



THE SECRETARY OF THE INTERIOR
WASHINGTON

JAN 16 2021

Mr. Nathan R. Rietmann
Rietmann Law, P.C.
1270 Chemeketa Street, NE
Salem, OR 97301

Dear Mr. Rietmann:

In response to my letter dated November 12, 2020, the Bureau of Reclamation (Reclamation) and the Department of the Interior's Office of the Solicitor have completed their review and analysis of Reclamation's obligations surrounding the Klamath Project. What has become evident from this reassessment is that project operations have come to suffer from a tortured consultation history, owing to several factors that include:

1. Pre-existence of Federal Energy Regulatory Commission (FERC) minimum release requirements from Iron Gate Dam under PacifiCorp's 1956 license for operation of the Klamath Hydroelectric Project (FERC license no. 2082);
2. Reclamation's assumption, prior to issuance of the "Amended Corrected Findings of Fact and Order of Determination" (ACFFOD), that Reclamation unilaterally owned the water rights in connection with the Klamath Project, including the interest in beneficial use of the water;
3. An attempt to negotiate proposed actions for Biological Assessments that were agreeable to all stakeholders and attempted to "balance" competing needs and respective rights within the basin, through the form of a section 7(a)(2) consultation but also in the context of anticipated enactment of a basinwide settlement; and
4. A view of agency action that was overly broad, especially in light of intervening court decisions.

Through these processes, Klamath Project operations for water supply, endangered species, and Tribal trusts have become substantially conflated. While this approach reflects a practical compromise made in light of several uncertainties, the outcome is an operating plan that no longer allows for inspection of any individual piece for compliance, creates confusion, and begets litigation and discord to no one party's service.

Enclosed to this letter are three documents. The first is a Reclamation decision document intended for guiding upcoming consultation processes and is modeled after a similar reassessment document developed by the U.S. Army Corps of Engineers regarding consultation on the Rio Grande.¹ The next two documents are memoranda from the Office of the Solicitor that inform the Reclamation decision document.² The key findings of this analysis include the following:

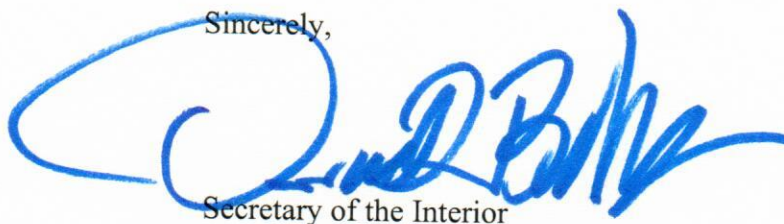
- (a) Considerable limitations exist to Reclamation's discretion to conduct section 7 Endangered Species Act (ESA) consultation on most contracts in the Klamath Project. However, this lack of obligation does not confer compliance by water users within the Klamath Project with the ESA. Additionally, the consideration of discretion with respect to section 7 consultations does not consider Reclamation's obligations to operate the project in accordance with senior Tribal water rights.
- (b) Areas of Federal discretion in the general management and operational activities, as outlined in the legislation authorizing the Klamath Project, will require continued consultation under section 7 of the ESA. This is particularly the case with respect to the action of either storing or bypassing tributary inflows to Upper Klamath Lake, and in the subsequent management of supplies stored previously and in priority.
- (c) Operations of Upper Klamath Lake are subject to Federal and State law, including the ACFFOD and senior rights of Tribes in the Klamath Basin. While said Tribal rights are either in the process of being adjudicated or have not yet been quantified, they are definitively senior to the Klamath Project. Reclamation has an obligation to take actions within its discretionary authority to protect them, and satisfaction of these rights would supersede those of the Klamath Project.
- (d) Water stored previously and in priority on behalf of the Klamath Project is not available for re-allocation for the purpose of meeting these in-stream flow rights, even if they are senior to the entity that previously stored those supplies. Accordingly, future consultation of the Klamath Project with respect to ESA-listed species in the Klamath River shall exclude management of flows stored previously and in priority in Upper Klamath Lake.
- (e) Reclamation's decisions to store inflow to Upper Klamath Lake and to later make it available for the Klamath Project may be guided or limited, to the extent that the Secretary of the Interior determines that they are needed for meeting trust obligations to the Klamath Tribes prior to the finalization of the ACFFOD.

¹ Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act, U.S. Bureau of Reclamation, January 2021.

² Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020 Letter of the Secretary of the Interior, January 14, 2021, and Use of Water Previously Stored in Priority for Satisfaction of Downstream Federally Reserved Rights, January 14, 2021.

I believe these findings present an opportunity to harmonize the operation of the Klamath Project with the requirements of Federal and State law, to parse out operational requirements for discussion and resolution, and to place a more appropriate burden of water management for declining aquatic species on the Klamath Project. Settlement, including actions that are outside the bounds of the Klamath Project, is likely still needed in the Klamath Basin, and this determination is made with the intention that it corrects for certain baseline legal requirements as an entry point to the next steps in those discussions.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. B. ..." with a large, stylized initial "D" on the left and "B." on the right, followed by a horizontal line and a final flourish.

Secretary of the Interior

Enclosures