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 UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE	)))))	PARTIAL ORDER OF DETERMINATION
	)	Water Right Claim 725

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 for Claim 574 and Statement and Proof of Claim for Claim 578 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. §§ 473-475, 477-482 and 551 (Organic Act).

2. In a July 1, 1999 letter, OWRD requested clarification of Claim 574, in part, as follows: "According to your claim map, there are two separate reaches of the stream which are claimed, not one continuous reach. If, indeed, there is more than one claimed stream reach, *please provide a separate claim form for each individual stream reach being claimed as provided for in OAR 690-028-0027.*"

3. On August 3, 1999, the USFS timely amended Claim 574 and timely amended Claim 578 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." Additionally, in response to OWRD's request, the USFS submitted an additional Statement and Proof of Claim that covered a portion of the original claim(s). OWRD labeled this additional claim as Claim 725.

4. The August 3, 1999 Statement and Proof of Claim for Claim 725 amended two elements of the original Claims 574 and 578 that pertain to the Claim 725 stream reach. First, it changed the period of use from June 1 through November 15 to May 1 through November 15. Second, it increased the natural flow limits from 7.1 cfs to 7.5 cfs for Sept. 1 to Sept. 30, and 5.8 cfs to 7.7 cfs for Oct. 1 to Oct. 30. This 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.

5. Identical copies of a separate map titled "Land Status for Sycan River Above Sycan Marsh Instream Flow Claim" ("Land Status Map") can be found within both Claims 574 and 578 (*see* Claim 574, Page 97-598-0023, and Claim 578, Page 97-602-0023). This Land Status Map shows an "Upper Reach" and a "Lower Reach" as follows:

    a. The "Lower Reach" is from SESE, SECTION 23, TOWNSHIP 32 SOUTH, RANGE 14 EAST, W.M. to SWSW, SECTION 22, TOWNSHIP 32 SOUTH, RANGE 14 EAST, W.M., and consists of one continuous reach, and has a reservation date of October 14, 1935.

    b. The"Upper Reach" is from SWNE, SECTION 22, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M. to SWSW, SECTION 24, TOWNSHIP 32 SOUTH, RANGE 14 EAST, W.M., and consists of two reaches separated by non-reserved lands, and has a reservation date of September 17, 1906. Within this "Upper Reach," the uppermost segment is from SWNE, SECTION 22, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M. to NWSW, SECTION 15, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M., (here called "upper segment"). The lowermost segment of this "Upper Reach" is from NWNW, SECTION 16, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M. to SWSW, SECTION 24, TOWNSHIP 32 SOUTH, RANGE 14 EAST, W.M. (here called "lower segment").

- In the original claims, Claim 574 cited a reservation date of September 17, 1906, but described the "Lower Reach", and Claim 578 cited a reservation date of October 14, 1935, but described the "Upper Reach." According to the "Land Status Map," the lower reach was assigned the priority date of the upper reach, and visa versa.

- In the August 3, 1999 amendments of these two claims, the amendment for Claim 574 described the upper segment of the "Upper Reach," but cited a reservation date of October 14, 1935; and the amendment for Claim 578 described the "Lower Reach," but cited a reservation date of September 17, 1906. Again, according to the "Land Status Map," the upper reach was assigned the priority date of the lower reach, and visa versa. Claim 725, which was bifurcated from Claim 574, describes the lower segment of the "Upper Reach," but cited a reservation date of October 14, 1935.

- On October 14, 1999, the USFS submitted Mylar claim maps to OWRD. (Claim Map Reference – Mylar filed as Claim #377, Page 202 and Page 215). These maps assign an a "Lower Reach" to Claim 578, an upper segment of the "Upper Reach" to Claim 574, and a lower segment of "Upper Reach" to Claim 725.

- Notwithstanding the ambiguity of Claims 574 and 578 and their respective amendments, OWRD finds a clear intention of the USFS to have filed claims consistent with "Upper Reach" and "Lower Reach" as shown on the Land Status Map. Therefore OWRD has assigned Claims 574, 578 and 725 as follows:

    a. Claim 578 is for the "Lower Reach," being the Sycan River from SESE, SECTION 23, TOWNSHIP 32 SOUTH, RANGE 14 EAST, W.M. to SWSW, SECTION 22, TOWNSHIP 32 SOUTH, RANGE 14 EAST, W.M., and has a reservation date of October 14, 1935.

    b. Claim 574 is for the upper segment of the "Upper Reach," being the Sycan River from SWNE, SECTION 22, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M. to NWSW, SECTION 15, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M., and has a reservation date of September 17, 1906.

    c. Claim 725 is for the lower segment of the "Upper Reach," being the Sycan River from NWNW, SECTION 16, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M. to SWSW, SECTION 24, TOWNSHIP 32 SOUTH, RANGE 14 EAST, W.M., and has a reservation date of September 17, 1906.

6. On October 4, 1999, following investigation of the evidence submitted, the Adjudicator issued a Summary and Preliminary Evaluation of Claims (Preliminary Evaluation) stating Claim 725 was approved.

7. On May 5, 2000, the Claimant, USFS, timely filed Contest 2252 to the Preliminary Evaluation of Claim 574.

8. On May 1, 2000, William J. Rust and Ethel J. Rust timely filed Contest 276 to the Claim and/or Preliminary Evaluation of Claim 725.

9. On May 1, 2000, Leonard Baio timely filed Contest 511 to the Claim and/or Preliminary Evaluation of Claim 725.

10. On May 2, 2000, Gary Strong timely filed Contest 746 to the Claim and/or Preliminary Evaluation of Claim 725.

11. On May 2, 2000, the Flynn Brothers (Con and Nora Flynn), and Con, Nora and John Flynn timely filed Contest 981 to the Claim and/or Preliminary Evaluation of Claim 725.

12. On May 2, 2000, Robert Bartell timely filed Contest 1216 to the Claim and/or Preliminary Evaluation of Claim 725.

13. On May 2, 2000, Margaret Jacobs timely filed Contest 1450 to the Claim and/or Preliminary Evaluation of Claim 725.

14. On May 2, 2000, Carolyn Obenchain timely filed Contest 1685 to the Claim and/or Preliminary Evaluation of Claim 725.

15. On May 4, 2000, Rodney Z. James timely filed Contest 2034 to the Claim and/or Preliminary Evaluation of Claim 725.

16. On May 5, 2000, Newman Enterprise (Douglas Newman) timely filed Contest 2486 to the Claim and/or Preliminary Evaluation of Claim 725.

17. On May 5, 2000, Francis Loving Trust, Hilda Francis Trustee timely filed Contest 2723 to the Claim and/or Preliminary Evaluation of Claim 725.

18. On May 8, 2000, John Briggs timely filed Contest 4473 to the Claim and/or Preliminary Evaluation of Claim 725.

19. On May 8, 2000, Peter M. Bourdet timely filed Contest 4708 to the Claim and/or Preliminary Evaluation of Claim 725.

20. On May 8, 2000, Vincent Lee Briggs timely filed Contest 4941 to the Claim and/or Preliminary Evaluation of Claim 725.

21. On May 8, 2000, Thomas William Mallams timely filed Contest 5184 to the Claim and/or Preliminary Evaluation of Claim 725.

22. On May 8, 2000, Thomas H. Bentley timely filed Contest 5417 to the Claim and/or Preliminary Evaluation of Claim 725.

23. On May 8, 2000, Thomas E. Stephens timely filed Contest 5650 to the Claim and/or Preliminary Evaluation of Claim 725.

24. On May 8, 2000, WaterWatch of Oregon, Inc. timely filed Contest 3092 to the Claim and/or Preliminary Evaluation of Claim 725.

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 3092. *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 2252) to Claim 575.

29. On April 2, 2003, the Adjudicator withdrew Case 009 from the Office of Administrative Hearings.

30. The USFS's Claim 725 states that the beginning of the instream reach of the Sycan River is located in the NENE, SECTION 16, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M.; however, identical copies of the "Land Status Map" found within both Claims 574 and 578 (*see* Claim 574, Page 97-598-0023, and Claim 578, Page 97-602-0023) on which the place of use for this claim is depicted, show that the reach of this claim begins in the NWNW, SECTION 16, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M. This is also supported by a USFS claim map (Mylar filed as # Claim 377, Page 215). Therefore, OWRD finds that the beginning of the instream reach for this claim is for this claim is the NWNW, SECTION 16, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M.

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) the priority date is changed from October 14, 1935 to reflect the correct priority date of September 17, 1906 as set forth in the original claim of its parent (Claim 574), and as consistent with the "Land Status Maps" in Claims 574 and 578 as described in Finding 5, above; and

   (b) the scrivener's error in the location of the beginning of the instream reach of the Sycan River in Claim 725 as described in Finding 30, above, which was incorporated into in the Preliminary Evaluation and the Settlement Agreement; the location of the beginning of the instream reach is corrected to the NWNW, Section 16.

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 3 and 4, above, does not constitute a new claim under ORS 539.210. This determination is based on the factors described in Findings 3 and 4, above. Because the amendment occurred prior to the beginning of open inspection, it is permissible and is incorporated into the Claimant's Claim 725 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 725 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 725

CLAIM MAP REFERENCE: MYLAR FILED AS CLAIM # 377, PAGE 202 and PAGE 215

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

SOURCE OF WATER: SYCAN RIVER, tributary to the 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	193.0
June 1 to June 30	54.0
July 1 to July 31	15.0
Aug 1 to Aug 31	9.4
Sept 1 to Sept 30	7.5
Oct 1 to Oct 31	7.7

DATE OF PRIORITY: SEPTEMBER 17, 1906

THE PLACE OF USE IS LOCATED AS FOLLOWS:
SYCAN RIVER FROM NWNW, SECTION 16, TOWNSHIP 33 SOUTH, RANGE 15 EAST, W.M., TO SWSW, SECTION 24, TOWNSHIP 32 SOUTH, RANGE 14 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