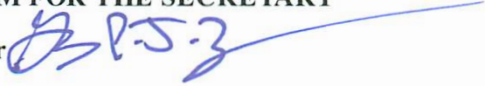


**BRIEFING MEMORANDUM FOR THE SECRETARY**

**From:** Gregory Zerzan, Acting Solicitor   
**Date:** May 14, 2025  
**Subject:** Klamath Updated Analysis of Endangered Species Act Obligations

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**Background**

For generations the federal government has made various commitments to the people and wildlife of the Klamath River basin. For the Indian tribes in the area, it made treaties and reserved lands, to help protect ancestral hunting and fishing rights as well as the ability to celebrate traditional ceremonial practices. For farmers and irrigators, it constructed the Klamath Irrigation Project and entered water-supply contracts to provide water to nourish their crops. Later, through the Endangered Species Act, the United States made commitments to protect the various wildlife and aquatic species in the region from threatened extinction. These multiple and at times conflicting commitments have proven difficult to keep, leading to conflict and litigation that has spanned decades.

The Department of the Interior's efforts to balance these competing interests has in recent times borne some fruit. To fulfill ancestral fishing rights, the Department has launched a hatchery program to supplement declining wild populations. However, questions regarding water rights and the protection of species have continued to vex the federal government. Thankfully, in recent times the U.S. Congress has passed legislation that helps to clarify how these various claims are to be managed and thus informs the Department's approach.

On February 10, 2025, the Secretary of the Interior rescinded the April 2021, withdrawal of certain analyses of the discretionary authority possessed by the Bureau of Reclamation for Endangered Species Act ("ESA") purposes and permissible uses of stored water. The Secretary further directed the Solicitor to update the reinstated analyses in light of legal developments since January 2021. This memo explains how the Department is to proceed with fulfilling the federal government's commitments. While this analysis directs the Department to manage resources in the Klamath River basin in the most fair and equitable manner possible consistent with the law, it does not in any way diminish the United States' trust authorities and responsibilities to local Tribes nor the valid and longstanding legal rights of irrigators. While this memo addresses how the Department will approach these at-times conflicting commitments, consistent with recent law and judicial precedent, it does not resolve them. It will continue to be the duty of the United States to attempt to fulfill all of the commitments it has made to its citizens.

The issues of discretionary authority and availability of stored water for downstream purposes are distinct, though interrelated, and are addressed separately below.

**Discretionary Authority**

On October 31, 2020, the Solicitor's Office completed an analysis of Reclamation's obligations to consult under Section 7 of the Endangered Species Act, 16 U.S.C. 1536, on its operations of the Klamath Project. On November 20, 2020, the Secretary endorsed this analysis and stated that its conclusions mandated a reassessment of the environmental baseline for the Project and a

its conclusions mandated a reassessment of the environmental baseline for the Project and a determination of what portion of Project water is segregable and, thus, set aside solely for irrigation and unavailable for other uses. (“2020 Analysis”).

In response to the direction of the 2020 Analysis, on January 14, 2021, the Solicitor provided a memorandum to the Secretary titled “Analysis of Klamath Project contracts to determine discretionary authority in accordance with the November 12, 2020, Letter of the Secretary of the Interior (“Discretion Analysis”). As stated in the Discretion Analysis, “if a contract provides Reclamation with discretionary authority to take action that could benefit species listed under the 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.”

The Discretion Analysis was intended to implement direction from the Secretary to assess the degree of discretionary authority possessed by Reclamation and inform Reclamation as it implemented its January 2021 Reassessment of Klamath Project operations. The Discretion Analysis focuses on provisions in contracts between Reclamation and Klamath Project irrigators that affect the degree of discretionary authority possessed by Reclamation to take action that could benefit ESA listed species to determine whether specific provisions provide Reclamation with sufficient discretionary authority to engage in ESA Section 7 consultation.

Since 2021, there have been several major legal developments that impact the 2020 Analysis and Discretion Analysis, as discussed below.

Klamath Basin Water Agreement Support Act, Pub. L. No. 118-246

On January 4, 2025, the Klamath Basin Water Agreement Support Act (“Act”) was enacted into law. This statute contains general catch-all provisions which respectively provide that

“(1) Compliance. – In implementing the amendments made by this section, the Secretary of the Interior shall comply with ...

(B) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); and (C) all other applicable laws” and

“(2) Effect. – None of the amendments made by this section –

(A) modify any authority or obligation of the United States with respect to any Tribal trust or treaty obligation of the United States;

(B) create or determine any water right; or

(C) affect any water right or water right claim in existence on the date of enactment of this Act.”

The statute also includes the following specific mandate:

“(g) Keno and Link River Dams. – The Secretary of the Interior shall comply with the terms of the agreement entitled ‘2016 Klamath Power and Facilities Agreement’ (‘Agreement’), including Attachment A to the Agreement.”

Attachment A to the Agreement in turn provides in relevant part that “(Reclamation) shall comply with the following provisions related to Link River Dam on Upper Klamath Lake and Keno Dam and Keno development.” Section 1 of the Agreement then requires that “Reclamation shall operate Link River Dam to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts between Klamath Reclamation Project contractors and Reclamation and for flood control and subject to Applicable Law.”

The statutory provisions and the Agreement incorporated by reference make clear that the Act does not affect the general applicability of the ESA or the rights of the tribes and other water rights holders. The Act also does not disturb the general applicability limitation on ESA Section 7, which makes clear that Section 7 only applies when an agency retains discretionary authority to act to benefit listed species. See *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) (“*Home Builders*”) (“[ESA Section] 7(a)(2)’s no jeopardy duty covers only discretionary agency actions[.]”).

The Act shows a clear and specific mandate from Congress to Reclamation to (1) operate the Project for the purposes of providing water for irrigation and conducting flood control and (2) provide water for the Project in accordance with the contracts between Reclamation and the irrigators. The Act uses “shall” to require Reclamation to comply with the Agreement, specifically including reference to Attachment A. Attachment A to the Agreement then uses “shall” in two places: first to require Reclamation to comply with its provision regarding operation of Link River Dam, then again in the provision specific to Link River Dam to require Reclamation to “operate Link River Dam to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts[.]”

These statutory mandates clearly direct Reclamation to operate Link River Dam, the critical facility for the Klamath Project, for water diversion to the Project consistent with existing contracts and flood control. The unequivocal language does not provide Reclamation the discretion to divert water for other uses if to the detriment of the Klamath Reclamation Project contractors. For example, Reclamation cannot operate the Project *both* to provide sufficient water to fully meet contractual requirements *and* to meet requirements imposed by the Biological Opinions prepared under ESA Section 7 if doing so would impair the mandated purposes of the Act.

Past examples of Reclamation trying to manage multiple demands for water are illustrative of the clarity provided by the Act. In 2021, Reclamation prohibited water diversions for irrigation because the Biological Opinions required that all but a de minimis amount of water be used for ESA purposes. In 2022, Reclamation was found to have violated the ESA by providing a small Project allocation.<sup>1</sup> The attempt to balance competing interests is now clearly resolved in favor of the Project contractors. Under *Home Builders*, if Reclamation cannot both comply with the specific mandates of the Act and take action – provide water to benefit ESA listed species – then ESA Section 7 does not apply. 551 U.S. at 669.

To the degree that ESA Section 7 has any application to the Klamath Project, it is constrained by the contracts themselves (see below re: *NRDC v. Haaland*) and the 2025 Act’s mandate that the contract terms control. Reclamation must provide water for diversion by the Project consistent

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<sup>1</sup> *Klamath Tribes v. United States Bureau of Reclamation*, 2023 U.S. Dist. LEXIS 198398 (D. Ore. 2023).

with the contracts. If a particular contract is non-discretionary, Reclamation lacks the discretionary authority to alter its performance under that contract in order to benefit listed species. Having no discretionary authority, Reclamation lacks the duty to consult under ESA Section 7 on the effects of that contract and must include the effects of that contract in the environmental baseline.

Language in the preceding portions of the Act does not change this analysis. In subsection (d) “Restoration Activities”, the Act provides that “[t]he Secretary may” carry out projects which benefit fish and aquatic resources and restore habitats. Use of the word “may” makes clear that this statutory provision is permissive, rather than mandatory. In contrast, Congress’ direction that the Secretary “shall” operate Link River Dam according to the terms of the ‘2016 Klamath Power and Facilities Agreement’ establishes that water delivery for irrigation purposes and flood control are the primary purposes of the Project. Subsection (d) is therefore properly read as empowering the Secretary to use the Klamath Project for the designated other purposes *only if* those other purposes do not impose upon the rights of the Klamath contractors.

Subsection “(e) Goals” modifies subsection (d) described above, as well as Section (2)(b) in the underlying Klamath Basin Water Supply Enhancement Act, to enunciate the goals of the programs authorized by (b) and (d). Nothing in subsection (e) or in the subsections that it modifies establishes a mandatory duty to take action to benefit wildlife.

“If the statutory language is clear, that is the end of our inquiry.” *A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1244 (9<sup>th</sup> Cir. 2000). The Act states unequivocally that the Secretary of the Interior “shall comply with the terms of” the Agreement and Attachment A of the ‘2016 Klamath Power and Facilities Agreement’. Attachment A requires Reclamation to operate Link River Dam to deliver water for irrigation purposes and to adhere to its contracts with Project irrigators. Under *Home Builders*, those statutory provisions deprive Reclamation of the discretion needed to trigger ESA Section 7.

*Natural Resources Defense Council v. Haaland*

If Reclamation must engage in ESA Section 7 consultation on portions of Klamath Project operations, consultation must adhere to the Ninth Circuit decision in *NRDC v. Haaland*, 102 F.4<sup>th</sup> 1045 (9<sup>th</sup> Cir. 2024). This case is the latest relevant development in a long line of litigation challenging Reclamation’s Section 7 consultations on the implementation of the executed water delivery contracts with a group of irrigators (the Sacramento River Settlement Contractors) in California’s Sacramento Valley on ESA-listed fish species. *Id.* at 1056 – 1063. Plaintiffs contended that the contracts between Reclamation and these irrigators provided Reclamation with sufficient discretionary authority to take actions that could benefit Chinook salmon, and that consultation was therefore required. *Id.* at 1062. This contention was rejected in *NRDC v. Norton*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017), in which the District Court conducted a detailed examination of the contract terms and found that they did not provide Reclamation with sufficient discretion to implement the contracts in a manner that would benefit Chinook salmon. *NRDC v. Haaland*, 102 F.4<sup>th</sup> at 1063. Notably, the 2020 Analysis and Discretion Analysis rely heavily on *NRDC v. Norton* and its interpretation of contractual provisions similar to those found in Klamath Project contracts. 2020 Analysis, 3, 9; Discretion Analysis, 3 – 5.

In *NRDC v. Haaland*, the Ninth Circuit rejected Plaintiffs' assertions and upheld *NRDC v. Norton*. It first cited *Environmental Protection Information Center v. Simpson Timber Co.* for the holding that "once the agency has entered into a legally binding agreement, it has such discretion [to benefit ESA-listed species] only to the extent permitted by the agreement's terms." 255 F.3d 1073, 1082 (9<sup>th</sup> Cir. 2001) (*EPIC*). It then cited *Sierra Club v. Babbitt* for the holding that "Reclamation retained discretion under the Settlement Contracts only to the extent the contracts themselves give it the power to 'implement measures that inure to the benefit of the protected species.'" 65 F.3d 1502, 1509 (9<sup>th</sup> Cir. 1995). These are two of the main cases relied upon by the 2020 Analysis for the same holdings.

*NRDC v. Haaland* then examined several provisions in the Settlement Contracts at issue to determine whether they provided Reclamation with sufficient discretionary authority to require consultation. Three of those provisions are especially relevant to the Klamath Project contracts considered in the Discretion Analysis.

The first two relevant provisions of the Settlement Contracts are Articles 3(i) and 3(h), which waive liability for the United States for shortages of water because of legal obligations and "errors in operation, drought, or unavoidable causes," respectively. *NRDC v. Haaland*, 102 F.4<sup>th</sup> at 1075 – 1076. Plaintiffs had argued that "Article 3(i) allows Reclamation to reduce the water it provides to the Settlement Contractors if necessary to meet legal obligations." *Id.* at 1075. The Ninth Circuit disagreed, stating "this provision does not give Reclamation discretion to alter the Settlement Contract to benefit a listed species. Rather, this is a force majeure clause that limits Reclamation's liability for damages in the event legal obligations are imposed on Reclamation that require it to breach the Settlement Contracts by reducing the diversion of water." *Id.* The Court reached a similar conclusion after examining Article 3(h), finding that it was simply a limitation of Reclamation's liability, not a license for Reclamation to "alter the amount of water diverted at its discretion." *Id.* at 1076. The Court then drove home the point, citing *Home Builders* for the holding that "[t]he duty to comply with mandatory legal obligations is not a source of discretion." 551 U.S. at 669. *NRDC v. Haaland*, 102 F.4<sup>th</sup> at 1076. The analyses of liability waivers in Klamath Project contracts in the 2020 Analysis and Discretion Analysis comport with the analysis in *NRDC v. Haaland*: the Klamath Project liability waivers have similar terms and must, therefore, be read as force majeure clauses which do not impart sufficient discretion to allow Reclamation to take action to benefit ESA-listed species. 2020 Analysis, 7; Discretion Analysis, 2 – 3.

The third relevant contractual provision analyzed in *NRDC v. Haaland* is Article 9(a), which provided that the contract constituted the full agreement between the parties as to quantities of water that could be diverted for beneficial use. 102 F.4<sup>th</sup> at 1076 – 1077. Plaintiffs argued that the reference to beneficial use imparted discretionary authority to Reclamation to determine what amount of water was reasonable for beneficial use. *Id.* The Court disagreed, finding that the provision simply confirmed the quantity and allocation of water without giving Reclamation the discretion to make adjustments. This is consistent with the conclusions in the 2020 Analysis and Discretion Analysis that portions of the Klamath contracts tying the quantity and timing of water delivered to beneficial use do not provide Reclamation with discretionary authority to take actions that could benefit listed species and therefore do not trigger a requirement to consult.

Other cases and legal positions are subject to the Klamath Basin Water Agreement Support Act and *NRDC v. Haaland*.

Since 2021, several cases have addressed application of the ESA to the Klamath Project.<sup>2</sup> However, all but one of these cases pre-date enactment of the Klamath Basin Water Agreement Support Act and *NRDC v. Haaland*. Their applicability to questions regarding the extent of Reclamation’s discretionary authority for ESA Section 7 purposes is limited, at best, in light of these two developments.<sup>3</sup> Furthermore, all but one of these cases omit the searching inquiry into contractual terms necessitated by the Klamath Basin Water Agreement Support Act and *NRDC v. Haaland*.<sup>4</sup>

Of special importance is the excessive reliance that all of the Klamath cases decided after 2021 place upon *Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206 (9<sup>th</sup> Cir. 1999) (*Patterson*), or its progeny or, directly or indirectly, on a 1995 vintage opinion from the Regional Solicitor, Pacific Southwest Region. *Patterson* found that Reclamation had discretionary authority to operate Link River Dam for ESA purposes and that the ESA overrides the water rights of the irrigators. 204 F.3d at 1213. The limitations of *Patterson* were noted in the 2020 Analysis, which explained that *Patterson* pre-dates the Supreme Court’s decision in *Home Builders* and thus “does not perform the necessary searching inquiry into the extent of Reclamation’s discretion at the Klamath Project, nor does it conduct a detailed analysis of the contracts between Reclamation and the irrigators.” 2020 Analysis, 8. These limitations in *Patterson* changed to fundamental flaws with enactment of the 2025 Act and its specific mandates that Reclamation operate the Project for irrigation purposes and adhere to the contracts. *Patterson*, therefore, does not define the parameters of ESA Section 7’s applicability, nor does it determine whether certain aspects of Project operations are non-discretionary and whose effects must, therefore, be included in the environmental baseline. As the 2020 Analysis notes, *Patterson* stands for the simple proposition that Reclamation must meet the requirements of the ESA.<sup>5</sup> The mandates of the 2025 Act and the carefully reasoned decision in *NRDC v. Haaland* drive home the point that this simple proposition is all that can be read into *Patterson*.

The 1995 Regional Solicitor opinion<sup>6</sup> was cited extensively in *KID v. Reclamation*, for a description of various aspects of Klamath Project operations and Reclamation’s asserted ESA and other obligations in the Basin. 48 F.4<sup>th</sup> 934, 939 - 941 (9<sup>th</sup> Cir. 2022). This opinion does not

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<sup>2</sup> *Yurok Tribe v. Bureau of Reclamation*, 19-cv-04405-WHO (N.D. Cal. 2023), appeal Nos. 23-15499 and 23-15521 pending; *United States v. Klamath Drainage District*, 2023 U.S. Dist. LEXIS 16171 (D. Ore. 2023), *affirmed* 2025 U.S. App. LEXIS 1347 (9<sup>th</sup> Cir. 2025), petition for en banc review pending (*U.S. v. KDD*); *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 48 F.4<sup>th</sup> 934 (9<sup>th</sup> Cir. 2022) (*KID v. Reclamation*); *KID v. U.S. District Court*, 69 F.4<sup>th</sup> 934 (9<sup>th</sup> Cir. 2023); *Klamath Tribes v. Bureau of Reclamation*, 2023 U.S. Dist. LEXIS 198400 (D. Ore. 2023); and *Klamath Tribes v. Bureau of Reclamation*, 2023 U.S. Dist. LEXIS 198398 (D. Ore. 2023). The Ninth Circuit decision in *U.S. v. KDD* is the sole case decided after enactment of the 2025 Act and, since it does not address the Act, does not affect the analysis of this memorandum.

<sup>3</sup> It should be noted that the regulatory definitions of “effects of the action” and “environmental baseline” were subject to minor clarifying changes in 2024, however these changes do not impact this analysis.

<sup>4</sup> The exception is *U.S. v. KDD*, 2023 U.S. Dist. LEXIS 16171.

<sup>5</sup> To the degree that the 2020 Analysis stated that *Patterson* could be read to require a duty to consult on Project operations as a whole, that statement must be reassessed in light the 2025 Act and this memorandum.

<sup>6</sup> 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); Regional Solicitor, Pacific Southwest Region; July 25, 1995.

analyze the issue of discretionary authority. Its lack of relevant analysis is not surprising given that this opinion is dated July 25, 1995, and thus pre-dates *Sierra Club* and subsequent caselaw establishing the need to determine whether contractual provisions restrain Reclamation's discretionary authority. Its conclusions regarding Reclamation's ESA Section 7 obligations are inaccurate, as noted in the 2020 Analysis and driven home by the 2025 Act and *NRDC v. Haaland*. For these reasons, the 1995 Regional Solicitor opinion is hereby withdrawn.

### **Stored Water**

Use of stored water to satisfy downstream tribal needs was the subject of a memorandum titled "Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights" and issued on January 14, 2021 ("Stored Water Analysis").<sup>7</sup> It concluded that:

Reclamation must determine how best to satisfy its trust obligation to the Yurok and Hoopa Tribes, who hold senior, but unquantified, rights on the Klamath River. Reclamation satisfies that trust obligation by providing water that would be available in the tribal fishery, absent the project. Project storage, then, would be delivered pursuant to Reclamation's other obligations, and most importantly, the [2014 Amended and Corrected Findings of Fact of the Final Order of Determination in the Klamath Basin Adjudication ("ACFFOD")]. Therefore, water previously stored in priority would not be available to draw upon to supplement the natural flow of the river.

Stored Water Analysis, 5. Since issuance of this memorandum, there have been only a limited number of legal developments which affect its conclusion and underlying analyses.

### **Klamath Basin Water Agreement Support Act, Pub. L. No. 118-246.**

As discussed above, the Klamath Basin Water Agreement Support Act included a general provision specifying that none of its provisions modify the tribal trust or treaty obligations of the United States or affect any water right, as well as a specific mandate that Reclamation operate the Project to provide water for the Project irrigators pursuant to their contracts. These provisions provide several key inputs to the Stored Water Analysis. First, Congress clearly conveyed its intent for the Project to be operated to provide water for irrigation consistent with the contracts by using the word "shall" to create a specific mandate to comply with the 2016 Klamath Power and Facilities Agreement and Attachment A to the Agreement. In the general provision, Congress highlighted the importance of tribal and other water rights, which necessarily include the right of Reclamation to store water in Upper Klamath Lake and the right of the irrigators to use that stored water as affirmed in the ACFFOD.<sup>8</sup> However, Congress did not specifically create an obligation to use stored water to satisfy downstream tribal rights. As discussed below, the lack of a specific Congressional mandate to use stored water to satisfy downstream tribal rights is critical.

Enactment itself of this statute is relevant to the stored water issue. The 2025 Act is the latest in a line of statutory provisions which specifically authorize and appropriate funds for different

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<sup>7</sup> While the 2020 Analysis briefly addressed the ACFFOD and stored water issue, it did not analyze Reclamation's authority to use stored water for downstream purpose and is therefore of limited utility on this issue.

<sup>8</sup> ACFFOD Claim KA 294 provides that the United States has a right to store 486,828 acre/feet of water on behalf of Klamath Project irrigators and that the irrigators have a right to use that amount.

facets of Klamath Project facilities and operations. *See, e.g.*, Pub. L. 106-498, 114 Stat. 2221; Pub. L. 115-270, Sec. 4308; Pub. L. 116-191, Sec. 1, 134 Stat. 976. The Klamath Project was created to allow irrigation using water stored behind Link River Dam. As the Supreme Court explained in *Nebraska v. Wyoming*, “if storage water is not segregated, those who have not contracted for the storage supply will receive at the expense of those who have contracted for it a substantial increment to the natural flow supply...” 325 U.S. 589, 639-640 (1945). Enactment of these statutes, including as recently as 2025, show clear Congressional intent for the Project to continue to operate for irrigation purposes using stored water.

Read together, these statutory provisions and enactment of the Act itself support the conclusion of the Stored Water Analysis: the United States has a general trust obligation to the downstream tribes, but a specific duty to operate the Project to provide water to the Project irrigators in accordance with their water rights and contracts. The United States meets these trust obligations by providing natural flow to the downstream tribes, while stored water is reserved for use by the Project irrigators.

#### Additional Judicial Decisions

The most instructive judicial decision is that of the Supreme Court in *Arizona v. Navajo Nation*, 599 U.S. 555, 561 (2023). This case involved the nature and extent of the United States’ obligations to take affirmative measures to provide water to the Navajo Nation. In an especially salient holding, the court stated that “[t]he Federal Government owes judicially enforceable duties to a tribe ‘only to the extent it expressly accepts those responsibilities.’” *Arizona v. Navajo Nation*, 599 U.S. at 564 *citing* *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). While Congress has expressed its intent to protect the rights of downstream tribes in the 2025 Act, it did not define those rights, nor did it expressly accept a duty to provide stored water to satisfy those rights. Without such an express acceptance, there is no duty to use water stored in Upper Klamath Lake to satisfy downstream tribal rights.

None of the Klamath specific court decisions explicitly state that the United States has an obligation to use stored water for the benefit of downstream tribes.<sup>9</sup> Relevant here is the Supreme Court’s admonition that “[w]hether the Government has expressly accepted such obligations ‘must train on specific rights-creating or duty-imposing’ language in a treaty, statute, or regulation. *Navajo Nation*, 537 U.S., at 506. That requirement follows from the separation of powers principles. As this Court recognized in *Jicarilla*, Congress and the President exercise the ‘sovereign function’ of organizing and managing the ‘Indian trust relationship.’ 564 U.S., at 175.” *Arizona v. Navajo Nation*, 599 U.S. at 564. Given the Supreme Court’s words and the lack of a statutory mandate to use stored water to satisfy tribal rights, it would be unwarranted to read into any of the existing judicial decisions an enforceable duty to use stored water in a manner contrary to that addressed in the Stored Water Analysis.

#### Previous Office of the Solicitor Analysis

On March 21, 2024, a Regional Solicitor provided a memorandum to the Bureau of Reclamation Regional Director titled “Bureau of Reclamation Authority to Release Water from Klamath

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<sup>9</sup> See Footnote 1 *supra* for a list of cases decided since 2021 and *KID v. U.S. District Court*, 69 F.4<sup>th</sup> 934 (9<sup>th</sup> Cir. 2023).

Project for Yurok Boat Dance Ceremony.” (“Boat Dance Memorandum”). This memorandum was issued as part of a settlement of litigation regarding the authority of Reclamation to provide water for the biennial Boat Dance conducted by the Yurok Tribe. The Department acknowledges its general trust obligations to the Yurok and other tribes, including the general obligation to support important tribal religious and cultural practices such as the Boat Dance. However, the Boat Dance Memorandum did not identify a statute or similar mandate which specifically establishes a right to use stored water, as required under *Arizona v. Navajo Nation*. The Boat Dance Memorandum must be read to conform to the analysis in this memorandum and the Stored Water Analysis. During each year that the Department is required to provide Boat Dance flows to the Yurok Tribe, the Department will need to engage in a specific analysis to determine how to provide Boat Dance flows while remaining consistent with this memorandum and the Stored Water Analysis.

### **Conclusions and follow-on actions**

Secretary Burgum directed the Office of the Solicitor to review legal developments during the last four years and issue updated versions of the 2020 Analysis, Discretion Analysis, Stored Water Analysis, and other specified documents. As discussed above, the major legal developments since 2021 are consistent with those analyses. Those analyses remain valid, as updated and modified by this memorandum.

The Klamath Basin Water Agreement Support Act created specific mandates for Reclamation to operate the Project to deliver water for irrigation and flood control and act consistently with existing contracts. If Reclamation cannot simultaneously obey these mandates and comply with ESA Section 7, Reclamation does not have a duty to comply with Section 7. *Home Builders*, 551 U.S. at 669. These mandates thus change the fundamental legal and operational paradigm in the Klamath Basin, which was predicated on the understanding of ESA application embodied in *Patterson* and the 1995 Regional Solicitor’s opinion. This shift requires Reclamation, in coordination with the Office of the Solicitor, to reassess its approach to Project operations and align those operations with the requirements of the 2025 Act.

Given the fundamental changes in the legal landscape created by enactment of the 2025 Act and the decision in *NRDC v. Haaland*, the Office of the Solicitor will work with the United States Department of Justice to encourage its approach be consistent with this memorandum.