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

January 14, 2021

Memorandum

To: Secretary

From: Solicitor

Subject: Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights

Pursuant to your November 12, 2020, letter, the Solicitor's Office has been undertaking a thorough review of the Klamath Project ("Project") contracts and relevant legal authorities that guide the Bureau of Reclamation's (Reclamation's) discretion in the operation of the Project, in parallel with Reclamation's effort to prepare a reassessment document. In doing so, the Solicitor's Office identified tribal water rights as being an important threshold issue in determining which Project operations can be placed in the environmental baseline, and advised Reclamation that Ninth Circuit and Federal Circuit courts have viewed tribal water rights as being generally senior to irrigation rights connected to the Project. Reclamation does not dispute the existence or priority of tribal water rights, but has requested input on whether water previously stored in priority can ever be released for satisfaction of unquantified, downstream federally reserved water rights held by the Yurok and Hoopa Valley Tribes (hereinafter collectively referred to as "the Yurok and Hoopa Tribes").

This memorandum addresses that question and ultimately concludes that water previously stored in priority is not available for satisfaction of downstream federally reserved water rights, and is instead bound by the terms of the Klamath Basin Adjudication ("KBA").

## I. Background

As noted by the federal courts, "[s]everal constraints [in the operation of the Klamath Project] force Reclamation to walk a water-management tightrope in dry years." *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197 (D. Or. 2001) (internal citations omitted). Reclamation's management is made more difficult "because the Upper Klamath Lake is relatively shallow and, therefore, the Klamath Project's storage capacity is limited." *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1231 (N.D. Ca. 2001) (hereinafter "*Pacific Coast*.").

The issue is further complicated by the fact that Endangered Species Act (ESA) compliance and tribal trust compliance have historically been conflated in the operation of the Klamath Project. Put differently, in the absence of quantified tribal water rights, the United States has taken the position that ESA compliance serves as a proxy for its minimum duty to the tribes because that tribal water right "cannot [be] any less than the quantity that would have been needed to avoid reducing appreciably the likelihood of … the survival of these same fish." *Baley v. United States*, 134 Fed. Cl. 619, 672–73 (2017) ("*Baley I*") (noting that ESA compliance and

the unique tribal trust requirements in the operation of the Klamath Project are "essentially a similar standard.") (internal citations omitted). But in reality, ESA compliance and tribal trust obligations are legally distinct.

There are—in effect—distinct categories of tribal water rights in connection with the Project: the Klamath Tribes' right to certain lake levels in Upper Klamath Lake ("UKL"), and the Yurok and Hoopa Tribes' in-stream flow rights for the Klamath River. The Klamath Tribes' rights to water levels in UKL have been quantified under McCarran Amendment proceedings in Oregon, and are not at issue for purposes of this memorandum. The Yurok and Hoopa Tribes' in-stream rights—while clearly identified by the federal courts—have not been fully quantified by an adjudication or enacted settlement.

In order to fully appreciate the issue presented here, it is necessary to briefly examine the relationship between the tribal rights, and their impact on Project operations as described by the federal courts.

Tribal water rights on the Klamath were first recognized in the *Adair* litigation. *See United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). There, the Ninth Circuit affirmed a district court determination that the Klamath Tribes had reserved on-reservation hunting and fishing rights upon establishment of the Reservation. *Id.* at 1398. The court held that those rights carried with them federally reserved water rights to support the tribal fishery. *Id.* at 1414. Further, because treaty rights are not "a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," the priority date for those reserved water rights predated the establishment of the reservation and were set at "time immemorial."[1] *Id.* at 1413–14 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

As mentioned above, these rights have since been administratively adjudicated and quantified, as part of the Klamath Basin Adjudication ("KBA") in Oregon, which culminated in the Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD"). The ACFFOD, *inter alia*, quantifies the Klamath Tribes' federally reserved water rights, and "thus, the Klamath Tribes have a legally enforceable federal right to maintain streamflow levels as quantified." *Hawkins v. Bernhardt*, 436 F. Supp. 3d 241, 251 (D.D.C. 2020). Accordingly, Reclamation must operate the project such that UKL lake levels satisfy the Klamath Tribes' quantified, senior right.[2]

The Yurok and Hoopa Tribes also have federally reserved water rights connected to the establishment of their reservations. Like the Klamath Tribes, the origin of those water rights is in reserved fishing rights, recognized at the establishment of their reservations. *See Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995).

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[1] Put another way, the treaty recognized rights that had been exercised by the Klamath Tribes pre-European contact and promised not to *impair* those rights. Thus, unlike other treaties whose purpose was to provide agricultural land in exchange for cession of traditional hunting and fishing grounds, the Klamath Tribes retained those rights, and thus priority date for the Klamath Tribes' water rights necessarily was prior to treaty execution, and thus described as "time immemorial." *Adair*, 723 F.2d at 1413–14.

[2] Due to a stipulation signed by the Klamath Tribes, United States, and Project water users, this senior right will not be enforced against the Project until the KBA is complete. So, Reclamation has not yet had to actually operate the Project to satisfy these UKL levels.

Courts have considered *all* tribal rights—the UKL rights held by the Klamath Tribes and the in-stream rights held by the Yurok and Hoopa Tribes—as being generally senior to any other water rights connected to the Project. *See Baley v. United States*, 942 F.3d 1312, 1322 (Fed. Cir. 2019) ("*Baley II*"). But, unlike the Klamath Tribes, the Yurok and Hoopa Tribes water rights are unquantified. Thus, while Reclamation has clear direction as to how to satisfy the federally reserved water rights held on behalf of the Klamath Tribes, it does not have as specific direction as to how to satisfy the rights of the Yurok and Hoopa Tribes.[3]

Reclamation's obligations with respect to the Yurok and Hoopa Tribes is of critical importance to the review process directed in the Secretary's Letter because it guides whether Reclamation can consider any stored water as unavailable for satisfaction of federally reserved water rights, and thus only available for distribution to water users under Oregon law.[4]

## II. Use of Stored Water for Satisfaction of Unquantified Downstream Rights

Three critical facts guide whether use of water previously stored in priority is subject to release for satisfaction of the Yurok and Hoopa Tribes' water rights: (1) the Yurok and Hoopa Tribes' water rights are currently unquantified; (2) Reclamation has some degree of discretion to determine how best to satisfy its trust obligations absent quantified water rights; but (3) that discretion is not unbound, and Reclamation is subject to the terms of the KBA.

As an initial matter, it is worth re-emphasizing that federally reserved water rights connected to the Yurok and Hoopa Tribes' respective reservations exist specifically to maintain a fishery reserved to tribal members upon establishment of the reservations. *Parravano*, 70 F.3d at 546. Therefore, the measure of water required to satisfy the tribal water rights is necessarily dependent on the health of the fishery, and the needs of the fish.[5] But, at its heart, the water right is a non-impairment right—i.e., the Tribes are entitled to prevent junior upstream diverters from reducing the flow of the river to the extent doing so is necessary for the protection of the tribal water right. *See id.*

And while courts have clearly recognized the existence and seniority of the Yurok and Hoopa Tribes' federally reserved water rights, those rights have not been quantified, and no court has considered Reclamation's trust obligation to fulfill those rights post-KBA or, even pre-KBA, independently from Reclamation's duties to the Klamath Tribes and its obligations under the ESA. Finally, and most importantly, no court has squarely analyzed whether the Yurok and Hoopa Tribes are entitled to the release of water previously stored in priority to supplement the Klamath River beyond that which would have been historically available, absent Project storage.

For that reason, there is sufficient authority to support an argument that Reclamation's trust responsibility does not compel it to release Project water in excess of that which would have been naturally available, absent the project.

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[3] To emphasize, there is no debate as to *whether* Reclamation has a duty to satisfy the federally reserved water rights of the Yurok and Hoopa Tribes, or their relative priority. Rather, it is the lack of quantification of those rights and their interaction with the Project that raises the issues presented in this memorandum.

[4] This, in turn, guides the scope of ESA consultation, which was the subject of the Letter.

[5] Thus, it is unsurprising that courts have historically condoned Reclamation's practice of using ESA consultation as a proxy for determining its tribal trust responsibilities. *See Baley I*, 134 Fed. Cl. at 673.

Courts have routinely recognized Reclamation's broad discretion in determining how best to satisfy "diverse, and often competing, demands for Project water." *Kandra*, 145 F. Supp. 2d at 1196. And while it is true that the courts have emphasized that tribal trust and ESA requirements are generally superior to water rights arising under water delivery contracts, Reclamation does have discretion in determining how it satisfies those superior obligations, in the absence of specific quantification.

To emphasize, the litigation in *Baley*, *Kandra*, and *Patterson* involved, *inter alia*, the reasonableness of Reclamation's position that its trust responsibility was satisfied through ESA compliance in the absence of specific quantification. For example, in *Baley II*, the Federal Circuit discussed at length the fact that the "no jeopardy" standard under the ESA was presumptively less protective of the tribal fishery than the "moderate living" standard to which the tribes were likely entitled. 942 F.3d 1336–37. Nonetheless, the *Baley II* court held that ESA compliance served as a valid proxy for then-unquantified tribal trust requirements, and noted that "[w]hether the Tribes would have had a separate cause of action against the United States had the Bureau not complied with the ESA is not before us." *Id.* at 1341.

*Baley* is one of many cases that upheld the reasonableness of the 2001 Operations Plan and actions taken under it, even though the Yurok and Hoopa Tribes alleged that operations under the plan violated Reclamation's trust obligations. For example, the Yurok Tribe asserted that Reclamation's failure to supplement Klamath River flows under the Operations Plan violated the trust responsibility because low river levels contributed to a large fish die-off in 2002 that adversely affected their federally reserved right to the fishery. *See Pacific Coast Federation of Fishermen's Ass'n v. United States Bureau of Reclamation*, Civ. No. C 02-02006 at 1–2 (N.D. Cal. March 8, 2005) (hereinafter "*PCFFA*"). The court disagreed, holding that because there was no quantified water right that Reclamation had failed to deliver, there was no "specific duty" Reclamation had violated by failing to supplement flows at the request of the Tribe.[6] *Id.* at 17. Put another way, there was no specific quantity of water—independent of the applicable Biological Opinion and Operations Plan—that Reclamation was required to deliver. *Id.* Again, under the Operations Plan, Reclamation had used ESA compliance as a proxy for tribal trust obligations.

Read together, these cases squarely frame the bounds of Reclamation's discretion with respect to the Yurok and Hoopa Tribes. On the one hand, Reclamation is clearly obligated to prioritize tribal water rights over other junior water rights connected to the Project, but on the other, absent a specific quantification of the tribal water rights, Reclamation necessarily has some degree of discretion to decide how best to satisfy those rights. In other words, until the rights of the Yurok and Hoopa Tribes are quantified, there is no definite quantity of water Reclamation must provide, though Reclamation is obligated to ensure the Tribes receive sufficient water to exercise their federally reserved fishing rights.

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[6] This is not to say that Reclamation's tribal trust obligations require nothing but compliance with generally applicable statutes. Tribal trust requirements are substantive and require Reclamation to operate its project so as to satisfy senior tribal rights before those of any junior appropriator.

Therefore, considering the above, 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.[7] Project storage, then, would be delivered pursuant to Reclamation's other obligations, and most importantly, the ACFFOD. Therefore, water previously stored in priority would not be available to draw upon to supplement the natural flow of the river.

This position neither rejects the existence and priority of the Yurok and Hoopa Tribes' water rights, nor allows any other water user connected to the Project to take any water from the tribal share. The Yurok and Hoopa Tribes would only be barred from calling upon water previously stored in priority—water that would not exist absent the Project—to supplement natural flows.

***a. Storage in Western Water Law***

Not only would this position be a permissible construction of the Tribes' as-yet-unquantified water rights, but it would also be harmonious with Western water law generally (and Oregon law specifically), as well as federal Reclamation Law.

The Bureau of Reclamation was established specifically to assist development of Western water by using Congressionally appropriated funds to construct large-scale storage projects that state or local entities might not be able to take on independently. As a benefit, those state and local entities receive water that otherwise would not exist for irrigation and other purposes. Water users enter into contracts to "pay back" the price of the project in exchange for access to the water facilitated by the Project.

Accordingly, in Section 8 of the Reclamation Act, Congress directed that Reclamation disperse water in accordance with state law. 43 U.S.C. § 372. And while subsequent federal laws sometimes provide Reclamation with duties that conflict with state water law, in the absence of a specific federal conflict, Reclamation still must operate its projects in comity with state water law. *California v. United States*, 438 U.S. 645, 670–71 (1978).

Accordingly, courts—including the U.S. Supreme Court—have historically recognized that water previously stored in priority under state law is not available for release to downstream water users with unquantified water rights, or water rights dependent on natural flow. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589, 639–40 (1945) (declining to include storage from Reclamation Act facilities in an equitable apportionment, noting "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…").

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[7] Currently, decisions on when to bypass inflow to the Klamath River or deliver it to either the Project or into storage in UKL are guided by the 2018 Biological Opinion as amended by the Interim Operations Plan. This memorandum does not address any current operations criteria, but rather focuses on the legal distinction between natural flow and water previously stored in priority as it relates to unquantified downstream rights.

There is no source of law, federal or state, that directs Reclamation to release Project storage—which has now been adjudicated under the KBA—to the Downstream Tribes. And while the Downstream Tribes could have asserted storage rights in the KBA, no such rights were asserted.[8] *Baley I*, 134 Fed. Cl. at 679.

Reclamation has a right, as determined by the ACFFOD, to store water in UKL. Once stored pursuant to Oregon law, Reclamation is significantly constrained in its discretion to release that water for any purpose other than that which is directed by the ACFFOD.[9] In the absence of any federal law to the contrary (including a quantified Indian water right), Reclamation cannot use its discretion to call upon water previously stored in priority.

Therefore, release of water previously stored in priority would be a violation of state law with no specific federal authority to justify it. Because that would run counter to Section 8 of the Reclamation Act, a reasonable interpretation of Reclamation's current duty to the Downstream Tribes is that it must provide natural flow, but not Project storage, in the absence of a quantified right or some other source of federal law that specifically conflicts with the State's currently controlling disposition on storage.

***b. Distinctions from Past Klamath Cases***

The critical distinguishing factors between what Reclamation is proposing here and *all* of the past cases concerning the Klamath Project are: (1) all of the Klamath-specific cases that analyze tribal water rights and their relation to Project water dealt with operations plans that conflated ESA and tribal trust responsibilities; and (2) those operations plans were in place prior to issuance of the ACFFOD.

As stated above, the Yurok and Hoopa Tribes unquestionably have reserved water rights in the Klamath River, and those rights are indeed senior to all but perhaps the Klamath Tribes.[10] However, in part because those rights have never been quantified, Reclamation must decide how to satisfy those rights through the operation of the Project without the aid of specific target flows, water level targets, or other any other specific operating criteria.[11]

As also indicated above, until the issuance of the ACFFOD, *all* tribal rights were determined by proxy through ESA compliance. The *Kandra*, *Patterson*, and *Baley* courts all permitted such an arrangement, but specifically noted that Project water rights were being actively adjudicated in the KBA. *See, e.g.*, *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 fn.3 (9th Cir. 1999). In other words, with respect to tribal water rights, the ESA served as a proxy in the absence of *otherwise quantified rights*.

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[8] This does not mean, however, that they cannot assert such rights in the future. As the *Baley I* court noted, "[a]lthough reserved rights can be adjudicated by state bodies, and the [Tribes] could have submitted claims to the [KBA] … their failure to do so *did not affect the existence or nature of their federal reserved rights*." *Baley I*, 134 Fed. Cl. at 679 (emphasis added).

[9] To note, the ACFFOD also controls lake levels Reclamation must maintain for the Klamath Tribes.

[10] Their priority date may also be "time immemorial," but their rights are at least as old as the establishment of their reservations. *See Baley I*, 134 Fed. Cl. at 670.

[11] As noted above, operations are currently guided by the 2018 Biological Opinion as amended by the Interim Operations Plan.

Thus, the operation of the Klamath Project is subject to additional constraints now, compared to the time at which those cases examined it. The KBA, when final, will have fully adjudicated the vast majority of the rights at issue in the line of cases described above—the major exception of course being the rights held by the Yurok and Hoopa Tribes.[12]

Therefore, reliance on those cases for anything other than use of ESA compliance as a project-wide proxy for unquantified tribal water rights during the pendency of a general stream adjudication stretches them beyond their own terms.

That is also important context to consider in light of the United States' opposition to the stored water argument, which was made by Project water users at multiple points in the cases described above. While it is true that the United States opposed a view that Project storage was unavailable for satisfaction of federal responsibilities *as a whole* and *during the pendency of the KBA*, it has never made the argument that downstream, unquantified rights are entitled to water previously stored in priority under the terms prescribed by state law in the ACFFOD.

That is true even of the United States' April 2020 filing in the KBA, opposing a challenge to the ACFFOD's quantification of the Klamath Tribes' right to specific water levels in UKL (hereinafter "Opposition Brief"). There, in defending a quantified tribal water right under the KBA, the United States argued that the Klamath Tribes were necessarily entitled to storage in UKL to satisfy the Tribes' quantified water right. *See* Opposition Brief at 64–75.

But, again, taking the position that a specific federal responsibility—there a *quantified* federally reserved water right—entitles the United States to use storage when it otherwise might conflict with state law is materially different than taking the position that a non-specific federal responsibility—i.e. an *unquantified* federally reserved water right—entitles the United States to release storage in conflict with state law. As stated above, that is a key fact that marries federal and state law under Section 8 of the Reclamation Act. Therefore, Reclamation's position with respect to water previously stored in priority is not inconsistent with either the April 2020 Opposition Brief, or any of the Klamath-specific case law in which storage was previously raised. It is also faithful to traditional Western water law, and fully consistent with Reclamation's trust obligation to the Yurok and Hoopa Tribes, who have senior rights to natural flow from the Klamath River over junior upstream diverters.

## III. Conclusion

For the reasons expressed herein, Reclamation's trust obligations to the Yurok and Hoopa Tribes require it to provide the Tribes with the full benefit of natural flow of the Klamath River to the extent necessary to satisfy their federally reserved water rights. In the absence of a specific, quantified water federally reserved water right, or other specific federal law, however, water previously stored in priority is bound by the ACFFOD and should be released in accordance with its terms.

[12] They were not required to participate in the KBA, and their non-participation did not affect the existence or nature of their rights. Quantification of the Tribes' water rights could change the analysis here.