

**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 539 |

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 539) 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 539 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 36.0 cfs to 63.0 cfs for June 1 to June 30, 35.0 cfs to 52.0 cfs for July 1 to July 31, 24.0 cfs to 31.0 cfs for Aug. 1 to Aug. 31, 22.0 cfs to 28.0 cfs for Sept. 1 to Sept. 30, 16.0 cfs to 22.0 cfs for Oct. 1 to Oct. 31, and 13.0 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.
5. On May 5, 2000, the Claimant, USFS, timely filed Contest 2207 to the Preliminary Evaluation of Claim 539.
6. On May 1, 2000, William J. Rust and Ethel J. Rust timely filed Contest 208 to the Claim and/or Preliminary Evaluation of Claim 539.
7. On May 1, 2000, Leonard Baio timely filed Contest 443 to the Claim and/or Preliminary Evaluation of Claim 539.
8. On May 2, 2000, Gary Strong timely filed Contest 678 to the Claim and/or Preliminary Evaluation of Claim 539.
9. On May 2, 2000, the Flynn Brothers (Con and Nora Flynn), and Con, Nora and John Flynn timely filed Contest 913 to the Claim and/or Preliminary Evaluation of Claim 539.
10. On May 2, 2000, Robert Bartell timely filed Contest 1148 to the Claim and/or Preliminary Evaluation of Claim 539.
11. On May 2, 2000, Margaret Jacobs timely filed Contest 1382 to the Claim and/or Preliminary Evaluation of Claim 539.
12. On May 2, 2000, Carolyn Obenchain timely filed Contest 1617 to the Claim and/or Preliminary Evaluation of Claim 539.
13. On May 4, 2000, Rodney Z. James timely filed Contest 1966 to the Claim and/or Preliminary Evaluation of Claim 539.
14. On May 5, 2000, Newman Enterprise (Douglas Newman) timely filed Contest 2418 to the Claim and/or Preliminary Evaluation of Claim 539.
15. On May 5, 2000, Francis Loving Trust, Hilda Francis Trustee timely filed Contest 2655 to the Claim and/or Preliminary Evaluation of Claim 539.
16. On May 8, 2000, John Briggs timely filed Contest 4405 to the Claim and/or Preliminary Evaluation of Claim 539.
17. On May 8, 2000, Peter M. Bourdet timely filed Contest 4640 to the Claim and/or Preliminary Evaluation of Claim 539.
18. On May 8, 2000, Vincent Lee Briggs timely filed Contest 4873 to the Claim and/or Preliminary Evaluation of Claim 539.

19. On May 8, 2000, Thomas William Mallams timely filed Contest 5116 to the Claim and/or Preliminary Evaluation of Claim 539.
20. On May 8, 2000, Thomas H. Bentley timely filed Contest 5349 to the Claim and/or Preliminary Evaluation of Claim 539.
21. On May 8, 2000, Thomas E. Stephens timely filed Contest 5582 to the Claim and/or Preliminary Evaluation of Claim 539.
22. On May 8, 2000, Waterwatch of Oregon, Inc. timely filed Contest 2953 to the Claim and/or Preliminary Evaluation of Claim 539.
23. 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.
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).*
25. On February 25, 2003, Waterwatch of Oregon, Inc. voluntarily withdrew Contest 2953. *See WATERWATCH'S VOLUNTARY WITHDRAWAL OF CONTESTS (Feb. 25, 2003).*
26. 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 2207) to Claim 539.
27. On April 2, 2003, the Adjudicator withdrew Case 009 from the Office of Administrative Hearings.

B. DETERMINATION

1. The Settlement Agreement executed between OWRD and USFS is adopted and incorporated as if set forth fully herein.
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 539 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 539

CLAIM MAP REFERENCE: MYLAR FILED AS CLAIM # 377, PAGE 189 and PAGE 190

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

SOURCE OF WATER: SAND CREEK, tributary to the WILLIAMSON 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 | 41.0 |
| June 1 to June 30 | 63.0 |
| July 1 to July 31 | 52.0 |
| Aug 1 to Aug 31 | 31.0 |
| Sept 1 to Sept 30 | 28.0 |
| Oct 1 to Oct 31 | 22.0 |

DATE OF PRIORITY: JANUARY 25, 1907

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SAND CREEK FROM SWNE, SECTION 35, TOWNSHIP 31 SOUTH, RANGE 7.5 EAST, W.M., TO SWNE, SECTION 31, TOWNSHIP 31 SOUTH, RANGE 7 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