

**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 564

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 564) 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 564 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 38.0 cfs to 58.0 cfs for June 1 to June 30, 16.0 cfs to 18.0 cfs for Sept. 1 to Sept. 30, and 16.0 cfs to 21.0 cfs for Oct. 1 to Oct. 30. The amendment was a result of the exchange of correspondence between the Department and the Claimant concerning the Claimant’s need to incorporate information concerning instream flow requirements. The Department intended to provide this information to the Claimant, but it was not available at the time of the claim filing deadline.
4. On September 30, 1999, Claim 564 was further amended to reflect a change in the place of use to include the headwaters of the main stem of Cow Creek and all tributaries of the main stem located on non-reserved lands.

5. The September 30, 1999 amendment changed the stream reach from COW CREEK FROM NENW, SECTION 14, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M., TO NESE, SECTION 14, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M. to “THE HEADWATERS OF THE MAIN STEM [Cow Creek] AND ALL TRIBUTARIES OF THE MAIN STEM . . .” This amendment expands the place of use by at least 30 river miles, and includes use from sources of water not identified in the original claim. The original claim described a reach from an upstream point to a downstream point. The amendment places additional reaches upstream from the original reach, and includes reaches from sources of water not identified in the original claim.
6. 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.
7. On May 5, 2000, the Claimant, USFS, timely filed Contest 2224 to the Preliminary Evaluation of Claim 564.
8. On May 1, 2000, William J. Rust and Ethel J. Rust timely filed Contest 233 to the Claim and/or Preliminary Evaluation of Claim 564.
9. On May 1, 2000, Leonard Baio timely filed Contest 468 to the Claim and/or Preliminary Evaluation of Claim 564.
10. On May 2, 2000, Gary Strong timely filed Contest 703 to the Claim and/or Preliminary Evaluation of Claim 564.
11. On May 2, 2000, the Flynn Brothers (Con and Nora Flynn), and Con, Nora and John Flynn timely filed Contest 938 to the Claim and/or Preliminary Evaluation of Claim 564.
12. On May 2, 2000, Robert Bartell timely filed Contest 1173 to the Claim and/or Preliminary Evaluation of Claim 564.
13. On May 2, 2000, Margaret Jacobs timely filed Contest 1407 to the Claim and/or Preliminary Evaluation of Claim 564.
14. On May 2, 2000, Carolyn Obenchain timely filed Contest 1642 to the Claim and/or Preliminary Evaluation of Claim 564.
15. On May 4, 2000, Rodney Z. James timely filed Contest 1991 to the Claim and/or Preliminary Evaluation of Claim 564.
16. On May 5, 2000, Newman Enterprise (Douglas Newman) timely filed Contest 2443 to the Claim and/or Preliminary Evaluation of Claim 564.
17. On May 5, 2000, Francis Loving Trust, Hilda Francis Trustee timely filed Contest 2680 to the Claim and/or Preliminary Evaluation of Claim 564.
18. On May 8, 2000, John Briggs timely filed Contest 4430 to the Claim and/or Preliminary Evaluation of Claim 564.

19. On May 8, 2000, Peter M. Bourdet timely filed Contest 4665 to the Claim and/or Preliminary Evaluation of Claim 564.
20. On May 8, 2000, Vincent Lee Briggs timely filed Contest 4898 to the Claim and/or Preliminary Evaluation of Claim 564.
21. On May 8, 2000, Thomas William Mallams timely filed Contest 5141 to the Claim and/or Preliminary Evaluation of Claim 564.
22. On May 8, 2000, Thomas H. Bentley timely filed Contest 5374 to the Claim and/or Preliminary Evaluation of Claim 564.
23. On May 8, 2000, Thomas E. Stephens timely filed Contest 5607 to the Claim and/or Preliminary Evaluation of Claim 564.
24. On May 8, 2000, Waterwatch of Oregon, Inc. timely filed Contest 2978 to the Claim and/or Preliminary Evaluation of Claim 564.
25. 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.
26. 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).
27. On February 25, 2003, Waterwatch of Oregon, Inc. voluntarily withdrew Contest 2978. *See WATERWATCH'S VOLUNTARY WITHDRAWAL OF CONTESTS* (Feb. 25, 2003).
28. 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 2224) to Claim 564.
29. On April 2, 2003, the Adjudicator withdrew Case 009 from the Office of Administrative Hearings.
30. Claim 561 and Claim 564 were both submitted by the USFS. The USFS claimed March 2, 1907 as the federal reservation date upon which Claim 561 is based; however, this date

is consistent with the particulars of Claim 564. The USFS claimed June 21, 1956¹ as the federal reservation date upon which the Claim 564 is based; however, this date is consistent with the particulars of Claim 561.

- Identical copies of a map titled “Land Status for Cow Creek Instream Flow Reach” (“Land Status Map”) can be found within both Claims 561 and 564 (*see* Claim 561, Page 97-585-0022, and Claim 564, Page 97-588-0022). This map shows lands within SECTION 11, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M with a “Historical Land Status Code” of “JJ,” and lands within SECTION 14, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M with a “Historical Land Status Code” of “OO.”
- Claim 561 contains supporting documents pertaining to land use Status Code JJ which includes an Order Exchanging Administrative Jurisdiction, June 21, 1956, 6-23-56, Fed. Reg. 4525. This Order confirms a reservation date of June 21, 1956 for SECTION 11, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M., but does not confirm a reservation date of June 21, 1956 for SECTION 14, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M. Claim 561 does not does not contain supporting documents pertaining to land use Status Code OO.
- Claim 564 contains supporting documents pertaining to land use Status Code OO which includes the Presidential Proclamation of March 2, 1907. Claim 564 does not does not contain supporting documents pertaining to land use Status Code JJ.
- Claim 561 describes an “Upper Reach” of Cow Creek from SESW, SECTION 11, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M., to SESW, SECTION 11, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M.
- Claim 564 describes a “Lower Reach” of Cow Creek from NENW, SECTION 14, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M., TO NESE, SECTION 14, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M.
- On October 14, 1999, the USFS submitted a Mylar claim map to OWRD showing the upper and lower reaches of Cow Creek. (Claim Map Reference – Mylar filed as Claim #377, Page 265). The end of the instream flow reach for Claim 561 (upper reach) and the beginning and end of the instream flow reach for Claim 564 (lower reach) shown on the Mylar claim map are not consistent with their respective claimed place of use or the Land Status Map (*see* Claim 561, Page 97-585-0022, and Claim 564, Page 97-588-0022), or the Order Exchanging Administrative Jurisdiction, June 21, 1956. The Mylar map shows the end of the reach for Claim 561 contiguous with the beginning of the reach for Claim 564, but located in the NESE, Section 14, rather than at the section-line boundary between sections 11 and 14. According to the USFS’ claimed place of use description, Claim 564 ends at the Oregon-California border on the section-line of Section 14, and not in California as shown on the Mylar claim map and Land Status Map.

¹ The claimed date was actually June 12, 1956; this date, based on the Order Exchanging Administrative Jurisdiction, June 21, 1956, 6-23-56, Fed. Reg. 4525 contains a scrivener’s error – it should read June 21, 1956.

The totality of the records for Claims 561 and 564, including the documents submitted by April 30, 1997 claim filing deadline, show a clear intention by the USFS to claim a reservation date of June 21, 1956 for Claim 561, and a reservation date of March 2, 1907 for Claim 564.

B. DETERMINATION

1. The Settlement Agreement executed between OWRD and USFS is adopted and incorporated as if set forth fully herein, with two exceptions:
 - a. that portion of the place of use that was expanded by the USFS's amendment of September 30, 1999; the place of use recognized herein is consistent with both the USFS's original claim and with its August 3, 1999 amendment,
 - b. the priority date of June 12, 1956, which was incorporated in the Preliminary Evaluation, has been changed to a priority date of March 2, 1907, consistent with Finding 30, above, and
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. OWRD finds that the claim amendment described in Findings 4 and 5, above, constitutes a new claim under ORS 539.210. The change in place of use is significant, including the addition of at least 30 additional river miles and the use of water from a source not originally claimed. There is no evidence on the record to suggest that the place of use for this claim was not reasonably ascertainable at the time of the claim filing deadline. As a result, this amendment may not be considered in the Findings of Fact and Partial Order of Determination for this claim.
6. 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.
7. Based on the file and record herein, IT IS ORDERED that Claim 564 is approved as set forth in the following Water Right Claim Description.

CLAIM NO. 564

CLAIM MAP REFERENCE: MYLAR FILED AS CLAIM # 377, PAGE 265

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

SOURCE OF WATER: COW CREEK, tributary to BEAVER CREEK

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	96.0
June 1 to June 30	58.0
July 1 to July 31	24.0
Aug 1 to Aug 31	17.0
Sept 1 to Sept 30	18.0
Oct 1 to Oct 31	21.0

DATE OF PRIORITY: MARCH 2, 1907

THE PLACE OF USE IS LOCATED AS FOLLOWS:

COW CREEK FROM NENW, SECTION 14, TOWNSHIP 41 SOUTH, RANGE 1 WEST,
W.M., TO NESE, SECTION 14, TOWNSHIP 41 SOUTH, RANGE 1 WEST, W.M

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013



Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

PARTIAL ORDER OF DETERMINATION

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