



DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: August 17, 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/ Forest Service Claims

The United States Forest Service has made claims in the Klamath Basin Adjudication for reserved water rights under the Organic Act of 1897, 16 USC §§ 471a-539k, the Multiple Use Sustained Yield Act (MUSYA), 16 USC §§ 528-531, the Wilderness Act, 16 USC §§ 1131-1136 and the Wild and Scenic Rivers Act, 16 USC §§ 1271-1286. You have asked for our assessment of the Forest Service's entitlement to reserved water rights under these statutes. Based on our assessment of the applicable law at this stage of this proceeding we conclude that, with some qualification, the Forest Service may be awarded reserved water rights under the Organic Act, the Wilderness Act and the Wild and Scenic Rivers Act. The weight of authority indicates that the Forest Service is not entitled to reserved water rights under MUSYA.

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

**I. Federal Reserved Water Rights Generally**

When the United States reserves land for particular purposes, it implicitly reserves sufficient water to accomplish those purposes. *Winters v. United States*, 207 US 564, 577 (1908). The reservation is for "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States*, 426 US 128, 141 (1976). In addition, water is reserved only to meet the "primary" purpose of the reservation, not "secondary" purposes. *United States v. New Mexico*, 438 US 696, 715 (1978). 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." *Id.* at 700. The primary purposes of a federal reservation are determined

by examining the legislation or executive order that established the reservation.

The United States may also expressly reserve water for particular purposes. Congress appears to have done so in the Wild and Scenic Rivers Act, discussed below.

## II. The Organic Act

The Organic Act, 16 USC §§ 471a-539k, authorized the President to establish national forests. The Organic Act provides:

No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States \* \* \*

16 USC § 475.

The Organic Act sets forth two primary purposes for which water may be claimed: 1) to secure favorable conditions of water flows; and 2) to furnish a continuous supply of timber. *See also New Mexico*, 438 US at 718 (“Congress intended that water would be reserved [under the Organic Act] only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law”).

For the purpose of furnishing a continuous supply of timber the Forest Service has made claims for administration, road watering, domestic uses, fire-fighting flows, and firebreak flows. The Forest Service may be entitled to reserved water rights for these uses if they are shown to be necessary to achieve the stated purpose. For example, in order to manage the forest, and thus to furnish a continuous supply of timber, the Forest Service must perform number of administrative functions. If the Forest Service has office buildings within the forests to support its functions, the Forest Service would be entitled to water for domestic uses in those buildings. The Forest Service also maintains a network of roads to facilitate harvesting, planting, monitoring, and forest fighting. Dust control may be necessary to use these roads effectively.

Likewise the Forest Service must, in order to furnish a continuous supply of timber, prevent and fight forest fires. The Idaho Supreme Court has stated that “[t]he control and prevention of forest fires is an integral part of the greater purpose of timber protection and a purpose clearly contemplated by Congress.” *Avondale Dist. v. North Idaho Props.*, 577 P2d 9, 18 (1978). Diverting water from a stream to fight fires would clearly fall within this purpose. In addition, the Forest Service may be able to demonstrate the necessity for instream flows as a fire barrier. *See Avondale, id.* (“fire barriers [are] of course part of the larger purpose of timber protection \* \* \*”).

The Forest Service has also claimed an instream flow under the Organic Act for “channel maintenance.” In the Snake River Basin Adjudication Judge Hurlbutt stated that such a claim

may be proper and that the United States should have “the opportunity to prove, as a factual matter, that an instream flow claim for channel maintenance in the National Forests is necessary

to assure favorable conditions of water flows, thereby enhancing the quantity of water available for water users, and then to prove the minimum quantity of water which must be reserved for its fulfillment.”<sup>1</sup> *In Re SRBA*, Organic Act Claims, Consolidated Subcase 63-25243 at 9 (Idaho Dist. Ct. Dec. 21, 1998) (memorandum decision denying the State of Idaho’s motion for summary judgment); *see also United States v. Jesse*, 744 P2d 491, 493-494 (1987). Although these decisions are not binding on the Oregon courts, we believe that Judge Hurlbutt’s analysis, as well as the analysis of the Colorado Supreme Court, is consistent with the United States Supreme Court’s analysis in *New Mexico*, and is persuasive on this point. The Forest Service may be entitled to these flows if it makes the required scientific showing that such channel maintenance is necessary to “securing favorable conditions of water flows” and that the amount of water claimed is necessary for channel maintenance. These determinations may only be made by evaluating the specific channel maintenance claims and the material the Forest Service submitted in support of those claims.

It should be noted, finally, that instream flows for the purpose of protecting fish or wildlife are not part of the primary purposes of the forest under the Organic Act.

### **III. The Multiple Sustained Yield Act**

The Forest Service has also made claims for instream reserved water rights under the Multiple Use Sustained Yield Act of 1960, 16 USC §§ 528-531. We think the Forest Service’s claims under MUSYA are foreclosed by the decisions of the District Court and the Ninth Circuit Court of Appeals in *United States v. Adair*, 723 F2d 1394 (9<sup>th</sup> Cir. 1983), *cert den. Oregon v. United States*, 467 US 1252 (1984), by the United States Supreme Court’s decision in *United States v. New Mexico*, 438 US at 718, and in the case of the claims to 1961 and 1974 priority dates, by the executive acts establishing the forest.

#### **A. The Adair Decisions.**

*United States v. Adair*, 478 F Supp 336 (D. Or. 1979), was an action brought by the United States, through the Forest Service and the Fish and Wildlife Service, for a declaration of water rights of parties “with interests in the former [Klamath] Reservation lands to use of the waters of the Williamson River system[.]” *Id.* at 339. The District Court determined that the Forest Service was not entitled to reserved water rights on the Winema National Forest under MUSYA. The court held that “[t]he Government is only entitled to water which was unappropriated when the forest lands were reserved and which is essential for timber production and conservation of water flow.” *Id.* at 348. The United States did not seek review of that declaration. *United States v. Adair*, 723 F2d at 1417 n. 29.

The *Adair* decisions establish that the Forest Service is not entitled to flows to serve MUSYA purposes, but is entitled to flows necessary to serve Organic Act purposes, on the portions of the Winema National Forest that lie within the Williamson River system.

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<sup>1</sup> The state of Idaho has appealed Judge Hurlbutt’s decision to the Idaho Supreme Court.

**B. *United States v. New Mexico.***

MUSYA, enacted in 1960, provided for broader purposes for federal forests:

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. \* \* \*

16 USC § 528.

In *United States v. New Mexico*, the United States Supreme Court concluded that passage of MUSYA did not change the primary purposes of a forest created before MUYSA, and consequently that no additional reserved rights attached to those forests. 438 US at 715. The United States has nonetheless claimed reserved rights for MUSYA purposes on many stream segments, with a priority date of June 12, 1960, the effective date of MUSYA. The United States apparently reads the *New Mexico* decision to hold only that the enactment of MUSYA did not create new reserved rights with the priority date of the original reservation.

We do not believe the *New Mexico* court left room for such a claim. The court observed, without any temporal limitation, that by enacting MUSYA “Congress did not intend to \* \* \* expand the reserved rights of the United States.” *Id.* at 713. The court observed further that “Congress did not intend in enacting the Multiple-Use Sustained-Yield Act of 1960 to reserve water for the *secondary* purposes there established.” *Id.* at 714 (emphasis in original). Nothing in the court’s opinion lends credence to the position that by enactment of MUSYA, Congress itself reserved water for existing national forests, either as of the date of the enactment or as of any other date.

**C. The 1961 and 1974 Claims**

The United States advances an additional argument with respect to entitlement to MUSYA flows for portions of the Winema National Forest that were created in 1961 and 1974 from former Klamath Reservation lands. With respect to national forests created after enactment of MUSYA, the *New Mexico* court stated “We intimate no view as to whether Congress, in the 1960 Act, authorized the subsequent reservation of national forests out of public lands to which a broader doctrine of reserved water rights might apply.” *Id.* at 715 n. 22. With that statement, the court apparently left open the possibility that national forests established after the enactment of MUSYA *could* have as primary purposes those authorized under MUSYA. The United States argues that the portions of the Winema Forest established in 1961 and 1974, after the passage of MUSYA, are entitled to MUSYA flows, with the reservation date as the priority date.

Assuming for the sake of analysis that the *Adair* decisions did not foreclose this claim, we do not believe the United States is entitled to these claimed MUSYA flows. Even if MUSYA authorized the executive branch to set aside lands with MUSYA purposes as primary purposes, we have not found any persuasive evidence suggesting that the lands at issue were reserved for MUSYA purposes. The former tribal lands were dedicated to forest purposes in

1961 and 1974, but the controlling documents do not indicate the intent to reserve the lands for MUSYA purposes.

For the foregoing reasons, we conclude that none of the Forest Service lands are entitled to reserved water rights under MUSYA.

#### **IV. Wilderness Areas**

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 the analysis in these opinions we think it likely that the Forest Service is entitled to a reserved right for these areas. The priority date would be the date of the enactment creating the wilderness area: September 3, 1964 for Mountain Lakes and Gearheart Wilderness Areas, and June 26, 1984 for Mount Thielsen and Sky Lakes Wilderness Areas. The primary purpose of the right 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. Therefore, the Forest Service could reasonably claim all of the water that had not been appropriated at the time of the wilderness designation.

#### **V. Wild and Scenic Rivers**

The Wild and Scenic Rivers Act established the national policy that certain rivers with outstanding values shall be preserved in free-flowing condition, and that they shall be protected for the benefit and enjoyment of present and future generations. 16 USC §§ 1271-1286, 1271. The Act’s purpose is to implement that policy through the creation of a National Wild and Scenic River system. 16 USC § 1272. The Act expressly reserves water for that purpose:

Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.

The Forest Service is entitled to a reserved right for the amount of water necessary to accomplish the purposes for which each wild and scenic reach was created. *See In Re SRBA, Wild & Scenic River Claims, Consolidated Subcase 75-13316, at 8-11 (Idaho Dist. Ct., July 27, 1998)* (memorandum decision granting, in part, and denying, in part, the United States' motion for summary judgment on reserved water rights claims). The designated rivers for which reserved water rights are claimed by the Forest Service (Sprague and Sycan) are single purpose reaches. The Sprague was designated as a "scenic" river. The Sycan was set aside in three segments, two of them for scenic purposes and one for recreation purposes. The proper amount to award the Forest Service is the minimum amount needed to achieve these purposes. It appears from the filing, however, that the Forest Service based the amounts claimed on the amounts necessary to protect fish resources. *See Claims 97-524; 97-525; 97-526*. In order to support these claims the Forest Service must demonstrate why these flows are needed to protect the designated values, which do not include fish resources.

## **VI. Conclusion**

We recommend that the department recognize Forest Service reserved rights based on the Organic Act, the Wild and Scenic Rivers Act, and the Wilderness Act, but not the Multiple-Use Sustained-Yield Act.

Attached is a breakdown of the Forest Service land types, and the recommended priority date and primary purposes.

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