

**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 495

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 495) 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 Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136.
2. On August 3, 1999, the USFS timely amended Claim 495, withdrawing the “Consumptive/out of stream use: *De minimus* [sic] consumptive use by wildlife and the public for administrative uses necessary to fulfill the purposes of the Wilderness Act . . . and Oregon Wilderness Act.”
3. 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.
4. On May 1, 2000, William J. Rust and Ethel J. Rust timely filed Contest 164 to the Claim and/or Preliminary Evaluation of Claim 495.
5. On May 1, 2000, Leonard Baio timely filed Contest 399 to the Claim and/or Preliminary Evaluation of Claim 495.
6. On May 2, 2000, Gary Strong timely filed Contest 634 to the Claim and/or Preliminary Evaluation of Claim 495.

7. On May 2, 2000, the Flynn Brothers (Con and Nora Flynn), and Con, Nora and John Flynn timely filed Contest 869 to the Claim and/or Preliminary Evaluation of Claim 495.
8. On May 2, 2000, Robert Bartell timely filed Contest 1104 to the Claim and/or Preliminary Evaluation of Claim 495.
9. On May 2, 2000, Margaret Jacobs timely filed Contest 1339 to the Claim and/or Preliminary Evaluation of Claim 495.
10. On May 2, 2000, Carolyn Obenchain timely filed Contest 1573 to the Claim and/or Preliminary Evaluation of Claim 495.
11. On May 4, 2000, Rodney Z. James timely filed Contest 1922 to the Claim and/or Preliminary Evaluation of Claim 495.
12. On May 5, 2000, Newman Enterprise (Douglas Newman) timely filed Contest 2374 to the Claim and/or Preliminary Evaluation of Claim 495.
13. On May 5, 2000, Francis Loving Trust, Hilda Francis Trustee timely filed Contest 2611 to the Claim and/or Preliminary Evaluation of Claim 495.
14. On May 8, 2000, John Briggs timely filed Contest 4361 to the Claim and/or Preliminary Evaluation of Claim 495.
15. On May 8, 2000, Peter M. Bourdet timely filed Contest 4596 to the Claim and/or Preliminary Evaluation of Claim 495.
16. On May 8, 2000, Vincent Lee Briggs timely filed Contest 4829 to the Claim and/or Preliminary Evaluation of Claim 495.
17. On May 8, 2000, Thomas William Mallams timely filed Contest 5072 to the Claim and/or Preliminary Evaluation of Claim 495.
18. On May 8, 2000, Thomas H. Bentley timely filed Contest 5305 to the Claim and/or Preliminary Evaluation of Claim 495.
19. On May 8, 2000, Thomas E. Stephens timely filed Contest 5538 to the Claim and/or Preliminary Evaluation of Claim 495.
20. On May 8, 2000, WaterWatch of Oregon, Inc. timely filed Contest 2924 to the Claim and/or Preliminary Evaluation of Claim 495.
21. 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 005.

22. 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). *See also* NOTICE OF ERRATA (July 18, 2002).
23. On February 25, 2003, WaterWatch of Oregon, Inc. voluntarily withdrew Contest 2924, the remaining contest to Claim 495. *See* WATERWATCH'S VOLUNTARY WITHDRAWAL OF CONTESTS (Feb. 25, 2003).
24. On March 14, 2003, the Adjudicator withdrew Case 005 from the Office of Administrative Hearings.
25. The place of use underlying Claim 495 is within or borders a federal reservation of land that is owned by the Claimant.
26. The rate and season of use claimed are no more than necessary to fulfill the primary purposes of the reservation.
27. As explained in the GENERAL CONCLUSIONS OF LAW CONCERNING FEDERAL RESERVED WATER RIGHTS, the date of reservation is the priority date of a federal reserved water right. The date of reservation is September 3, 1964, based on the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136.

## B. DETERMINATION

1. THE WILDERNESS ACT, 16 USC §§ 1131-1136 and the OREGON WILDERNESS ACT of 1984 for a federal reserved water right is a valid basis for this claim, including the claimed purpose of use. In 1964 Congress passed THE WILDERNESS ACT, 16 USC §§ 1131-1136, establishing the National Wilderness Preservation System, under which designated lands are to be administered "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness \* \* \* " 16 USC § 1131(a). These lands were to be devoted to the public purposes of recreational, "scientific, educational, scenic or historical value." 16 USC § 1131 (c)(2), (4). The wilderness designation is unique in that it may apply to lands which have already been reserved under some other designation, such as national forest lands.

The courts that have considered the question have concluded that THE WILDERNESS ACT was intended to reserve water for designated wilderness areas. *Sierra Club v. Block*, 622 F Supp 842, 858 (D. Colo. 1985) and *Sierra Club v. Lyng*, 661 F Supp 1490, 1500 (D. Colo. 1987), *both vacated for lack of ripeness*, *Sierra Club v. Yeutter*, 911 F2d 1405 (10<sup>th</sup> Cir. 1990); *In Re SRBA*, Wilderness Act, MUSYA and HCNRA Claims, Consolidated

Subcases 75-13605, 63-25239, and 79-13597, at 11 (Idaho Dist. Ct. Dec. 18, 1997) (order granting and denying United States' motions for summary judgment on reserved water rights claims). Based on this precedent, the Forest Service is entitled to a reserved right for these areas.

The priority date is the date of the enactment creating the wilderness area: September 3, 1964 for Mountain Lakes and Gearheart Wilderness Areas, and June 26, 1984 for Gearheart Wilderness (Additions), Mount Thielsen and Sky Lakes Wilderness Areas. The primary purpose of the Wilderness Act is to protect the area in its natural condition, or at least in the condition that existed at the time of the designation, for recreational, scenic, scientific, educational, conservation and historic use. This primary purpose includes the instream flow purpose claimed by the USFS.

2. The GENERAL CONCLUSIONS OF LAW CONCERNING FEDERAL RESERVED WATER RIGHTS is incorporated as if set forth fully herein.
3. Based on the file and record herein, IT IS ORDERED that Claim 495 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO.** 495

**CLAIM MAP REFERENCE:** USFS # D2 / OWRD # 97-519-0122

**CLAIMANT:** UNITED STATES DEPARTMENT OF AGRICULTURE  
FOREST SERVICE  
1220 SW 3<sup>RD</sup> ROOM 1734  
PORTLAND, OR 97204

**SOURCE OF WATER:**

ALL STREAMS, LAKES, PONDS, SPRINGS, SEEPS OR OTHER NATURAL SOURCES OF WATER, WHETHER NAMED OR NOT AND WHETHER PERENNIAL, INTERMITTENT OR EPHERMAL WITHIN THE BOUNDARIES OF THE MOUNTAIN LAKES WILDERNESS AREA; TRIBUTARY TO SPRAGUE RIVER

**PURPOSE or USE:** INSTREAM FLOW

**RATE OF USE:**

ALL UNAPPROPRIATED FLOW AND ALL SURFACE WATER SOURCES AS OF SEPTEMBER 3, 1964

**PERIOD OF ALLOWED USE:** JANUARY 1 – DECEMBER 31

**DATE OF PRIORITY:** SEPTEMBER 3, 1964

**THE PLACE OF USE IS LOCATED AS FOLLOWS:**

SECTIONS 1 THROUGH 36, TOWNSHIP 37 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