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May 11, 2016

Mr. Rodney D. Whitfield
Financial Manager
United States Department of the Interior
Bureau of Reclamation
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, CA 95825

Re: BOR's Explanation for Not Providing Klamath Project SPCCRs
(MP-3000; FIN-6.20)

Dear Mr. Whitfield:

I am in receipt of your correspondence dated April 18, 2016, setting forth the Bureau of Reclamation (BOR)'s response to my request for Statements of Project Construction Cost Recovery (SPCCR) for the Klamath Project for Fiscal Years 2001-2015. As you correctly recognize, I represent the interests of the Klamath Irrigation District (KID) on federal matters (including the C Canal Flume Financing Agreement) which BOR's legal obligation to produce and deliver annual SPCCRs engender.

If I understand your explanation correctly, the Bureau has been unable to provide Klamath Project SPCCRs since 2001, as the 2014 GAO report to which we both have referred¹ confirms, because of alleged complexities preventing the Bureau from properly accounting for revenues derived from leased lands located on Project Wildlife Refuges and for reimbursable Project-related and Endangered Species Act (ESA)-related contractor costs. If I also correctly understand your explanation, the Bureau will be unable to properly meet its longstanding legal obligation under the reclamation laws to provide annual Project accountings in the near future, because the Klamath Basin Restoration Agreement (KBRA)² which contained a proposed political resolution of these issues failed to secure Congressional approval.

The KID sees through your offices' spurious and disingenuous explanation and demands the Bureau's immediate delivery of annual accounting statements reflecting the net balance of the KID's portion of Project capital costs and operation and maintenance (O&M) expenditures for the period specified inclusive of these items. The BOR has had ample opportunity since 2001 to provide the SPCCRs on a timely basis as the Reclamation Manual requires, especially since multiple KID requests have been made for the agency's production and delivery of such documents.

As you can readily discern,

“The Reclamation Manual consists of a series of Policy and Directives and Standards. Collectively, these releases assign program responsibility and establish and document Bureau of Reclamation-wide methods of doing business. All requirements in the Reclamation Manual are mandatory³ (emphasis added).

It is well known that “policy documents with procedures and requirements for SPCCR preparation [were first] developed as part of the Reclamation Instructions [...i]n 1977.”⁴ It also is well known that a prime objective of the 2006-2007 “Team 25” recommendations “for reporting project financial status to [BOR] managers, *customers and stakeholders*” (emphasis added) was to

“Establish and implement a standard, agency-wide process for evaluating and communicating the current financial circumstances of Reclamation infrastructure, including cost invested, *repayment status, O&M cost allocations*, design life, facility condition, etc. (emphasis added).”⁵

In addition, it is well known that the BOR Directives and Standards (D&S) focusing on SPCCRs which supersede the 1977 Instructions imposes “content, format, and *due-date requirements* for SPCCR preparation” (emphasis added).⁶ In particular, Paragraph 6 of this D&S provides that,

“A separate SPCCR is *required annually* for any authorized reimbursable construction project, division, or unit that has:

- A. Construction costs allocated to one or more reimbursable authorized project purposes, such as irrigation [...]
- C. Completed the first year of advance planning.
- D. Rehabilitation and betterment, safety of dams, salinity or other authorized construction activity. [...]
- E. Active repayment status.
- F. Not been deauthorized.
- G. Not been transferred in title to a non-Federal entity” (emphasis added).⁷

Paragraphs 8B-8E of this D&S provide not only that “[a]ll project costs, including incurred costs, estimated future construction costs, and other charges *must* be included in the SPCCR,” but also that “[r]epayment data presented *must* equal total costs,” that “Reclamation cost data *must* be supported by and reconcile to the existing financial reporting system general and subsidiary ledgers,” and that “Regions *must* maintain [both...] supporting documentation for allocations between project purposes, and [...] distribution of costs to divisions and repayment entities” (emphasis added).⁸

Furthermore, Paragraph 10 of this D&S provides that “[a]ll SPCCRs and accompanying graphs *must* be posted on the regional intranet site and a notification of availability *must* be posted on the regional internet site within 15 days after the completion due date” (emphasis added).⁹ Paragraph 11 of this D&S, moreover, provides that “[e]ach SPCCR *must* be distributed [to...] C. project beneficiaries (upon request)” (emphasis added).¹⁰

While Reclamation may “recognize[, as you state,] the need for completed SPCCRs for the Klamath Project which identify costs and project repayment on a District and/or contract level,” the BOR’s ongoing and endless efforts to complete the SPCCRs is neither acceptable nor compliant with the letter and spirit of the applicable reclamation laws.

Finally, it is wholly irrelevant whether certain of the KBRA’s provisions (e.g., Art. 15.4.4) would have Page | 3 provided a political resolution of these accounting issues had Congress approved the KBRA.

KBRA Article 15.4.4.A.i, for example, would have allocated 10 and 90 percent of the past net revenues derived from the leasing of National Wildlife Refuge lands, respectively, to the Tulelake Irrigation District, and then to the Reclamation Fund as a credit to the Klamath Reclamation Project facilities.¹¹ KBRA Article 15.4.4.A.ii would have deemed the then current Reclamation Fund balance for such past net leasing revenues as equal to the then total Klamath Project debt outstanding, thereby effectively extinguishing all prior and current KID Klamath Project debt,¹² even though the KID previously had very likely already fulfilled its obligation of Project repayment and is entitled to a credit for its current and past O&M (including capital) charges.¹³ KBRA Article 15.4.4.A.iii would have reaffirmed that any such extinguishment of Project debt would not, by itself, have affected the Bureau’s claims to title in any of the transferred works then currently owned by the U.S. government absent prior Congressional approval, thereby rendering districts free to invoke the procedure set forth in their Project contracts for acquiring title to their transferred works.¹⁴ Meanwhile, KBRA Article 15.4.4.B would have applied future National Wildlife Refuge net leasing revenues against future Klamath Project capital costs.¹⁵

Clearly, Congress did not authorize the Bureau to freely enter into an agreement with state, local and tribal governments that operates (behind Congress’ back) to redefine the BOR’s obligation to account under the reclamation laws to Klamath Project beneficiaries for these repayment and cost items, notwithstanding the KBRA’s certain appeal to some Project irrigators. This is especially true considering that the BOR had employed questionable, if not, underhanded methods to minimize the voices of KBRA opponents.¹⁶

In sum, Congress’ decision last year to reject the KBRA does not provide your offices today with reasonable or legitimate grounds to further prolong the production and delivery of annual SPCCRs to the Klamath Irrigation District. Congress unequivocally did not intend to enable the Bureau to engage in the practice of obfuscation and delay until it has found a clever way to reinsert the KBRA piecemeal into a new or as-yet-undisclosed Klamath Basin agreement¹⁷ or pending legislation (e.g., SA 3288, the Merkley/Wyden bill).¹⁸ Indeed, Congress also did not intend for Reclamation Fund monies paid in by irrigators to be reallocated for non-irrigation Project-related purposes, such as to finance tribal water right settlements, including the KBRA, as the Bureau’s own documentation clearly reveals. This constitutes nothing less than the agency’s unilateral and illegal reinterpretation of federal law. The Bureau must work harder at fulfilling its obligation to irrigators as Congress mandated.

We trust that you will grasp the meaning and import of our response which, no doubt, will be shared with members of Congress and the media.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
Managing Principal

Cc: David Murillo, BOR Sacramento
John Bezdek, Interior Department OSG
Edward Sheets, BOR Contractor
The Honorable Doug LaMalfa, U.S. Congress
The Honorable Greg Walden, U.S. Congress

ENDNOTES

¹ See United States Government Accountability Office, *Bureau of Reclamation - Availability of Information on Repayment of Water Project Construction Costs Could Be Better Promoted*, Report to Congressional Requesters, GAO-14-764 (Sept. 2014), at fn 17 p. 11-12, Table 1.d. p. 14, Appendix III.f. p. 39, Appendix III.J p. 43, available at: <http://gao.gov/assets/670/665588.pdf> (“These project numbers do not include the Klamath project in the Mid-Pacific region, which also has an outstanding repayment obligation by irrigation districts, because *Reclamation has not prepared a final repayment statement for this project since fiscal year 2001*. According to Reclamation officials, the repayment statement has not been finalized because they are in the process of crediting revenues from leasing land, among other things [...]” (emphasis added)).

² See *Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities* (Feb. 18, 2010), available at: <http://216.119.96.156/Klamath/Klamath%20Basin%20Restoration%20Agreement%202-18-10signed.pdf>.

ENDNOTES

³ See U.S. Department of Interior Bureau of Reclamation, *Reclamation Manual*, available at: <http://www.usbr.gov/recman/>.

⁴ See U.S. Department of Interior, Bureau of Reclamation Manual, Directives and Standards – *Statement of Project Construction Cost and Repayment (SPCCR)*, Temporary Release FIN TRMR-73 (11/11/2015) (Supersedes 9/28/2007, Expires 11/11/2016), at p. 1, available at: http://www.usbr.gov/recman/temporary_releases/fintrmr-73.pdf.

⁵ See United States Department of Interior Bureau of Reclamation, *MEMORANDUM – Managing for Excellence – Implementation of Team 25 Recommendations* (94-00001, ADM-1.10) (Jan. 5, 2007), at 2, available at: <http://www.usbr.gov/excellence/Finals/Team25FinalProducts.pdf>.

⁶ See U.S. Department of Interior, Bureau of Reclamation Manual, Directives and Standards – *Statement of Project Construction Cost and Repayment (SPCCR)*, Temporary Release FIN TRMR-73 (Expires 11/11/2016), *supra* at 1.

⁷ *Id.*, at par. 6, p. 4.

⁸ *Id.*, at paras. 8A-8E, p. 5.

⁹ *Id.*, at para. 10, p. 8.

¹⁰ *Id.*, at para. 11.

¹¹ “[A]fter 10% of the net revenues from leasing of [Tulelake National Wildlife Refuge] TLNWR lands within boundaries of TID are provided to TID, as provided in article 4 of Contract No. 14-06-200-5954, and payment is made to counties from net revenues from the leasing of Refuge lands in TLNWR and [Lower Klamath National Wildlife Refuge] LKNWR (Area K) in lieu of taxes, [...] the Parties agree that remaining net revenues from the leasing of Refuge lands in TLNWR and LKNWR at the time of enactment of the Authorizing Legislation proposed in Appendix A and deposited in the Reclamation Fund shall apply as a credit to existing capital costs of Klamath Reclamation Project facilities.” See KBRA Art. 15.4.4.A.i.

¹² “[T]he United States and the KPWU [Klamath Project Water Users] agree that the funds held in the Reclamation Fund from the Refuges’ lease land revenues at the time of enactment of the Authorizing Legislation *will be deemed to be equal to, and applied to liquidate, any and all debt or encumbrance of the Klamath Restoration Project or Project contractors as of the date of enactment of that act*. KPWU and the United States further agree that the disposition of net lease revenues thereafter shall be in accordance with Applicable Law, including the Authorizing Legislation” (emphasis added).

¹³ According to a March 15, 2016 email correspondence dispatched to KID Board members by George (Moss) Discroll, the BOR Klamath Basin Area Office’s Senior Water & Lands Specialist, the KID did not owe any “current operation and maintenance (O&M) payments due to Reclamation, for Reserved Works facilities (i.e., for KID, Upper Klamath Lake/Klamath River and the Lost River Diversion Channel).” “In this respect, KID has no current outstanding balance for CY 2016 charges, and is slated to receive a refund of \$12,355 (representing the surplus from the CY 2015 amount advanced, after application to estimated CY 2016 estimated charges).”

¹⁴ “The provision in Section 15.4.4.A.ii that any past Klamath Reclamation Project debt or encumbrance is deemed satisfied and the provision in Section 15.4.4.B that future net revenues will be applied to future Klamath Reclamation Project capital costs, does not affect the title of Klamath Reclamation Project facilities that are currently owned by the United States. Express Congressional approval is required to transfer title to any Klamath Project Reclamation Project facilities now owned by the United States, and nothing in this Agreement or the Authorizing Legislation shall affect any such title transfer. The Parties also acknowledge that the authorized purposes of the Klamath Reclamation Project, including as they may be stated in the Authorizing Legislation, are not determinative of whether Congress may subsequently approve such title transfer.” See KBRA Art. 15.4.4.A.iii.

¹⁵ “The Parties shall support federal legislation providing for the disposition of future net revenues from leasing of Refuge lands in the manner specified in Appendix A.” See KBRA Art. 15.4.4.B.

¹⁶ See Doug Whitsett, *Citizen Participation in Government*, Klamath Basin Crisis.org, available at: <http://www.klamathbasincrisis.org/whitsett/citizenparticipation120208.htm> (“Impeding citizen contributions to public meetings is being honed into a new art form. Two commonly used methods include; public meetings manipulated by paid facilitators to reach a predetermined consensus, and the application of the Delphi Technique perfected by followers of Stuart Udall.”).

¹⁷ See, e.g., “2016 Klamath Power and Facilities Agreement” (April 1, 2016), at 5th and 6th Recitals, available at: <https://www.doi.gov/sites/doi.gov/files/uploads/REVISED%204-6-2016%20Yurok%20DRAFT%202016%20Klamath%20Power%20%26%20Facilities%20Agmt%20%20CLEAN.pdf>

(“Components of the KBRA as related to agriculture in the Upper Klamath Basin included the cost of power for irrigated agriculture and the operation of facilities related to irrigated agriculture. State and Federal and other Parties are committed to realization of processes and benefits contemplated under the three agreements, recognizing that certain outcomes were not guaranteed or are more uncertain than others and recognizing also that certain measures have independent merit.” *Id.*, at 5th Recital. “The Federal Agency Parties actively participated in the negotiation and drafting of the KBRA and UKBCA, but did not sign the KBRA or UKBCA based on their determination that authorizing legislation was necessary in order for the Federal Agency Parties to legally commit to certain terms. However, the Federal Agency Parties agree with other Parties that a broader approach to water- and resource-related issues, going well beyond the Amended KHSA, is called for, and this Agreement is appropriate as a step in the direction toward addressing the legitimate interests of irrigation-related parties, including in relation to the Amended KHSA and expiration of the KBRA.” *Id.*, at 6th Recital.).

¹⁸ See “Senate Amendment (SA) 3288,” amending SA 2953 proposed to S.2012, adding new Section 4 “Power and Water Management” to The Klamath Basin Water Supply Enhancement Act of 2000 (Public Law 106-498, 114 Stat 2221), Cong. Rec. (Feb. 4, 2016), at 688-689 at Subsection (b), “Water Environmental and Power Activities” at p. 2, available at: http://www.koganlawgroup.com/uploads/Merkley-Wyden_Bill_Linking_Approval_of_Amended_KHSA_BOR_C_Flume_Financing_Tribal_Water_Rights_Lower_Cost_Pow.pdf

(“Pursuant to the reclamation laws and subject to appropriations and required environmental reviews, the Secretary may carry out activities including entering into an agreement or contract or otherwise making financial assistance available – (A) to plan, implement, and administer programs to align water supplies and demand for irrigation water users associated with the Klamath Project, with a primary emphasis on programs developed or endorsed by local entities comprised of representatives of those water users; B) to plan and implement activities and projects that – (i) avoid or mitigate environmental effects of irrigation activities; or (ii) restore habitats in the Klamath Basin watershed, including restoring tribal fishery resources held in trust; and C) to limit the net delivered cost of power for covered power uses”) (identifying funding that is tied to programs the objectives of which include the KBRA and the other basin agreements, and horse-trading it with C Canal Flume replacement).