

**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 545

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 545) 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 545 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 26.0 cfs to 28.0 cfs for June 1 to June 30, 16.0 cfs to 17.0 cfs for July 1 to July 31, 15.0 cfs to 17.0 cfs for Aug. 1 to Aug. 31, 16.0 cfs to 18.0 cfs for Sept. 1 to Sept. 30, 17.0 cfs to 19.0 cfs for Oct. 1 to Oct. 30, and 17.0 cfs to 19.0 cfs for Nov. 1 to Nov. 15. 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 545 was further amended to reflect a change in the place of use to include the headwaters of the main stem of Sevenmile Creek and all tributaries of the main stem located on non-reserved lands.

5. The September 30, 1999 amendment changed the stream reach from SEVENMILE CREEK FROM NESW, SECTION 10, TOWNSHIP 33 SOUTH, RANGE 6 EAST, W.M., TO SESE, SECTION 14, TOWNSHIP 33 SOUTH, RANGE 6 EAST, W.M. to “THE HEADWATERS OF THE MAIN STEM [Sevenmile Creek] AND ALL TRIBUTARIES OF THE MAIN STEM . . .” This amendment expands the place of use by at least 9 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 2211 to the Preliminary Evaluation of Claim 545.
8. On May 1, 2000, William J. Rust and Ethel J. Rust timely filed Contest 214 to the Claim and/or Preliminary Evaluation of Claim 545.
9. On May 1, 2000, Leonard Baio timely filed Contest 449 to the Claim and/or Preliminary Evaluation of Claim 545.
10. On May 2, 2000, Gary Strong timely filed Contest 684 to the Claim and/or Preliminary Evaluation of Claim 545.
11. On May 2, 2000, the Flynn Brothers (Con and Nora Flynn), and Con, Nora and John Flynn timely filed Contest 919 to the Claim and/or Preliminary Evaluation of Claim 545.
12. On May 2, 2000, Robert Bartell timely filed Contest 1154 to the Claim and/or Preliminary Evaluation of Claim 545.
13. On May 2, 2000, Margaret Jacobs timely filed Contest 1388 to the Claim and/or Preliminary Evaluation of Claim 545.
14. On May 2, 2000, Carolyn Obenchain timely filed Contest 1623 to the Claim and/or Preliminary Evaluation of Claim 545.
15. On May 4, 2000, Ambrose W. McAuliffe and Roger Nicholson timely filed Contest 1800 to the Claim and/or Preliminary Evaluation of Claim 545.
16. On May 4, 2000, Rodney Z. James timely filed Contest 1972 to the Claim and/or Preliminary Evaluation of Claim 545.
17. On May 5, 2000, Newman Enterprise (Douglas Newman) timely filed Contest 2424 to the Claim and/or Preliminary Evaluation of Claim 545.

18. On May 5, 2000, Francis Loving Trust, Hilda Francis Trustee timely filed Contest 2661 to the Claim and/or Preliminary Evaluation of Claim 545.
19. On May 8, 2000, John Briggs timely filed Contest 4411 to the Claim and/or Preliminary Evaluation of Claim 545.
20. On May 8, 2000, Peter M. Bourdet timely filed Contest 4646 to the Claim and/or Preliminary Evaluation of Claim 545.
21. On May 8, 2000, Vincent Lee Briggs timely filed Contest 4879 to the Claim and/or Preliminary Evaluation of Claim 545.
22. On May 8, 2000, Thomas William Mallams timely filed Contest 5122 to the Claim and/or Preliminary Evaluation of Claim 545.
23. On May 8, 2000, Thomas H. Bentley timely filed Contest 5355 to the Claim and/or Preliminary Evaluation of Claim 545.
24. On May 8, 2000, Thomas E. Stephens timely filed Contest 5588 to the Claim and/or Preliminary Evaluation of Claim 545.
25. On May 8, 2000, Waterwatch of Oregon, Inc. timely filed Contest 2959 to the Claim and/or Preliminary Evaluation of Claim 545.
26. 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.
27. 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, David Cowan, successor in interest to William J. Rust and Ethel J. Rust, and Ambrose W. McAuliffe and Roger Nicholson. *See* NOTICE OF WITHDRAWAL OF BAIO *ET AL'S* CONTESTS AGAINST THE UNITED STATES FOREST SERVICE CLAIMS (July 2, 2002).
28. On December 31, 2002, the USFS amended the priority date of Claim 545 "from June 4, 1897 as originally claimed to July 31, 1971".
29. On February 25, 2003, Waterwatch of Oregon, Inc. voluntarily withdrew Contest 2959. *See* WATERWATCH'S VOLUNTARY WITHDRAWAL OF CONTESTS (Feb. 25, 2003).
30. 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 2211) to Claim 545.

31. 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, 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; and
 - b. the priority date is changed to July 31, 1971 as set forth in the USFS's amended claim dated December 31, 2002.
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. The Department 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 9 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 545 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 545

CLAIM MAP REFERENCE: MYLAR FILED AS CLAIM # 377, PAGE 205

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

SOURCE OF WATER: SEVENMILE CREEK, tributary to KLAMATH LAKE

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	36.0
June 1 to June 30	28.0
July 1 to July 31	17.0
Aug 1 to Aug 31	17.0
Sept 1 to Sept 30	18.0
Oct 1 to Oct 31	19.0

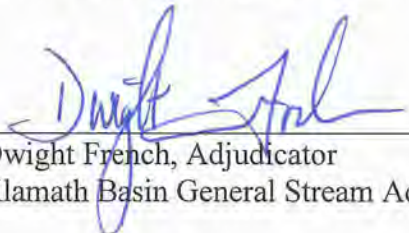
DATE OF PRIORITY: JULY 31, 1971

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SEVENMILE CREEK FROM NESW, SECTION 10, TOWNSHIP 33 SOUTH, RANGE 6 EAST, W.M., TO SESE, SECTION 14, TOWNSHIP 33 SOUTH, RANGE 6 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