

**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 516

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 516) 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 Organic Administration Act of 1897, 16 U.S.C. §§ 473-478, 479-482 and 551 (Organic Act).
2. On August 3, 1999, the USFS timely amended Claim 516 as follows: (1) claimed water quantities were amended for the “[i]ntegration of water availability estimates provided by Oregon Water Resources Department pursuant to OAR 690-28-040(5)” and (2) “[f]urther analysis of fire records showed that numerous wildfires occur during the month of May, so the claim was amended to include that month.”
3. The August 3, 1999 amendment to the original claim changed the period of use from June 1 through November 15 to May 1 through November 15, and increased the natural flow limits from 20.0 cfs to 21.0 cfs for June 1 to June 30, 18.0 cfs to 20.0 cfs for July 1 to July 31, 18.0 cfs to 19.0 cfs for Sept. 1 to Sept. 30, 20.0 cfs to 21.0 cfs for Oct. 1 to Oct. 31, and 18.0 cfs to 20.0 cfs for Nov. 1 to Nov. 15. The amendment was a result of the exchange of correspondence between OWRD and the Claimant concerning the Claimant’s need to incorporate information concerning instream flow requirements. OWRD intended to provide this information to the Claimant, but it was not available at the time of the claim filing deadline.

4. 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 as amended on August 3, 1999.
5. On May 5, 2000, the Claimant, USFS, timely filed Contest 2192 to the Preliminary Evaluation of Claim 516.
6. On May 1, 2000, William J. Rust and Ethel J. Rust timely filed Contest 185 to the Claim and/or Preliminary Evaluation of Claim 516.
7. On May 1, 2000, Leonard Baio timely filed Contest 420 to the Claim and/or Preliminary Evaluation of Claim 516.
8. On May 2, 2000, Gary Strong timely filed Contest 655 to the Claim and/or Preliminary Evaluation of Claim 516.
9. On May 2, 2000, the Flynn Brothers (Con and Nora Flynn), and Con, Nora and John Flynn timely filed Contest 890 to the Claim and/or Preliminary Evaluation of Claim 516.
10. On May 2, 2000, Robert Bartell timely filed Contest 1125 to the Claim and/or Preliminary Evaluation of Claim 516.
11. On May 2, 2000, Margaret Jacobs timely filed Contest 1360 to the Claim and/or Preliminary Evaluation of Claim 516.
12. On May 2, 2000, Carolyn Obenchain timely filed Contest 1594 to the Claim and/or Preliminary Evaluation of Claim 516.
13. On May 4, 2000, Rodney Z. James timely filed Contest 1943 to the Claim and/or Preliminary Evaluation of Claim 516.
14. On May 5, 2000, Newman Enterprise (Douglas Newman) timely filed Contest 2395 to the Claim and/or Preliminary Evaluation of Claim 516.
15. On May 5, 2000, Francis Loving Trust, Hilda Francis Trustee timely filed Contest 2632 to the Claim and/or Preliminary Evaluation of Claim 516.
16. On May 8, 2000, John Briggs timely filed Contest 4382 to the Claim and/or Preliminary Evaluation of Claim 516.
17. On May 8, 2000, Peter M. Bourdet timely filed Contest 4617 to the Claim and/or Preliminary Evaluation of Claim 516.
18. On May 8, 2000, Vincent Lee Briggs timely filed Contest 4850 to the Claim and/or Preliminary Evaluation of Claim 516.

19. On May 8, 2000, Thomas William Mallams timely filed Contest 5093 to the Claim and/or Preliminary Evaluation of Claim 516.
20. On May 8, 2000, Thomas H. Bentley timely filed Contest 5326 to the Claim and/or Preliminary Evaluation of Claim 516.
21. On May 8, 2000, Thomas E. Stephens timely filed Contest 5559 to the Claim and/or Preliminary Evaluation of Claim 516.
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 009.
23. 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).
24. On March 18, 2003, the OWRD and USFS executed STIPULATION TO RESOLVE CONTESTS 2162, 2163, 2166, 2168, 2169, 2171, 2172, 2174, 2177, 2184, 2186, 2188, 2190, 2192, 2194, 2196, 2198, 2200, 2201, 2203, 2205, 2207, 2209, 2211, 2213, 2214, 2216, 2218, 2220, 2222, 2224, 2225, 2227, 2229, 2231, 2233, 2234, 2236, 2238, 2240, 2242, 2244, 2246, 2248, 2250, 2252, AND 2253 (Settlement Agreement) which resolved the remaining contest (Contest 2192) to Claim 516.
25. On April 2, 2003, the Adjudicator withdrew Case 009 from the Office of Administrative Hearings.
26. The Settlement Agreement executed between OWRD and USFS incorporated the priority date identified in the Preliminary Evaluation, being April 15, 1961, which is based on the "Proclamation Taking Title to Certain Lands. . ." April 15, 1961, Federal Register, 26 Fed. Reg. 3251-3254 (1961). OWRD finds that the portion of Claim 516 located in the NORTH ½ and the NWSE, SECTION 24, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M has a reservation date of July 26, 1961; these lands are not listed in the" Proclamation Taking Title to Certain Lands. . ." April 15, 1961, Federal Register, 26 Fed. Reg. 3251-3254 (1961) but are listed on Presidential Proclamation No. 3423, July 26, 1961, 26 Fed. Reg. 6799 (1961).

B. DETERMINATION

1. The Settlement Agreement executed between OWRD and USFS is adopted and incorporated as if set forth fully herein, with the exception that the portion of Claim 516 located from the north boundary of the NENW, SECTION 24, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M., to the south boundary of the NWSE, SECTION 24, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M. has a priority date of July 26, 1961 as described in Finding 26, above.
2. The instream flows recognized pursuant to this claim are not additive to any other instream flows based on other water rights, permits or claims within the same stream reach or a portion of the same stream reach.
3. The GENERAL CONCLUSIONS OF LAW CONCERNING AMENDMENT OF CLAIMS is incorporated as if set forth fully herein.
4. OWRD finds that the claim amendment described in Findings 2 and 3, above, does not constitute a new claim under ORS 539.210. This determination is based on the factors described in Findings 2 and 3, above. Because the amendment occurred prior to the beginning of open inspection, it is permissible and is incorporated into the Claimant's claim for consideration in this Findings of Fact and Partial Order of Determination.
5. The Organic Administration Act of 1897 for a federal reserved water right is a valid basis for this claim. The GENERAL CONCLUSIONS OF LAW CONCERNING CLAIMS BASED ON THE ORGANIC ADMINISTRATION ACT OF 1897 is incorporated as if set forth fully herein.
6. Based on the file and record herein, IT IS ORDERED that Claim 516 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 516

CLAIM MAP REFERENCE: MYLAR FILED AS CLAIM # 377, PAGE 236

CLAIMANT: UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
1220 SW 3RD ROOM 1734
PORTLAND, OR 97204

SOURCE OF WATER: FIVEMILE CREEK, tributary to the NORTH FORK SPRAGUE RIVER

PURPOSE OR USE:

INSTREAM USE TO MAINTAIN A NATURAL FIRE BREAK AND SOURCE OF WATER FOR FOREST FIRE CONTROL

PERIODS OF ALLOWED USE AND RATES:

THE INSTREAM FLOW ALLOCATED PURSUANT TO THIS CLAIM IS NOT ADDITIVE TO ANY OTHER INSTREAM FLOWS WITHIN THE SAME STREAM REACH OR A PORTION OF THE SAME STREAM

Period of Use:	Natural Flow is Limited to Not More than the Following Rates in Cubic Feet per Second (CFS):
May 1 to May 31	24.0
June 1 to June 30	21.0
July 1 to July 31	20.0
Aug 1 to Aug 31	18.0
Sept 1 to Sept 30	19.0
Oct 1 to Oct 31	21.0

DATES OF PRIORITY:

APRIL 15, 1961 – FIVEMILE CREEK FROM NENW, SECTION 13, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M., TO SOUTH BOUNDARY OF SESW, SECTION 13, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M.; AND

FIVEMILE CREEK FROM NORTH BOUNDARY OF SWSE, SECTION 24, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M., TO SWSE, SECTION 24, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M.


JULY 26, 1961 – FIVEMILE CREEK FROM NORTH BOUNDARY OF NENW, SECTION 24, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M., TO SOUTH BOUNDARY OF NWSE, SECTION 24, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

FIVEMILE CREEK FROM NENW, SECTION 13, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M., TO SWSE, SECTION 24, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M.

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013



Dwight French, Adjudicator
Klamath Basin General Stream Adjudication