



DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: September 30, 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 Basin Adjudication  
U.S. Fish and Wildlife Service Claims

The U.S. Fish and Wildlife Service (FWS) has made claims in the Klamath Basin Adjudication to water rights in four different National Wildlife Refuges (NWR's): The Klamath Marsh NWR,<sup>1</sup> the Upper Klamath NWR, the Lower Klamath NWR, and the Tule Lake NWR. The claimed rights encompass state vested rights arising via Bureau of Reclamation (BOR) appropriations for the Klamath Project under the Reclamation Act (32 Stat. 388), *Walton*<sup>2</sup> successor rights to water rights of Klamath Indian Reservation allottees, and federal reserved rights necessary to fulfill the purposes of the wildlife refuges, as articulated by the various laws and executive orders establishing the Refuges. Between all four Refuges, the FWS makes a total of 21 claims to water rights, all of which are for "out-of-stream" purposes. You have asked for our assessment of the FWS's legal entitlement to the claimed water uses. We conclude that with the proper factual demonstration, the FWS may be entitled to irrigation rights within the Klamath Project, *Walton* rights, and federal reserved rights with the priority dates and primary purposes discussed below.

We emphasize that this advice is preliminary, and may change based on evidence or argument presented by claimants or others during the course of the adjudication proceedings.

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<sup>1</sup> Although the FWS refers to the federal reservation as the "Klamath Forest National Wildlife Refuge," (*see, e.g.*, claim #300), Congress changed the name of the Refuge in 1998 to the "Klamath Marsh National Wildlife Refuge." 112 Stat. 2956, § 206.

<sup>2</sup> *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9<sup>th</sup> Cir. 1981).

## **I. Federal Reserved Water Rights Generally**

When the United States reserves land for particular purposes, it implicitly reserves sufficient water to accomplish those purposes.<sup>3</sup> The reservation is for “only that amount of water necessary to fulfill the purposes of the reservation, no more.”<sup>4</sup> In addition, water is reserved only to meet the “primary” purpose of the reservation, not “secondary” purposes.<sup>5</sup> 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.”<sup>6</sup> The primary purposes of a federal reservation are determined by examining the legislation or executive order that established the reservation. The priority date of a reserved right is the date of the creation of the reservation or the date the land in question was made part of the reservation, whichever is later.<sup>7</sup>

## **II. Klamath Marsh National Wildlife Refuge**

The FWS makes eight claims to water rights for the Klamath Marsh NWR. One claim is for a federal reserved right for “wildlife refuge” purposes. Seven claims are for *Walton* allotment successor rights for “irrigation” purposes. All uses are “out-of-stream.”

### **A. The federal reserved right.**

#### **1. The priority date**

The FWS claims a priority date of “July 23, 1985 (Parties to *U.S. v. Adair*); Sept. 7, 1960 (non-parties to *U.S. v. Adair*).”<sup>8</sup> As qualified below, that priority date is correct. The Klamath Tribe was terminated by Public Law 587 (68 Stat. 718), August 13, 1954. That law was amended by Public Law 85-731 (72 Stat. 816), August 23, 1958, which added section 28(f) designating certain lands as the “Klamath Forest National Wildlife Refuge,” effective April 1, 1961. Public Law 85-731 was subsequently amended by Public Law 86-247 (73 Stat. 477), September 9, 1959:

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<sup>3</sup> *Winters v. United States*, 207 US 564 (1908).

<sup>4</sup> *Cappaert v. United States*, 426 US 128, 141 (1976).

<sup>5</sup> *United States v. New Mexico*, 438 US 696 (1978).

<sup>6</sup> *New Mexico*, 438 US at 700.

<sup>7</sup> For every claim we assume that the FWS has provided, on the claim form, priority dates that correspond with the date of the creation of the reservation or the date of any later acquisition. If your review of individual files indicates that is not the case, the date of acquisition should be substituted for the date claimed.

<sup>8</sup> Claim #97-300 at 2.

by changing the effective date for the taking of title by the United States from April 1, 1961, to the earliest date after September 30, 1959, when the Secretary of the Interior determines that funds \* \* \* are available from the sale of stamps under the [Stamp Act].<sup>9</sup>

The Secretary of the Interior so determined on September 7, 1960, stating that:

The effective date \* \* \* for the taking of title thereto by the United States \* \* \* is this 7<sup>th</sup> day of September 1960.<sup>10</sup>

Thus, the date of creation of the federal reservation, and therefore the priority date of the claimed reserved water right, is September 7, 1960 for land that was made part of the reservation on that date.<sup>11</sup>

The Stipulation of October 16, 1986, however, ordered:

2. The priority date of the water right for the Refuge is July 23, 1985.
3. The water right declared by this supplemental judgment pertains to all Klamath Marsh lands now within the Refuge, which has a land area of 16,377 acres.
4. The provisions of this supplemental judgment shall apply to and be binding upon the defendants who are \* \* \* signatory hereto.
5. As to all persons who are not parties to this action and the judgments entered herein, the Government retains the right to claim a federal reserved water right for the Refuge with a priority date of September 7, 1960.<sup>12</sup>

Pursuant to the stipulation, the FWS's claimed priority date for the reserved right of "July 23, 1985 (Parties to U.S. v. Adair)" is correct.

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<sup>9</sup> 73 Stat. 477.

<sup>10</sup> Notice, Department of the Interior, F.R. 8833, Sept. 14, 1960 (F.R. Doc. 60-8517). Note that this is the "Executive Order" referred to by the FWS.

<sup>11</sup> Our cursory review of the complete file for Claim #97-300 indicates that the FWS may have claimed the September 7, 1960 priority date for land that was acquired after that date. *See, e.g.* Claim #97-300 at 22-23. If that is the case, the priority date for that land would be the date of acquisition, not the September 7, 1960 date. *See* note 7.

<sup>12</sup> *United States v. Adair*, U.S. District Court for the District of Oregon, Civ. No. 75-914-SO (October 16, 1986) (supplemental declaratory judgment and stipulation of consent) at 2-3.

## 2. The Purposes

The “wildlife purposes” claimed by the FWS may be gleaned from the documents that authorized and created the reservation. Public Law 85-731 declared that “Such lands are designated as the Klamath Forest National Wildlife Refuge, which shall be administered in accordance with the law applicable to areas acquired pursuant to (the Stamp Act).”<sup>13</sup> The “Executive Order” of September 7, 1960 similarly directed that that the Refuge be administered “in accordance with the law applicable to areas acquired with funds from the sale of stamps under the (Stamp Act).”<sup>14</sup> The Stamp Act authorized expenditures:

for the location, ascertainment, acquisition, administration, maintenance, and development of suitable areas for inviolate *migratory-bird sanctuaries* \* \* \* [and] for such investigations on such refuges and elsewhere in regard to migratory waterfowl as the Secretary of Agriculture may deem essential for the highest utilization of the refuges *and for the protection and increase of these birds*.<sup>15</sup>

The FWS also relies upon the Refuge Recreation Act (RRA) in articulating the “purposes of the reservation.” This reliance is misplaced. Reserved rights may be reserved only to meet the “primary” purpose of the reservation, not “secondary” purposes.<sup>16</sup> The RRA articulates a “compatibility standard,” such that the Secretary of the Interior may allow “incidental or secondary” recreational uses of the refuges only where such uses are not “inconsistent with” the “primary purposes for which the said conservation areas were acquired or established.”<sup>17</sup> Thus, the RRA does not establish any “primary purpose” which may imply a reserved water right.

We conclude that the primary purpose of the Klamath Marsh National Wildlife Refuge, as established by the Stamp Act, is the conservation of migratory birds. We also conclude that some amount of water is necessary to meet the purpose of the reservation,<sup>18</sup> but that the FWS is entitled only to the amount of water without which the purposes of the reservation would be defeated.

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<sup>13</sup> 72 Stat. 818.

<sup>14</sup> F.R. 8833, Sept. 14, 1960.

<sup>15</sup> 48 Stat. 451, 452, sec. 4(a).

<sup>16</sup> *United States v. New Mexico*, 438 US 696 (1978).

<sup>17</sup> 16 USC § 460k

<sup>18</sup> A district court in Idaho has concluded that FWS is not entitled to a water right for the Deer Flat National Wildlife refuge, which was established “as a refuge and breeding ground for migratory birds and other wildlife.” See *In Re SRBA*, Deer Flat Wildlife Refuge Claims, Consolidated Subcase No. 02-10063 (Idaho Dist. Ct. Dec. 31, 1998)(memorandum decision granting State of Idaho’s motion for summary judgment). The opinions of the courts of Idaho are not binding in Oregon. We are not persuaded by the reasoning of that court on this issue.

## **B. Walton Rights**

The FWS claims seven *Walton* rights within the Klamath Marsh NWR, all with a priority date of October 14, 1864, the date of the Treaty creating the Klamath Indian Reservation (16 Stat. 707). The purpose of these water rights is “irrigation” during the “irrigation season,” and the Treaty is the only document relied on to establish the purpose.

When tribal land is converted to allotments, the Indian allottees succeed to the tribe’s treaty irrigation right in proportion to the number of irrigable acres on the allotment. The nature and extent of the water rights obtained by non-Indian successors to these allotments was addressed in *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9<sup>th</sup> Cir. 1981). The court explained:

The non-Indian successor acquires a right to water *being appropriated by the Indian 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.<sup>19</sup>

The Ninth Circuit specifically addressed the federal government’s *Walton* rights within the Klamath Marsh NWR in *United States v. Adair*, 723 F2d 1394 (1983), holding that “the Government is entitled to claim rights as successor to Indian allottees.”<sup>20</sup> However, the court went on to hold that these *Walton* rights (with the 1864 priority date) were distinct from any “reserved right” the government may have to fulfill the purposes of the NWR (which would have the much later priority date of reservation).<sup>21</sup>

Thus, while the FWS may properly claim the seven *Walton* rights with the 1864 priority dates, it is important to bear in mind that these rights are for “irrigation” and not for “wildlife refuge” purposes. Any additional water that is required for “wildlife refuge” purposes will have the later priority dates, discussed above. The *Walton* rights may be recognized if the FWS demonstrated that the rights were either developed while in Indian hands or diligently developed after passing into the hands of a non-Indian.

## **III. Upper Klamath National Wildlife Refuge**

The FWS makes four claims to federal reserved water rights in the Upper Klamath NWR. All four claims are for “wildlife refuge” purposes, and are out-of-stream. The priority dates of the claimed rights are the dates of creation or expansion of the Refuge. Although one expansion

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<sup>19</sup> *Colville Confederated Tribes v. Walton*, 647 F2d at 51 (9<sup>th</sup> Cir. 1981) (emphasis added).

<sup>20</sup> *United States v. Adair*, 723 F2d 1394, 1418 (9<sup>th</sup> Cir. 1983).

<sup>21</sup> *Id.* at 1419.

was made by Public Law 88-567, the other two expansions came from land acquisitions from private individuals.<sup>22</sup> Following a discussion of the “purposes” for all four reserved water rights, we address each claim individually.

### A. The Purposes

Executive Order 4851 established the Upper Klamath NWR on April 3, 1928:

as a refuge and breeding ground for birds and wild animals \* \* \* . The reservation of these lands as a wild life refuge is subject to the use thereof by [the Department of the Interior] for irrigation and other incidental purposes.<sup>23</sup>

Public Law 88-567 (78 Stat. 850) narrowed the purposes of the Refuge, focusing upon “waterfowl management”:

to preserve intact the necessary existing habitat for migratory waterfowl in this vital area of the Pacific flyway, and to prevent depredations of migratory waterfowl on agricultural crops in the Pacific Coast States.

Sec. 2 Notwithstanding any other provisions of law, all lands owned by the United States lying within the Executive order boundaries of the Tule Lake National Wildlife Refuge, the Lower Klamath National Wildlife Refuge, the Upper Klamath National Wildlife Refuge, and the Clear Lake Wildlife Refuge are hereby dedicated to wildlife conservation. Such lands shall be administered \* \* \* for the *major purpose of waterfowl management*, but with full consideration to optimum agricultural use that is consistent therewith.<sup>24</sup>

Although “wildlife conservation” is mentioned, the emphasis was shifted by this statute to “the *major purpose of waterfowl management*” rather than wildlife in general. Public Law 88-567 narrows the “primary purpose” of the Refuge from “wildlife refuge” generally to “waterfowl management” in particular. Congress also acknowledged consistent agricultural use, but did not reserve the land for that purpose. We conclude that the sole primary purpose under Public Law 88-567 is waterfowl management. In addition, although P.L. 88-567 added land to an existing refuge, its narrowed purpose applies to the entire refuge.

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<sup>22</sup> The United States Supreme Court cases recognizing federal reserved rights have referred to reservations “from the public domain.” See, e.g., *United States v. New Mexico*, 438 US 696 (1978) and *Cappaert v. United States*, 426 US 128, 138 (1976). 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).

<sup>23</sup> Executive Order 4851, April 3, 1928 (emphasis added).

<sup>24</sup> Pub.L. 88-567, sect. 2 (emphasis added).

## **B. The Four Claims**

### **1. Claim #97-308 (April 3, 1928)**

This claim correctly asserts a priority date of April 3, 1928, based upon the date of Executive Order 4851. The primary purpose is “migratory waterfowl management.” P.L. 88-567.

### **2. Claim #97-309 (February 26, 1954)**

This claim correctly asserts a priority date of February 26, 1954, based upon the date of issuance of a “Final Judgment In Condemnation and Order Disbursing Funds.”<sup>25</sup> The claimed land was acquired on that date “for use in connection with the Upper Klamath National Wildlife Refuge,” i.e. the purposes stated in Executive Order 4851 (1928). These purposes were narrowed by the passage in 1964 of P.L. 88-567. Consequently, the purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

### **3. Claim #97-310 (September 2, 1964)**

This claim correctly asserts a priority date of September 2, 1964, based upon the date of passage of Public Law 88-567, which expanded the refuge and elaborated upon the purposes of the Refuge. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

### **4. Claim #97-311 (February 14, 1968)**

This claim correctly asserts a priority date of February 14, 1968, based upon the date of execution of an “Exchange Deed.”<sup>26</sup> The land was incorporated on that date into the Upper Klamath National Wildlife Refuge, and thus has the purposes associated with that refuge. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

## **IV. Lower Klamath National Wildlife Refuge**

The FWS makes five claims to water rights in the Lower Klamath NWR. The first claim is to a state vested irrigation right based upon a May 17, 1905 U.S. Bureau of Reclamation (BOR) “Notice of Intent to Appropriate.” The other four claims are to federal reserved water rights for “wildlife refuge” purposes. One of the reserved rights is based upon the 1908 Executive Order establishing the Refuge; one is based upon Public Law 88-567 (1964), which added certain lands to the Refuge and elaborated upon the Refuge “purposes;” and the remaining two are based upon land acquisitions from private individuals.

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<sup>25</sup> This land was acquired from private ownership. *See* note 21.

<sup>26</sup> This land was acquired from private ownership. *See* note 21.

**A. The State Vested Right (BOR Appropriation)**

The FWS claims a “state vested water right” for the purpose of “irrigation for or consistent with Refuge purposes”<sup>27</sup> based upon a May 17, 1905 BOR Notice of Intent to Appropriate.<sup>28</sup> The FWS is entitled to a priority date of May 17, 1905 if the appropriate showing is made for an irrigation right in a Bureau Project.

**B. The Reserved Rights Claims**

Executive Order 924 established the Lower Klamath NWR on August 8, 1908:

as a preserve and breeding ground for native birds \* \* \*. This order is made subject to and is not intended to interfere with the use of any part of the reserved area by the Reclamation Service \* \* \*.<sup>29</sup>

For the reasons already described, we believe Public Law 88-567 (78 Stat. 850) changed the purpose of the Refuge to waterfowl management.

Both the Executive Order and Public Law 88-567 acknowledge agricultural use, but do not reserve land for that purpose.

**1. Claim #97-313 (August 8, 1908)**

This claim correctly asserts a priority date of August 8, 1908, based upon the date of Executive Order 924. The purpose of the Refuge was modified by Public Law 88-567. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

**2. Claim #97-314 (September 2, 1964)**

This claim correctly asserts a priority date of September 2, 1964, based upon the date of passage of Public Law 88-567, which expanded the Refuge and elaborated upon the purposes. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

**3. Claim #97-315 (November 30, 1944)**

This claim correctly asserts a priority date of November 30, 1944, based upon the date of recordation of a deed of sale to the United States of America.<sup>30</sup> The land was incorporated on

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<sup>27</sup> The irrigation purposes are for the irrigation of crops: “Cereal grains, grasses, marsh and upland vegetation necessary for or consistent with Refuge purposes.” Claim #97-312.

<sup>28</sup> Claim #97-312.

<sup>29</sup> Executive Order 924, Aug. 8, 1908.

<sup>30</sup> This land was acquired from private ownership. *See* note 21.

that date into the Lower Klamath National Wildlife Refuge, and has the purposes associated with that refuge. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

**4. Claim #97-316 (July 14, 1949)**

This claim correctly asserts a priority date of July 14, 1949, based upon the date of entry of a judgment of condemnation on that date.<sup>31</sup> The land was incorporated on that date into the Lower Klamath National Wildlife Refuge, and has the purposes associated with that refuge. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

**IV. Tule Lake National Wildlife Refuge**

The FWS makes four claims to water rights in the Tule Lake NWR. The first claim is to a state vested right based upon the same May 17, 1905 Bureau of Reclamation (BOR) “Notice of Intent to Appropriate” for “irrigation” purposes as was relied upon for the Lower Klamath NWR, discussed above. The other three claims are to federal reserved water rights for “wildlife refuge” purposes. All three of the reserved right claims are based upon the Executive Orders establishing or expanding the Refuge.

**A. The State Vested Right (BOR Appropriation)**

The FWS first claims a “state vested water right” for the purpose of “irrigation for or consistent with Refuge purposes”<sup>32</sup> based upon the BOR’s May 17, 1905 Notice of Intent to Appropriate. This claim is identical to that made for the Lower Klamath NWR, discussed above, and the analysis is the same. The FWS may claim vested rights for *irrigation* purposes with the 1905 priority date. Any *additional* water required to fulfill the primary purposes of the Refuge - the reserved right - will have a priority date as of the date of creation or expansion of the Refuge.

**B. The Reserved Rights Claims**

Executive Order 4975 established the Tule Lake NWR on October 4, 1928:

as a refuge and breeding ground for birds and animals. \* \* \* All of the lands involved have been withdrawn for reclamation purposes in connection with the Klamath irrigation project \* \* \*. The reservation of these lands as a bird refuge is subject to the use thereof \* \* \* for irrigation and other incidental purposes.<sup>33</sup>

Executive Order 5945 (November 3, 1932) added certain lands to the Refuge:

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<sup>31</sup> This land was acquired from private ownership. See note 21.

<sup>32</sup> The irrigation purposes are for the irrigation of crops: “Marsh vegetation, cereal grains, row crops, alfalfa and hay necessary or consistent with Refuge purposes.” Claim #97-317.

<sup>33</sup> E.O. 4975, Oct. 4, 1928.

as a refuge and breeding ground for wild birds and animals. \* \* \* All of the lands here involved have been withdrawn for reclamation purposes in connection with the Klamath Irrigation Project \* \* \*. The reservation of these lands as a wild-life refuge is subject to the use thereof \* \* \* for irrigation and other incidental purposes.<sup>34</sup>

Executive Order 7341 (April 10, 1936) added land to the Refuge “in order to effectuate further the purposes of the Migratory Bird Conservation Act.”

Finally, Section 2 of Public Law 88-567 provides that the “major” purpose of the Refuge is waterfowl management.

The Executive Orders, as well as Public law 88-567, refer expressly to use of these lands for irrigation and other incidental uses as well as for wildlife refuge purposes, but they do not reserve the Refuge for agricultural purposes. For the reasons described earlier, we believe the purposes of the Refuge established by the executive orders were narrowed by Public Law 88-567 to waterfowl management.

**1. Claim #97-318 (October 4, 1928)**

This claim correctly asserts a priority date of October 4, 1928, based upon the date of Executive Order 4975. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

**2. Claim #97-319 (November 3, 1932)**

This claim correctly asserts a priority date of November 3, 1932, based upon the date of Executive Order 5945, which expanded the Refuge and superseded Executive Order 4975. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

**3. Claim #97-320 (April 10, 1936)**

This claim asserts a priority date of April 10, 1936, based upon the date of Executive Order 7341, which expanded the Refuge. The purpose for which the right may be recognized is “waterfowl management.” P.L. 88-567.

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<sup>34</sup> Executive Order 5945, Nov. 3, 1932 (emphasis added).