

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

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

Horsefly Irrigation District; Langell Valley Irrigation District; John M. Mosby; Marilyn Mosby; Boyd P. Braren; Boyd P. Braren Trust; Roger Nicholson; Richard Nicholson; Agri Water, LLC; 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; 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;	PROPOSED ORDER Case No. 273 Claims: 308, 309, 310, and 311 Contests: 2867, 2868, 2869, 2870 ¹ , 3223, 3224, 3225, 3226 ² , 3297, 3298, 3299, 3300, 3631, 3632, 3633, 3634 ³ , and 3994
Contestant(s)	
vs.	
United States Department of Interior, Fish and Wildlife Service	
Claimant/Contestant.	

¹ WaterWatch of Oregon, Inc.'s Contests 2867, 2868, 2869, and 2870 were dismissed.
See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May
20, 2003.

² Medford and Rogue River Valley Irrigation Districts voluntarily withdrew from
Contests 3223, 3224, 3225 and 3226 on March 3, 2003.

³ Don Vincent voluntarily withdrew from Contests 3631, 3632, 3633, and 3634 on
December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3631, 3632,
3633, and 3634 on June 24, 2002. Klamath Hills District Improvement Company
voluntarily withdrew from Contests 3631, 3632, 3633, and 3634 on January 16, 2004.

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HISTORY OF THE CASE

THIS PROCEEDING pursuant to ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

Claimant:

On April 30, 1997, the United States Fish and Wildlife Service (FWS) filed Claims 308, 309, 310, and 311 for year-round water use on the Upper Klamath National Wildlife Refuge. The amount of water, source of water, and priority dates vary:

Claim 308:

20,933.2 acre-feet (af), as amended on May 7, 1999 (originally 19,077.7 af)
Crystal Creek and Upper Klamath Lake
April 3, 1928

Claim 309:

13,857.5 af, as amended on May 7, 1999 (originally 12,583.5 af)
Upper Klamath Lake
February 26, 1954

Claim 310:

8,109.9 af, as amended on May 7, 1999 (originally 7,209 af)
Upper Klamath Lake
September 2, 1964

Claim 311:

609.7 af, as amended on May 7, 1999 (originally 562.3 af)
Upper Klamath Lake
February 14, 1968

Claimant FWS seeks a federal reserved water right based upon Executive Order No. 4851 (April 3, 1928) that set up the Upper Klamath National Wildlife Refuge and also based on subsequent additions to the Refuge, specifically including the Migratory Bird Conservation Act, 45 Stat. 1222 (February 18, 1929) as amended; the Kuchel Act by Congress (Public Law 88-567, enacted September 2, 1964); Final Judgment on Condemnation entered on February 26, 1954; and Exchange Deed dated February 14, 1968.

Preliminary Evaluation & Contests:

On October 4, 1999, the Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation (P.E.) for these claims, approving all claims. On May 8, 2000, several contests were filed. WaterWatch of Oregon filed Contests

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2867, 2868, 2869, and 2870, all of which were subsequently dismissed. Horsefly, Langell Valley, Rogue River Valley, and Medford Irrigation Districts (Irrigation Districts) filed Contests 3223, 3224, 3225, and 3226. Roger Nicholson, *et al.* filed Contests 3297, 3298, 3299, and 3300. The Klamath Irrigation District *et al.* (Klamath Project Water Users or KPWU⁴) filed Contests 3631, 3632, 3633, and 3634. Claimant FWS filed Contest 3994. The Oregon Water Resources Department (OWRD) referred this matter to the Office of Administrative Hearings for a contested case hearing.

On September 26, 2003, Claimant FWS filed a Motion for Ruling on Legal Issues. The same day, the Nicholson Group and KPWU filed a Consolidated Motion for Ruling on Legal Issues. Responses and replies were filed. Administrative Law Judge Richard Barber issued an Order on Motions for Ruling on Legal Issues on July 29, 2004 (2004 Ruling). The 2004 Ruling concluded that Claimant FWS had a federal reserved water right for the purpose of providing a refuge and breeding ground for protection of birds and wild animals and their habitat and that the priority dates for the reserved rights are the dates of the creation of and the addition of lands to the Refuge.

A pre-hearing conference was held on April 19, 2005. All participants filed pre-hearing statements and appeared at the pre-hearing conference, at which the participants agreed to a schedule of further proceedings.

Pursuant to a Notice of Hearing mailed to all participants by certified mail on March 25, 2005, a hearing was held on April 26, 2005 for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed and whose presence had been requested for cross-examination. Lawrence S. Smith, Administrative Law Judge, presided. Claimant FWS appeared and was represented by its attorney, Bruce Bernard. KPWU were represented by their attorney, Paul Simmons. OWRD was represented by Assistant Attorney General Stephen Sanders. Only one other contestant, Roger Nicholson, appeared, but withdrew before the end of the hearing. Written direct testimony, with attached

⁴ Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Berlva Prichard (On June 24, 2002 Contestant Berlva Pritchard informed the Office of Administrative Hearings that she had sold her interest in property giving rise to her claims and contest and was no longer a participant in this contested case.), Don Vincent (On November 28, 2000, Contestant Don Vincent informed the Adjudicator that he had sold his interest in property giving rise to his claims and this contest and was no longer a participant in this contested case.), 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.

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exhibits, was provided by Claimant FWS (see Evidentiary Rulings below). Rebuttal testimony was also provided by Tim Mayer and Dave Mauser on behalf of the United States, who were cross-examined per KPWU's timely request.

The hearing record remained open for rulings by ALJ Smith on issues and evidence. A Rulings on Legal Issues and Evidence; Briefing Schedule was issued June 3, 2005. The Rulings contained the following briefing schedule for closing arguments: June 30, 2005 for Claimant FWS's closing argument; August 1, 2005 for Contestants' response(s); and August 15, 2005 for Claimant FWS's reply.

On June 30, 2005, Claimant FWS filed the United States' Motion for Reconsideration of Portions of Rulings on Legal Issues. The same day, it filed the United States' Posthearing Memorandum.

On August 1, 2005, KPWU filed the following: Klamath Project Water Users' Motion for Reconsideration; a Response to United States' Motion for Reconsideration; and a Response to United States' Posthearing Brief.

On August 4, 2005, ALJ Smith issued the following:

- Ruling on Motion for Reconsideration of Portions of Rulings on Legal Issues, granting Claimant FWS's Motion for Reconsideration.
- Ruling on Klamath Project Water Users' Motion for Reconsideration, Response to United States' Motion for Reconsideration, denying reconsideration and the response as untimely.
- Amended Rulings on Legal Issues and Evidence; Briefing Schedule. The Amended Rulings amended a part of the prior rulings and held that Claimant FWS was not required to demonstrate that unappropriated water was available at the time the upper Klamath River was designated as a wild and scenic river and that any issues regarding the validity of Claimant FWS's water right were resolved by ALJ Barber's 2004 Ruling.

On August 15, 2005, Claimant FWS filed the United States' Posthearing Reply Memorandum.

On August 24, 2005, KPWU filed the Stipulation and Joint Request for Order and a [Proposed] Order of the Administrative Law Judge. The ALJ signed it on September 1, 2005, and it was distributed to the parties on September 12, 2005. No further documents or evidence was offered or admitted after that date and the record was closed.

EVIDENTIARY RULINGS

The following exhibits were admitted without objection:

OWRD Ex. 1;

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Claimant FWS's Affidavit and Testimony of Dr. Timothy D. Mayer (Ex. No. 273 E 000 40002) and the accompanying exhibits (Exs. 273 E 000-40003 through 40015;⁵

Claimant FWS's Affidavit and Testimony of Dr. David M. Mauser (Ex. No. 273 E 000 40017) and the accompanying exhibits (Exs. 273 E 000-40018 and 40019), except the testimony as it relates to fish habitats on pages 11 and 16 of his testimony;

KPWU's maps for demonstrative aids (Exs. 273 E 000 30225(aerial), 30226 (USGS quadrangle map delineating area covered by Claims 308, 309 and portion of 311), and 30227 (USGS quadrangle map delineating area covered by Claim 310 and portion of 311)).

Dr. Mauser was recognized as an expert in wildlife ecology and wetland and waterfowl management.

Dr. Mayer was recognized as an expert in hydrology and water quality.

ISSUES

At the close of the hearing on April 26, 2005, Claimant FWS and Contestant KPWU disagreed about the hearing issues. The Hearing Notice listed the issues, but some of these issues were decided in the 2004 Order. On June 3, 2005, ALJ Smith issued a Rulings on Legal Issues and Evidence, setting out the issues and ruling on objections. After Claimant FWS requested reconsideration, an Amended Rulings on Legal Issues and Evidence; Briefing Schedule was issued August 4, 2005, which listed the following issues for resolution in this Final Order:

1. What is the appropriate amount of water for each of Claimant FWS's four approved claims?
2. Whether Claimant FWS may enlarge its claim after the deadline for filing of claims.
3. Whether Claimant FWS is required to provide sufficient evidence of year-round use or need for water to support the primary purpose of the refuge, and if so, did it do so.
4. Whether Claimant FWS's water rights may extend to the waste or unreasonable use of water.

⁵ Except for Dr. Mayer's statement on page 11 of his testimony, which Claimant FWS withdrew ("This is a reasonable statistic to us since Oregon water right law requires that a water right be exercised in full at least every five years.").

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5. Whether the quantity of water claimed by Claimant FWS is wasteful and an unreasonable use of water.

6. Whether the place of use should be corrected in four places where Township 35 and 36 have been switched.

FINDINGS OF FACT

1. On April 30, 1997, the United States' Department of Interior, Fish and Wildlife Service (Claimant FWS) filed Claims 308, 309, 310, and 311 for year-round water use on the Upper Klamath National Wildlife Refuge. The purpose of the Refuge was in part to protect the remaining wetland habitat along Upper Klamath Lake and also to mitigate for the loss of wetland habitat at Lower Klamath Refuge and Lower Klamath Lake. (Mauser test. at 17; Mayer test. at 6; Weddell *et al*, 1998.) Claimant FWS seeks a federal reserved water right based upon Executive Order No. 4851 (April 3, 1928) that set up the Upper Klamath National Wildlife Refuge and upon subsequent additions to the Refuge, specifically including the Migratory Bird Conservation Act, 45 Stat. 1222 (February 18, 1929) as amended; the Kuchel Act by Congress (Public Law 88-567, enacted September 2, 1964); Final Judgment on Condemnation entered on February 26, 1954; and Exchange Deed dated February 14, 1968. These additions are contiguous to the original Refuge lands and being used as part of the Upper Klamath Refuge and were transferred to the federal government for that purpose. The amount of water, source of water, and priority dates claimed by Claimant FWS were:

Claim 308:
20,933.2 acre-feet, as amended on May 7, 1999 (originally 19,077.7 af)
Crystal Creek and Upper Klamath Lake
April 3, 1928

Claim 309:
13,857.5 af, as amended on May 7, 1999 (originally 12,583.5 af)
Upper Klamath Lake
February 26, 1954

Claim 310:
8,109.9 af, as amended on May 7, 1999 (originally 7,209 af)
Upper Klamath Lake
September 2, 1964

Claim 311:
609.7 af, as amended on May 7, 1999 (originally 562.3 af)
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2. On October 4, 1999, OWRD issued its Preliminary Evaluation (P.E.) for these claims, approving all claims. On May 8, 2000, several contests were filed. WaterWatch of Oregon filed Contests 2867, 2868, 2869, and 2870, which were subsequently dismissed. Horsefly, Langell Valley, Rogue River Valley, and Medford Irrigation Districts (Irrigation Districts) filed Contests 3223, 3224, 3225, and 3226. Roger Nicholson, *et al.* filed Contests 3297, 3298, 3299, and 3300. The Klamath Irrigation District, *et al.* (Klamath Project Water Users – KPWU⁶) filed Contests 3631, 3632, 3633, and 3634. Claimant FWS filed Contest 3994.

3. Wetland habitat in the Upper Klamath National Wildlife Refuge provides important habitat that meets the needs of a variety of birds and wildlife species, including: spring habitat for migratory waterfowl, including ducks and geese that travel the Pacific Flyway from nesting grounds in Canada and Alaska to wintering areas further south in California and Mexico; molting areas for waterfowl that breed farther south in California and throughout the western United States; habitat for colonial nesting waterbirds, such as western and Clark's grebes, white pelicans, and double crested cormorants; habitat for nesting bald eagles; habitat for northwestern pond turtle, great egret, snowy egret, greater sandhill crane, least bittern and red-necked grebe; and habitat for a number of aquatic and semi-aquatic mammals, such as muskrats and beavers. (Mauser test. at 9-12.)

4. Two habitat types, emergent vegetation (permanent marsh) and open water, and the associated plant species, are important and necessary for providing the needed habitat for a refuge and breeding ground for birds and wild animals on the Refuge. (Mauser test. at 12-15.) Emergent vegetation consists of plant species rooted in marsh sediments with leaves and/or stems that protrude above the surface of the water. (*Id.* at 12.) Open water habitat is either devoid of vegetation or contains submergent or floating leaf vegetation. (*Id.*) Several important plant communities exist within these two habitat types on the Refuge. (*Id.*) Emergent species common and important to the Refuge include hardstem bulrush, cattail, burreed, and sedges. (*Id.*) The dominant emergent aquatic plant communities within the Refuge are comprised primarily of several sedge species (sedge community), hardstem bulrush community, and the open water/wocus community. (*Id.*) An additional plant community, which occupies very few acres, but is of biological significance, is the floating sedge/willow island community. (*Id.*) Areas of emergent vegetation are utilized by a variety of wildlife species, including sandhill cranes, several rail species, black and Forster's terns, bitterns, herons, egrets, Canada gees, western and Clark's grebes, several diving duck species such as redheads and canvasback, white pelicans, cormorants, great egrets, and great blue herons. (*Id.* at 13.) Open water, submergent plant species common and important to the Refuge include coontail, bladderwort, pondweeds of the genus *Potamogeton*, and species of the genus *Nuphar* (locally called wocus). (*Id.* at 13-14.) Open water habitats are important to several species of fish, foraging white pelicans, cormorants, grebes and diving ducks. (*Id.* at 13.) The complex interspersed of these plant communities creates habitat

⁶ See footnote 4 above.

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complexity and diversity which results in a greater diversity of wildlife species. (*Id.* at 14.) Both emergent vegetation and open water habitats are necessary to protect birds and other wildlife on the Refuge. (*Id.*) These emergent vegetation and open water habitats, as they currently exist on the Refuge, are an appropriate mix for the Refuge and are necessary for the protection of the birds and other wildlife on the Refuge. (*Id.*)

5. Emergent vegetation and open water habitats require water year-round to provide the benefits described above. (Mauser test. at 14-17.) Water depths on the Refuge change both geographically and temporarily. (*Id.* at 16.) The hydrologic diversity in space and time is critical to maintaining a diversity of water bird species. (*Id.* at 16-17.) Diversity in the hydrologic regime creates a diverse variety of aquatic plant communities which increases wildlife diversity. (*Id.* at 17.) Habitat and hydrologic complexity is also important because most aquatic wildlife species have different habitat requirements at different times of the year. (*Id.*) The range of water levels through the season and the habitats that result create a diversity of depths and vegetative habitat complexity, both of which result in a diverse productive wetland habitat, which is necessary for the protection of birds and other animals on the Refuge. (*Id.*)

6. The place of use for each claim was determined by Claimant FWS's Surety Division, using Geographical Information Systems (GIS) coverage from the National Wetland Inventory maps for each claim on the Refuge. (Mayer test. at 9.) The maps were used to determine the wetland area within each claim and to delineate and separate the emergent vegetation and open water habitat types on the Refuge. (*Id.*)

7. The places of use of the federal reserved water rights under Claims 308 through 311 for the Refuge are established by GIS mapping, and are: Claim 308—6,066 acres; Claim 309—4,048 acres; Claim 310—2,479; and Claim 311—172 acres, for a total of 12,765 acres. (OWRD Ex. 1; Mauser and Mayer testimony and Attachment 1.)

8. The amount of water was quantified by determining the evapotranspiration (ET) and evaporation requirements for these two habitat types as well as the flushing flow (aka freshening flow) necessary to ensure that salt concentrations do not increase. (Mayer test. at 9-10.) The term "freshening flow" refers to flows intended to manage salt concentrations in wetlands. (*Id.*) The total water requirement for emergent vegetation habitat consists of ET and freshening flows. (*Id.*) The total water requirement for open water habitat consists of evaporation and freshening flows. (*Id.*) The water requirements necessary for ET, open water evaporation, and freshening flows are as follows: emergent vegetation ET—2.77 acre-feet per acre; open water evaporation—3.83 acre-feet per acre; and freshening flow—1.15 (an additional 15% of the total ET and evaporation requirement). (*Id.* at 13.)

9. The total water requirements and use under Claims 308 through 311 for the Refuge are: Claim 308—20,933.2 acre-feet per year; Claim 309—13,857.5 acre-feet

per year; Claim 310—8,109.9 acre-feet per year; Claim 311—609.7 acre-feet per year; total—43,510.3 acre-feet per year. (Mayer test. at 14.) The water requirement for the Refuge equates to an average duty of 3.41 acre-feet per acre.

10. The quantities stated above are the amounts reasonably necessary to fulfill the specific purpose of the Refuge, i.e., providing a refuge and breeding ground for the protection of birds and wild animals and their habitat. (Maurer test. at 17; Mayer test. at 15.) These amounts of water have been quantified as the amounts that are necessary and are being used to maintain the existing wetlands habitat on the Refuge. (Mayer test. at 9.) These are the amounts that fulfill the Refuge purpose, and no more, and do not include any waste or unreasonable use of water. (*Id.* at 15.)

CONCLUSIONS OF LAW

1. The appropriate amount of water for each of Claimant FWS's four approved claims was established by Claimant FWS's experts, whose testimony was not contradicted.

2. Claimant FWS did not enlarge its claim after the deadline for filing of claims.

3. Claimant FWS established a year-round use or need for water to support the primary purpose of the refuge.

4. Claimant FWS's water rights may not extend to the waste or unreasonable use of water.

5. The quantity of water claimed by Claimant FWS is not wasteful or an unreasonable use of water.

6. The place of use should be corrected in four places where Township 35 and 36 have been transposed.

OPINION

Claimants of water rights have the burden of establishing their contested claims, by a preponderance of the evidence. ORS 539.110. The burden of presenting evidence to support a particular fact or position in a contested case rests on the proponent of the fact or position. ORS 183.450. Claimant FWS seeks to establish a Federal Reserved water right and has the burden of proving the following elements, by a preponderance of the evidence:

1. The particular purpose meant to be served by the reservation of land.

2. That with the reservation of the land was included an express or implied reservation of water.

3. The quantity of water necessary to fulfill the particular purpose of the reservation.

1. Appropriate amount of water for each claim

Per the 2004 Ruling, Claimant FWS has established that when the United States established the Upper Klamath National Refuge, it impliedly reserved the water necessary to fulfill the specific purposes of the Refuge, which are providing refuge and breeding ground for the protection of birds and wild animals and their habitats. (2004 Ruling at 10.) The remaining issue is the quantity of water necessary to fulfill that purpose of providing a refuge and breeding ground for the protection of birds and wild animals and their habitat. Claimant FWS provided the only evidence of the amount of water needed for each of its established claims. Claimant FWS's witnesses Mayer and Mauer were qualified as experts. Their expert testimony and exhibits were not rebutted and were consistent and well-reasoned. Their evidence supports their conclusions regarding the quantity of water necessary for the claims of Claimant FWS and are therefore adopted.

2. Amending Claimant FWS's claim after the deadline

Claimant FWS filed amended statements and proof of claims for its Claims 308 through 311 on May 7, 1999. On October 1, 1999, Claimant FWS filed a revised attachment for Item 8 (place of use) for Claim 308.

Procedures and deadlines for filing claims and amended claims with OWRD are in ORS 539.040(3)(a)⁷ and OAR 690-028-0065.⁸ OAR 690-030-0085(1) provides in relevant part:

⁷ ORS 539.040(3)(a) provides:

(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).

⁸ OAR 690-028-0065 provides in relevant part:

The notice of taking of testimony issued by the Director pursuant to ORS 539.040 shall state:

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Except as provided in Sections (2) through (12) of this rule, the Water Resources Director (Director) may not permit any alteration or amendment of the original claim after the period for inspection has commenced; but any new matter that the claimant may wish to set forth must be set forth in the form of an affidavit, regularly verified before a proper officer and filed with the Director prior to the close of the period for public inspection.

“Period of inspection” is at least 10 days after mailing the notice by OWRD.
ORS 539.090.⁹

(1) All claimants shall file a statement and proof of claim, including persons who have already filed a registration statement. The claim shall contain the same information as required under OAR 690-028-0025, 690-028-0026, or 690-028-0027 as appropriate. If the claimant agreed with data collected and mapped by the Department or if the map submitted with the original registration is still valid, then an additional map is not required. For purposes of the Klamath Basin adjudication a person may submit an updated map prepared by a certified water right examiner, or a registered engineer or surveyor.

(2) Any person who does not file a registration statement within the time required by ORS 539.240 may not file a statement and proof of claim to an undetermined vested right to water.

(3) Director shall set a time certain for filing statements and proofs of claim and notify all registrants by certified return receipt mail when and how the statement and proof of claim shall be filed. The Director may set separate times for accepting claims for consumptive uses, practicably irrigable acreage and instream reserved rights.

(4) Claimants may be required to provide information in addition to that on their registration statement, including, but not limited to additional information that was not available at time of registration such as:

(a) New maps showing changes in use; or

(b) Documentation of chain of title to the current owner.

(5) For purposes of the Klamath Basin adjudication fees required by ORS 539.081 shall be paid at the time a claim is filed. Fees shall be processed as provided in OAR 690-028-0028.

(6) Each claim shall be evaluated on the same basis as surface water registrations as stated in OAR 690-028-0040.

⁹ ORS 539.090 provides:

Upon the completion of the taking of testimony by the Water Resources Director, the director shall at once give notice by registered mail or by certified mail with return receipt to the various claimants and to any party who has notified the director that the party wishes to contest the claims of others, that all of the evidence will be open to inspection of the various claimants or owners. The notice shall specify the times when and the places where the evidence will be open to inspection, and the director shall keep the evidence open for inspection at the specified times and places. The earliest time for inspection shall be at least 10 days after mailing the notice; and, in the aggregate, the hours during which the director is to keep the evidence open to inspection shall at least equal 80 hours, counting only the hours between 8 a.m. and 5 p.m. during any day of the week

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Amended claims are due by the business day prior to the commencement of open inspection. OAR 690-030-085. In regards to this claim, the open inspection commenced on October 4, 1999, which was more than 10 days after OWRD mailed a notice. Claimant FWS filed its revised attachment for Item 8 on October 1, 1999, before the commencement of open inspection. Claimant FWS's claim was timely amended.

3. Sufficient evidence of year-round use or need for water

As stated above, the evidence in the record on behalf of Claimant FWS, was consistent and reliable. It was not rebutted because the contestants provided no testimony and what evidence that was provided on their behalf contained no evidence regarding the amount of water necessary to meet the Refuge purposes. Claimant FWS's expert witnesses credibly established that the water rights of Claimant FWS need year-round use of water.

4 and 5. Wasteful or unreasonable use of water.

No evidence of wasteful or unreasonable use of water was provided by KPWU or the other contestants. As stated in the 2004 Ruling, Claimant FWS "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." 2004 Ruling at 11. Claimant FWS has established that the amount determined above in section one is reasonably necessary to fulfill the specific purposes of the Refuge. Because the amount is necessary, the amount is not wasteful or an unreasonable use of water.

Contestant KPWU's claim of wasteful or unreasonable use of water is basically a reconsideration of the 2004 Ruling. In fact, the Stipulation and Joint Request for Order and the [Proposed] Order of the Administrative Law Judge preserves Contestant KPWU's right to file exceptions to the 2004 Ruling, which was relied upon and incorporated in this Proposed Order. Moreover, Claimant FWS correctly argues in its reply that the question of regulation of Claimant FWS's reserved water right and the amount of water it is entitled to will be determined by OWRD, based on specific conditions at the time of any future call, if there is one.

6. Correction of place of use

The Preliminary Evaluation incorrectly identified the place of use for Claim 308 by transposing a Township number. Claimant FWS proposed to correct the place of

except Sunday. The director shall also state in the notice the county in which the determination will be heard by the circuit court; provided, that the cause shall be heard in the county in which the stream or some part thereof is situated.

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use to the correct number. No contestant objected, so Claimant FWS's proposal is granted.

ORDER

I propose that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below. The elements of an implied federal reserve right to water are established for Claims 308 through 311 as follows:

SOURCE: Upper Klamath Lake, tributary to Link River, and with respect to only Claim 308, additionally Crystal Creek, tributary to Upper Klamath Lake.

POINT OF DIVERSION: No point of diversion as of the date of this Order; the marsh vegetation within the place of use is currently supported by diffuse waters of Upper Klamath Lake. To the extent that there is an existing point of diversion, it is coincident with the place of use.

USE: Providing a refuge and breeding ground for the protection of birds and wild animals and their habitat, including maintenance of emergent vegetation and open water areas by providing both the consumptive water requirements of these habitats, i.e., evapotranspiration requirements (transpiration from plants, as well as evaporation from open water surfaces), and freshening flow requirements (to ensure that salt concentrations are maintained at reasonable levels).

QUANTITY:

Claim 308 --20,933.2 acre-feet per year (af)

Claim 309--13,857.5 af

Claim 310--8,109.9 af

Claim 311--609.7 af

TOTAL--43,510.3 af

PERIOD OF USE: Year-round use, January 1 through December 31.

PRIORITY DATE:

Claim 308 April 3, 1928, for the original area of the Refuge.

Claim 309 February 26, 1954, for the portion of the water right pertaining to the lands added to the refuge.

Claim 310 September 2, 1964, for the portion of the water right pertaining to the lands added to the Refuge on that date.

Claim 311 February 14, 1968, for the portion of the water right pertaining to the lands added to the Refuge on that date.

PLACE OF USE (See Schedule of Places of Use, Klamath Adjudication Case 273, attached)



Lawrence S. Smith, Administrative Law Judge
Office of Administrative Hearings

Date: December 15, 2006

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 Hearing Officer. 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:

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

**SCHEDULE OF PLACES OF USE, KLAMATH ADJUDICATION CASE 273
PLACE OF USE FOR UPPER KLAMATH LAKE NWR, CLAIM 308**

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot#</u>	<u>Acres</u>
Willamette Base and Meridian					
35	6	1	NENE	1	40.05
35	6	1	NWNE	2	40.15
35	6	1	SWNE		40.00
35	6	1	SENE		40.00
35	6	1	NENW	3	40.25
35	6	1	NWNW	4	40.35
35	6	1	SWNW		40.00
35	6	1	SENW		40.00
35	6	1	NESW		40.00
35	6	1	NWSW		40.00
35	6	1	SWSW		40.00
35	6	1	SESW		40.00
35	6	1	NESE		40.00
35	6	1	NWSE		40.00
35	6	1	SWSE		40.00
35	6	1	SESE		40.00
35	6	2	NENE	1	40.24
35	6	2	SWNE		32.24
35	6	2	SENE		40.00
35	6	2	NESE		40.00
35	6	2	NWSE		34.11
35	6	2	SWSE		35.42
35	6	2	SESE		40.00
35	6	12	NENE		38.26
35	6	12	NWNE		39.43
35	6	12	SWNE		38.51
35	6	12	SENE		40.00
35	6	12	NENW		39.91
35	6	12	NWNW		40.00
35	6	12	SWNW		40.00
35	6	12	SENW		39.89
35	6	12	NESW		39.06
35	6	12	NWSW		40.00
35	6	12	SWSW		40.00
35	6	12	SESW		40.00

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35	6	12	NESE	40.00
35	6	12	NWSE	40.00
35	6	12	SWSE	40.00
35	6	12	SESE	40.00
35	6	13	NENE	40.00
35	6	13	NWNE	40.00
35	6	13	SWNE	40.00
35	6	13	SENE	40.00
35	6	13	NENW	40.00
35	6	13	NWNW	40.00
35	6	13	SWNW	40.00
35	6	13	SENW	40.00
35	6	13	NESW	40.00
35	6	13	NWSW	40.00
35	6	13	SWSW	40.00
35	6	13	SESW	40.00
35	6	13	NESE	40.00
35	6	13	NWSE	40.00
35	6	13	SWSE	40.00
35	6	13	SESE	40.00
35	6	24	NENE	40.00
35	6	24	NWNE	40.00
35	6	24	SWNE	40.00
35	6	24	SENE	40.00
35	6	24	NENW	40.00
35	6	24	NWNW	40.00
35	6	24	SWNW	40.00
35	6	24	SENW	40.00
35	6	24	NESW	40.00
35	6	24	NWSW	40.00
35	6	24	SWSW	40.00
35	6	24	SESW	40.00
35	6	24	NESE	40.00
35	6	24	NWSE	40.00
35	6	24	SWSE	40.00
35	6	24	SESE	40.00
35	6	25	NENE	40.00
35	6	25	NWNE	40.00
35	6	25	SWNE	40.00
35	6	25	SENE	40.00
35	6	25	NENW	40.00
35	6	25	NWNW	39.60
35	6	25	SWNW	36.03

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 SALEM OREGON**

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35	6	25	SENW	40.00
35	6	25	NESW	39.73
35	6	25	NWSW	37.48
35	6	25	SWSW	40.00
35	6	25	SESW	37.14
35	6	25	NESE	40.00
35	6	25	NWSE	40.00
35	6	25	SWSE	40.00
35	6	25	SESE	38.67
35	6	35	NENE	40.00
35	6	35	NWNE	40.00
35	6	35	SWNE	40.00
35	6	35	SENE	40.00
35	6	35	NESE	40.00
35	6	35	NWSE	40.00
35	6	35	SWSE	40.00
35	6	35	SESE	40.00
35	6	36	NENE	16.49
35	6	36	NWNE	40.00
35	6	36	SWNE	40.00
35	6	36	SENE	5.93
35	6	36	NENW	36.90
35	6	36	NWNW	40.00
35	6	36	SWNW	40.00
35	6	36	SENW	36.68
35	6	36	NESW	33.72
35	6	36	NWSW	39.78
35	6	36	SWSW	36.25
35	6	36	SESW	39.59
35	6	36	NESE	0.05
35	6	36	NWSE	37.03
35	6	36	SWSE	29.10
36	6	1	NWNE	29.64
36	6	1	SWNE	28.15
36	6	1	NENW	40.00
36	6	1	NWNW	36.74
36	6	1	SWNW	38.64
36	6	1	SENW	40.00
36	6	1	NESW	40.00
36	6	1	NWSW	40.59
36	6	1	SWSW	38.24
36	6	1	SESW	39.11
36	6	1	NWSE	18.51

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 SALEM OREGON

KBA_ACFFOD_03698

36	6	1	SWSE	4.96
36	6	2	NENE	40.00
36	6	2	NWNE	33.91
36	6	2	SWNE	16.97
36	6	2	SENE	37.66
36	6	2	NENW	4.83
36	6	2	NESW	2.78
36	6	2	NWSW	32.71
36	6	2	SWSW	40.00
36	6	2	SESW	21.40
36	6	2	NESE	32.91
36	6	2	NWSE	9.74
36	6	2	SWSE	10.75
36	6	2	SESE	13.43
36	6	3	NESE	40.00
36	6	3	SESE	40.00
36	6	11	NENE	0.33
36	6	11	NWNE	21.20
36	6	11	SWNE	40.00
36	6	11	SENE	16.60
36	6	11	NESW	40.00
36	6	11	NWSW	40.00
36	6	11	SWSW	40.00
36	6	11	SESW	40.00
36	6	11	NESE	39.22
36	6	11	NWSE	40.00
36	6	11	SWSE	40.00
36	6	11	SESE	40.00
36	6	12	NENW	7.07
36	6	12	NWNW	10.34
36	6	12	NESW	0.00
36	6	12	NWSW	16.80
36	6	12	SWSW	38.82
36	6	12	SESW	9.79
36	6	13	NWNE	4.08
36	6	13	SWNE	30.29
36	6	13	SENE	4.22
36	6	13	NENW	33.84
36	6	13	NWNW	40.00
36	6	13	SWNW	40.00
36	6	13	SENW	40.00

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36	6	13	NESE	33.51
36	6	13	SESE	30.18
36	6	14	NENE	40.00
36	6	14	NWNE	40.00
36	6	14	SWNE	40.00
36	6	14	SENE	40.00
36	6	14	NENW	40.00
36	6	14	NWNW	40.00
36	6	14	SENW	40.00
36	6	14	NWSE	40.00

TOTAL
6066.04

PLACE OF USE FOR UPPER KLAMATH LAKE NWR, Claim 309

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot#</u>	<u>Acres</u>
Willamette Base and Meridian					
35	7.5	9	SWNE	2	7.80
35	7.5	9	SENE	1	17.39
35	7.5	9	NESW	3	10.09
35	7.5	9	SWSW	4	6.19
35	7.5	10	SWNE	2	44.42
35	7.5	10	SWNW	4	29.91
35	7.5	10	SENW	3	33.08
35	7.5	10	NESW	5	21.96
35	7.5	10	SESW	8	16.56
35	7.5	10	NWSE	6	32.56
35	7.5	10	SWSE	7	0.22
35	7.5	16	NWNW	1	28.50
35	7.5	16	SWNW	2	61.44
35	7.5	16	NWSW	3	62.80
35	7.5	16	SWSW		40.00
35	7.5	16	SESW	4	43.85
35	7.5	17	NENE		15.61
35	7.5	17	NWNE		14.56
35	7.5	17	SWNE		40.00
35	7.5	17	SENE		40.00

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35	7.5	17	NENW		15.33
35	7.5	17	NWNW		15.28
35	7.5	17	SWNW		40.00
35	7.5	17	SENW		40.00
35	7.5	17	NESW		40.00
35	7.5	17	NWSW		40.00
35	7.5	17	SWSW		40.00
35	7.5	17	SESW		40.00
35	7.5	17	NESE		40.00
35	7.5	17	NWSE		40.00
35	7.5	17	SWSE		40.00
35	7.5	17	SESE		40.00
35	7.5	18	NENE		15.52
35	7.5	18	NWNE		16.32
35	7.5	18	SWNE		40.00
35	7.5	18	SENE		40.00
35	7.5	18	NENW		15.67
35	7.5	18	NWNW	1	15.77
35	7.5	18	SWNW	2	40.20
35	7.5	18	SENW		40.00
35	7.5	18	NESW		40.00
35	7.5	18	NWSW	3	40.24
35	7.5	18	SWSW	4	40.26
35	7.5	18	SESW		40.00
35	7.5	18	NESE		40.00
35	7.5	18	NWSE		40.00
35	7.5	18	SWSE		40.00
35	7.5	18	SESE		40.00
35	7.5	19	NENE		39.73
35	7.5	19	NWNE		40.00
35	7.5	19	SWNE		40.00
35	7.5	19	SENE		39.71
35	7.5	19	NENW		40.00
35	7.5	19	NWNW	1	40.26
35	7.5	19	SWNW	2	40.19
35	7.5	19	SENW		40.00
35	7.5	19	NESW		36.68
35	7.5	19	NWSW	3	39.56
35	7.5	19	SWSW	4	40.04
35	7.5	19	SESW		31.77
35	7.5	19	NESE		40.00
35	7.5	19	NWSE		40.00
35	7.5	19	SWSE		36.36
35	7.5	19	SESE		37.03

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**WATER RESOURCES DEPT
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35	7.5	20	NENE		40.00
35	7.5	20	NWNE		40.00
35	7.5	20	SWNE		40.00
35	7.5	20	SENE		40.00
35	7.5	20	NENW		40.00
35	7.5	20	NWNW		38.15
35	7.5	20	SWNW		34.86
35	7.5	20	SENW		36.40
35	7.5	20	NESW		40.00
35	7.5	20	NWSW		39.13
35	7.5	20	SWSW		36.54
35	7.5	20	SESW		40.00
35	7.5	20	NESE		40.00
35	7.5	20	NWSE		40.00
35	7.5	20	SWSE		40.00
35	7.5	20	SESE		40.00
35	7.5	21	NENW	1	41.11
35	7.5	21	NWNW		40.00
35	7.5	21	SENW	2	60.05
35	7.5	21	NWSW	3	63.33
35	7.5	21	SWSW	4	61.55
35	7.5	28	NWNW	1	61.28
35	7.5	28	SWNW	2	61.61
35	7.5	28	NWSW	3	58.90
35	7.5	28	SWSW	4	16.41
35	7.5	29	NENE		40.00
35	7.5	29	NWNE		40.00
35	7.5	29	SWNE		40.00
35	7.5	29	SENE		40.00
35	7.5	29	NENW		40.00
35	7.5	29	NWNW		38.34
35	7.5	29	SWNW	4	47.61
35	7.5	29	SENW		40.00
35	7.5	29	NESW	3	16.25
35	7.5	29	NESE	1	38.96
35	7.5	29	NWSE	2	24.31
35	7.5	30	NENE		33.89
35	7.5	30	NWNE		37.60
35	7.5	30	SWNE	2	40.00
35	7.5	30	SENE	1	22.28
35	7.5	30	NENW		39.62

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**WATER RESOURCES DEPT
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KBA_ACFOD_03702

35	7.5	30	NWNW		40.00
35	7.5	30	SWNW		40.00
35	7.5	30	SENW		39.18
35	7.5	30	NESW	4	27.74
35	7.5	30	NWSW	5	51.02
35	7.5	30	NWSE	3	19.08
					<u>TOTAL</u>
					4048.04

PLACE OF USE FOR UPPER KLAMATH LAKE NWR, Claim 310

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot#</u>	<u>Acres</u>
Willamette Base and Meridian					
34	6	25	NENE		40.00
34	6	25	NWNE		32.93
34	6	25	SWNE		40.00
34	6	25	SENE		40.00
34	6	25	NESW		40.00
34	6	25	NWSW		39.25
34	6	25	SWSW		40.00
34	6	25	SESW		40.00
34	6	25	NESE		40.00
34	6	25	NWSE		40.00
34	6	25	SWSE		40.00
34	6	25	SESE		40.00
34	6	26	NESE		17.00
34	6	26	SWSE		36.79
34	6	26	SESE		38.83
34	6	35	NENE		40.00
34	6	35	NWNE		19.98
34	6	35	SWNE		19.97
34	6	35	SENE		40.00
34	6	35	NESE		40.00
34	6	35	SESE		40.00
34	6	36	NENE		40.00
34	6	36	NWNE		40.00
34	6	36	SWNE		40.00
34	6	36	SENE		40.00

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KBA_ACFOD_03703

34	6	36	NENW		40.00
34	6	36	NWNW		40.00
34	6	36	SWNW		40.00
34	6	36	SENW		40.00
34	6	36	NESW		40.00
34	6	36	NWSW		40.00
34	6	36	SWSW		40.00
34	6	36	SESW		40.00
34	6	36	NESE		40.00
34	6	36	NWSE		40.00
34	6	36	SWSE		40.00
34	6	36	SESE		40.00
37	8	25	NWNE	2	38.62
37	8	25	SWNE		40.00
37	8	25	NENW	3	25.35
37	8	25	SWNW	4	51.29
37	8	25	NESW		40.00
37	8	25	NWSW	7	34.12
37	8	25	SWSW		40.00
37	8	25	SESW		40.00
37	8	25	NWSE		40.00
37	8	25	SWSE		40.00
37	8	26	SESE	1	19.73
37	8	35	NENE	1	39.91
37	8	35	NWNE	2	14.90
37	8	35	SWNE	3	23.25
37	8	35	SENE	4	40.00
37	8	35	NESE	5	37.21
37	8	35	NWSE	6	13.18
37	8	36	NWNE		40.00
37	8	36	SWNE		40.00
37	8	36	NENW		40.00
37	8	36	NWNW		40.00
37	8	36	SWNW		40.00
37	8	36	SENW		40.00
37	8	36	NESW		40.00
37	8	36	NWSW		40.00
37	8	36	SWSW	4	31.77
37	8	36	SESW		40.00
37	8	36	NWSE		40.00
37	8	36	SWSE		40.00
37	8	36	SESE	5	24.97

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37	8	36	SESW		40.00
37	8	36	NWSE		40.00
37	8	36	SWSE		40.00
37	8	36	SESE	5	24.97

TOTAL
2479.02

PLACE OF USE FOR UPPER KLAMATH LAKE NWR, Claim 311

<u>Township N or S</u>	<u>Range E</u>	<u>Section</u>	<u>Qtr/Qtr-Sec</u>	<u>Lot#</u>	<u>Acres</u>
Willamette Base and Meridian					
35	7.5	9	NENE		1.55
35	7.5	10	NWNE	1	11.80
35	7.5	10	NENW		6.58
35	7.5	10	NWNW		4.18
37	8	25	NENE	1	16.19
37	8	25	SENE	5	19.18
37	8	25	NESE	6	20.54
37	8	25	SESE	8	21.83
37	8	36	NENE	1	22.76
37	8	36	SENE	2	23.37
37	8	36	NESE	3	24.04
					<u>TOTAL</u>
					172.01

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SALEM, OREGON

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2006, I served 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:

Dwight W. French / Teri Hranac
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
dwight.w.french@wrд.state.or.us
teri.k.hranac@wrд.state.or.us

Barbara Scott-Brier
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500 NE Multnomah St., Suite 607
Portland, OR 97232
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Environment & Natural Resources Division
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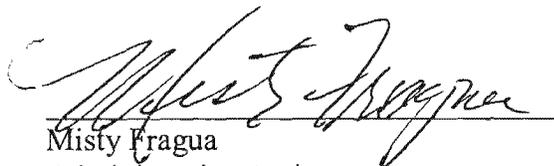
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