



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 / PIA Claims - Legal Overview

A number of claimants to water rights in the Klamath Basin Adjudication are 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 "PIA claims." We conclude that five elements are necessary to constitute a valid claim: 1) The claim must be for water use (current or future) on former Klamath Indian Reservation land; 2) The claimant must be a Klamath Indian; 3) The land must be arable; 4) Irrigation system development must be both technically possible and economically feasible; and 5) The right must not have been lost during intervening non-Indian ownership.

Elements #1 and #2

The first two elements are at the heart of the federal reserved water rights doctrine, as articulated by the United States Supreme Court in *Winters v. United States*, 207 US 564 (1908). Under the "*Winters* doctrine," water is implicitly reserved to fulfill the primary purposes of the reservation, *i.e.*, the purposes set forth in the Treaty.

In *Arizona v. California*, 373 US 546 (1963), the Supreme Court articulated the "practicably irrigable acreage" standard in order to quantify the *Winters* right. The Court held that PIA rights are the rights to water sufficient to fulfill the agricultural purposes of the Treaty and are therefore confined to former Reservation land, may only be claimed by

an Indian, and carry a priority date defined by the Treaty.¹ The PIA rights held by Klamath Indian allottees 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.² Such rights are therefore confined to former Reservation land and must be claimed by a Klamath Indian.

Elements #3 and #4

Elements 3 and 4, echoed in OAR 690-28-026(1), reflect the analyses applied in *Big Horn I*³ and other cases.⁴ In *Big Horn I*, the court explained:

The determination of (PIA) involves a two-part analysis, i.e., the PIA must be susceptible of sustained irrigation (not only proof of the *arability* but also of the *engineering feasibility* of irrigating the land) and irrigable “at *reasonable cost*.”⁵

Element #5

The 5th element, echoed in OAR 690-28-026(3), is consistent with the Ninth Circuit’s decision in *United States v. Anderson*, 736 F2d 1358 (9th Cir. 1984), regarding Indian reacquisition of land after allotment and sale to non-Indians. In *Anderson*, the court explained:

...(A) non-Indian successor acquires a right to that quantity of water being utilized at the time title passes, plus that amount of water which the successor puts to *beneficial use* with *reasonable diligence* following the transfer of title. Where “the full measure of the Indian’s reserved water right is not acquired by this means and maintained through continued use, it is lost to the non-Indian successor.” Consequently, *on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse*...⁶

Thus, a non-Indian successor to an Indian allottee can lose both the developed and

¹ *Arizona v. California*, 373 US 546, 600-601 (1963).

² 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).

³ *In re Rights to Use Water in Big Horn River*, 753 P2d 76 (Wyo. 1988).

⁴ *See, e.g., State ex rel. Martinez v. Lewis*, 861 P2d 235, 247 (N.M.App. 1993).

⁵ *Big Horn I*, 753 P2d at 101 (emphasis added).

⁶ *United States v. Anderson*, 736 F2d 1358, 1362 (9th Cir. 1984) (emphasis added) (citation omitted).

the “inchoate” portions of the Indian’s PIA right by failing to diligently put such water to beneficial use, and those rights once lost are not revived by subsequent Indian reacquisition.

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