



United States Department of the Interior  
OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

January 14, 2021

Memorandum

To: Secretary  
From: Solicitor  
Subject: Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020 Letter of the Secretary of the Interior

Pursuant to the direction given in your November 12, 2020, letter, I provide the following analysis of contracts between the Bureau of Reclamation (Reclamation) and water users and associated entities which receive water through the Klamath Project. This analysis focuses on the degree of discretionary authority provided by the contracts to Reclamation. As discussed in the SOL October 2020 Memorandum, if a contract provides Reclamation with discretionary authority to take action that could benefit species listed under the Endangered Species Act (ESA), Reclamation must consult under ESA Section 7 on the impacts of that action. However, if a contract does not provide discretionary authority, Reclamation must include the impacts of the action in the environmental baseline of the consultation.

This memorandum is intended to implement the direction given in the Secretary's Letter and (2) inform Reclamation as it proceeds in accordance with the guidance provided by the *Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act* (Reassessment) and, in particular, *Section 5.1.5 Coordinating Project Diversions*. This memorandum incorporates by reference the analysis contained in the SOL October 2020 Memorandum.

I. Introduction and Identification of Key Clauses

In accordance with the Reassessment, Reclamation must address contractual provisions as part of the consultation on overall Project operations and allocation of water. The portion of the consultation which involves the contracts affects only the water allocated to the Project.

SOL has identified six types of contractual provisions which have the potential to either impart discretionary authority or constrain the discretion of Reclamation in ways which could affect ESA listed species. These provisions are (1) liability waivers; (2) provisions addressing beneficial use to determine the amounts of water delivered under a contract and the dates of delivery; (3) the total amount of water which a contract obligates Reclamation to provide per year or irrigation season; (4) the total amount of water which a contract obligates Reclamation to provide per month; (5) the dates of delivery; and (6) reapportionment clauses.

For contracts which do not impart discretionary authority, and which are therefore included in the environmental baseline, the contracting parties other than Reclamation may still be subject to the ESA Section 9 take prohibition. *Sierra Club v. Babbitt*, 65 F.3d 1502 (9<sup>th</sup> Cir. 1995). Furthermore, whether Reclamation possesses discretionary authority in contract implementation does not affect the underlying water rights of the parties to the contract or other entities.

Between 1908 and 1972, Reclamation, acting through and on behalf of the Secretary, entered into over 150 perpetual contracts with district entities and individual landowners to provide water from the Project for irrigation and related purposes, in exchange for payment of Project costs and other conditions. In total, Reclamation's perpetual contracts for water from the Project (Upper Klamath Lake [UKL], Klamath and Lost River, Clear Lake and Gerber reservoirs) cover 204,239 irrigable acres, including portions of Lower Klamath and Tule Lake NWRs. In addition, there are portions of the Project that are not served under a perpetual water contract (Temporary Water Contracts).<sup>1</sup>

Water supply contracts for the Project fall into one of three categories. In some cases, these contracts encompass lands for which the owners claimed non-federal water rights that predated the Project and which rights were folded into the Project water supply through contract. Those types of contracts are generally called "settlement contracts." In other situations, Reclamation only agreed to deliver water to a specified point, and the contracting entity or individual was then responsible for constructing and operating the non-federal facilities necessary to convey the water to its intended place of use. Those types of contracts are generally called "Warren Act contracts." Lastly, in some cases Reclamation constructed all the works necessary to deliver the water to its intended place of use, in which case the contracts are called "repayment contracts."<sup>2</sup> All three types of contracts are included in the general term "water supply contracts."

## II. Discussion of Key Clauses

### 1. Liability waivers

Most contracts between Reclamation and Klamath Project water users contain a liability waiver with language similar to Article 9 of the Sunnyside Irrigation District contract (ILR-174 – 1922-10-24): "On account of drought, inaccuracy of distribution or other cause, there may occur at times a shortage in the quantity of water provided for herein, and while the United States will

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<sup>1</sup> Under Ninth Circuit case law, consultation is required for non-perpetual contracts. *Nat. Res. Defense Council v. Jewell*, 749 F.3d 776, 785 (9<sup>th</sup> Cir. 2014).

<sup>2</sup> A subset of repayment contracts are contracts, such as the November 29, 1954 contract with the Klamath Irrigation District, transfer works constructed by Reclamation to the contracting entity, which then assumes Reclamation's responsibilities for operating and maintaining the works, delivering water, and collecting charges. The status of a contract as a transferred works contract does not affect Reclamation's discretionary authority since the contracting entity is bound by federal law and regulations (Article 6) and assumes the contractual obligations of the United States (Article 13), and because Reclamation maintains ultimate control over the transferred works through its reservation of the right to resume operation of the transferred works if the contracting entity violates any contractual provisions (Article 21).