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 (9th 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).[1]

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."[2] 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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[1] Under Ninth Circuit case law, consultation is required for non-perpetual contracts. *Nat. Res. Defense Council v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014).

[2] 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).

use all reasonable means to guard against such shortages, in no event shall any liability accrue against the United States, its officers, agents or employees, for any damage, direct or indirect, arising therefrom, and the payments due hereunder shall not be reduced because of any such shortage."

As discussed in the SOL October 2020 Memorandum, these are force-majeure clauses, similar to the one which the court in *Natural Resources Defense Council v. Norton*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017) found insufficient to trigger the Section 7 consultation obligation. The first part delineates the events which could prevent the United States from fulfilling its contractual obligation to deliver water. The remainder of the clauses commit the United States to taking reasonable measures to avoid shortage and absolve the United States from liability should a shortage arise notwithstanding those measures. The structure of the clauses as a single sentence indicates that each must be read as a whole. The plain language of the clauses as a whole focuses on protecting the United States from liability if drought, inaccuracy of distribution, or other causes create a shortage which prevents the United States from delivering the amount of water required under the contract, not on authorizing the United States to alter the amount of water when the United States is trying to meet another priority.

Because these liability waivers do not authorize the United States to alter the amount of water delivered, they do not provide sufficient discretion for Reclamation to consult.

2. Beneficial use

Section 8 of the Reclamation Act of 1902 dictates that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."[3] 43 U.S.C. § 372. All Klamath Project water contracts were executed pursuant to the Reclamation Act of 1902, as stated in the preambles to the contracts, including those contracts that also expressly reference the Warren Act. While many of the Klamath Project contracts give irrigation districts the right to divert as much water as is necessary for beneficial use on the irrigable lands they serve, the fact that the contracts were executed pursuant to the Reclamation Act of 1902 necessarily means that the provisions of the Act, including Section 8, govern the contracts.

Generally speaking, "state law governs the distribution of water from federal projects unless Congress expresses a different approach." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) (*citing California v. United States*, 438 U.S. 645 (1978)). Thus,

[3] The remainder of Section 8—now codified at 43 U.S.C. § 383—states: "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." Courts have interpreted the language concerning interstate streams as a disclaimer—that the Act in no way was intended to affect the disposition of interstate streams, and that "the matter be left just as it was before [the passage of the Act.]" *State of Wyoming v. State of Colorado*, 259 U.S. 419, 463 (1922) *vacated on other grounds by State of Wyoming v. State of Colorado*, 353 U.S. 953 (1957). Section 8's primary purpose, though, is to require the use and distribution of water to be carried out in accordance with state law, absent specific contrary federal law.

unless Congress expresses an intent to supplant state law with respect to distribution from a particular Reclamation project, the concept of "beneficial use" is set by state law. *See id.*; *see also United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983) ("beneficial use itself was intended to be governed by state law.").

Beneficial use is not static. Rather, "[i]t is settled that beneficial use expresses a dynamic concept, which is 'a variable according to conditions.'" *Alpine Land & Reservoir*, 697 F.2d at 857 (internal citations omitted). Thus, the exact quantity of water necessary to satisfy beneficial use can—and presumably will—change over time. *See id.* Perhaps unsurprisingly, then, disagreements as to how much water is required to satisfy "beneficial use" are not uncommon. *See, e.g.*, *id.* (challenging the District Court's determination of 3.5 acre-feet-per-acre for bottomland farmers, and 4.5 acre-feet-per-acre for benchland farmers). Regardless, as stated above, the question of how much water is necessary to satisfy beneficial use is a factual question, determined by state law. *See, e.g.*, *Jicarilla Apache*, 657 F.2d at 1133 ("the determination of beneficial use is a question of fact.").

Therefore, the Klamath Project contracts that obligate Reclamation to provide sufficient water for beneficial use seem to provide Reclamation with very little discretion. Those contracts, in effect, set both a ceiling and a floor on the amount of water each contracting party is entitled to take from the Project—enough to satisfy beneficial use, under Oregon law. While Reclamation does have considerable authority under some contracts to re-apportion water in times of shortage, for example, it does not have the discretion to adjust the amount required to satisfy "beneficial use" when that is the measure of the right in a given contract.

In *Natural Resources Defense Council v. Norton*, the Eastern District of California examined, *inter alia*, Reclamation's discretion to modify water deliveries on executed contracts based on its own "beneficial use" determination. 236 F. Supp. 3d 1198, 1224–25 (E.D. Cal. 2017). In the contracts at issue in that litigation, Reclamation was similarly obligated to deliver sufficient water to satisfy beneficial use.[4] *Id.* Plaintiffs argued that because beneficial use is not static, and because it "requires consideration of 'alternative uses of the water' which is 'variable according to conditions,'" Reclamation had discretion to change "quantities and allocations in light of current conditions and competing uses for the water." *Id.* at 1225 (internal citations omitted). But the court disagreed. It noted that "[e]ven assuming that Reclamation has the authority to determine whether a particular use is beneficial, nothing [in the contract] suggests Reclamation may adjust contract quantities based on a beneficial use determination made after contract execution." That was so even though the contract itself did not define beneficial use as any particular amount of water. *See generally id.* In other words, even though the court recognized that the amount required to satisfy beneficial use could theoretically change over time, the contract still obligated Reclamation to deliver that quantity—whatever it was—

[4] The full provision at issue read: "During the term of this Settlement Contract and any renewals thereof [] it shall constitute full agreement as between the United States and the Contractor as to the quantities of water and the allocation thereof between Base Supply and Project water which may be diverted by the Contractor from its Source of Supply for beneficial use of the land shown on Exhibit B from April 1 through October 31, which said diversion, use, and allocation shall not be disturbed so long as the Contractor shall fulfill all of its obligations hereunder." *Id.*

notwithstanding a hypothetical determination that the water could be better used elsewhere. *See id.*

There is a colorable argument that the contracts at issue in *NRDC* are materially different than those under review in the Klamath Project. First, as the *NRDC* court noted, the contracts at issue in that case were settlement contracts which contained clauses that specified that "allocation *shall not be disturbed*" during the life of the contract. *See id.* Second, and along similar lines, those contracts also contained language that specified the agreement constituted the "full agreement as between the United States and the Contractor as to the quantities of water and the allocation thereof between Base Supply and Project water." *Id.* at 1224–25. The contracts at issue in the Klamath Project contract review are not as specific,[5] and generally only state that Reclamation is obligated to deliver water sufficient to satisfy "beneficial use" each irrigation season. Arguably, without the limiting language present in the *NRDC* contracts, these contracts afford Reclamation more discretion to adjust water deliveries based on a beneficial use determination each irrigation season.

However, that view would be unlikely to prevail in front of a reviewing court. While the language in the contracts does differ, the central question is exactly the same as that in the *NRDC* case—does Reclamation have the authority to modify water deliveries under an executed contract based on a beneficial use theory. Even assuming (as the *NRDC* court did) that Reclamation has the authority to make the beneficial use determination in the first instance,[6] that decision still must be made pursuant to state law. *See NRDC*, 236 F. Supp. 3d at 1225 ("Section 8 of the Reclamation Act of 1902 requires that all water provided pursuant to the Act be put to 'beneficial use,' *as defined by state law*.") (emphasis added); *accord California*, 438 U.S. at 665–67. And just as in the *NRDC* case, the contracting parties here have executed contracts guaranteeing sufficient water for beneficial use, so long as sufficient water is available.[7]

So while Reclamation can, by necessity, determine whether or not a certain portion of the water is "waste," or that a certain portion of land within a district is no longer irrigable,[8] Reclamation does not appear to have the discretion to modify water deliveries under an executed contract based on a determination that beneficial use demands a lower quantity, absent a showing that the particular tract at issue is wasting water, or otherwise needs less to get the full benefit of beneficial use.[9] This is emphasized by the fact that the *Amended and Corrected Findings of Fact and Order of Determination* in the Klamath River Basin General Stream Adjudication

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[5] Of course, the contract language varies, and this memo is only concerned with those that entitle irrigation districts to divert enough water to satisfy beneficial use.

[6] Indeed, in the Klamath Project, all of the water being delivered is Project water (as opposed to non-project water apportioned by the state under state law), and therefore Reclamation does make this determination. Of course, as this memo explains, that determination is nonetheless guided by state law.

[7] The "availability" determination is a separate issue and is the subject of part II of this memo.

[8] This is, indeed, part of a beneficial use determination. Some contracts contain amendments, for example, changing the determination of irrigable acres, which would necessarily change the amount of water needed to satisfy beneficial use.

[9] This is a wholly separate determination, however, from a determination that the tract *could* use the water, but that the water could be *better* used elsewhere. *See NRDC*, 236 F. Supp. 3d at 1225.

(hereinafter "*ACFFOD*") sets a standard for beneficial use, as specifically applied in the Klamath Basin. *See ACFFOD* at 13.[10]

3. Total amount of water per year/irrigation season

The total amount of water which Reclamation is obligated by a particular contract to deliver per year or per irrigation season is an area in which Reclamation's discretionary authority, if any, has significant potential to affect ESA listed species because of the importance of the volumes of water in Upper Klamath Lake and the Klamath River below Iron Gate Dam to ESA listed species. Klamath Project contracts specify that Reclamation will deliver (a) a fixed amount of water; (b) up to a specific amount of water; or (c) an amount of water determined by beneficial use. While many contracts explicitly state that the amount of water to be delivered is subject to beneficial use, the fact that all Klamath Project contracts were executed pursuant to the Reclamation Act of 1902 means that all contracts are subject to Section 8 and its requirement that beneficial use is the measure of water.

a. Fixed amount clauses

The contract with the Van Brimmer Ditch Company (I8r-1065-1909; I8r-1065a-1943) provides a prime example of a contract which requires Reclamation to deliver a fixed amount of water per irrigation season with no reference to beneficial use. Article 2 (as amended) requires the United States to "deliver to [Van Brimmer] during each and every irrigation season, that is, from April fifteenth to October first of each year, a quantity of water, not to exceed fifty second-feet, in which [Van Brimmer] claims the right to the exclusive use[.]" Article 15 of the original contract (which was not amended) provides "It is also understood and agreed that the United States hereby recognizes the right as existing in [Van Brimmer] to the perpetual use of said fifty (50) second feet of water, according to the provisions herein set forth, subject, however, to any possible established priority to the use of said fifty (50) second feet of water, other than such as may be claimed by the United States or those claiming through it."

Article 20 of the1943 amendment further establishes that Van Brimmer cannot claim, and the United States is not obligated to deliver, water in excess of 50 second-feet. "[T]he use of water by [Van Brimmer] in any year in excess of 50 cubic feet per second is not to be the basis of any claim by [Van Brimmer] for similar excess deliveries at any later date, and that the United States and its successors in control of the Klamath Project are not to be obligated at any time to deliver water to [Van Brimmer] in excess of 50 second-feet].]"

The recognition by the United States of Van Brimmer's right to the perpetual use of 50 second-feet of water in Article 15 prevents Reclamation from curtailing water deliveries below that amount. Article 20 provides further evidence of the understanding that the United States is obligated to deliver 50 second-feet of water by stating that the United States is not obligated to deliver more than that amount of water. The specific acknowledgement by the United States of

[10] The *ACFFOD* describes water delivery obligations as "duties." Thus, the standard "duty" for irrigation "is not to exceed three and one-half acre-feet-per-acre during any irrigation season, unless otherwise specified ..." *ACFFOD* at 13.

Van Brimmer's right to 50 second-feet in Article 15 provides no discretion for Reclamation to reduce the amount of water which Reclamation must deliver.

As a settlement contract, Van Brimmer contains especially proscriptive provisions specifying the amount of water which must be delivered. While the other contracts which specify fixed amounts of water are not as prescriptive as Van Brimmer, the fact that they specify that Reclamation shall deliver a specific amount of water and are subject to beneficial use means that Reclamation lacks discretion to reduce the total amount of water provided under them, and therefore is not obliged to consult on them. *See* Pine Grove Irrigation District contract (ILR-403-1918-12-21), Article 5 (stating that beneficial use is the measure for water used in the district) and Article 6 (stating in relevant part that "It is expressly understood and agreed that the amount of water to be delivered hereunder shall be two and one-half feet (2.5) acre-feet-per-acre of irrigable land [.]").

b. Ceilings on the amount of water

The contract with the Sunnyside Irrigation District (Ilr-174, dated October 24, 1922) exemplifies the relatively large number of contracts which commit Reclamation to delivering water up to a specific ceiling. Article 5 as amended requires the United States "to impound, store, or otherwise provide water for the irrigation of District lands" and to deliver that water through the C Canal in quantities that shall not "exceed [2.5] acre-feet-per-acre of irrigable land during the usual irrigation season as established on the Klamath Project, being approximately that period from April 15 to September 30 of each year, inclusive; and in no event shall it exceed 0.6 acre-feet of water per irrigable acre in any one month[.]" The subsequent article, Article 6, further provides that the United States shall deliver water "only upon written demand of the District served on the project Manager of the Klamath Project..." Reading these provisions together, Article 5 establishes a ceiling on the total amount of water which the United States must deliver and which the contractor may demand during the irrigation season but does not establish a floor of the minimum amount of water which the United States must deliver.

In isolation from the rest of the contract, it could be argued that the "up to" terminology implies an ability to deliver zero water at the discretion of the agency. However, this argument fails to consider the role of beneficial use in determining the amount of water which Reclamation must provide under the contract. When reading these contracts in their entirety and including Section 8 of the Reclamation Act of 1902, it is apparent that the volume of flow to be delivered has been determined as whatever constitutes beneficial use. As discussed earlier, beneficial use is not static and cannot be practically described in a contract, beyond its upper bound as provided in such contracts. In this manner, it is the contractor and not Reclamation that determines the schedule, volume, and rate for water deliveries, limited by contractual upper bounds and the State of Oregon's determination of beneficial use.[11]

[11] In the absence of an explicit floor on the amount of water, a finding that beneficial use does not determine the amount of water which Reclamation must deliver would mean that Reclamation would have unlimited discretion to reduce water deliveries to zero. Such a finding could render the contract illusory and therefore invalid, and could defeat the Congressionally mandated purposes of the Klamath Project. *See* October 2020 Solicitor's Office Memorandum, page 6.

c. Beneficial use as the sole measurement of water

The contract with the Tulelake Irrigation District [14-06-200-5954 (1956-09-10)] exemplifies contracts in which the amount of water to be delivered is defined solely by beneficial use. Article 33(a) provides that "The District shall have the right in perpetuity, subject to the terms and conditions of this contract and consistently with the applicable laws of the State of California, to receive from the Klamath Project all water needed by the District for beneficial irrigation uses within the District. Said water shall be delivered from the works under the control of the United States or its designees or its agents at such times and in such amounts as the District may demand, subject only to the limit of the capacity of the facilities available therefor and the amount of water required for reasonable beneficial use within the District." Because beneficial use is determined in accordance with state law pursuant to Section 8 of the Reclamation Act of 1902, Reclamation lacks the discretion to alter the definition or amount of water determined by state law to be of beneficial use. Reclamation therefore lacks the discretion to consult on the amount of water delivered pursuant to the Tulelake and similar contracts.

4. Total amount of water per month

Many of the contracts include a ceiling on the amount of water which Reclamation is obligated to provide each month. This provision is salient to consultation because the timing of water deliveries is a factor which could benefit listed species.

A typical provision is found in Article 5 of the Sunnyside contract, which states in relevant part that "in no event shall [the supply of water] exceed 0.6 acre-feet of water per irrigable acre in any one month[.]" While stated as a ceiling, the monthly water supply is also subject to the beneficial use standard, both explicitly in another part of Article 13 and implicitly through incorporation of Section 8 of the Reclamation Act of 1902. Since beneficial use determines the amount of water deliveries needed per month, Reclamation lacks the discretion to reduce the amount of water delivered per month to benefit ESA-listed species, and therefore lacks the discretion needed to consult.

5. Dates of delivery

These clauses provide that Reclamation will deliver water (a) during a specific date range; (b) during an approximate period (when contracts state "the usual irrigation season," it is always coupled with a date range); or (c) on a per annum basis. The Van Brimmer contract is an example of a contract with a specific date range. Article 2 (as amended) requires the United States to "deliver to [Van Brimmer] during each and every irrigation season, that is, from April fifteenth to October first of each year, a quantity of water, not to exceed fifty second-feet, in which [Van Brimmer] claims the right to the exclusive use[.]" The requirement to deliver that volume of water from April 15 to October 1 contained in Article 2 prevents Reclamation from altering the dates of delivery, and therefore deprives Reclamation of the discretionary authority needed to consult on the timing of water deliveries.

A number of contracts provide an approximate date range, as exemplified by the Sunnyside contract. Article 5 provides that the District will receive up to a specified amount of

water "during the usual irrigation season as established on the Klamath Project, being approximately that period from April 15 to September 30 of each year, inclusive." Other contracts, such as the Klamath Irrigation District Water User Type B Contracts (private lands) (example: Adams water right application, Certificate No. 02168) specify that water deliveries are on a per annum basis. These state in relevant part "said applicant shall be entitled to receive, subject to the payment of the annual charges for building, operation, and maintenance, [a specified number of][12] acre feet of water per annum per acre of irrigable land herein described, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project[.]"

While use of the words "approximately" and "per annum" appear to provide Reclamation with the flexibility to alter the dates of delivery, they are subject to the beneficial use standard, at least implicitly through incorporation of Section 8 of the Reclamation Act of 1902. Since beneficial use determines when water deliveries are needed, Reclamation lacks the discretion to alter the dates of delivery to benefit ESA-listed species, and therefore lacks the discretion needed to consult.

6. Reapportionment

Certain of the contracts contain clauses allow reapportionment of water among users with equal priority dates. One key example, because of the size of the District, is Article 33(c) of the Tulelake Irrigation District contract. This clause reads: "In the event a shortage of water from the Klamath Project arises as a result of drought or other unavoidable causes, the United States may apportion the available supply among the District and others having rights of priority equal to the rights of the District." This clause authorizes the United States to reapportion available water supplies among the holders of "contract" rights. It is not an open-ended authorization for the United States to reapportion water to users or uses that are not otherwise covered by a contract for Project water, such as benefiting ESA-listed species. It therefore does not provide sufficient discretionary authority to require consultation.

Another common example is a type of reapportionment clause which exists in many of the contracts entered into pursuant to the Warren Act. Most commonly, this clause is added as a proviso to the article describing the water supply furnished by the United States under the contract. A typical example is Article 7 of the contract with Malin Irrigation District (Ilr-195, dated September 9, 1922), which provides "That all rights to the use and delivery of water acquired by the District under the contract are inferior and subject to the prior rights reserved to the lands of the Klamath project." The origins of this clause stem from a 1910 decision by the Secretary of the Interior to release certain lands from the Project, notably those to be served by pumping water out of the Project's canal system, as well as Section 1 of the Warren Act, 43 U.S.C. § 523, which authorizes the Secretary of the Interior to enter into certain contracts, subject to "preserving a first right to lands and entrymen under the project".

[12] The specified number of acre feet varies among the water right applications. For the Adams application, it is 1.8 acre-feet.

The intended operation of this provision in the Malin Irrigation District's contract is reinforced by Article 33(b) of the Tulelake Irrigation District's contact (14-06-200-5954, dated September 10, 1956), which provides that "The rights of the District to water from the Klamath Project pursuant to the terms of this contract shall be equal to those of others executing similar contracts under the Reclamation Act of June 18, 1902, as amended, and shall be prior to those rights conferred pursuant to contracts executed under the Act of February 21, 1911, commonly known as the Warren Act." Accordingly, Reclamation must ensure that Tulelake Irrigation District's contractual right to water from the Klamath Project is satisfied before making water available to Warren Act contractors. Here again is a clause authorizing the United States to reapportion the available water supply from the Klamath Project among the various water contracts within the Project, and not an open-ended authorization for the United States to reapportion water to users or uses not otherwise covered by a contract for Project water. Therefore, to the extent there is discretion afforded Reclamation by such contract provisions, it is limited to allocating water in the event of a shortage among the various water contracts within the Klamath Project.