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

Memorandum

To: Daniel H. Jorjani, Solicitor

From: Carter L. Brown, Associate Solicitor – Division of Water Resources
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Subject: An Updated Review of Legal Issues concerning the United States Bureau of Reclamation Operation of the Klamath Project

The Secretary of the Department of the Interior has asked the Office of the Solicitor to review and provide preliminary guidance on the Bureau of Reclamation's ("Reclamation") authority with respect to certain aspects of its operation of the Klamath Project. The Secretary has specifically asked the Solicitor to review whether Reclamation must engage in consultation under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), for its proposed operations plan. The Secretary intends to provide direction to the Bureau of Reclamation regarding the development of a plan of operations and the development of a biological assessment.

The request for a review by the Office of the Solicitor is occasioned in part by 2020's critically dry hydrological conditions and resulting water challenges, recent changes to the regulations regarding interagency consultation under Section 7 of the ESA, recent legal decisions in Oregon regarding water rights held by various entities in the Klamath Basin, and stakeholder correspondence presenting additional views and requesting review in light of, among other things, developments in ESA Section 7 case law and adoption of the 2014 Amended and Corrected Findings of Fact of the Final Order of Determination in the Klamath River Basin Adjudication (ACFFOD).

The Secretary understands the Office of the Solicitor has not reviewed its legal analysis since the issuance of the ACFFOD, the Supreme Court's Opinion in *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), the federal district court's ruling in *Natural Resources Defense Council v. Norton*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017) ("*NRDC*"), and regulatory updates to the definition of "baseline" pursuant to the ESA. 50 C.F.R. § 402.02.

This reassessment finds that the discretion possessed by Reclamation in its operation of the Klamath Project requires interagency consultation for the operations of the Klamath Project. However, Reclamation's discretion on how the project is operated and whether certain consequences to listed species and their habitat are effects of the project operations is almost certainly constrained by various contracts with Klamath Project water users.

With respect to the contracts, the degree of discretion varies depending on the specific terms contained in each contract. At least one contract appears to clearly constrain

Reclamation's discretion to the point that Reclamation's fulfillment of the contract, including provision of water pursuant to that contract, is not subject to consultation under ESA Section 7. The other water user contracts related to the Klamath Project are more complicated and contain language that requires additional analysis.

This legal review is not final agency action and does not, in itself, determine which Klamath operations require ESA Section 7 consultation. Those determinations are the responsibility of Reclamation and will be made by Reclamation as part of the ESA consultation process consistent with all applicable laws and regulations. Reclamation's analysis will require a careful analysis of the discretion, if any, afforded Reclamation under the specific terms of the relevant contracts.

I. Section 7 of the Endangered Species Act

The ESA and its implementing Section 7 regulations require federal agencies to consult with the relevant ESA administering agency if any action authorized, funded, or carried out by such agency "may affect" any endangered or threatened species or critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). By regulatory definition and Supreme Court precedent, the consultation requirement is confined to instances in which the agency possesses the discretionary authority to take action which could benefit the listed species. 50 C.F.R. § 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."); 50 C.F.R. § 402.16(a) ("Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law . . . ."); *Home Builders*, 551 U.S at 667–73 (". . . we defer to the Agency's reasonable interpretation of ESA § 7(a)(2) as applying only to 'actions in which there is discretionary Federal involvement or control.'").

Assessing whether the agency possesses discretionary authority over an action such that consultation is required necessitates consideration of the relevant authorizing statute, any implementing contracts, and any other laws constraining agency authority. Regarding authorizing statutes, the Supreme Court's decision in *Home Builders* establishes that, when a statute requires an agency to take specific actions, without any ability for the agency to make discretionary decisions to benefit ESA listed species, then the agency is not required to consult under the ESA's Section 7. Following *Home Builders*, both the Ninth and Tenth Circuits have issued holdings that particular statutes do not provide agencies with sufficient discretionary authority to consult. *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1219–25 (9th Cir. 2015) (holding that the Bureau of Safety and Environmental Enforcement (BSEE) was not required to consult when approving a plan for oil and gas development because the statute required BSEE to approve a plan which met specified statutory criteria); *WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 947 F.3d 635, 640–42 (10th Cir. 2020) (holding that Army Corps of Engineers was not required to consult because the statutes governing its operation of dams on the Rio Grande did not provide sufficient discretion to take action to protect ESA-listed species).

Regarding contracts, Section 7 does not "apply to an agreement finalized before passage of the ESA where the federal agency currently lacks the discretion to influence the private activity for the benefit of the protected species." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1511–12 (9th Cir. 1995). In *Environmental Protection Information Center v. Simpson Timber Co.*, 255

F.3d 1073, 1079–82 (9th Cir. 2001) ("*EPIC*"), the Ninth Circuit further affirmed that Section 7 does not amend existing contracts to impart discretionary authority to an agency.

In *NRDC*, the district court agreed with Reclamation that it must have sufficient discretion in the context of water contracts in the Sacramento Valley to take actions that may benefit ESA-listed Delta smelt in order to have a consultation duty under Section 7. 236 F. Supp. 3d at 1211–30. The court specifically addressed contracts which have already been executed, writing: "In other words, in order to trigger the requirement for re-consultation under *EPIC* and 50 C.F.R. § 402.16 in the context of an executed and otherwise valid contract, the action agency must have retained sufficient discretion in that contract to permit material revisions to it that might benefit the listed species in question." *Id.* at 1217 (emphasis in original).

Recent regulatory changes also clarified how effects from non-discretionary actions are dealt with in a Section 7 consultation. On September 26, 2019, the United States Fish and Wildlife Service amended the definition of the "baseline" in its regulations to state that the baseline refers to the condition of the species or critical habitat in the action area, without the consequences to the species or habitat caused by the proposed action. The baseline includes, among other things, all past and present impacts of all federal, state, and private actions, the anticipated impacts of all proposed federal projects in the action area, and ongoing agency activities or existing agency facilities that are not within the action agency's discretion to modify. 50 C.F.R. § 402.02. For an ESA Section 7 consultation, the "environmental baseline" includes, among other things, the effects of ongoing agency activities that the agency has no discretion to modify. If Reclamation has no discretion regarding water delivery under its contracts, the consequences to species from the administration of those contract are properly included in the baseline and are not effects of the current action.

Regarding other applicable law, the United States generally must comply with state law determining water rights and participate in state adjudications of those rights. Section 8 of the Reclamation Act generally requires the Secretary of the Interior to act in accordance with state law regarding Reclamation projects. 43 U.S.C. § 383. The McCarran Amendment further provides that the United States may be joined in adjudications under water rights when the United States holds such rights. 43 U.S.C. § 666. The Ninth Circuit has held that the United States must participate in the State of Oregon's adjudication of water rights in the Oregon portion of the Klamath Basin. *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994). The United States has acknowledged these authorities and is an active participant in the adjudication at the administrative phase and in the current judicial phase.

II. The law governing the Klamath Project

A. Authorizing statutes

The Klamath Project was authorized in 1905 pursuant to the Reclamation Act and the Act of February 9, 1905. 43 U.S.C. § 601. The Reclamation Act authorizes the Secretary "to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters." 43 U.S.C. § 411. The Reclamation Act was enacted for the purpose of reclaiming the arid lands of the West through construction of major irrigation projects which were too expensive and large scale for private individuals to develop. *See California v. U.S.*, 438 U.S. 645 (1978) (discussing the history and purpose of the

Reclamation Act as a means to provide the irrigation needed to make arid lands in the Western United States agriculturally productive).

B. Contracts

Reclamation entered into multiple contracts with individuals and irrigation districts to establish terms for provision of water, construction and maintenance of facilities, repayment of Klamath Project costs by irrigators, and other matters related to the operation of the Project. These contracts are perpetual: there is no opportunity for Reclamation to either renew them with revised terms or refuse to renew them.

For purposes of this inquiry, generally there are three relevant contractual terms. The first relevant term is the amount of water which Reclamation agreed to provide and the timing of its delivery. The second such term are the liability waivers which absolve Reclamation of liability for water shortages. Finally, there are the re-apportionment clauses which allow Reclamation to re-apportion water among users in the event of a shortage. These clauses, as applicable, are discussed in relation to the four major contracts entered into to facilitate operation of the Klamath Project.

The Van Brimmer contract dates from 1909 and was amended by mutual assent in 1943. It addresses the water rights of irrigators whose rights predate the 1905 appropriation of waters in the Klamath Basin by the United States and construction of the Project. Because construction of the Project made it impossible for Van Brimmer to divert water in its existing manner, the contract is Reclamation's agreement to provide the water to which Van Brimmer has a right using Project facilities. The contract obligates Reclamation to provide 50 second/feet of water from April 15 through October 1 of every year. The Van Brimmer contract does not contain a liability waiver or re-apportionment clause.

The Tulelake Irrigation District contract dates from 1956, and requires the United States to deliver water "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." Contract between the United States and the Tulelake Irrigation District, Sept. 10, 1956, Sec. 33(a). Section 33(b) of the contract specifies the priority dates of the water available to the District. The shortage provision relieves the United States from liability for shortages caused by "drought" and "other causes." *Id.* at Sec. 26. This contract also authorizes Reclamation in the event of such shortages to apportion water among the different districts that share in the Project's 1905 priority date. *See* Art. 33(c) ("In the event a shortage of water available 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.").

The Klamath Irrigation District contract dates from 1954 and contains a liability waiver holding the United States harmless for water shortages that prevent the United States from delivering water due to "drought or other causes." Amendatory Contract between the United States of America and the Klamath Irrigation District, Nov. 29, 1954, Sec. 26. The Klamath Irrigation District contract does not contain a re-apportionment provision. It does not specify the amount of water or dates of delivery: these terms are controlled by the contracts between the United States and individual irrigators within the Klamath Irrigation District.

The Sunnyside Irrigation District contract dates from 1923 and requires the United States to deliver up to 2 acre/feet of water per irrigable acre per irrigation season (defined as April 15 to September 30) and up to 0.6 acre/feet per month. Contract between United States and Sunnyside Irrigation District for construction of works and sale of water, Feb. 12, 1923, Sec. 5. It does not have a re-apportionment provision; however, it does have a provision which protects the United States from liability for shortages in water delivery caused by "drought, inaccuracy of distribution, or other cause." *Id.* at Sec. 9.

C. Other law

The Oregon state administrative adjudication of water rights in the Klamath Basin resulted in the 2014 ACFFOD, which is binding pending completion of the current judicial proceedings in Oregon state court and issuance of a final decree. Absent any contrary federal law, the United States is bound by the ACFFOD issued during the administrative phase and will be bound by the final decree resulting from the judicial phase. Two water rights regarding Upper Klamath Lake were determined in the adjudication. The ACFFOD has concluded that the United States is the owner of a right to store water in Upper Klamath Lake to benefit the separate irrigation rights recognized for the Klamath Project—although the ACFFOD does not determine "the relative rights of the KPWU [Klamath Project water users] entities and the United States to control or operate diversion and distribution works, including headgates, pumps, canals and other structures . . . and does not alter in any way the relative rights of the United States and the irrigation entities to control or operate the irrigation works." Since Reclamation is required under Section 8 of the Reclamation Act to follow State law, the ACFFOD's determination is legally binding to the extent that it is not inconsistent with congressional directives. In addition, in *Klamath Irrigation District v. Oregon Water Resources Department*, Case No. 20CV17922 (Cir. Ct. Marion County), a case to which the United States is not a party, the court issued an Amended Opinion on October 2, 2020 that held that, as a matter of state law, OWRD must prevent Reclamation from releasing stored water for other than a permitted purpose by users with an established right, license, or permit to use the stored water in Upper Klamath Lake. The court implemented this holding on October 13, 2020 by ordering OWRD "to immediately stop the distribution, use and/or release of Stored Water from the [Upper Klamath Lake] without determining that the distribution, use and/or release is for a permitted purpose by users with existing water rights of record or determined claims to use the Stored Water in the [Upper Klamath Lake]." Those persons have been determined by the ACFFOD to be the beneficiaries of the irrigation rights recognized for the Klamath Project.

The ACFFOD states that (1) the United States holds a federal reserved water right to fulfil the Tribes' treaty right to a fishery for suckers, (2) confirms a time immemorial priority date of that right; and (3) establishes that the right consists of specific minimum levels of Upper Klamath Lake. However, the ACFFOD also provides that, pursuant to a stipulation into which the United States and the Tribes entered, this federal reserved right cannot result in curtailment of rights older than 1908 until the conclusion of the entire state proceeding, including judicial challenges. The United States' storage right and the irrigators' water rights have a 1905 priority date, and therefore this ACFFOD provision currently limits the United States' ability to issue a call to ensure that lake levels are not depleted below the specified Tribal water right levels.

III. The Bureau of Reclamation's authority to operate the Klamath Project may be constrained by some of the existing pre-ESA water user contracts such that Reclamation may lack discretionary control over certain operations for purposes of ESA consultation.

As noted above, implementation of water contracts entered into before the enactment of the ESA may not trigger ESA consultation if Reclamation did not retain sufficient discretion in the contract to take actions that could benefit listed species. Assessment of whether Reclamation retained such discretion requires a case-by case, contract-specific analysis of the contract's terms. As to those contracts, Reclamation may not possess the discretionary authority to take action to protect listed species, and thus is not required to consult under ESA Section 7.[1]

As discussed above, the 1902 Reclamation Act authorized projects for the purpose of reclaiming lands for agriculture and has been interpreted by memoranda from the Office of the Solicitor and the Commissioner of Reclamation to authorize supporting purposes, such as flood control and power generation. *Authority for Construction of Works to Protect Tulelake Area, including Coppeck Bay Lands, from Flooding – Tulelake Division, Klamath Project*, Leland O. Graham, Regional Counsel, Office of the Solicitor (Sept. 16, 1947); *Authorization of Construction of Certain Flood Protection Works, Klamath Project*, Leland O. Graham, Regional Counsel, Office of the Solicitor (Oct. 8, 1948); *Klamath Power Determination*, Michael L. Connor, Commissioner of Reclamation (May 17, 2013). The limited statutory purpose of the Project, when read in conjunction with certain of the contracts and other laws discussed herein, arguably may not impart discretionary authority to Reclamation to take action to benefit listed species. Reclamation's discretion to take action to benefit listed species may be further constrained by the ACFFOD. Per the McCarran Amendment, Section 8 of the Reclamation Act, and other federal law, the United States must follow the ACFFOD and state law to the degree they are consistent with federal legal mandates. Further analysis is needed to determine the relationship between the 1902 Reclamation Act, the ACFFOD, and state law to Reclamation's discretionary authority.

The pre-ESA contracts between Reclamation and the irrigators, which impose a non-discretionary duty on Reclamation to deliver water for irrigation purposes, may negate any discretion to benefit listed species depending on the contract. The contractual terms vary, but one, the Van Brimmer contract, specifically obligates Reclamation to deliver a specific quantity of water during a specific time period at a specific location. The Van Brimmer contract does not contain a shortage clause or other provisions which could be interpreted to allow Reclamation to reduce, reschedule, or otherwise modify water deliveries. The proscriptive nature of the Van Brimmer contract leaves Reclamation no discretion to take actions that could benefit listed species. Without such discretion, Reclamation does not have a duty to consult under ESA Section 7 regarding its fulfillment of the Van Brimmer contract.

[1] Notwithstanding the lack of a consultation requirement pursuant to Section 7, the question of whether Reclamation and the water users may nonetheless face potential liability under ESA Section 9 is worthy of greater exposition than can be afforded in this memo. However, in general, the Solicitor's Office believes that Reclamation would not be liable for impacts to species under Section 9 if those impacts result from actions over which Reclamation has no discretion. There is a strong legal argument for the proposition that if an action agency has no ability to avoid take because Congress has set a certain path for that agency action, then any resulting take is not attributable to the agency.

The contract with the Tulelake Irrigation District requires Reclamation to deliver as much water as the irrigation district demands, subject only to the capacity of the delivery system and the amount of water reasonably needed for beneficial use. As noted below, the Tulelake contract also contains liability waiver and re-apportionment provisions addressing consequences in the event of a shortage. These requirements would need to be examined to determine whether Reclamation lacks discretion to reduce water deliveries to the Tulelake Irrigation District to benefit listed species.

The Tulelake contract contains a liability waiver shortage clause which relieves Reclamation of liability if Reclamation is unable to deliver the entire amount of water required under the contract because of drought or "other causes." As the *NRDC* court held, such a clause does not convey discretionary authority to Reclamation to act to benefit listed species but is rather a force majeure clause which shields Reclamation from liability if a drought or other event outside of Reclamation's control causes a shortage. *NRDC*'s holding was reached after the *Home Builders* decision and comports fully with the reasoning in *Home Builders*. The Tulelake contract reapportionment clause allows reapportionment of water in the event of a shortage, but only among water users with equal priority dates to the District. This provision too may not provide Reclamation with the requisite discretion to take action for the benefit of listed species but likely would require further analysis.

The remaining contracts, with Klamath Irrigation District and Sunnyside Irrigation District, are less proscriptive regarding the amount of water and timing of deliveries than the Van Brimmer and Tulelake contracts and contain shortage clauses. Reclamation may lack the discretionary authority to reduce or alter water deliveries under these contracts to benefit listed species. However, the less proscriptive nature of these contracts arguably stands as a counterweight to the proposition that Reclamation lacks discretion to trigger an ESA Section 7 consultation, and therefore would require further analysis.

If Reclamation ultimately determines that it lacks sufficient discretionary authority to trigger the consultation requirement with respect to any specific contracts or other operational aspects of the Klamath Project, any effects attributable to those non-discretionary actions will need to be included in the environmental baseline, as defined by 50 C.F.R. § 402.02, in any consultation of the discretionary contracts or actions at the Project. Because the consequences to listed species and designated critical habitat of non-discretionary actions taken pursuant to such contracts are included in the environmental baseline, these consequences are not part of the effects of the action to be analyzed in a consultation and cannot be altered through the consultation process. For example, neither reasonable and prudent measures nor any reasonable and prudent alternatives developed during the consultation process can result in diminishment of the amount of water delivered pursuant to the Van Brimmer contract, nor to alteration of the dates of delivery or other material non-discretionary terms. However, the effects of the discretionary actions will be added to the baseline consequences in making jeopardy and/or adverse modification determinations, which may result in reasonable and prudent alternatives to the discretionary actions.

IV. Other authority does not detract from this analysis.

The conclusion of this memorandum regarding the constraints imposed by the Reclamation Act on Reclamation's authority may appear to run counter to the Ninth Circuit's decision in *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917,

928–29 (9th Cir. 2008) ("*NWF*"). That decision held that agencies possess the discretion needed to consult when implementing a statute that provides a broad mandate to achieve a goal rather than the proscriptive authority of the statutes considered in *Home Builders, Alaska Wilderness League,* and *WildEarth Guardians*.

The distinction between the outcome in *NWF* and the present analysis depends upon the specific language in the contracts between Reclamation and the irrigators. By entering into these pre-ESA contracts, which impose a non-discretionary duty on Reclamation to deliver water for irrigation purposes, Reclamation arguably obviated any discretion to benefit listed species that it might have arguably possessed to achieve the mandates of the Reclamation Act. The proscriptive nature of these contracts sets the present case apart from the situation in *NWF*. *NWF* addressed ESA Section 7 compliance by the National Marine Fisheries Service in the context of operation of the Federal Columbia River Power System. The Ninth Circuit distinguished *Home Builders*, writing:

> The [*Home Builders*] Court found [50 C.F.R. § 402.03] to be a reasonable resolution to the problem of an agency being unable to "simultaneously obey" both Section 7 and a separate statute which expressly requires an agency to take a conflicting action. [*Home Builders*, 127 S. Ct.] at 2533–34. We do not face this problem here, however, because in the present case, Congress has imposed broad mandates, rather than directing the agency to take specific actions, and the agencies are perfectly capable of simultaneously obeying Section 7 and those mandates.

524 F.3d at 928. Here, some of the proscriptive contracts by which Reclamation meets the mandate of the Reclamation Act to reclaim lands for agriculture arguably prevent Reclamation from simultaneously obeying Section 7 and meeting its contractual obligations. As to those contracts, Reclamation thus lacks the discretionary authority to take action to benefit listed species. Without that discretionary authority, Reclamation's proposed operation must comply with the contract, and the consequences to listed species from doing so do not constitute effects that are attributable to the operation of the project.

The general premise underlying the Ninth Circuit's decision in *Klamath Water Users Protective Ass'n v. Patterson*, a portion of which broadly held that the Klamath Project is subject to the ESA, is also consistent with the direction in this memorandum. 204 F.3d 1206 (9th Cir. 1999). As a general matter, this case stands for the simple proposition that Reclamation must meet the requirements of the ESA, as all federal agencies must. However, in doing so, Reclamation must develop its future operations in a manner that is consistent with more recent regulatory changes and case law. *Patterson* predates the Supreme Court's decision in *Home Builders* and the Supreme Court's direction that ESA Section 7 is not triggered where any agency lacks discretionary authority or control over an action. Thus, *Patterson* does not perform a 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. Reclamation can meet both the general premise enunciated by *Patterson* and the application of Section 7 to only discretionary actions mandated by *Home Builders* and regulation by conducting the detailed reexamination of the parameters of Reclamation's discretionary authority described in this memorandum and adjusting its consultation accordingly.

Finally, in 1995, the Regional Solicitor for the Pacific Southwest Region issued a memorandum addressing water rights in the Klamath Basin. In 1997, a second memorandum

was issued jointly by the Regional Solicitors for the Pacific Northwest and Southwest Regions to address a letter from an Assistant Attorney General for the State of Oregon which had made assertions contrary to the rights asserted by the United States. These memoranda addressed, among other things, the applicability of ESA Section 7 consultation to the Klamath Project operations. But they did not address the more recent precedents, including the Supreme Court's 2007 decision in *Home Builders*. To the degree that these memoranda conflict with this analysis, they are hereby withdrawn.

V. Conclusion

In *Home Builders*, the Supreme Court acknowledged that reading ESA Section 7 to apply to all agency actions would implicitly repeal statutes with conflicting mandates, that such a reading was not required by Section 7 itself and ran contrary to the prohibition on implicitly repealing statutes, and that agency regulations implementing Section 7 resolved this issue by establishing that Section 7 applies only when an agency possesses discretionary authority to act to the benefit of listed species. Likewise, the consequences to listed species or their habitat that flow from carrying out a non-discretionary action are effects to be included in the environmental baseline.

Reclamation's Klamath operations is governed by numerous water contracts. The degree to which Reclamation's discretion is constrained varies depending on the terms of the specific contract. The Van Brimmer contract presents strong circumstances for concluding that Reclamation lacks any discretion to implement the contract in a way that could benefit listed species, and therefore is not required to consult on any aspect of its implementation of the contract. For the Tulelake contract, the only possible source of discretion is the shortage clause. Under the accurate post-*Home Builders* interpretation of the liability waiver clause, as embodied in *NRDC*, the clause is a force majeure clause that does not impart discretionary authority for Reclamation to act to benefit listed species. Further analysis of the reapportionment clause may also dictate that it does not provide Reclamation with sufficient discretion to trigger consultation. Similarly, while the contracts with the Klamath Irrigation District and Sunnyside Irrigation District impose less proscriptive requirements on Reclamation, the contracts should be examined to determine whether in light of *Home Builders* and other recent precedents whether Reclamation lacks the requisite discretionary control to consult regarding these contracts.

In light of the foregoing analysis, when developing its proposed operations for the Klamath Project, Reclamation should evaluate the contracts in light of the above-discussed principles and determine whether any portion of water in the Klamath Project is subject to nondiscretionary contract terms and include any effects attributable to the deliveries of such waters in the environmental baseline as part of any ESA consultation. To the extent other water users have competing or conflicting claims, relevant allocations shall be determined in accordance with this analysis until any final Klamath adjudication or any other relevant judicial order or determination.

Concur X

Daniel H. Jorjani

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Daniel H. Jorjani, Solicitor

Do Not Concur _____

10/29/20

Date