⁵
Quality is only adequately addressed where consideration is
given to the resource's relative value as compared to other
sites of the same resource within the jurisdiction. McCoy v.
Linn County, ___ Or LUBA ___ (LUBA No. 87-046, December 15,
1987), slip op at 22; OAR 660-16-000(3). Petitioners recognize

1 the county made findings concerning the quality of the
2 hydro-electric resource, but petitioners say the findings were
3 based only on consideration of the characteristics of the
4 existing and proposed hydro-electric power generation projects
5 in the Klamath River Canyon planning area. The county did not
6 consider the quality of the site as compared to other
7 hydro-electric energy resource sites within the Klamath River
8 Canyon outside the planning area. Specifically, petitioners
9 claim the county did not consider the quality of the site as
10 compared to proposed hydro-electric power generation projects
11 upstream. According to petitioners, this omission requires a
12 remand.

13 OAR 660-16-000(2) provides that a valid inventory of the
14 Goal 5 resource must "include a determination of the location,
15 quality, and quantity of each of the resource sites."

16 OAR 660-16-000(3) provides that

17 "The determination of quality requires some
18 consideration of the resource site's relative value,
19 as compared to other examples of the same resource in
at least the jurisdiction itself. * * * " (Emphasis
in original).

20 Respondents cite us to portions of the record in which
21 testimony was received about other potential hydro-electric
22 generating sites. However, we are not cited to any analysis of
23 the quality of the other potential hydro-electric generating
24 sites. The county's decision includes no qualitative
25 comparison of hydro sites. We must agree, then, that the
26 county's decision fails to meet OAR 660-10-000(2), and this

1 subassignment of error is sustained.

2 2. "The county's decision not to include in the plan
3 inventory all of the wildlife species found at
4 the Klamath River canyon Goal 5 fish and wildlife
5 site misconstrued the applicable law, was
6 unjustified, and was not supported by substantial
7 evidence in the whole record."

8
9 Petitioners argue the plan inventory includes only fish,
10 big game and raptors. Petitioners allege the county received
11 information on the location, quality and quantity of other
12 wildlife species including waterfowl, upland game and nongame
13 birds, small and medium size mammals, fur bearers, reptiles and
14 amphibians. Petitioners allege failure to include these
15 species in the inventory requires a remand. Petitioners cite
16 as authority Friends of the Columbia Gorge v. LCDC, 85 Or App
17 249, 253, 736 P2d 575 (1987), wherein the Court stated that a
18 decision to include a Goal 5 resource site in the plan
19 inventory must include all the relevant resources which exist
20 at the site.

21 Respondents distinguish the Friends of the Columbia Gorge
22 case on the ground that the Court held that a local government
23 only had an obligation to include all of the relevant resources
24 existing on the site. See Friends of the Columbia Gorge v.
25 LCDC, 85 Or App at 253. Respondents argue there is room for
26 judgment as to which of the bird, mammal and other species are
relevant and which are not. Respondents argue the county set
forth in detail its considerations in determining what
significant resources, as distinguished from other resources,

1 are to be included. Respondent city argues:

2 "The county relies upon such factors as the
3 accessibility of the site for conservation or
4 development purposes, quantities that are unique or
5 abundant in relation to similar resources or other
6 locations and qualities that are uniquely or notably
7 deserving of conservation when compared with the
8 quality and quantity of similar resources or sites
9 throughout the county, or which possess favorable,
10 technical and economic feasibilities for
11 development." Brief of Respondent City of Klamath
12 Falls at 7-8 (LUBA No. 88-010).

13 The city cites us to the inventory update document wherein
14 the county states

15 "In reaching such conclusions, the county considers a
16 'significant' resource to be characterized by
17 locations that are accessible for conservation or
18 development purposes; quantities that are unique or
19 abundant in relation to similar resources at other
20 locations; and qualities that are uniquely or notably
21 deserving of conservation with compared with the
22 quantity and quality of similar resources or sites
23 throughout the county, or which possess favorable,
24 technical and economic feasibilities for
25 development." Record 20.

26 Respondents advise the planning department review of the canyon
and Goal 5 criteria in 1986 concluded the resources discussed
were still the only ones meeting "the threshold of significance
defined in OAR 660-16-000(5)(c)." Record 20. In other words,
other fish and wildlife resources were not, under this
amendment, updated or reconsidered because they were determined
not significant in earlier inventories.

As we understand the Court's opinion in Friends of Columbia
Gorge v. LCDC, supra, a jurisdiction must include all relevant
resources existing at a site when including a Goal 5 resource
site in its plan inventory. Here, the county had information

1 before it on other animal species and gave an explanation in
2 its inventory findings of why it chose to limit its
3 consideration to the species chosen. Petitioners neither
4 articulate a reason why the county's explanation is defective
5 nor explain why the county's choice of species to inventory is
6 not supported by substantial evidence. We will not make
7 petitioners' charge for them. Deschutes Development v.
8 Deschutes County, 5 Or LUBA 218, 220 (1982).

9 This subassignment of error is denied.

10 3. "The county's decision to exclude the Klamath
11 River canyon planning area from the plan
12 inventory as an outstanding scenic site
13 misconstrued the applicable law, was unjustified,
and was not supported by substantial evidence in
the whole record."

14 Petitioners League of Women Voters, et al, argue the
15 county's decision to exclude the Klamath River Canyon planning
16 area from the plan inventory as an outstanding scenic resource
17 site was error. Petitioners claim the Klamath River Canyon is
18 classified with the U.S. Bureau of Land Management (BLM) as a
19 Class II Visual Resource Management Area because it has unique
20 features. As we understand petitioners' argument, recognition
21 by the BLM is sufficient reason to place the site on the
22 inventory of scenic resources. Petitioners do not cite legal
23 authority for this proposition.⁶

24 Respondents argue that the county was not obliged to
25 consider whether the site is an outstanding scenic resource.
26 According to respondents, the county did not reopen its plan

1 with respect to all Goal 5 resources. Respondents argue there
2 is simply no obligation under the goal or the rule to
3 reconsider acknowledged inventories of Goal 5 resources which
4 are not altered or updated by a land use action.

5 We agree. Nothing in Goal 5 or OAR 660-10-000 et seq.
6 requires a complete review of all Goal 5 resources when
7 amending an acknowledged comprehensive plan.⁷ The county
8 may, if it chooses, rely on its existing acknowledged Goal 5
9 inventories.

10 This subassignment of error is denied.

11 4. "The county misconstrued the applicable law and
12 failed to justify its decision to exclude
wilderness areas from the plan inventory."

13 Petitioners claim the county was obliged to make adequate
14 findings showing that potential wilderness areas in the canyon
15 planning area do not satisfy Goal 5 criteria for inclusion in
16 the inventory or that they were not of sufficient importance to
17 warrant inclusion in the inventory. Because this discussion is
18 missing, petitioners claim the decision should be remanded. We
19 do not agree.

20 The county did not reopen its review of the inventory of
21 this area for consideration of wilderness areas. As discussed
22 in the previous subsection, the county was under no obligation
23 to do so. We do not believe a failure to update its inventory
24 of wilderness areas is error.

25 This subassignment of error is denied.

26 //

1 5. "The county's decision to delay the Goal 5
2 process with respect to newly identified historic
3 and clutural areas was not justified or supported
4 by substantial evidence in the whole record."

5 Petitioners claim that during the course of collecting
6 information about Goal 5 resources in the Klamath River Canyon,
7 the county learned about particular historic home sites, an
8 historic road, five homesteads or early ranches, one stagecoach
9 station, one cemetary and a school. Information about these
10 sites was incorporated into the county's list of potential Goal
11 5 resources, but the county decided to delay the Goal 5 process
12 for newly identified historic sites. That is, the county made
13 a "1B"⁸ decision about the newly identified sites.

14 Petitioners claim this delay was error. Petitioners further
15 assign as error a county failure to make findings explaining
16 how the available information about the sites was inadequate to
17 identify with particularity the location, quantity and quality
18 of the resource at these sites.

19 Respondents say the county plans a biannual plan update in
20 1987-88, and the historic and cultural portions of the Goal 5
21 element of its plan are scheduled for review at that time.

22 Respondents claim the county did not choose to reopen the
23 historic and cultural portions of its Goal 5 inventory during
24 the current biannual review, and the county was under no
25 obligation to do so.

26 Respondents also note the petitioners did not refer to any
evidence in the record to show they raised this objection

1 during the county's plan amendment proceedings. Having failed
2 to do so, respondents argue the petitioners may not be heard to
3 object now.

4 First, we do not believe it incumbent upon the petitioners
5 to appraise the county of an error in substance. The fact the
6 petitioners may not have objected to the county's 1B
7 designation for these resource sites during the course of the
8 county's proceedings need not preclude petitioners from raising
9 the issue here. See ORS 197.185(3) and Twin Rocks v. Rockaway,
10 2 Or LUBA at 40-42.

11 We disagree with the respondents' claim that the county did
12 not choose to reopen consideration of the historic and cultural
13 element of its inventory at this time. The inventory update
14 document states this element of the inventory is revised.
15 Record 21. However, we do not believe the county's update of
16 this inventory automatically requires us to sustain
17 petitioners' subassignment of error.

18 Petitioners simply claim that information exists about the
19 historic sites newly placed on the inventory. Petitioners do
20 not explain to this Board why the information cited in the
21 record is sufficient for the county to proceed with the Goal 5
22 process at this time. That is, petitioners do not point to
23 information in the record showing such information was adequate
24 for the county to make a full Goal 5 analysis. We decline to
25 find the county committed error as charged.

26 This subassignment of error is denied.

1 B. Identification of Conflicting Uses

2 "The county's identification of uses conflicting with
3 the hydroelectirc energy resource misconstrued the
4 applicable law, was unjustified, and was not supported
 by substantial evidence in the whole record."

5 Petitioners advise that once Goal 5 resources are
6 inventoried, OAR 661-16-005 requires a local government to
7 identify conflicting uses. "A conflicting use is one which, if
8 allowed, could negatively impact a Goal 5 resource site."

9 OAR 660-16-005. Petitioners claim the county failed to satisfy
10 the goal and OAR 6601-6-005 because it did not identify the
11 uses allowed in the underlying forestry zone as conflicting
12 uses. The county apparently believed that the uses did not
13 have a "reasonable potential for occurrence." Record 27.

14 Petitioners argue this assumption is error. They add that the
15 forestry zone allows 10 outright uses and 12 conditional uses.
16 Petitioners explain OAR 660-16-005 provides the criterion for
17 identifying a conflicting use is not whether the use has
18 reasonable potential for occurrence but only whether the use
19 could negatively impact a Goal 5 resource site.

20 The county's discussion about conflicting uses shows it
21 believed the uses allowable in the forestry zone were not
22 likely to occur because of the nature of the uses and the
23 nature of the terrain. Respondents say the county could easily
24 have chosen to list all of the permitted uses within the
25 forestry zone, to find that those uses are unlikely to occur
26 and, then, to conclude that there will be no conflicts simply

1 because the uses will not exist. The respondents say this
2 methodology would achieve the same result as the methodology
3 mentioned in OAR 660-16-005, which provides that the analysis
4 is done "primarily" by examining the uses allowed in the
5 applicable zoning districts.

6 We believe petitioners' reading of the rule is correct.
7 The rule states that identifying conflicts is to be done
8 "primarily by examining the uses allowed in broad zoning
9 districts established by the jurisdiction * * *."

10 OAR 660-16-005. While it may be that other methods can be
11 appropriate, some detailed explanation of the rationale behind
12 another method, if chosen, is necessary. Simply concluding
13 that the uses are not likely to occur, without facts supporting
14 that conclusion, is not convincing, particularly with regard to
15 uses clearly identified in the ordinance. See Audubon Society
16 of Portland v. LCDC, ___ Or App ___ (CA #A43921, August 17,
17 1988). We therefore sustain this portion of petitioners' claim.

18 Petitioners also complain the county's findings contradict
19 the conclusion that certain uses are not likely to occur.
20 Petitioners point to livestock, grazing and timber harvesting
21 as among current uses in the Klamath River Canyon planning
22 area, yet the county did not include those uses in its list of
23 uses which conflict with the hydro-electric energy resource.
24 See Record 24, 27-28.

25 The respondents reply that Record Exhibit M, Volume III,
26 Exhibit E, Section 9.1.2 describes the livestock grazing

1 activity and shows minimal use which might be affected by a
2 hydro project. Section 9.1.3 describes logging and shows no
3 commercial timber harvest in the project area in recent years,
4 and the only timber harvesting on going is on the plateau
5 surrounding the canyon, an area unaffected by a hydro project.
6 Respondents argue petitioners do not contradict this evidence,
7 and the county was justified in concluding there was no
8 appreciable level of livestock grazing or timber harvesting
9 activity. Therefore, identification of these activities as
10 conflicting uses was not required, according to respondents.

11 Respondents' citation to the record shows that there is
12 grazing in the area. It appears that the grazing is not
13 extensive (the permittee for the lower pasture is permitted to
14 graze 43 stock on the land from 1 May to 15 July). Exhibit M,
15 Volume III, page 9-1. Also, the report states that there is no
16 commercial timber harvesting in the area. There is a timber
17 harvest on the Klamath plateau surrounding the canyon.

18 We do not believe that this analysis meets OAR 660-16-005.
19 The rule requires analysis of conflicting uses. The potential
20 for the existence of a conflicting use, once identified, must
21 be discussed. We are not cited to discussion in the decision of
22 why the county believes that a use that it identifies as
23 conflicting nonetheless would not affect or be affected by the
24 proposed hydro project. We therefore sustain this portion of
25 petitioners' claim.

26 Petitioners also argue that the county did not identify

1 wilderness areas, outstanding scenic sites and historic and
2 cultural areas as conflicting uses. The county's omission of
3 these resources from the list of conflicting uses was,
4 according to petitioners, the consequence of its erroneous
5 decision to exclude wilderness areas and outstanding scenic
6 sites from the plan inventory and to delay the Goal 5 process
7 with respect to historic and cultural areas.

8 We believe this claim has already been answered. The
9 county did not reopen its inventories with respect to
10 wilderness areas and outstanding scenic sites. It did reopen
11 its inventory with respect to historic and cultural areas.
12 However, having done so, the county made a "1B" decision with
13 regard to historic and cultural resource sites. It delayed
14 completion of the Goal 5 process regarding these resources
15 until its periodic review process. Record 21-22, 75-77. As
16 discussed under subassignment A.5., supra, we find no error in
17 this aspect the county's action.

18 This subassignment of error is sustained in part.

19 C. Analysis of ESEE Consequences

- 20 1. "The ESEE analysis was defective because the
21 county failed to analyze the ESEE consequences
22 with respect to certain uses which should or
might have been identified as conflicting uses."

23 Here petitioners again state that livestock grazing, timber
24 harvesting, the scenic quality of the Klamath River Canyon,
25 wilderness areas, historic areas and cultural areas should have
26 been identified as conflicting uses. The county's ESEE

1 analysis was therefore incomplete, according to petitioners,
2 because the county did not analyze the consequences of
3 livestock grazing and timber harvesting or of the other uses
4 which should have been identified as conflicting uses.
5 Petitioners claim we must remand the decision to correct this
6 error.

7 We agree with petitioners to the extent petitioners
8 challenge the ESEE analysis because it is not based upon an
9 adequate review of the consequences of conflicting grazing,
10 timber and hydro-electric uses.

11 With respect to the scenic quality of the Klamath River
12 Canyon, we note the county was not obliged to reconsider that
13 portion of its inventory. Therefore, we do not find the county
14 committed error in its ESEE analysis simply because it chose
15 not to reconsider the scenic quality of the Klamath River
16 Canyon, inventory it as a scenic resource and complete a new
17 ESEE analysis of uses conflicting with such a resource. We
18 make the same comment with respect to wilderness areas.

19 With respect to historic and cultural areas, we note again
20 the county's decision to make a "1B" decision and delay
21 completion of the Goal 5 process until the plan review
22 scheduled for 1987-88. Because we do not find the county's
23 "1B" decision in error, we do not fault the county in its ESEE
24 analysis with regard to these resources.

25 This subassignment of error is sustained in part.

26 //

1 2. "The ESEE analysis of the impacts of scenic
2 waterway status on the hydroelectric energy
3 resource was not justified or supported by
 substantial evidence in the whole record."

4 The county found that if the Klamath River were protected
5 as a scenic waterway to the exclusion of hydro development,
6 there would be a loss of economic and social gains which might
7 otherwise accrue to the county. Record 31. The county listed
8 the various economic gains. Record 31-32. The county found
9 that there would be a net gain to the local economy, and the
10 new facility would support a regional energy need in the
11 1990s. Record 32, 46. Petitioners complain, however, that the
12 county did not specify the magnitude of the energy demand that
13 might be unfulfilled if the hydro-electric generating station
14 were not allowed. Petitioners believe this analysis is
15 necessary in order to consider adequately the social and
16 economic gains to be achieved if the project were allowed.

17 Petitioners go on to charge the record does not provide
18 substantial evidence to support the county's conclusions of
19 ESEE benefits. The record does not show, for example, that
20 hydro development would massively benefit the local economy.
21 Petitioners complain there is no way of showing whether a
22 hydro-electric project on the river will supply an actual need
23 for energy in the region, and petitioners charge the Northwest
24 Power Planning Council states that power from the
25 hydro-electric project in this planning area isn't needed in
26 the low forecast for energy need, and is not needed until the

1 year 2002 in the medium forecast. See Record Exhibit K at iii;
2 Exhibit C at 1265. See also Record 245 - 252; Exhibit A, p.
3 602-80.

4 Respondent city cites testimony that additional
5 hydro-electric energy will be needed anywhere from 1990 on,
6 depending upon an assumed growth rate and power demand. Record
7 250. See also Record 87, 177, 248, 251-2 and 298.

8 While respondents's evidence suggests a demand for power
9 from the proposed project will exist in the future, this
10 conclusion is based on assumptions concerning rates of growth
11 and power demand. The evidence offered by petitioners is based
12 on different assumptions. The county's order does not explain
13 the basis for the assumptions it relies on, and we are cited to
14 no evidence in the record establishing such a basis. Under
15 these circumstances, we find the petitioners' evidence
16 undermines that relied upon by the county. A reasonable person
17 would not, given the evidence on both sides, assume the future
18 power demands projected by respondent. Therefore, without some
19 explanation about why the county concluded as it did regarding
20 this evidence, we must conclude the county's decision is not
21 supported by substantial evidence on this point. Younger v.
22 City of Portland, 305 Or 346, ___ P2d ___ (1988).

23 We sustain this subassignment of error.

- 24 3. "The ESEE analysis of the impacts of the
25 hydroelectric energy resource on conflicting uses
26 and other Goal 5 resources was not justified or
supported by substantial evidence in the whole
record."

1
2 The county found that, with certain control measures, the
3 net environmental consequences to fish populations and habitat
4 will be an increase in available rainbow trout habitat with no
5 adverse impact on population levels. Record 34-35.

6 Petitioners complain the county's findings are contradicted by
7 evidence from the Oregon Department of Fish and Wildlife
8 expressing the opinion that a hydro-electric project "cannot be
9 developed without significant damage to the Klamath River wild
10 rainbow trout population." Record Exhibit C at 1271.

11 Both petitioners go on to make similar challenges with
12 respect to the county's findings about the consequences of a
13 hydro-electric project on wildlife habitat and migratory big
14 game, white water rafting and recreation, archaeological
15 resources, and the potential scenic waterway.

16 Again, without respondents' citation to evidence in the
17 record supporting the county's decision, we must conclude that
18 petitioners' charges are well-founded.

19 There are two exceptions to our finding. The county does
20 cite us to evidence regarding impacts on the trout fishery at
21 Record 209, 599, 947-48, 1060-71; Exhibit M; Volume II, Exhibit
22 E, Sections 3.1.22 et seq. Respondents suggest these portions
23 of the record show that the effects of hydro projects on the
24 fishery will be positive. Much of the evidence cited consists
25 of comments by individuals and a report by the applicant
26 regarding fish, wildlife, and botanical resources. However,

1 the applicant's report is a substantial study of fish habitat.
2 The report concludes that there is no evidence, given a
3 particular minimum stream flow, showing a hydro-electric
4 project will result in loss of critical habitat for trout. See
5 Exhibit M, Volume II, Exhibit E, Pages 31.1-79 to 106.

6 Petitioners do not explain why this evidence is not
7 reliable. They offer testimony from an Oregon Department of
8 Fish and Wildlife biologist. His evidence says the Klamath
9 River provides a very valuable trout habitat, and the hydro
10 project will significantly adversely affect the habitat. This
11 evidence, then, contradicts that of the applicant.

12 Under such circumstances, where both sets of evidence are
13 believable, we believe the local government may choose the
14 evidence it wishes to follow. While the evidence relied upon
15 by the county does not at all agree with that presented by the
16 Oregon Department of Fish and Wildlife, we are unable to say
17 that the evidence is not substantial. That is, the evidence
18 offered by the Department of Fish and Wildlife does not so
19 undermine the evidence offered by the applicant as to render
20 the applicant's evidence not substantial. Younger v. City of
21 Portland, supra.

22 There is a second area for which respondent cites
23 supporting evidence in the record. The county heard testimony
24 that rafting may co-exist with the proposed hydro project.
25 Record 135. The county concluded that there is a possibility
26 of a reduction in rafting. We understand the county, then, to

1 minimize the potential loss of white water rafting. The county
2 apparently viewed additional recreational opportunities
3 occasioned by construction of the hydro-electric project to
4 outweigh this possible loss.

5 The county's analysis does not answer the evidence cited by
6 petitioners that the rafting resource is "unique and
7 irreplaceable." The petitioners' charge that the hydro project
8 will destroy a section of river known for the high degree of
9 difficulty of its rapids and its useability through the summer,
10 an apparent rarity in rafting. The county's analysis only
11 considers the number of people served and the total funds
12 generated by this resource. While these factors are certainly
13 relevant to a review of the quality of the resource, the
14 county's analysis is not complete in that it does not consider
15 the unique recreational quality of this resource.

16 This subassignment of error is sustained in part.

17 D. Development of Program to Achieve the Goal

- 18 1. "The county is precluded from allowing conflicting
19 uses in the Canyon until the Klamath River Canyon is
20 either removed from state and federal inventories or
the jurisdiction has determined that a scenic
designation is inappropriate."

21 Petitioners DLCD, et al, argue that at the time of
22 acknowledgment, Klamath County was required to designate
23 potential scenic waterways as "1C" resources. That is, the
24 county was required to include this section of the river within
25 its Goal 5 inventory as a potential scenic waterway.
26 Completion of the Goal 5 process for this potential scenic

1 waterway was to be postponed until some action was taken by
2 either the state or federal agency responsible for scenic
3 waterways. Petitioners claim that the county may not allow
4 uses which preclude a state or federal scenic waterway
5 designation until the Klamath River is either removed from
6 state and federal inventories, or the state and federal
7 agencies determine that a scenic designation is not
8 appropriate. This determination has not been made.

9 The city responds that neither the federal government under
10 the Wild and Scenic Rivers Act, Pub.L.90-542 (1968); 28 USC __.
11 1273(a), nor the State of Oregon under ORS 398.805 to 390.925,
12 has designated the Klamath River as a scenic waterway.

13 Further, the Klamath River Canyon does not appear on the
14 federal list of potential additions to the federal wild and
15 scenic river system. According to the city, Goal 5 only
16 requires that a river be on the Goal 5 inventory if it is a
17 potential or approved federal wild and scenic waterway or an
18 approved state scenic waterway.⁹ Respondent city argues,
19 therefore, that petitioners' claim that no action may be taken
20 which might preclude a later designation as a federal wild and
21 scenic waterway or state scenic waterway is simply wrong.

22 We are cited to no legal requirement prohibiting the county
23 from choosing to make a "3B" decision (that is, to allow the
24 conflicting use fully) for this resource site. The fact that a
25 state agency has the resource site listed as a potential scenic
26 waterway does not give rise to a legal prohibition against the

1 county's "3B" choice. See OAR 660-16-010(2).

2 If petitioner DLCD is arguing the acknowledgment order
3 prohibits the county from making such a decision, we disagree.
4 The acknowledgment order does not create a separate and
5 enforceable standard for reviewing the county's decision in
6 this regard. 1000 Friends of Oregon v. Jackson County, 15 Or
7 LUBA 306, 309 (1987).

8 This subassignment of error is denied.

9 2. "The program developed to achieve the goal is
10 defective because the county did not comply
11 satisfactorily with the preliminary steps of
inventorying, identifying conflicting uses, and
analyzing the ESEE consequences."

12 Petitioners argue the county did not do a proper inventory,
13 particularly of the hydro site. We discussed this claim in
14 section A.1., supra. Petitioners also claim the county failed
15 to identify those uses which conflict with the hydro site. We
16 reviewed these claims supra at subsection B. Because of these
17 alleged errors, petitioners claim the county was unable to do
18 an adequate ESEE analysis. We discussed this concern in
19 subsection C1, 2 and 3, supra. Therefore, petitioners argue
20 that the county is simply unable to develop an appropriate
21 program to achieve the goal, as required by OAR 660-16-010,
22 because of the inadequacies in the inventory, conflicting uses
23 and ESEE analysis.

24 We agree. OAR 660-10-010 requires the county to develop a
25 program to achieve the goal "based on the determination of the
26 economic, social, environmental and energy consequences" of the

1 conflicting uses required to be identified by OAR 660-16-005.
2 The identification of conflicting uses in turn depends on the
3 inventories of Goal 5 resources required by OAR 660-10-000. By
4 not completing the earlier steps of the Goal 5 planning
5 process, the county failed to establish the required basis for
6 developing a program to achieve the goal.

7 The county's findings justifying its choice of development
8 of the hydro resource over other Goal 5 resources appears to
9 consider only the positive economic consequences of
10 hydro-electric development. It does not balance those
11 consequences against the potential loss of other Goal 5
12 resources.

13 We therefore sustain this subassignment of error.

14 3. "The standards for development of hydroelectric
15 facilities are not clear and objective."

16 Petitioners League of Women Voters, et al, now turn their
17 attention to amendments to the code. A new addition to code
18 article 33 "Significant Resource Area", Section 83.005.M,
19 requires that instream habitat enhancement structures are to be
20 provided and maintained in the river "as appropriate for the
21 purposes of improving fry and juvenile habitat." Code
22 83.005.M.2.b; Record 3. Petitioners complain that the standard
23 is too vague to provide adequate means of determining under
24 what conditions structures are appropriate.

25 We agree. There is no discussion of what "as appropriate"
26 means and how this standard, vague as it is, is to be measured

1 and achieved. The county has made a "3C" (limit conflicting
2 use) decision for fish habitat in the canyon planning area.
3 Record 61. OAR 660-16-010(3) requires the county to develop a
4 program to achieve the goal which designates, with certainty,
5 the uses allowed fully, and those prohibited. This section of
6 the rule also requires specific standards and limitations to be
7 placed on the conditional uses. The county's vague standards
8 do not amount to such a program.

9 Petitioners DLCD, et al, also attack other Code 83.005.M
10 standards for protecting the inventoried resources as vague and
11 not sufficiently detailed to comply with the goal.

12 "1.a. Raptor nest sites shall be protected from
13 significant adverse impacts throughout the period of
construction and operation of the facility;

14 "* * * * *

15 "2.b. Instream habitat enhancement structures shall
16 be provided and maintained in the river, as
17 appropriate, for the purpose of improving fry and
juvenile habitat;

18 "2.c. Suspended sediment loading during construction
or removal of cofferdams shall be minimized.

19 "* * * * *

20 "2.e. Fill material containing relatively low
21 concentrations of fines shall be utilized for the
exposed portions of constructed facilities;

22 "* * * * *

23 "4.a. Buffer zones shall be recognized and observed
24 around known raptor nest sites to minimized [sic]
25 disturbance during construction and operation of
facilities.

26 "* * * * *

1 "6.a. Archaeologic deposits shall be preserved through
2 an acceptable excavation and recovery program * * *;

3 "* * * * *" (Rec 3-5). (Emphasis added).

4 We agree that these provisions are simply not sufficient to
5 meet OAR 660-16-010. There is no clear indication of what
6 standard each of the measures adopts and what showing will be
7 necessary to achieve the standard. See Lee v. City of
8 Portland, 57 Or App 798, 646 P2d 662 (1982).

9 We therefore sustain this subassignment of error.

10 In summary, we sustain subassignments of error A.1, B (in
11 part), C.1 (in part), C.2, C.3 (in part), D.2 and D.3.

12 SECOND ASSIGNMENT OF ERROR (DLCD)

13 "The county's ordinance violated Goal 2 and OAR
14 660-16-020(1) by failing to adequately coordinate its
15 amendment process with state and federal agencies and
16 local landowners. It also exceeded its regulatory
17 authority by taking action which is within the
18 jurisdiction of state agencies, OPRD and Water
19 Resources Commission."

20 A. Action Within Jurisdiction of OPRD

21 Petitioners complain that the county was required to
22 coordinate with the Oregon Parks and Recreation Division and
23 the U.S. Bureau of Land Management, the two agencies
24 responsible for scenic waterway designations. The record
25 includes submissions by these agencies about their roles and
26 the status of potential scenic waterway designation for the
subject stretch of the Klamath River. Petitioners complain
that if the county disagrees that this section of the Klamath
River merits potential scenic waterways designation, then the

1 county should have sought removal of that segment of the river
2 from the state and federal agencies' lists.

3 As noted earlier in this opinion, there is nothing in this
4 record to show that the state has designated this portion of
5 the Klamath River as an approved scenic waterway. There is no
6 indication this part of the river is recognized as a
7 "potential" scenic waterway under the Wild and Scenic Rivers
8 Act.¹⁰ We are aware of no prohibition on the county's change
9 of the designation of the river as alleged by petitioner (See
10 Goal 5 assignment, subassignment D.1, supra). Further,
11 petitioner cites no legal authority for the proposition that
12 mere belief by an agency that a river is such a resource has
13 the effect of so designating the river.

14 This subassignment of error is denied.

15 B. Action Within Jurisdiction of WRC

16 Petitioners also complain that the county did not
17 coordinate with the Water Resources Commission (WRC) about
18 instream waterflows. The county states that it must maintain a
19 minimum stable flow of 350 cubic feet per second for fish
20 protection and habitat enhancement (Record 3), but there is no
21 indication that this instream flow standard was coordinated
22 with the Water Resources Commission which has primary authority
23 to establish such flows. See ORS 536.220 to ORS 536.350.

24 Petitioners also complain there is no analysis in the findings
25 to suggest that this flow level was coordinated with the Oregon
26 Department of Fish and Wildlife.¹¹

1 We do not read the county's decision establishing a
2 particular instream flow for fish protection to usurp any
3 authority held by a state agency. The county simply gives this
4 flow rate as its development standard for a hydro-electric
5 facility in the canyon planning area. The county's approval
6 standard does not interfere with the ability of the WRC to
7 adopt a minimum stream flow standard for the river.

8 This subassignment of error is denied.

9 C. Coordination With Agencies and Landowners

10 With respect to the charge the county failed to coordinate
11 these activities with state and federal agencies and local
12 landowners, we note that Goal 2 and OAR 660-16-020(1) require
13 that public agencies and landowners be notified at the earliest
14 possible opportunity of the development of inventory data,
15 identification of conflicting uses and adoption of
16 implementation measures. The coordination requirement of Goal
17 2 requires the county to consider the concerns of other
18 governmental units. It does not require that all units of
19 government agree to a particular decision. Perkins v.
20 Rajneeshpuram, 10 Or LUBA 88, 102 (1984).

21 However, respondents simply say there is no indication that
22 state and federal agencies were not made aware of the proposed
23 amendments. Respondents do not cite us to evidence in the
24 record demonstrating that state and federal agencies were made
25 aware of the various steps of the Goal 5 planning process and
26 their responses/concerns considered by the county. Rajneesh v.

1 Wasco County, 13 Or LUBA 202 (1985).

2 This subassignment of error is sustained. We sustain
3 DLCD's second assignment of error in part.

4 THIRD ASSIGNMENT OF ERROR (DLCD)

5 "Ordinance 44.15 violated the county's own
6 Comprehensive Plan by failure to cooperate with state
7 or federal scenic potential studies and failure to
address the public benefit requirement for the
amendment."

8 Klamath County Plan Policy 31 states:

9 "At the time rivers are studied for official
10 designation as state scenic waterways or federal wild
and free-flowing rivers, the county and other state
11 and federal agencies shall cooperate in the study of
rivers for inclusion in state or federal designations
12 and in the application of the Goal 5 rule."

13 The policy also states the county will work with state and
14 federal study groups to evaluate the potential designations.
15 Petitioners claim the county violated this policy by amending
16 the plan to adopt a "3B" (allow conflicting uses fully)
17 decision for the river as a potential scenic waterway.
18 According to petitioners, the amendment precludes the
19 possibility of future scenic waterway designation because it
20 potentially allows development of a hydro-electric facility
21 which could inundate or otherwise adversely effect the scenic
22 quality of this stretch of the river.

23 Additionally, petitioners complain the county failed to
24 address a public need requirement for amending the plan.
25 However, petitioners do not cite any source for this
26 requirement, and we will not search the county plan and

1 ordinances for such a requirement.

2 We do not read plan policy 31 to preclude the county's
3 action. The policy simply states that at the time the rivers
4 are studied, the county will cooperate with agencies. So far
5 there has been no study. We do not believe that policy 31
6 establishes a prohibition on changing the status of the river.

7 This assignment of error is denied.

8 FOURTH ASSIGNMENT OF ERROR

9 "The county's conclusions are not supported by its
10 findings and the findings are not supported by
substantial evidence in the whole record."

11 Petitioners advise that the county order encompasses the
12 river from the J.C. Boyle Dam to the California/Oregon
13 border. Petitioners state the revised Hydroelectric Energy
14 Sources inventory sheet adopted as part of this amendment
15 (Record 85) amends the Goal 5 treatment of several dam sites
16 not otherwise addressed in the proceeding. Specifically,
17 petitioner alleges "3A" designations were given to the John
18 Boyle and Keno Dam sites, and "1A" designations to the North
19 Fork, Sprague, Gerber Reservation, Kid and Harpord Dams.
20 Petitioner alleges the ordinance changes the Goal 5 status of
21 these resource sites without an ESEE analysis and without
22 required findings. In addition, petitioner repeats the claim
23 that a public need finding appearing in the decision is not
24 supported by substantial evidence.

25 Respondent city does not deny that the county made the
26 changes referred to in this assignment of error. Respondent

1 does not cite us to any explanation for the changes. Without
2 such an explanation, we must sustain this assignment of
3 error.¹²

4 This assignment of error is sustained.

5 The decision of Klamath County is remanded.
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FOOTNOTE

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4 1
5 Statewide Planning Goal 5 is the "Open Spaces, Scenic and
6 Historic Areas, and Natural Resources Goal."
7

8 -----
9 2
10 Respondent Klamath County adopts the City of Klamath Falls'
11 argument as its own. We refer to both the county and the city
12 when mentioning "respondents."
13

14 -----
15 3
16 OAR 660-10-010 describes three types of Goal 5 management
17 programs - "protect the resource site," "allow conflicting uses
18 fully," and "limit conflicting uses." However, the rule's
19 description of each type of program concludes with the
20 following statement:
21

22 "Reasons which support this decision must be presented
23 in the comprehensive plan, and plan and zone
24 designations must be consistent with this decision."
25 OAR 660-10-010(1), (2) and (3)."
26

27 -----
28 4
29 Goal 2 requires

30 "[A]ll land use plans shall include identification of
31 issues and problems, inventories and other factual
32 information for each applicable statewide planning goal,
33 evaluation of alternative courses of action and ultimate
34 policy choices, taking into consideration social, economic,
35 energy and environmental needs. Required information shall
36 be contained in the plan document or in supporting
37 documents."
38

39 This mandate may itself require findings, at least with
40 respect to Goal 5 plan amendments. Goal 5, by its terms,
41 requires that evaluation of "alternative courses of action and
42 ultimate policy choices * * *." A statement articulating
43 reasons behind alternative courses of action and ultimate
44 policy choices requires findings or, "a statement of reasons
45 and facts" supporting the decision.
46

1

5

2 OAR 660-16-000(4) states:

3 "The inventory completed at the local level, including
4 options (5)(a), (b), and (c) of this rule, will be
5 adequate for Goal compliance unless it can be shown to be
6 based on inaccurate data, or does not adequately address
7 location, quality or quantity. The issue of adequacy may
8 be raised by the Department or objectors, but final
9 determination is made by the Commission."

7

6

8 We note that petitioners League of Women Voters, et al,
9 argue the county may not exclude the Klamath River Canyon from
10 the inventories as an outstanding scenic resource on the ground
11 that it believes the scenic views are simply not significant.
12 The League cites evidence in the record that BLM considers the
13 site to be unique because it features unique scenic and
14 cultural opportunities. Petitioners charge the county's
15 decision, therefore, lacks substantial evidence. Petitioners
16 also cite the state Parks and Recreation Division as expressing
17 the belief that the area has outstanding scenic qualities.

14

7

15 We note that the county is not obliged to reopen its
16 inventories simply because petitioners believe there is
17 evidence to suggest the old inventory is no longer accurate or
18 complete. See Urguhart v. Lane Council of Governments, 80 Or
19 App 176, 721 P2d 870 (1986). The statement on page 20 of the
20 record wherein the county claims that "such uses may exist
21 within the planning area are deemed as significant * * *."
22 appears to be a statement of the county's belief about the
23 scenic resources at the time of adoption of its acknowledged
24 Goal 5 inventory. It is not at all clear, as petitioners
25 charge, that the county has reopened all of its Goal 5
26 inventories. Indeed, the county states its comprehensive
inventory of all potential Goal 5 resources is contained within
its "Goal 5 packet," an element of the comprehensive plan
acknowledged August 6, 1984.

23

8

24 OAR 660-16-000(5)(b) provides:

25 "(5) Based on data collected, analyzed and refined by
26 the local government, as outlined above, a
jurisdiction has three basic options:

1 "* * * * *

2 "(b) Delay Goal 5 Process: When some information is
3 available, indicating the possible existence of a
4 resource site, but that information is not
5 adequate to identify with particularity the
6 location, quality and quantity of the resource
7 site, the local government should only include
8 the site on the comprehensive plan inventory as a
9 special category. The local government must
10 express its intent relative to the resource site
11 through a plan policy to address that resource
12 site and proceed through the Goal 5 process in
13 the future. The plan should include a time-frame
14 for this review. Special implementing measures
15 are not appropriate or required for Goal 5
16 compliance purposes until adequate information is
17 available to enable further review and adoption
18 of such measures. The statement in the plan
19 commits the local government to address the
20 resource site through the Goal 5 process in the
21 postacknowledgment period. Such future actions
22 could require a plan amendment."

14 -----
15 9
16 We understand the city to maintain that the term
17 "potential" in Goal 5's listed "potential and approved
18 federal wild and scenic waterways and state scenic
19 waterways" resource category applies only to federal wild
20 and scenic waterways. The city's point is interesting,
21 but we note the county did recognize the river as a Goal 5
22 resource because of its "potential" scenic waterway
23 character when it made its original and current "1C"
24 scenic waterway designation.

20 -----
21 10
22 There is testimony in the record that the BLM is
23 studying the river as a potential candidate for wild and
24 scenic river status as part of its resource management
25 plan to be completed in 1990. Record 255.

23 -----
24 11
25 The Oregon Departments of Energy and Water Resources
26 echoed this complaint.

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We note in this regard that there is nothing in the record showing the designations given to these hydro sites in the original, acknowledged Goal 5 inventory. That information was provided to us by the county at our request. However, respondent county and respondent city both argue that we may not take administrative or judicial notice of this information. Rather than get into an argument as to whether the Board may take judicial notice of prior enactments of local government, we simply note that neither respondent denies that the Goal 5 inventory designations mentioned in our discussion were changed. We therefore assume the designations were amended as alleged.

1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Final Opinion
3 and Order for LUBA Nos. 88-010 and 88-012, on August 24, 1988,
4 by mailing to said parties or their attorney a true copy
thereof contained in a sealed envelope with postage prepaid
addressed to said parties or their attorney as follows:

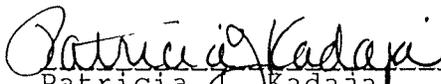
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15
16 Dated this 24th day of August, 1988.

17
18 
19 Patricia J. Kadaja
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