



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: September 14, 1999

TO: Richard Bailey, Adjudicator
Water Resources Department

FROM: Walter Perry, Assistant Attorney General
Natural Resources Section

Meg Reeves, Assistant Attorney General
Natural Resources Section

SUBJECT: Klamath Adjudication / *Walton* Claims - Legal Overview

A number of claimants to water rights in the Klamath Basin Adjudication have made claims as non-Indian successors to Klamath Indian allottees, claiming an amount of water sufficient to irrigate the allotment's share of the Tribe's "practicably irrigable acreage" (PIA), with a priority date of October 14, 1864 (the Treaty date). You have asked us to provide a brief statement of the law applicable to such "*Walton* claims."¹ We conclude that four elements are necessary to constitute a valid claim: 1) The water use must be on former Klamath Indian Reservation land; 2) The water use must be on land that was transferred from Indian ownership; 3) The claim is limited to the amount of water actually developed at the time of transfer from Indian ownership; except that 4) The claim may also include the amount of the Indian allottee's inchoate portion of the PIA right that the *Walton* claimant has developed with due diligence since the transfer from Indian ownership.

Element #1

When the United States reserves land for particular purposes, it implicitly reserves sufficient water to accomplish those purposes.² In quantifying the "*Winters* right"

implied by an Indian reservation created by treaty, the United States Supreme Court has

¹ The name derives from the seminal case defining such rights: *Colville Confederate Tribes v. Walton*, 647 F2d 42, 51 (9th Cir. 1981).

² *Winters v. United States*, 207 US 564 (1908).

held that: “(E)nough water (is) reserved to irrigate all the practicably irrigable acreage [PIA] *on the reservations*.”³

The “PIA rights” held by Klamath Indian allottees, claimed by non-Indian successors to those allotments as “*Walton rights*,” are the rights to water sufficient to fulfill the Treaty purposes of promoting the adoption of an agricultural lifestyle by the Klamath Tribe within the Reservation boundaries.⁴ Such rights are therefore confined to former Reservation land and carry a priority date defined by the Treaty.

Elements #2, #3, and #4

Elements 2, 3, and 4 are derived from the seminal case of *Colville Confederate Tribes v. Walton*, 647 F2d 42 (9th Cir. 1981) (*Walton II*). Element #2 is derived from the *Walton* court’s holding that “(t)he full quantity of water available to the Indian allottee ... may be conveyed to the non-Indian purchaser.”⁵ Therefore, title must be traced to an Indian allottee.

The *Walton* court went on to place the following limitations on the transfer, reflected in elements #3 and #4:

The non-Indian successor acquires a right to water *being appropriated* by the Indian allottee *at the time title passes*. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with *reasonable diligence after the passage of title*. If the full measure of the Indian’s reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.⁶

The Ninth Circuit expressly applied the *Walton* analysis to non-Indian successors to Klamath Indian allottees in *United States v. Adair*, 723 F2d 1394, 1417 (9th Cir. 1983).

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³ *Arizona v. California*, 373 US 546, 601 (1963) (emphasis added).

⁴ The Treaty with the Klamath Indians of October 14, 1864, states in part: “(T)he design of the expenditure [in payment for the country ceded by this treaty] ... (is) to promote the well-being of the Indians, advance them in civilization, and *especially in agriculture*, and to secure their moral improvement and education.” 16 Stat. 707, 708, Art. II (emphasis added).

⁵ *Colville Confederate Tribes v. Walton*, 647 F2d 42, 51 (9th Cir. 1981).

⁶ *Id.* (emphasis added).