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Memorandum

To: Regional Director, Region 1, U.S. Fish and Wildlife Service, Portland, OR
Regional Director, U.S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA
Area Director, Portland Area Office, Bureau of Indian Affairs, Portland, OR
Area Director, Sacramento Area Office, Bureau of Indian Affairs, Sacramento, CA

From: Regional Solicitor Pacific Southwest Region *David Kawi*
Regional Solicitor Pacific Northwest Region *Lynn Peterson*

Subject: Oregon Assistant Attorney General's March 18, 1996, Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project

As requested, we have reviewed the March 18, 1996, letter from Stephen Sanders, Assistant Attorney General, Natural Resources Section, to Martha Pagel, Director, Oregon Water Resources Department (OWRD) (March 18 letter). The March 18 letter responds to a request of the Director of the OWRD for "a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and an analysis of water management authority in the basin pending the completion of the adjudication." We are responding jointly because the March 18 letter addresses issues of concern to agencies within the responsibility of both the Pacific Southwest and the Pacific Northwest Regions of the Solicitor's Office.

The issues raised in the March 18 letter arise in the context of actions by the Secretary of the Interior (Secretary), acting through the Bureau of Reclamation (Reclamation), to manage and operate the Klamath Project (Project) and particularly to develop a Project operations plan. In so doing, Reclamation and other Federal agencies with responsibility related to water and wildlife resources, including Indian trust resources, in the Klamath Basin (Fish and Wildlife Service, Bureau of Indian Affairs, and National Marine Fisheries Service) are engaged in a process of consultation with and consideration of the interests of diverse groups,

including agricultural water users, Indian tribes, and wildlife interests, regarding Project operations and the development of a plan intended to govern operations pending completion of the Klamath Basin adjudication presently being conducted by the State of Oregon.¹

The March 18 letter raises issues regarding the authority of the Secretary to manage the Klamath Project pending completion of the adjudication, as well as issues regarding the United States' water rights, including tribal water rights the United States holds in trust, in the Klamath Basin. The March 18 letter is in wide circulation and may be read as calling into question the legal basis of various federal actions to manage the Project, including the development of an operations plan. Our conclusions regarding a number of the issues differ from those contained in the March 18 letter. For these reasons, we think it important to set out in general terms our views on the major issues for our client agencies and interested parties.

This memorandum reaffirms long-standing positions of the United States regarding management of water projects for irrigation, wildlife protection, and Indian rights, and builds on the July 25, 1995, memorandum from the Regional Solicitor, Pacific Southwest Region, to the Regional Director, Bureau of Reclamation, Mid-Pacific Region (July 25 memorandum).² This memorandum does not attempt to provide a complete legal analysis of all the issues raised by the March 18 letter. Further legal analysis will be presented, as needed, in connection with the adjudication or otherwise.

¹ Upon completion of the adjudication and pursuant to section 8 of the Reclamation Act of 1902, the Project will be operated in accordance with the outcome of the adjudication, as well as with other applicable requirements, and the operations plan will be revised as appropriate. As discussed throughout this memorandum, many of the issues raised in the March 18 letter arise as a result of Reclamation's need to meet its obligations and responsibilities in operating the Project, the absence of a completed adjudication of the Klamath Basin, and the lack of any other action by the State of Oregon to administer junior water rights in relation to senior unadjudicated water rights in the Basin.

² The March 18 letter contains several references to the July 25 memorandum, which describes the general rights to the waters of the Klamath and Lost River drainages affected by the operation of the Klamath Project and the obligations of the Bureau of Reclamation to the holders of these rights. We adhere to the conclusions set forth in the July 25 memorandum. This memorandum addresses additional issues not raised in the July 25 memorandum.

I. Management of the Klamath Project

The March 18 letter states that the United States, through development of an operations plan by Reclamation, is asserting that it has the authority to regulate water uses in the Klamath Basin where no such authority exists. March 18 letter, pages 5-7. The United States is not, however, seeking in the operations plan to preempt or supplant the State's role in adjudicating and administering water uses; rather, it is carrying out the responsibilities federal law places on it in managing the Klamath Project.³

An operations plan is being developed through an open process, including consultation with affected government and other interests and an opportunity for public comment, to arrive at an informed decision regarding Reclamation's operation of the Project pending completion of the adjudication. Reclamation is using this process to review Project operations to assure that they are consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act (ESA) and other requirements mandated by law and within the authority of the Secretary.⁴

The March 18 letter states that it is unclear how water must be managed pending completion of the adjudication and declares that the state will not regulate or administer unadjudicated water rights or water uses. March 18 letter, page 5. The March 18 letter also asserts that the federal government lacks authority to manage any water uses in the basin, even those involving water

³ The March 18 letter refers to the project operations plan as the Klamath Project Operations Plan or "KPOP." KPOP is no longer the label applied to the operations plan now being developed which will address project management pending completion of the Klamath Basin adjudication being conducted by the State of Oregon. Our analysis of the underlying authorities is applicable to whatever operations plan is ultimately adopted.

⁴ The March 18 letter bases its analysis and conclusions on the proposition that the 1905 water rights filing by the United States for development of the Klamath Project is limited to irrigation uses. ("The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation." March 18 letter, page 3.) This memorandum focuses on the issue of authority raised in the March 18 letter. The nature of the Project water rights will be addressed at the appropriate time in the pending adjudication.

rights and uses subject to federal law. For the reasons set out below, we have a different view.

The Secretary, through Reclamation, must manage and operate reclamation projects developed pursuant to the Reclamation Act of 1902 (43 U.S.C. § 372 et seq., Act of June 17, 1902, 32 Stat. 388) and its amendments and supplements. Specifically, section 10 of the Reclamation Act, 43 U.S.C. § 373, expressly directs the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" to carry out the reclamation laws. See United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 212 (9th Cir. 1989). Districts and water users within the project must comply with such actions taken pursuant to section 10 and pursuant to contracts between Reclamation and the districts and water users. Id.; Pyramid Lake Paiute Tribe v. Hodel, 878 F.2d 1215 (9th Cir. 1989); Truckee-Carson Irrigation District v. Secretary of Department of Interior, 742 F.2d 527 (9th Cir. 1984), cert. denied, 472 U.S. 1007 (1985). The operations plan process and resulting plan are clearly authorized by section 10 of the Reclamation Act of 1902. See July 25 memorandum for further discussion.⁵

The federal courts have not hesitated to order the Secretary to fulfill his tribal trust obligations and to comply with the ESA in operating reclamation projects. See Pyramid Lake Paiute Tribe v. Morton, 353 F.Supp. 252, 255-56 (D.D.C. 1973). The Secretary, through Reclamation, must operate reclamation projects consistent with vested, fairly implied senior Indian water rights. Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1033 (9th Cir.), cert. denied, 474 U.S. 1032 (1985) (district court did not abuse its discretion in ordering Reclamation to make water available to protect unquantified, unadjudicated treaty-reserved fisheries related water rights); Pyramid Lake Paiute Tribe v. Morton, supra (Secretary of the Interior "was obliged to formulate a closely developed regulation that would preserve water for the Tribe . . . [and] to assert his statutory and contractual authority to the fullest extent possible to accomplish the result." Id. at 256). Cf. Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486

⁵ See also Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977) (water obtained from a federal reclamation project is not there for the taking by the landowner, but for the giving by the United States, and terms upon which water can be put to use, and manner in which rights to use can be acquired, are only for the United States to fix, and if such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States).

U.S. 1007 (1988) (prior to allocating water from a federal irrigation project among project water users, the Department had to adequately protect the tribe's senior instream flow water rights). See also Parravano v. Babbitt, 861 F.Supp. 914 (N.D. Cal. 1994), aff'd, 70 F.3d 539 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996) (Secretary of Commerce properly considered the tribe's federally reserved fishing rights in issuing emergency regulations reducing harvest limits of Klamath River salmon).

Moreover, a specific statutory directive is not needed for Reclamation to manage irrigation deliveries to protect senior tribal water rights. Although the Klamath Tribes' water rights have not yet been quantified in an adjudication, the existence of the Klamath Tribes' rights to the water needed to protect their treaty-reserved hunting and fishing rights (with a priority date of time immemorial) and for agricultural uses has been confirmed by the Ninth Circuit Court of Appeals. United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984). The Yurok and Hoopa Valley Tribes in California hold unadjudicated water rights which vested at the latest in 1891 and perhaps as early as 1855. See, e.g., United States v. Adair, supra; Arizona v. California, 373 U.S. 546, 600 (1963); United States v. Winans, 198 U.S. 371 (1905). Cf. Solicitor's Opinion, M-36979, Fishing Rights of the Yurok and Hoopa Valley Tribes (Oct. 4, 1993).⁶

While the March 18 letter asserts that "[o]nly the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system," March 18 letter, page 7, both federal and state courts have jurisdiction in appropriate cases to establish and enforce the priority system. See, e.g., Cappaert v. United States, 426 U.S. 126 (1976) and Winters v. United States, 207 U.S. 564 (1908). In addition, nothing in the McCarran Amendment, 43 U.S.C. § 666, prohibits the United States from managing and operating its reclamation projects. The priority water rights system is one of the bases upon which reclamation projects are operated. While Reclamation does not adjudicate water rights, the absence of a completed adjudication and Reclamation's legal obligation to manage the project in accordance with law require that Reclamation use its best efforts to operate the project consistent with existing water rights.

⁶ Although tacitly recognizing the fisheries reserved water rights of the Klamath Tribes and the Yurok and Hoopa Valley Tribes, the March 18 letter questions without answering the extent of the Klamath tribal right, and implies that the Yurok and Hoopa Valley Tribes' rights are "paper" rights with no enforceability. March 18 letter, pages 6-7, fn. 4. As discussed above, and in the July 25 memorandum, pages 4-5, in our view the tribes' rights are senior and enforceable against junior uses, and adjustments may be required in how the Klamath Project is operated to be consistent with the tribes' rights.

The March 18 letter further asserts that regulation in favor of senior tribal, federal, and project water rights may not occur until those rights have been adjudicated and cites South Delta Water Agency v. U.S. Department of the Interior, 767 F.2d 531 (9th Cir. 1985), as supporting the proposition. March 18 letter, pages 5-6. However, that case does not address the issue. The Ninth Circuit merely held that, contrary to the State of California's argument, suit cannot be brought pursuant to the McCarran Amendment against the United States for the administration of water rights without a prior general stream adjudication having determined those rights.

The State of Oregon has declined to administer junior rights to protect senior tribal, project, and other federal rights on the grounds that such rights are unknown until the adjudication is complete. However, in the absence of a completed adjudication or other determination of the senior water rights, the project must be operated based on the best available information. For example, the Project irrigation water rights can be reasonably estimated. Similarly, although the tribal instream flow and lake rights are complex, they also may be reasonably estimated; and even though unadjudicated, they are vested, senior rights, and Reclamation must operate the project consistent with those rights. Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States, supra, at 1131-32. ("The priority date of time immemorial obviously predates all competing rights" and to ignore this would violate "the fundamental principles of the appropriative system of water rights.")

The March 18 letter also states that users junior to the Klamath Project should provide water to senior rights holders before the Project does so. March 18 letter, page 7. We agree that to do so best comports with the priority system of water rights administration. But the March 18 letter does not address the situation, as in this case, where the State is not protecting senior water rights. Moreover, the March 18 letter offers no avenue or mechanism for effecting calls on junior users. It adopts a hands-off position even though the State is in a better position to deal with junior nonfederal water users.⁷ In such a situation, the Secretary must exercise what authority he has in managing the Project to protect senior water rights and meet requirements of federal law.

⁷ The March 18 letter sets forth at page 5 Oregon's position that it "neither regulates in favor of nor against unadjudicated water rights." The letter fails, however, to discuss whether the State has authority to regulate junior water rights in relation to senior unadjudicated rights prior to completion of the adjudication, and if so, whether the State should exercise that authority in the Klamath Basin. This has contributed to the demand for Reclamation to prepare an operations plan.

We disagree with the assertions in the March 18 letter regarding the water rights for the national wildlife refuges.⁸ March 18 letter, pages 5-6. Among others, bases for the refuge water rights include state-based rights perfected by applying project water or return flows to beneficial use, and federal reserved rights to the water unappropriated at the time of the refuges' creation and needed to carry out the refuges' purposes. See Arizona v. California, supra, at 598.

In sum, the operations plan is not an attempt to regulate water uses in the Klamath Basin. Rather, it reflects Reclamation's effort to exercise its authority to manage the project consistent with all of its obligations, including senior Indian water rights, contractual obligations and ESA requirements. See Pyramid Lake Paiute Tribes v. Morton, supra; United States v. Alpine Land and Reservoir Co., supra.⁹

II. The Project Operations Plan is not a "Reallocation" of Klamath Project Water

The March 18 letter states that obligations to Indian tribes and listed species do not provide authority to "reallocate" water

⁸ Although the distinction may not be at issue here, we also disagree with the view expressed at page 6 of the March 18 letter that "[as] a technical matter, only 'land set aside from the public domain' may acquire a reserved right" and not land acquired by the United States. See Memorandum, Department of Justice, Office of Legal Counsel, June 16, 1982, at pages 77-78. In that opinion, the issue of reserved rights for acquired lands was directly addressed:

Much of the language used by the Court to describe the scope of the reservation doctrine, in fact, is broad enough to cover all lands set aside for a particular federal purpose, regardless of the prior ownership of the land. . . . [I]n [United States v. New Mexico], the Court did not suggest that the reserved rights doctrine applies only to lands that may be formally reserved from the public domain; it recognized rather that the doctrine applies to any land that has been set aside as a national forest (which could be reserved or acquired lands). See 438 U.S. at 698-99.

Id. at 78.

⁹ For the Newlands Project, discussed in United States v. Alpine Land and Reservoir Co., supra, the initial project operation criteria and procedures (OCAP) were issued prior to a final adjudication of water rights in the Newlands Project, while the final OCAP were adopted after the final decree was affirmed. The Alpine decision upheld the final OCAP.

absent specific federal authority for the new use and compliance with state law. March 18 letter, page 9; see also pages 3, 5, 8, 10, 11. Once again, we believe the March 18 letter mischaracterizes the nature of the issue. The lack of a completed water rights adjudication does not legitimize uses of water that would not otherwise be authorized. Reclamation's actions are intended to result in management and operation of the Klamath Project in a manner which is consistent with and carries out all its legal obligations and responsibilities. Operation of the project to reflect Reclamation's obligations is not a reallocation of water.

The March 18 letter cites several cases to support the proposition that Project water stored under a water right "acquired for irrigation" cannot be used to meet the United States' obligations to Indian tribes and under the ESA. March 18 letter, pages 9-10. In our view, the cases cited either do not apply to the situation at hand or do not support the proposition that the United States may ignore Indian water rights or its obligations under the ESA.

In Nevada v. United States, 463 U.S. 110 (1983), the Supreme Court simply held that the United States could not ignore the limits of decreed federal reserved or other water rights where all the water rights, including the Indian rights, had already been fully adjudicated. Nevada does not address the issue of whether project operations must be consistent with existing senior water rights or the ESA where none of the water rights have been fully adjudicated.

In Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985), the court found that the Secretary's decision to operate Stampede Dam solely for the purpose of conserving an endangered species of fish was not arbitrary. Although the court explicitly found that it need not address tribal water rights to reach its decision, the court stated that any asserted obligation of the Secretary to enter into contracts for the sale of project water for municipal and industrial purposes pursuant to the project's authorizing legislation should be considered only when his superseding obligations to the Tribe and under the ESA have been fulfilled. (This case concerned the same Reclamation project that was the subject of Nevada v. United States. However, the water rights connected with Stampede Dam are not adjudicated.)

Likewise, in O'Neill v. United States, 50 F.3d 677 (9th Cir.), cert. denied, U.S. 116 S. Ct. 672 (1995), the court held that the United States was not liable for not furnishing the full contractual amount of water to water users when that amount could not be delivered consistent with the requirements of the ESA and the Central Valley Project Improvement Act, Pub. L. No. 102-575. The court found that the provisions in the contract which precluded

federal liability for water shortage were broad enough to include the "mandates of valid legislation."¹⁰

Reclamation is mandated by the ESA to avoid jeopardizing the continued existence of listed species and to conserve listed species.¹¹ In addition, individual water users and water districts, as well as Reclamation, are subject to the prohibition in section 9 of the ESA on taking listed species. See, e.g., United States v. Glenn-Colusa Irrigation District, 788 F.Supp. 1126 (E.D. Cal. 1992).

As a final matter, the March 18 letter seems to assume that once the Klamath Basin adjudication is completed and the State begins administering the water rights, the Secretary will no longer need to manage the Project. See, e.g., March 18 letter, pages 2, 4-5. The cases make clear, however, that the Secretary's authority and responsibilities under federal law to manage the Project will continue, concurrent with the requirement to operate the Project consistent with adjudicated water rights. See Pyramid Lake Paiute Tribes v. Morton, supra and United States v. Alpine Land and Reservoir Co., supra, cases which involved previously adjudicated project water rights.

III. The Klamath Basin Adjudication

The March 18 letter addresses the three general categories of claims the author believes will be resolved in the Klamath Basin adjudication. We do not propose to address these issues now. The United States will make appropriate arguments and set forth in full the federal position regarding these issues in the course of the adjudication. We do, however, make the observations set out below with respect to certain points raised in the March 18 letter concerning the adjudication.¹²

¹⁰ Similar shortage provisions are found in Klamath Project contracts.

¹¹ Reclamation is also obligated to confer with the Fish and Wildlife Service or the National Marine Fisheries Service on any action which is likely to jeopardize the continued existence of any species proposed to be listed, and is authorized to take conservation measures to minimize impacts on the proposed species. ESA, section 7(a)(4), 16 U.S.C. § 1536(a)(4), and section 5(a), 16 U.S.C. § 1534(a).

¹² The March 18 letter was written by an Assistant Attorney General of the State of Oregon who we understand will advise the decision maker in the administrative phase of the adjudication. Several aspects of his letter raise a concern that he appears to have taken positions on issues to be determined in the adjudication before the parties have had opportunity to brief and litigate them.

The March 18 letter states that Klamath Project water rights "likely . . . are held by the irrigation districts or perhaps by individual district members" rather than by the United States. March 18 letter, page 4. It is well established, however, that the United States through the Bureau of Reclamation holds the legal title to the water rights for the project. Nevada v. United States, *supra*; Ide v. United States, 263 U.S. 497 (1924); United States v. Humboldt Lovelock Irr. Light & Power Co., 97 F.2d 38 (9th Cir. 1938), *cert. denied*, 305 U.S. 636 (1938); United States v. Tilley, 124 F.2d 850 (8th Cir. 1942); see also Solicitor's Opinion, M-36966, 97 I.D. 21, Filings of Claims for Water Rights in General Stream Adjudications (July 6, 1989); Solicitor's Opinion, M-36967, 97 I.D. 32, Authority to Provide Water to Stillwater Wildlife Management Area (July 10, 1989). In 1905, the United States, through the Secretary of the Interior, pursuant to the Reclamation Act of 1902 and Oregon law, initiated the appropriation of the amount of water necessary to develop the Klamath Project.

The United States Supreme Court has long held that individual water users who have entered into contracts with the United States to receive project water, hold a beneficial interest in that portion of the project water right actually put to beneficial use. Nevada v. United States, *supra*; Nebraska v. Wyoming, 325 U.S. 589 (1945); Ickes v. Fox, 300 U.S. 82 (1937). Unlike the United States and individual water users, in the typical case irrigation districts hold neither a legal nor beneficial interest in the water right. They have no property interest in the water, nor have they in their own right diverted the water to storage. Truckee-Carson Irrigation District v. Secretary of the Interior, *supra*. Moreover, the districts have not put the water to beneficial use and thus do not hold an interest in the water right.

In light of the foregoing, Reclamation is the proper entity to file claims on and hold the water rights for the Klamath Project, 97 I.D. 21, recognizing the beneficial interest of individual water users entitled to use project water for beneficial uses, provided that the use comports with the terms of applicable Reclamation contracts and state and federal law.

Although the March 18 letter does not discuss the subject, there are federally owned lands within the project boundaries that receive project water. The United States is the proper party to file for those water rights in this situation, where the United States holds both the legal and beneficial interests in the lands and the water.

Finally, the United States has control of the project return flows within the boundaries of the project, has the right to use the return flows, and has the right to continue such use. Ide v. United States, *supra*. Contrary to assertions in the March 18 letter, the United States Supreme Court did not hold in Ide that use of recaptured water had to be the original use; the Court

merely held that the recaptured water had to be beneficially used. Thus, we do not believe that Ide or subsequent cases preclude the United States from using return flows for uses other than irrigation and domestic purposes.

Similarly, Jones v. Warm Springs Irrigation District, 91 P.2d 542 (Or. 1939), is not applicable to circumstances where water remains within the project boundaries and control of the appropriator; that case concerned return flow deemed to be abandoned because there had been no indication of an attempt to recapture. Finally, the Oregon Supreme Court in Cleaver v. Judd, 393 P.2d 193 (Or. 1964), recognized that under Oregon law an appropriator is justified in recapturing waste, seepage, and occasional surface water runoff.

IV. CONCLUSION

Pending completion of the adjudication, Reclamation is authorized and obligated to manage and operate the Klamath Project consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act and other requirements mandated by law and within the authority of the Secretary. These obligations may be clarified or otherwise affected by the pending adjudication; however, Reclamation will continue to have authority to manage and operate the Project consistent with its obligations after completion of the adjudication.