

**BEFORE THE DIRECTOR  
OF THE WATER RESOURCES DEPARTMENT  
OF THE STATE OF OREGON**

**KLAMATH BASIN GENERAL STREAM ADJUDICATION**

In the Matter of the Claim of the	)	PARTIAL ORDER OF
UNITED STATES DEPARTMENT OF	)	DETERMINATION
AGRICULTURE, FOREST SERVICE	)	
_____	)	
	)	Water Right Claim 494

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

**A. FINDINGS OF FACT**

1. On April 29, 1997, the UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE (USFS) timely submitted a Statement and Proof of Claim (Claim 494) to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication claiming a federal reserved water right under the Oregon Wilderness Act of June 26, 1984, 98 Stat. 272 *et. seq.*
2. On August 3, 1999, the USFS timely amended Claim 494, withdrawing the “Consumptive/out of stream use: *De minimus* [sic] consumptive use by wildlife and the public for administrative uses necessary to fulfill the purposes of the Wilderness Act . . . and Oregon Wilderness Act.”
3. On October 4, 1999, following investigation of the evidence submitted, the Adjudicator issued a Summary and Preliminary Evaluation of Claims (Preliminary Evaluation) stating the claim was approved.
4. On May 5, 2000, the Claimant, USFS, timely filed Contest 2179 to the Claim and/or Preliminary Evaluation of Claim 494.
5. On May 1, 2000, William J. Rust and Ethel J. Rust timely filed Contest 163 to the Claim and/or Preliminary Evaluation of Claim 494.
6. On May 1, 2000, Leonard Baio timely filed Contest 398 to the Claim and/or Preliminary Evaluation of Claim 494.

7. On May 2, 2000, Gary Strong timely filed Contest 633 to the Claim and/or Preliminary Evaluation of Claim 494.
8. On May 2, 2000, the Flynn Brothers (Con and Nora Flynn), and Con, Nora and John Flynn timely filed Contest 868 to the Claim and/or Preliminary Evaluation of Claim 494.
9. On May 2, 2000, Robert Bartell timely filed Contest 1103 to the Claim and/or Preliminary Evaluation of Claim 494.
10. On May 2, 2000, Margaret Jacobs timely filed Contest 1338 to the Claim and/or Preliminary Evaluation of Claim 494.
11. On May 2, 2000, Carolyn Obenchain timely filed Contest 1572 to the Claim and/or Preliminary Evaluation of Claim 494.
12. On May 4, 2000, Rodney Z. James timely filed Contest 1921 to the Claim and/or Preliminary Evaluation of Claim 494.
13. On May 5, 2000, Newman Enterprise (Douglas Newman) timely filed Contest 2373 to the Claim and/or Preliminary Evaluation of Claim 494.
14. On May 5, 2000, Francis Loving Trust, Hilda Francis Trustee timely filed Contest 2610 to the Claim and/or Preliminary Evaluation of Claim 494.
15. On May 8, 2000, John Briggs timely filed Contest 4360 to the Claim and/or Preliminary Evaluation of Claim 494.
16. On May 8, 2000, Peter M. Bourdet timely filed Contest 4595 to the Claim and/or Preliminary Evaluation of Claim 494.
17. On May 8, 2000, Vincent Lee Briggs timely filed Contest 4828 to the Claim and/or Preliminary Evaluation of Claim 494.
18. On May 8, 2000, Thomas William Mallams timely filed Contest 5071 to the Claim and/or Preliminary Evaluation of Claim 494.
19. On May 8, 2000, Thomas H. Bentley timely filed Contest 5304 to the Claim and/or Preliminary Evaluation of Claim 494.
20. On May 8, 2000, Thomas E. Stephens timely filed Contest 5537 to the Claim and/or Preliminary Evaluation of Claim 494.
21. On May 8, 2000, WaterWatch of Oregon, Inc. timely filed Contest 2923 to the Claim and/or Preliminary Evaluation of Claim 494.

22. These matters were referred to the Office of Administrative Hearings for a contested case hearing. The Office of Administrative Hearings designated these matters and other like claims of the USFS as Case 005.
23. On December 6, 2001, the USFS's Contest 2179 was dismissed. *See* ORDER OF DISMISSAL (Dec. 6, 2001).
24. On July 2, 2002, the following contestants withdrew with prejudice their respective contest: Leonard Baio, Gary Strong, Flynn Brothers, Robert Bartell, Margaret Jacobs, Carolyn Obenchain, Rodney Z. James, Newman Enterprise (Douglas Newman), Francis Loving Trust, Hilda Francis Trustee, John Briggs, Peter M. Bourdet, Vincent Lee Briggs, Thomas William Mallams, Thomas H. Bentley, Thomas E. Stephens, and David Cowan, successor in interest to William J. Rust and Ethel J. Rust. *See* NOTICE OF WITHDRAWAL OF BAIO *ET AL*'S CONTESTS AGAINST THE UNITED STATES FOREST SERVICE CLAIMS (July 2, 2002). *See also* NOTICE OF ERRATA (July 18, 2002).
25. On February 25, 2003, WaterWatch of Oregon, Inc. voluntarily withdrew Contest 2923, the remaining contest to Claim 494. *See* WATERWATCH'S VOLUNTARY WITHDRAWAL OF CONTESTS (Feb. 25, 2003).
26. On March 14, 2003, the Adjudicator withdrew Case 005 from the Office of Administrative Hearings.
27. The place of use underlying Claim 494 is within or borders a federal reservation of land that is owned by the Claimant.
28. The rate and season of use claimed are no more than necessary to fulfill the primary purposes of the reservation.
29. As explained in the GENERAL CONCLUSIONS OF LAW CONCERNING FEDERAL RESERVED WATER RIGHTS, the date of reservation is the priority date of a federal reserved water right. The date of reservation is June 26, 1984, based on the Oregon Wilderness Act of 1984, 98 Stat. 27 *et. seq.*
30. Claim 493 and Claim 494 were both submitted by the USFS, however, the USFS claim map for Claim 493 is consistent with the particulars of Claim 494, and the USFS claim map for Claim 494 is consistent with the particulars of Claim 493. The following facts support the conclusion that these two maps have been reversed on the record.
  - Upon receipt of Claim 493 (labeled "D1" by the USFS) from the USFS, OWRD assigned it page numbers 97-517-0001 through 97-517-0070. Claim 493 is based on a reservation date of September 3, 1964.

- Upon receipt of Claim 494 (labeled “DD1” by the USFS), also from the USFS, OWRD assigned it page numbers 97-518-0001 through 97-518-0078. Claim 494 is based on a reservation date of June 26, 1984.
- The USFS claim map labeled “D1” is titled, in part, *Gearhart Wilderness Area – 1984 Addition*, and was assigned the page number 97-517-0070. The label and the pagination of this map are consistent with Claim 493, but its title is consistent with the reservation date presented in Claim 494.
- The USFS claim map labeled “DD1” is titled, in part, *Gearhart Wilderness Area 1964*, and was assigned page number 97-518-0078. The label and pagination of this map are consistent with Claim 494, but its title is consistent with the reservation date presented in Claim 493.
- Identical copies of a separate map titled “Land Status for Gearhart Wilderness Instream Flow Claim” (“Land Status Map”) can be found within both Claims 493 and 494 (*see* Claim 493, Page 97-517-0006, and Claim 494, Page 97-518-0006). This map shows certain lands with a “Historical Land Status Code” of “W – Gearhart Wilderness Act of 1964” and certain other lands with a “Historical Land Status Code” of “WW – Gearhart Wilderness Act of 1984.”
- The USFS gave lands in Claim 493 a “Historical Land Status Code” of “W” (*see* Claim 493, Page 97-517-0024). The lands shown on the Land Status Map under land use code “W – Gearhart Wilderness Act of 1964” are identical to the lands identified on map “DD1” which show the boundaries on the Gearhart Wilderness Addition of 1964. The Land Status Map therefore provides additional support for the conclusion that the map “DD1” is intended to show lands claimed as part of Claim 493.
- The USFS gave lands in Claim 494 were given a “Historical Land Status Code” of “WW” (*see* Claim 494, Page 97-518-0024). The lands shown on the Land Status Map under land use code “WW – Gearhart Wilderness Act of 1984” are identical to the lands identified on map “D1” which shows the boundaries of the 1984 Addition to the Gearhart Wilderness Area. The Land Status Map therefore provides additional support for the conclusion that the map “D1” is intended to show lands claimed as part of Claim 494.
- Identical copies of another, but smaller scale map can be found within both Claims 493 and 494 (Claim 493, Page 97-517-0002, and Claim 494, Page 97-518-0003). This map shows the general location of the Gearhart Mountain Wilderness within the Klamath Basin. On this map the actual boundaries of lands reserved under Wilderness Act of 1964 have been reversed with the actual boundaries of lands added under the Wilderness Act of 1984.

The totality of the record for Claim 493 and for Claim 494 make it plain that the map labeled “DD1” belongs with Claim 493, and the map labeled “D1” belongs with Claim 494. This finding is consistent with the USFS Mylar maps filed October 14, 1999 (*see* Mylar maps filed as Claim # 377, Pages 227, 228, 238, 239, 247, and 248).

31. The USFS Mylar maps describing lands within the Gearhart Mountain Wilderness Area for Claim 494 (Mylar filed as Claim # 377, Pages 227, 228, 238, and 239) include lands in Sections 22, 27 and 28 of Township 35 South, Range 16 East, W.M. which are outside of the Klamath Basin, and therefore are not a part of the Klamath Basin Adjudication area.

## **B. DETERMINATION**

1. THE WILDERNESS ACT, 16 USC §§ 1131-1136 and the OREGON WILDERNESS ACT of 1984 for a federal reserved water right is a valid basis for this claim, including the claimed purpose of use. In 1964 Congress passed THE WILDERNESS ACT, 16 USC §§ 1131-1136, establishing the National Wilderness Preservation System, under which designated lands are to be administered “for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness \* \* \* “ 16 USC § 1131(a). These lands were to be devoted to the public purposes of recreational, “scientific, educational, scenic or historical value.” 16 USC § 1131 (c)(2), (4). The wilderness designation is unique in that it may apply to lands which have already been reserved under some other designation, such as national forest lands.

The courts that have considered the question have concluded that THE WILDERNESS ACT was intended to reserve water for designated wilderness areas. *Sierra Club v. Block*, 622 F Supp 842, 858 (D. Colo. 1985) and *Sierra Club v. Lyng*, 661 F Supp 1490, 1500 (D. Colo. 1987), *both vacated for lack of ripeness*, *Sierra Club v. Yeutter*, 911 F2d 1405 (10<sup>th</sup> Cir. 1990); *In Re SRBA*, Wilderness Act, MUSYA and HCNRA Claims, Consolidated Subcases 75-13605, 63-25239, and 79-13597, at 11 (Idaho Dist. Ct. Dec. 18, 1997) (order granting and denying United States’ motions for summary judgment on reserved water rights claims). Based on this precedent, the Forest Service is entitled to a reserved right for these areas.

The priority date is the date of the enactment creating the wilderness area: September 3, 1964 for Mountain Lakes and Gearhart Wilderness Areas, and June 26, 1984 for Gearhart Wilderness (Additions), Mount Thielsen and Sky Lakes Wilderness Areas. The primary purpose of the Wilderness Act is to protect the area in its natural condition, or at least in the condition that existed at the time of the designation, for recreational, scenic, scientific, educational, conservation and historic use. This primary purpose includes the instream flow purpose claimed by the USFS.

2. The GENERAL CONCLUSIONS OF LAW CONCERNING FEDERAL RESERVED WATER RIGHTS is incorporated as if set forth fully herein.

3. Based on the file and record herein, IT IS ORDERED that Claim 494 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO.** 494

**CLAIM MAP REFERENCE:**

USFS # D1 / OWRD # 97-517-0070 and MYLAR FILED AS CLAIM # 377, PAGES 227, 228, 238, AND 239

**CLAIMANT:** UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE  
1220 SW 3<sup>RD</sup> ROOM 1734  
PORTLAND, OR 97204

**SOURCE OF WATER:**

ALL STREAMS, LAKES, PONDS, SPRINGS, SEEPS OR OTHER NATURAL SOURCES OF WATER, WHETHER NAMED OR NOT AND WHETHER PERENNIAL INTERMITTENT OR EPHERMAL WITHIN THE BOUNDARIES OF THE GEARHART MOUNTAIN WILDERNESS; TRIBUTARY TO SPRAGUE RIVER

**PURPOSE or USE:** INSTREAM FLOW

**RATE OF USE:**

ALL UNAPPROPRIATED FLOW AND ALL SURFACE WATER SOURCES AS OF JUNE 26, 1984

**PERIOD OF ALLOWED USE:** JANUARY 1 – DECEMBER 31

**DATE OF PRIORITY:** JUNE 26, 1984

**THE PLACE OF USE IS LOCATED AS FOLLOWS:**


Twp	Rng	Mer	Sec	Q-Q
34 S	15 E	WM	25	SE SE
34 S	15 E	WM	36	NE NE
34 S	15 E	WM	36	NW NE
34 S	15 E	WM	36	SW NE
34 S	15 E	WM	36	SE NE
34 S	15 E	WM	36	SE NW
34 S	15 E	WM	36	NE SW
34 S	15 E	WM	36	NW SW
34 S	15 E	WM	36	NE SE
34 S	15 E	WM	36	NW SE
34 S	15 E	WM	36	SW SE
34 S	15 E	WM	36	SE SE
34 S	16 E	WM	30	SW SW
34 S	16 E	WM	30	SE SW
34 S	16 E	WM	30	NE SE

Twp	Rng	Mer	Sec	Q-Q
34 S	16 E	WM	30	NW SE
34 S	16 E	WM	30	SW SE
34 S	16 E	WM	30	SE SE
34 S	16 E	WM	31	NE NE
34 S	16 E	WM	31	NW NE
34 S	16 E	WM	31	SW NE
34 S	16 E	WM	31	SE NE
34 S	16 E	WM	31	NE NW
34 S	16 E	WM	31	NW NW
34 S	16 E	WM	31	SW NW
34 S	16 E	WM	31	SE NW
34 S	16 E	WM	31	NE SW
34 S	16 E	WM	31	NW SW
34 S	16 E	WM	31	SW SW
34 S	16 E	WM	31	SE SW
34 S	16 E	WM	31	NE SE
34 S	16 E	WM	31	NW SE
34 S	16 E	WM	31	SW SE
34 S	16 E	WM	31	SE SE
35 S	15 E	WM	1	NE NE
35 S	15 E	WM	1	NW NE
35 S	15 E	WM	1	SW NE
35 S	15 E	WM	1	SE NE
35 S	15 E	WM	1	NE NW
35 S	15 E	WM	1	SW NW
35 S	15 E	WM	1	SE NW
35 S	15 E	WM	1	NE SW
35 S	15 E	WM	1	NW SW
35 S	15 E	WM	1	SW SW
35 S	15 E	WM	1	SE SW
35 S	15 E	WM	1	NE SE
35 S	15 E	WM	1	NW SE
35 S	15 E	WM	1	SW SE
35 S	15 E	WM	1	SE SE
35 S	15 E	WM	2	NE SE
35 S	15 E	WM	2	SE SE
35 S	15 E	WM	11	NE NE
35 S	15 E	WM	12	NE NE
35 S	15 E	WM	12	NW NE
35 S	15 E	WM	12	NE NW
35 S	15 E	WM	12	NW NW
35 S	16 E	WM	5	NW NW
35 S	16 E	WM	5	SW NW
35 S	16 E	WM	5	SE NW
35 S	16 E	WM	5	NE SW
35 S	16 E	WM	5	NW SW
35 S	16 E	WM	5	SW SW
35 S	16 E	WM	5	SE SW
35 S	16 E	WM	6	NE NE
35 S	16 E	WM	6	NW NE
35 S	16 E	WM	6	SE NE
35 S	16 E	WM	6	NE NW

Twp	Rng	Mer	Sec	Q-Q
35 S	16 E	WM	6	NW NW
35 S	16 E	WM	6	SW NW
35 S	16 E	WM	6	SE NW
35 S	16 E	WM	8	NE NE
35 S	16 E	WM	8	NW NE
35 S	16 E	WM	8	SW NE
35 S	16 E	WM	8	SE NE
35 S	16 E	WM	8	NE NW
35 S	16 E	WM	8	NW NW
35 S	16 E	WM	8	SW NW
35 S	16 E	WM	8	SE NW
35 S	16 E	WM	8	NE SW
35 S	16 E	WM	8	NW SW
35 S	16 E	WM	8	SW SW
35 S	16 E	WM	8	SE SW
35 S	16 E	WM	8	NE SE
35 S	16 E	WM	8	NW SE
35 S	16 E	WM	8	SW SE
35 S	16 E	WM	8	SE SE
35 S	16 E	WM	9	NW NE
35 S	16 E	WM	9	SW NE
35 S	16 E	WM	9	SE NE
35 S	16 E	WM	9	NE NW
35 S	16 E	WM	9	NW NW
35 S	16 E	WM	9	SW NW
35 S	16 E	WM	9	SE NW
35 S	16 E	WM	9	NE SW
35 S	16 E	WM	9	NW SW
35 S	16 E	WM	9	SW SW
35 S	16 E	WM	9	SE SW
35 S	16 E	WM	9	NE SE
35 S	16 E	WM	9	NW SE
35 S	16 E	WM	9	SW SE
35 S	16 E	WM	9	SE SE
35 S	16 E	WM	15	NW NW
35 S	16 E	WM	15	SW NW
35 S	16 E	WM	15	NE SW
35 S	16 E	WM	15	NW SW
35 S	16 E	WM	15	SW SW
35 S	16 E	WM	15	SE SW

End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013




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Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication