



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: September 30, 1999

TO: Richard Bailey, Adjudicator
Water Resources Department

FROM: Walter Perry III, Assistant Attorney General
Natural Resources Section

Meg Reeves, Assistant Attorney General
Natural Resources Section

SUBJECT: BLM Claims
Klamath Basin Adjudication

You have asked for our assistance in evaluating claims filed by the Bureau of Land Management (BLM) in the Klamath River Adjudication. The BLM has filed two types of claims. Claims #325-375 are claims based on the "Public Water Reserve No. 107" for human and animal consumption at water holes. Claim #376 is a claim for recreation and fishery purposes, based on the Wild and Scenic Rivers Act.¹ We conclude that the BLM is entitled to the minimum amount of water necessary to serve the purposes of these federal reservations.

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.

1. Public Water Reserve No 107

The Federal Government is entitled to a reserved right for the minimum amount necessary to support the primary purpose of a federal reservation.² In 1926 President Calvin Coolidge signed an Executive Order entitled "Public Water Reserve No. 107"³ (PWR 107). PWR 107 provides:

¹ 16 USC §§ 1271 *et seq.*

² *Winters v. United States*, 207 US 564 (1908); *Cappaert v. United States*, 426 US 128 (1976); *United States v. New Mexico*, 438 US 696 (1978).

³ 43 CFR § 2321.1-19 (a).

It is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

The Executive Order was authorized under the Stock Raising Homestead Act (SHRA).⁴ This Act authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes.

The Secretary of the Interior's recommendation⁵ to the president stated:

The control of water in the semi arid regions of the west means the control of the surrounding grazing areas, possibly in some regions millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon unreserved public domain, it is believed important to retain the title to and supervision of such spring and water holes on the unreserved public domain as have not already been appropriated.

The United States made claims under this Executive Order in adjudications in Colorado and Idaho, and the Supreme Courts of those states recognized those claims. The Colorado Supreme Court stated: "Reserved water from public springs and water holes is available for the purposes of human and animal consumption in the amount necessary to prevent monopolization of the water resources."⁶ The Idaho Supreme Court came to a similar conclusion.⁷ We are persuaded by the reasoning in these cases. Therefore, we conclude that water is reserved under this Executive Order for the primary purposes of stock watering and human consumption and carries a priority date of April 17, 1926.

2. Wild and Scenic Rivers Act

In Claim #376, the BLM has made a claim for a water right on the Klamath River between JC Boyle Dam and the California state line, based on the Wild and Scenic Rivers Act. The claim is for water to support recreation (boating and scenic enjoyment) and fisheries.

⁴ 43 USC §§ 218-219, 222, 291-302.

⁵ Letter of April 17, 1926 from Hubert Work, Secretary of the interior to Calvin Cooledge.

⁶ *United States v. City and County of Denver*, 656 P2d 1, 31 (Colo. 1982).

⁷ *In the Matter of SRBA - Basin Wide Issue #9*, 959 P2d 449 (Idaho 1998), *cert. den.*, *Idaho v. United States*, 119 S Ct 1158 (1999); *cert. den.*, *Hoagland v. United States*, 119 S Ct 1158 (1999).

The Wild and Scenic Rivers Act established the national policy that certain rivers:

* * * which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and * * * protected for the benefit and enjoyment of present and future generations.⁸

In the Act, Congress expressly reserved water for the purposes of the Act.⁹

The BLM is entitled to a reserved right for the amount of water necessary to accomplish the purposes for which the river stretch is designated. This stretch of the Klamath was designated by the Secretary of the Interior on September 22, 1994, under section 2(a)(ii) of the Wild and Scenic Rivers Act of 1968.¹⁰ The Secretary is authorized to designate a section of river upon the application of the Governor of a state if, among other things, the river possesses at least one “outstandingly remarkable” value of the types enumerated. The Governor of Oregon made such a request on April 22, 1993. The National Park Service evaluated the eligibility of the stretch in 1994 and found that the stretch contained seven classes of nationally or regionally significant resources. These resources included endangered species such as bald eagles and Lost River suckers, historic features, prehistoric sites, exceptional scenic beauty, outstanding fishing and whitewater boating opportunities, and Native American traditional use. Based on this report, the Secretary made his designation on September 22, 1994.

As the designation was based on the National Park Service recommendations, the purposes of the reservation include recreation (boating and scenic enjoyment) and fisheries. The BLM is entitled to the minimum amount of water necessary to preserve those uses with a priority date of September 22, 1994.

WNP:wnp:ros:bjw/GEN31545

⁸ 16 USC § 1271.

⁹ 16 USC § 1284(c).

¹⁰ Pub.L. 90-542, 82 Stat. 906 (Oct. 2, 1968), sect. 2(a), 16 USC § 1273.