



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: September 30, 1999

TO: Richard Bailey, Adjudicator
Water Resources Department

FROM: Meg Reeves, Assistant Attorney General
Natural Resources Section

Walter, Perry Assistant Attorney General
Natural Resources Section

SUBJECT: Klamath Adjudication/National Park Service Claims
DOJ File No. 690-600-GN0269-97

The National Park Service (NPS) has made various claims in the Klamath Basin Adjudication to reserved water rights in the Crater Lake National Park. You have asked for our assessment of the NPS's entitlement to the reserved water rights claimed. We conclude that, as qualified below, when Congress created the Park it reserved sufficient water for Park purposes, which include domestic and administrative uses, fire protection, preservation of the Park's scenic, natural and historic conservation uses, and preservation of wildlife, with a priority date of 1902. Later additions to the Park reserved water for all Park purposes as of the date of the later acquisitions.

We emphasize that our advice is preliminary, and may change based on arguments made, or evidence presented, by the claimants and others over the course of the adjudication.

I. The Claims

The NPS has made eleven instream claims, ten of which are for "Preservation and protection of all natural and historic objects, timber and wildlife, and conservation of scenery," and one of which is for "Preservation and protection of Crater Lake, including all of its natural and historic objects, wildlife, and conservation of scenery." The NPS has also made ten consumptive use claims, all of which encompass two stated purposes: "Domestic, Administrative, Wildlife," and "Fire Protection."

The NPS asserts that the water rights claimed are necessary to fulfill the primary purposes of the reservation, as encompassed by the documents withdrawing land for the Park,

creating the Park, and creating the NPS: a) Executive Order of February 1, 1886;¹ b) Act of May 22, 1902, ch. 820, 32 Stat. 202 (1902); c) the Act of Aug. 25, 1916, ch. 408, 39 Stat. 535 (1916); d) Act of May 14, 1932, ch. 184, 47 Stat. 155 (1932); e) Act of Dec. 19, 1980, Pub. L. No. 96-553, 94 Stat. 3255 (1980); and f) Act of Sept. 8, 1982, Pub. L. No. 97-250, 96 Stat. 709 (1982).² While the NPS relies upon the Act of 1916 (establishing the NPS) and the Act of 1982 (correcting the boundary of the Park) in stating the purposes of the reservation, the NPS does not appear to rely upon those statutes for claimed priority dates.

Two other documents are involved in the creation of the reservation: acquisitions of private land on December 5, 1940 and January 30, 1942. While the NPS relies upon the 1940 acquisition to establish a priority date,³ the NPS does not appear to rely upon the land acquisition documents for the primary purposes of the reservation.⁴

II. Federal Reserved Water Rights Generally

When the United States reserves land for particular purposes, it implicitly reserves sufficient water to accomplish those purposes.⁵ The reservation is for “only that amount of water necessary to fulfill the purpose of the reservation, no more.”⁶ In addition, water is reserved only to meet the “primary” purpose of the reservation, not “secondary” purposes.⁷ Evaluation of a claim based on an implied reservation of water requires examination of the specific purposes for which the land was reserved, and a determination that “without the water the purposes of the reservation would be entirely defeated.”⁸ The primary purposes of a federal reservation are determined by examining the legislation or executive order that established the reservation.

III. Reservations - Priority Dates

In support of its claimed priority dates the NPS relies upon the date of the Executive Order withdrawing land for the Park, the dates of enactment of the various statutes establishing or altering the boundaries of the Park, and the date of one of the acquisitions of private land.

¹ This “Executive Order” is a one-page hand-written document with no apparent citation.

² See, e.g., Statement and Proof of Claim to the Use of Surface Waters of the Klamath River and Its Tributaries (Claimant: United States of America, National Park Service), Claim #591 at 2 (*hereinafter* Claim #591).

³ See, e.g., claim to “Mainstem of Sun Creek,” List of Priority Dates for Crater Lake and All Stream Reaches (Exhibit App.-7), at 8.

⁴ See, e.g., Claim #591, paragraph 7.

⁵ *Winters v. United States*, 207 US 564, 577 (1908).

⁶ *Cappaert v. United States*, 426 US 128, 141 (1976).

⁷ *United States v. New Mexico*, 438 US 696, 715 (1978).

⁸ *Id.* at 700.

A. The Executive Order

The NPS relies on an 1886 Executive Order to establish reserved right priority dates. A reserved water right may be implied by a withdrawal of land by Executive Order. For instance, in *Arizona v. California*, 373 U.S. 546, 598 (1962), the United States Supreme Court recognized priority dates based on executive orders withdrawing lands as an Indian reservation. Here, however, the 1886 Executive Order did not create a reservation or articulate purposes to which a reserved water right might attach. The Executive Order merely withdrew the lands from settlement or sale “pending legislation looking to the creation of a public park * * *.” It did not reserve the land as a national park, or for any other purpose. No purposes for the land were articulated until the Park’s enabling legislation was passed in 1902. The Executive Order did not establish a federal reservation. Therefore, 1886 is not an appropriate priority date for the Park.

B. Statutes Creating the Park

A reserved water right may be created by an Act of Congress reserving public land for a particular purpose.⁹ The NPS relies, in part, upon the Acts of 1902, 1932, and 1980 in establishing priority dates to the various claims, depending upon when the particular reach became a part of the Park. The Act of 1902 established Crater Lake National Park. The Act of 1932 added certain lands to the Park. The Act of 1980 revised the boundary of the Park. Any land added to the Park by any of these statutes carries an implied reserved right with the priority date of enactment of the statute.

C. Land Acquisitions

The NPS claims “1940” as one priority date pertinent to the mainstem of Sun Creek, reflecting the date of acquisition from private ownership. We believe a 1940 priority date for Park purposes is appropriate.¹⁰

IV. Primary Purposes

The NPS has made eleven instream reserved rights claims, ten of which are for preservation and protection of all natural and historic objects, timber and wildlife, and conservation of scenery, and one of which is for preservation and protection of Crater Lake, including all of its natural and historic objects, wildlife, and conservation of scenery. The NPS has also made ten consumptive use claims, all of which encompass two stated purposes: “Domestic, Administrative, Wildlife,” and “Fire Protection.” Generally, the NPS claims all of the unappropriated water in the Park, in that the in-stream claims are to “all natural flows less those amounts needed for * * * out-of-stream uses.”

⁹ *New Mexico*, 438 US at 700.

¹⁰ The United States Supreme Court cases establishing federal reserved rights have described such rights as arising when the federal government reserves land “from the public domain.” *See, e.g., New Mexico* at 698; *Cappaert*, 426 US at 138. From that it could be argued that no reserved rights attach to acquisitions from private ownership. The Ninth Circuit, however, has held that acquisitions from private ownership do carry reserved water rights. *United States v. Anderson*, 736 F2d 1358, 1361-1362 (9th Cir. 1984).

In 1902, Congress established the Crater Lake National Park “as a public park or pleasure ground for the benefit of the people of the United States [and] for the preservation of the natural objects within said park, and also for the protection of the timber from wanton depredation, the preservation of all kinds of game and fish, * * * and the prevention and extinguishment of forest fires.”¹¹ Congress clarified and confirmed its intent in the act creating the National Park Service in 1916. In that act Congress stated that the purposes of national parks were “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave then unimpaired for the enjoyment of future generations.”¹² Those acts establish Congress’s intent to set aside land for park purposes.

These purposes include preservation of scenic, natural and historic conservation uses and preservation of wildlife. Preservation of scenic, natural and historic conservation uses includes ecosystem maintenance protecting forest growth, vegetative cover, watershed protection, soil and erosion control, lawn watering and fire protection. Also included would be maintenance of water related aesthetic conditions as well as maintenance of natural features. Preservation and conservation of wildlife would include bird watering, wildlife habitat maintenance, and preservation of habitat for fish and other aquatic life. The Water Resources Department (WRD) should recognize the minimum amount necessary to fulfill these park purposes. WRD could conclude that an award of the entire natural flow would be necessary to achieve this purpose.¹³

In addition, the park also has public enjoyment purposes including a) visitor accommodations (campgrounds, hotels, water and sewer); b) visitor centers (water fountains and sewer); c) facilities for visitor enjoyment (trail maintenance, lake levels for water borne enjoyment); and d) ranger stations and housing for park personnel.

The Act of May 14, 1932, ch. 184, 47 Stat. 155 (1932), transfers certain land from the Crater Lake National Forest to the Crater Lake National Park. This Act does not articulate any new purposes of the Park.¹⁴ The lands affected would have the same primary purposes as under the 1902 act, but with 1932 priority. Similarly, lands covered by the 1940 acquisition and the Act of 1980 would have priority as of those dates.

¹¹ Act of May 22, 1902, ch. 820, §§ 1-2, 32 Stat. 202 (1902).

¹² Act of Aug. 25, 1916, ch. 408, § 1, 39 Stat. 535 91916).

¹³ Based on Congress’s stated intent to leave the park “unimpaired for the enjoyment of future generations”, the Colorado water court stated “it appears that Congress * * * intended to reserve *all of the unappropriated water in the park* for park purposes. * * * The fact that the entire flow is needed is sufficient quantification of the right.” *Concerning the Application for Water Rights of the United States of America for Reserved Water Rights in Rocky Mountain National Park*, No. W-8439-76, at 8-9 (Colo. Dist. Ct. Water Div. 1, Dec. 29, 1993) (memorandum of decision and order) (emphasis added).

V. Conclusions

When Congress designated Crater Lake National Park it reserved sufficient water for Park purposes, which include domestic and administrative uses, fire protection, preservation of the Park's scenic, natural and historic conservation uses, and preservation of wildlife, with a priority date of 1902. Later additions to the Park reserved water for all Park purposes as of the date of the later acquisitions.

MRR:mrr:ejt/GEN27708