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TO: Regional Director, Bureau of Reclamation,
Mid-Pacific Region

FROM: Regional Solicitor, Pacific Southwest Region

SUBJECT: Certain Legal Rights and Obligations Related
to the U.S. Bureau of Reclamation, Klamath
Project for Use in Preparation of the Klamath
Project Operations Plan (KPOP)

This memorandum describes the general rights to the waters in the Klamath and Lost River drainages affected by the operation of the U.S. Bureau of Reclamation's (Reclamation) Klamath Irrigation Project located within the Upper Klamath and Lost River Basins in Oregon and California. In addition, the obligations of Reclamation to the holders of these rights are discussed. The rights that are treated in this memorandum include those of the Klamath Project water users (those who hold contracts with the United States to receive water from the project), the Upper Klamath, Lower Klamath, Tule Lake, and Clear Lake National Wildlife Refuges (NWR) managed by the U.S. Fish and Wildlife Service (these refuges are located within the exterior boundaries of the Klamath Project), and the Klamath, Yurok, and Hoopa Tribes (they have treaty-based or federally reserved fishing and water rights that are or may be affected by project operations). None of the above water rights has been quantified.

Rights

Klamath Project Water Users

The Klamath Project water users obtain their supply of water for irrigation purposes from the project facilities pursuant to various contracts with Reclamation entered into pursuant to the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 371 et seq., as amended and supplemented. The contracts are between Reclamation and a water district or Reclamation and an individual water user. These contracts provide, in general, that the water user is to receive enough water to satisfy the beneficial use for

¹ The existence and nature of the Klamath Tribes' reserved water rights for hunting, fishing, and gathering were declared in United States v. Adair, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984).

the irrigation of a specified acreage. Certain of the contracts specify the beneficial use amount on a per acre basis.

The underlying water rights for the project, upon which the water supply stated in each of the contracts discussed above depends, were obtained by Reclamation, in accordance with state law, in 1905, when Reclamation filed a notice of intent to appropriate all of the available water in the Klamath River and Lost River and their tributaries in Oregon. Similar filings were made for the waters originating in California, within the Lost River and Clear Lake drainages.² Subsequent to these filings, Reclamation constructed project facilities through which water is delivered to the project water users. The project's 1905 water rights are junior to the reserved water rights of the tribes but senior to the reserved water rights of the refuges, as discussed below.

Federal law provides that Reclamation obtain water rights for its projects and administer its projects pursuant to state law relating to the control, appropriation, use or distribution of water used in irrigation, unless the state laws are inconsistent with express or clearly implied congressional directives. 43 U.S.C. § 383; California v. United States, 438 U.S. 645, 678 (1978); appeal on remand, 694 F.2d 117 (1982). The beneficial ownership of a project water right is in the water users who put the water to beneficial use. Nevada v. United States, 463 U.S. 110 (1983). Under law of most western states a water right is obtained through appropriation followed by application within a reasonable time to beneficial use. Nebraska v. Wyoming, 325 U.S. 589 (1945); Ickes v. Fox, 300 U.S. 82 (1937). Oregon law (as well as California law) is similar to the laws of most other western states in that actual application of the water to the land is required to perfect a water right for agricultural use.³

² Oregon statutes concerning the appropriation of water before February 24, 1909, the effective date of the Oregon Water Rights Act of 1909, provided that the extent of the appropriation was determined by the actual capacity of the completed diversion structure, assuming that the requirement to post a notice of intent to appropriate together with application of water to beneficial use within a reasonable time had occurred. See In re Waters of the Tualatin River and its Tributaries, 366 P.2d 174 (Or. 1961). The laws for appropriation of water in California that were in effect in 1905 were similar to those in Oregon. Cal. Civil Code of 1872, §§ 1410-22 (Deering 1977). The effective date of the California Water Commission Act, which established California's current appropriation scheme, is December 19, 1914.

³ See ORS §§ 539.010 et seq.; State ex rel. v. Hibbard, 570 P.2d 1190, 1194 (Or. Ct. App. 1977); Alexander v. Central Oregon Irrigation District, 528 P.2d 582 (Or. Ct. App. 1974), and Cal.

Oregon also recognizes that water for irrigation purposes is appurtenant to the land for which it is appropriated and applied, but is not inseparable from the land. In re Deschutes River and Tributaries, 286 P. 563 (Or. 1930); see also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir.), cert. denied, 464 U.S. 863 (1983). Federal law concerning Reclamation projects also provides that the use of water acquired under the Act "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and the limit of the right." 43 U.S.C. § 372. Beneficial use is determined in accordance with state law to the extent not inconsistent with congressional directives. See Alpine Land & Reservoir Co., 697 F.2d at 853-854; see also California v. United States, 438 U.S. at 678.

Wildlife Refuges

There are two National Wildlife Refuges that are particularly dependent on project operations: Lower Klamath and Tule Lake NWRs.⁴ The Lower Klamath NWR consists of 51,713 acres which straddle the Oregon-California border. This NWR was created by Executive Order No. 924 (Aug. 8, 1908) "as a preserve and breeding ground for native birds." The boundaries of the Lower Klamath NWR were altered by Executive Order No. 2200 (May 14, 1915). The Tule Lake NWR is a 39,990 acre marsh area located in northern California just south of the Oregon border. Tule Lake was created by Executive Order No. 4975 (Oct. 4, 1928) also "as a refuge and breeding ground for birds."⁵

Each refuge has a federal reserved water right to the amount of water, unappropriated at the time of creation of the refuge, necessary to fulfill the primary purposes of the refuge. See United States v. New Mexico, 438 U.S. 696 (1978). The priority date for the reserved water right of each refuge is the date of the executive order creating that refuge. See Cappaert v. United

Water Code § 1240; Joerger v. Pacific Gas & Elec. Co., 276 P. 1017 (Cal. 1929); Madera Irr. Dist. v. All Persons, 306 P.2d 886 (Cal. 1957).

⁴ There are two other National Wildlife Refuges within the exterior boundaries of the project that are also dependent on project operations. The Upper Klamath NWR was created in 1928 and is located at the northern portion of Upper Klamath Lake. It encompasses 14,965 acres of marsh and open water. The Clear Lake NWR was created in 1911 and encompasses 20,000 acres of water surface and upland area within the Clear Lake drainage in the Lost River Basin.

⁵ The interrelation of the Klamath Project irrigation uses and the NWR purposes are further delineated in the Kuchel Act, 16 U.S.C. §§ 695k-695r.

States, 426 U.S. 128, 138 (1976). In addition, certain lands within the Lower Klamath and Tule Lake refuges that are irrigated have a priority date of 1905 based on the Klamath Project water rights. Finally, the refuges receive significant quantities of return flows and other project waters which, although initially used for irrigation purposes, are beneficially reused for refuge purposes.

Klamath Indian Tribes

The Klamath Indian Tribes have treaty-based rights. The exercise of certain of these rights are affected by project operations. The Tribes' primary interest is in the operation of Upper Klamath Lake because it serves as habitat for fish protected by their treaty rights, including two endangered species of fish, the Lost River and shortnose suckers. These fish are a traditional food source for the Tribes. Changing water elevation in the lake and recurring water quality problems impact the suckers.

A treaty entered into in 1864 reserves to the Klamath Tribes fishing, hunting, and gathering rights on lands that were formerly part of the original Klamath Indian Reservation in Oregon.⁶ The reservation abutted Upper Klamath Lake and included several of its tributaries, notably the Williamson River. Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 107. The treaty reserves to the Tribes a federal Indian reserved water right to support their hunting, fishing, and gathering rights.⁷ United States v. Adair, 723 F.2d 1394 (9th Cir.), cert. denied, 444 U.S. 1252 (1984). The Tribes' water

⁶ In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act. Act of Aug. 13, 1954, c. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C. §§ 564-564x). Under this Act, reservation lands were disposed to private parties, individual Indians, the Forest Service and the Fish and Wildlife Service, but the Tribes' hunting, fishing, and gathering rights, and supporting water rights, were left intact. United States v. Adair, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); Kimball v. Callahan, 590 F.2d 768, 775 (9th Cir.), cert. denied, 444 U.S. 826 (1979); Kimball v. Callahan, 493 F.2d 564, 568-69 (9th Cir.), cert. denied, 419 U.S. 1019 (1974). The Klamath Tribes were later restored as a federally recognized tribe under the Klamath Restoration Act of 1986. Pub. L. No. 99-398, 100 Stat. 849.

⁷ The Tribes' water right is not dependent on state law, but rather is controlled by federal law. However, in an adjudication of water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666, this federal right would be subject to quantification by a state court. Adair, 723 F.2d at 1411 n.19.

Tribes' water right includes "the right to prevent other appropriators from depleting the streams['] waters below a protected level in any area where the non-consumptive right applies." Adair, 723 F.2d at 1411; accord Joint Board of Control v. United States, 832 F.2d 1127, 1131-32 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988); Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1033 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985).

The Tribes' water right includes the right to certain conditions of water quality and flow to support all life stages of fish. See United States v. Anderson, 591 F.Supp. 1, 5-6 (E.D. Wash. 1982), aff'd in part & rev'd in part on other grounds, 736 F.2d 1358 (9th Cir. 1984); see also United States v. Gila Valley Irrigation Dist., 804 F.Supp. 1, 7 (D. Ariz. 1992), aff'd in part & vacated in part, 31 F.3d 1428 (9th Cir. 1994), on remand Globe Equity No. 59, Phase IV, slip op. (April 14, 1995). The Tribes' water right attaches to bodies of water located within the original boundaries of the Klamath Indian Reservation. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support a tribal fishery within the original reservation.⁸ Cf. Arizona v. California, 373 U.S. 546, 595 n.97, 600, decree entered, 376 U.S. 340, 344 (1964) (awarding reserved water right in off-reservation river). The standard to be applied in determining the quantity of water secured by this right has not been determined as of the date of this memorandum. The Tribes' water right is aboriginal in origin and thus has a priority date of time immemorial. Adair, 723 F.2d at 1415.

Yurok and Hoopa Valley Indian Tribes

The Yurok and Hoopa Valley Tribes have federal Indian reserved fishing rights to take anadromous fish within their reservations in California. Memorandum from the Solicitor to the Secretary, Fishing Rights of the Yurok and Hoopa Valley Tribes, M-36979 (Oct. 4, 1993) (Sol. Op.). These rights were secured to the Yurok and Hoopa Indians by a series of nineteenth century executive orders and confirmed to the Yurok and Hoopa Tribes by

⁸ In the pending Snake River Basin Adjudication in Idaho, the United States has made claims for off-reservation instream flow water rights derived from Indian fishing rights to anadromous fish. The quantity of flow claimed is that amount required to provide adequate flows to maintain fisheries habitat in the stream reach on a monthly basis.

the 1988 Hoopa-Yurok Settlement Act (HYSA), 25 U.S.C. § 1300i et seq.

In 1855, the President, by Executive Proclamation, established the Klamath Reservation in California.¹⁰ I C. Kappler, Indian Affairs: Laws and Treaties 816-817 (1904). The Hoopa Valley Reservation was formally set aside for Indian purposes by executive order in 1876, and the reservation was extended by another executive order in 1891 to encompass the Klamath Reservation and the connecting strip of land in between.¹¹ Id. at 815; see People v. McCovey, 685 P.2d 687, 689 (Cal. 1984); see also Donnelly v. United States, 228 U.S. 243, 253-259 (1912); Blake v. Arnett, 663 F.2d 906, 911 (9th Cir. 1981); Esler v. Gill Net Number One, 54 Cal. Rptr. 568, 571-72 (1966). The HYSA partitioned the extended reservation into the present Hoopa Valley and Yurok Reservations and declared the assets of each reservation held in trust by the United States for the benefit of the respective Tribes. 25 U.S.C. § 1300i-1(b).

The Yurok and Hoopa Valley Tribes' fishing rights entitle them to take fish for ceremonial, subsistence, and commercial purposes. United States v. Eberhardt, 789 F.2d 1353, 1359 (9th Cir. 1986). Their fishing rights "include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living." Sol. Op. at 3.

The executive orders setting aside what are now the Yurok and Hoopa Valley Reservations also reserved rights to an instream flow of water sufficient to protect the Tribes' rights to take fish within their reservations. See Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir.), cert. denied, 454 U.S. 1092 (1981); Anderson, 591 F.Supp. at 5-6. As with the Klamath Tribes, the Yurok and Hoopa Tribes' water rights include the right to prevent other appropriators from depleting the streams' waters below a protected level. See Joint Board of Control, 832 F.2d at 1131-32; Adair, 723 F.2d at 1411; see also Kittitas Reclamation District, 763 F.2d at 1033. The Tribes' rights include the right to certain conditions of water quality and flow

⁹ For the purpose of determining the existence of reserved water rights, there is no consequence to the fact that the Tribes' rights are derived from executive orders rather than treaties. Arizona v. California, 373 U.S. at 598.

¹⁰ The executive order establishing the Klamath Indian Reservation was issued pursuant to the Act of March 3, 1853, 10 Stat. 238, authorizing the President "to make . . . reservations in the State of California for Indian purposes."

¹¹ These executive orders were issued pursuant to the Act of April 8, 1864, 13 Stat. 39.

to support all life stages of fish. See Anderson, 591 F.Supp. at 5-6; see also Gila Valley Irrigation District, 804 F.Supp. at 7. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support the Tribes' on-reservation fisheries. Cf. Arizona v. California, 373 U.S. at 595 n.97, 600 (awarding reserved water right in off-reservation river). The exact standard to determine the amount of water secured by these rights has not been determined as of the date of this memorandum. The priority date of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier.

Obligations

Klamath Project Water Users

Reclamation has an obligation to deliver water to the project water users in accordance with the project water rights and the contracts between Reclamation and the water user (which may be through a water district) subject to the availability of water. Reclamation must protect the rights of the users of project water, see Filing of Claims for Water Rights in General Stream Adjudications, M-36966, 97 I.D. 21 (July 6, 1989), and cannot "ignore . . . the obligations that necessarily devolve upon it from having mere title to water rights for the [project], when the beneficial ownership of these water rights resides elsewhere." Nevada v. United States, 463 U.S. at 127. Water would not be available, for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act. Water lawfully stored in the project's reservoirs can be used for domestic and irrigation purposes to the extent the water is applied to beneficial use within the project. Reclamation cannot store or divert water for project purposes that is needed to satisfy prior existing rights.

Refuges

Reclamation has an obligation to ensure that the refuges receive adequate water to fulfill their federal reserved water rights (i.e., the amount of water necessary to fulfill the primary purposes of the refuges) when in priority and when water is available. In addition, Reclamation can continue to provide available project water for beneficial reuse by the refuges to the extent of past and current usage and consistent with project purposes.

The Kuchel Act (see footnote 5) requires that the refuge lands be used primarily for waterfowl purposes but with full consideration given to optimum agricultural use so far as agricultural use is consistent with the refuge purposes. 16 U.S.C. § 6951. In addition, the pattern of agricultural leasing existing in 1964 is to be continued on specified lands within the refuges as

consistent with proper waterfowl management. Id. § 695n. Thus, it is possible that certain irrigated lands within the refuge boundaries would not be cultivated in the usual manner if that would be inconsistent with the purposes of the refuges. If such change in cultivation resulted in less water being used for irrigation within the project, then more water may be available for the refuges, pursuant to a change in the water right or otherwise, subject to prior existing rights and water availability.

The Tribes

The United States has a trust responsibility to protect tribal trust resources. This trust responsibility is one held by all federal agencies. Pyramid Lake Paiute Tribe v. Department of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990). In general, the trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes. See Mitchell v. United States, 463 U.S. 206, 224-226 (1982); Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 425-426 (1991); Joint Board of Control of the Flathead, Mission and Jocko Irr. Dist. v. United States, 862 F.2d 195 (1988).

Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation's trust responsibility to protect tribal trust resources.

With respect to the Tribes' fishing rights, Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect those rights, even though those activities take place off-reservation. See Parravano v. Babbitt, 861 F.Supp. 914, 924 (N.D. Cal. 1994), appeal pending. Thus, Reclamation must use any operational discretion it may have to ensure that those rights are not diminished. In doing so, Reclamation, in formulating any operating plan, must minimize unnecessary waste and take such other steps within its legal and contractual authority as are necessary to protect tribal rights. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252, 255-256 (1973). In relation to a different Reclamation project, a court directed Reclamation, in formulating an operating plan, to provide, among other things, an effective means to measure water use, to end delivery of water to unentitled lands, and to assure compliance with such measures by project water users. Id. at 258.

Endangered Species Act

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq., requires Reclamation to review its programs and utilize them in furtherance of the purposes of the ESA. 16 U.S.C. § 1536(a)(1). Reclamation has an obligation not to engage in any action that is likely to jeopardize the continued existence of a listed species. In addition, Reclamation must consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (with respect to anadromous species) to insure that any action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat of such species.¹² Id. § 1536(a)(2). If as a result of such consultation, FWS or NMFS, as appropriate, finds that the action will result in the incidental taking of a listed species but is not likely to jeopardize the continued existence of the species, or that there is a reasonable and prudent alternative to the proposed action that will avoid such jeopardy, then FWS or NMFS will set forth the impact of such incidental taking, the reasonable and prudent measures necessary to minimize such impact, and the terms and conditions that Reclamation must comply with to implement such measures. Id. § 1536(b)(4).

Two species of sucker fish that occupy Upper Klamath Lake and its tributaries (as well as other water bodies within and adjacent to the project) have been listed as endangered under the ESA and Reclamation has consulted with the FWS with respect to the effects of project operations on these species. The FWS issued a Biological Opinion in 1992 (Long Term Biological Opinion) that set certain mandatory lake level elevations for Upper Klamath Lake necessary to avoid jeopardizing the species.

The coastal steelhead has been proposed for listing by NMFS. 60 Fed. Reg. 14253 (March 16, 1995). Reclamation has, through the conferencing provisions of the ESA, Id. § 1536(a)(4), determined that the 1995 operations of the Klamath Project will not jeopardize the continued existence of the steelhead. NMFS has concurred in this determination.¹³

Conclusion

None of the rights discussed above are quantified (except see footnote 1). Even so, Reclamation is not free to disregard these

¹² Critical habitat has not been designated for the Lost River and shortnose suckers.

¹³ A petition to list the chinook salmon has been received by NMFS. 60 Fed. Reg. 30263 (June 8, 1995). NMFS has proposed to list the coho salmon. ____ Fed. Reg. (____ July ____, 1995).

rights, and its discretion to determine the necessary means to protect and fulfill each of these rights is limited. Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights. Reclamation must also, consistent with its statutory, contractual and trust obligations, fulfill the rights of the project water users and the refuges.

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