

This document serves as Messrs. Pederson and Schultz's response to Part II, Question 6 of Form OSC-12. Below is a detailed narrative document pertaining to illegalities and wrongdoing in the formation and implementation of the financial assistance agreement between the Bureau of Reclamation (BOR) and the Klamath Water and Power Agency (KWAPA), originally entered on September 26, 2008 (hereinafter referred to as the "Contract"). This wrongdoing falls into three OSC-qualifying categories: 1) violation of law and regulations, 2) gross waste of funds, and 3) abuse of authority. Several disclosures overlap two or more categories. Messrs. Pederson and Schultz have personal knowledge or documentary evidence of all of the following acts and omissions.

**I. Introduction and Background: History of the Contract and the Water User Mitigation Program (WUMP).**

The Klamath Project is located in South Central Oregon and Northern California. It provides water to over 200,000 acres of farm land in that area, primarily from the Upper Klamath Lake and the Klamath River. Upper Klamath Lake is the major source of water for the upper portion of the Klamath River. Since 2001, due to Endangered Species Act (ESA) requirements and drought conditions, Reclamation's Klamath Project has supplemented supplies of water from the lake and river for irrigators with a Water Bank Program, involving land idling, substitution of ground water for surface water for irrigation needs, direct pumping and off stream storage. The 2002 and the subsequent 2010 National Marine Fisheries Service's Endangered Species Act Biological Opinions required minimum flows in the Klamath River to protect federally listed endangered coho salmon. In addition, a biological opinion from the U.S. Fish and Wildlife Service requires maintaining Klamath Lake elevation thresholds to protect ESA-listed suckers. The combination of these Biological Opinions has the effect of making less surface water available for irrigators.

After seven years of implementing the Water Bank Program (2001 through 2007), at a cost of almost \$33 million, the BOR decided to seek a non-federal government entity to manage the program, now called the "Water User Mitigation Project" (WUMP). The BOR advertised a contract through its financial assistance program proposal process. The Contract was awarded on September 26, 2008 to the then recently-formed Klamath Water and Power Agency (KWAPA). **Ex. 1.** KWAPA is an inter-governmental agency formed on August 20, 2008 by representatives from a few California and Oregon irrigation and drainage districts within the Klamath Project, registered in the State of California pursuant to Title 1, Division 7 of Chapter 5 of the Government Code of the State of California and in Oregon pursuant to the provisions of Oregon Revised Statutes 190.110. The original Contract provided that the WUMP was to be funded by a federal financial assistance grant and managed by BOR and KWAPA for 5 years (ending in December 2012). Prior to the Contract, KWAPA had existed only for a few months as a Board of Directors, and had no staff, office space or other infrastructure, all of which was subsequently funded by the Contract.

The Contract recites that supplementation of water supply for the Klamath Project was necessary due to the increased deliveries of water for fish and wildlife purposes required

by the ESA, specifically the requirement to maintain additional water in Upper Klamath Lake for suckers and increased flow requirements in the Klamath River for coho salmon.

As further detailed below, while the Contract recites that its objective is “to complete a study to examine the potential for stakeholder capability to manage market-based water supplementation programs . . .” **Exhibit 1 at 2, § A.3**, that objective is inaccurately recited in an attempt to meet the terms of a claimed statutory authority for the Contract which actually does not apply. In fact, the tasks KWAPA is to complete under the original Contract do not involve a study examining the potential for managing market-based water supplementation programs, but are directed at actually managing such programs without any prior feasibility study. KAWPA’s tasks under the Contract are to acquire options for supplemental water and to report on the efforts to obtain that water. **Id., § A.5.1**. Specifically, the Contract recites that KWAPA is to develop a program to provide up to 50,000 acre-feet of supplemental water in year one, 40,000 acre-feet in year two, 30,000 acre-feet in year three, 20,000 acre-feet in year four, and 10,000 acre-feet in year five. **Id. at 3, § A.5.2**.

The Contract claims that that the additional water obtained will benefit the Klamath National Wildlife Refuges as well as irrigators, **id. at 2, § A.3**, and that the water will be used “to meet Project requirements for the direct benefit of fish and wildlife habitat.” **Id. at §A.5.1, Task 1**. As detailed below, these are also inaccurate claims intended to meet the terms of another claimed statutory authority for the Contract which actually does not apply. The actual expenditures under the Contract have been directed at obtaining groundwater for Klamath Project irrigators, paying farmers to idle land to increase water supplies for the remaining farmland, paying farmers to compensate them for receiving less irrigation water in times of drought, paying well owners whose water sources were depleted by groundwater pumping under the Contract, and paying the expenses of KWAPA. There is no evidence that any of the funds under the Contract, or any of the water provided by means of the Contract, has been used to benefit National Wildlife Refuges or fish and wildlife habitat in any way. In fact, the unsustainable groundwater pumping that has occurred under the Contract reduced the total amount of water in the Klamath Basin, to the detriment of fish and wildlife, including endangered species.

The original five year (2008 through 2012), \$11.25 million Contract has been modified at least 17 times. The Contract language as of the seventeenth modification in 2013 allows funding of KWAPA of up to \$41.25 million. **Ex. 2, p. 2**. In addition, as detailed below, the Contract duration has been extended, first to 2015 and then to 2023. By 2013, nearly \$34 million had been obligated by BOR under this Contract, **id., p. 2**, and KWAPA budgeted an additional nearly \$14 million for 2014, **Ex. 3**, for a total of nearly \$48 million through 2014.

**II. The Contract Violates the Federal Grant and Cooperative Agreement Act and Lacks Statutory Authority. Federal Funds have been the Expended in Violation of Law.**

Under the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §6301-6308, (“FGCA”), the principal purpose of a financial assistance agreement such as the Contract here is to provide funds to a grant recipient to “carry out a public purpose of support or stimulation authorized by a law of the United States.” 31 USC § 6304(1) (emphasis added). While procurement contracts involve outside parties transferring goods or services directly to the government in return for payment, financial assistance agreements involve the transfer of money to a non-federal party to carry out a public purpose. 31 U.S.C. §6305. Federal agencies do not need specific statutory authority to enter procurement contracts, but must comply with federal procurement law in the process. In contrast, assistance agreements are not subject to federal procurement law but must be specifically authorized by statute. *E.g., CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency*, 745 F.3d 1379, 1381 (Fed. Cir. 2014). The Department of Interior Manual, 505 DM 2 at 7, provides that financial assistance agreements must include “U.S. Code citation(s) to the statutory authorization and/or appropriation permitting expenditure of the identified funds for an authorized purpose.” Sec. 2.10.B(2).

Here, with a possible minor exception discussed below, the use of the funds provided under the Contract is not authorized by any statute; and the funds have not been used to carry out a public purpose.

**A. The Authorities Cited In Issuing the Contract Do Not Authorize the Contract.**

The authorities cited as authorizing this Contract (**Exhibit 1 at 2, § A.2** are: 1) the Klamath Basin Water Supply Enhancement Act of 2000, Public Law 106-498; 2) the Fish and Wildlife Coordination Act (FWCA), Public Law 89-72; 3) the Reclamation Reform Act of 1982, Public Law 97-293, Section 210; and 4) the Consolidated Appropriations Act, 2008, Public Law 110-161. In a Modification in 2010, the Reclamation States Emergency Drought Relief Act of 1991, Public Law 102-250, was added as an authority. **Ex. 4, at 5.** None of these authorities authorizes this Contract or the expenditure of funds which has actually occurred under the Contract. Thus, the expenditure of funds under the Contract is illegal.

**1) The Klamath Basin Water Supply Enhancement Act of 2000**

The Klamath Basin Water Supply Enhancement Act of 2000; Public Law 106-498, 114 Stat. 2221, authorized the Secretary of Interior to conduct feasibility and other studies. The portion of the Act relied upon in the Contract is Section 2, authorizing the Secretary of Interior to work with “affected State, local and tribal interests, stakeholder groups and the interested public, to engage in feasibility studies of . . . proposals related to . . . potential for development of additional Klamath Basin groundwater supplies . . . further innovations in the use of existing water resources, or market-based approaches, in order

to meet growing water needs.” *See, Exhibit 1, p. 2, § A.2*, quoting 114 Stat. 2221, Sec. 2 (emphasis added). The Contract claims to “forward those objectives by allowing stakeholders to develop market-based approaches to developing groundwater supplies and other innovative means of providing Project water supplies.” *Id.*, § A.2. The Contract further states that: “The objective of this project is to complete a study to examine the potential for stakeholder capability to manage market-based water supplementation programs including but not limited to: off stream storage, direct pumping, groundwater substitution and land idling.” *Id. at, § A.3.*

However, as noted above, the actual tasks KWAPA is to perform under the Contract do not include any feasibility studies, and based on the budgets and other documentation concerning implementation of the Contract, it is apparent that no such feasibility studies have been conducted.

The Contract states the objective to conduct a feasibility study, but does not set any tasks, targets or goals to be achieved during the tenure of the Contract to achieve that objective. Moreover, the quotation of the statute in the Contract conveniently omits language requiring the authorized feasibility studies concerning the potential for development of increased groundwater supplies to include analysis of the impact of such development on “non-project lands, groundwater and surface water supplies, and fish and wildlife.” 114 Stat. 2221, Sec. 2 (2). The Contract contains no provisions for compliance with this statutory requirement, which would have exposed the potential detriment to non-project lands and fish and wildlife from the groundwater pumping that has taken place under the Contract. In fact, neither the Contract nor any subsequent modification contains any actual tasks related to a feasibility study at all.

Moreover, subsequent documentation concerning project implementation evidences that over \$30 million dollars of expenditures took place under the Contract for its first four years, **Exhibit 5**, without even commencing the feasibility study authorized by the Klamath Basin Water Supply Enhancement Act. The June 30, 2009 third quarter FY 2008-09 KWAPA Performance Progress Report is the only such report from KWAPA that lists as an activity which it had begun: “identification of studies to accomplish A3 OBJECTIVE of agreement 08FC20020 [the feasibility study].” **Exhibit 6, # 13.** However, nearly three years later, on March 15, 2012, KWAPA sought a three year extension of the Contract termination date, reporting that it needed more time “to gain more experience in order to investigate” the subjects of the feasibility study. **Exhibit 7at 2.** The request states:

Due to the hydrologic pattern related to the Klamath Project over the past four years, the ability for KWAPA to develop market-based approaches to developing groundwater supplies and other innovative means of providing Klamath Project water supplies, was difficult to attain due to lack of continuous water shortage from one irrigation season to next.

The Klamath Project has experienced one season of water shortage/drought condition since this cooperative agreement was awarded,

therefore only allowing KWAPA to institute the Water User Mitigation Program for one year through the past four years of the agreement.

Thus, not gaining adequate experience to complete a study to examine the potential for stakeholder capability to manage market based water supplementation programs . . .

Moreover, there is no evidence that the feasibility study authorized in the statute was conducted or has even commenced at any time since that extension in 2012, or that any project funds have been budgeted for it. Nevertheless, tens of millions of dollars have been expended to obtain more water and to pay the expenses of KWAPA -- purposes not authorized by any of the cited statutory authority. Through 2014, nearly \$48 million has been expended on this Contract, without the initiation of any feasibility study.

The failure to complete a feasibility study was not merely due to hydrologic patterns, but to the terms of the Contract itself. Although the contract calls for a study, it reveals that the real function of the Contract is to identify and purchase contracts for options to deliver water to the Klamath Project, **Ex. 1 at 2, § A.5.1**, and thereby provide tens of thousands of acre-feet of water to the Project for each year of the initial contract. **Id. at 3, §A.5.1.2**. As shown below, the bulk of the money provided in the Contract and in subsequent modifications has been budgeted for buying water and land idling contracts, not for the feasibility studies authorized by the statute. The remainder of the funds was used to compensate irrigators who did not receive irrigation water and well owners whose wells were depleted by groundwater pumping under the Contract, and for the expenses of KWAPA itself.

For example, the WUMP budget modification of May 6, 2010, **Exhibit 8 at 4-5**, shows that in 2010, \$32,750,000 was slated to be spent on water supply contracts, out of which \$4,750,000 was to be paid for the groundwater supply water contracts, \$25 million for land idling and \$3 million for similar expenses in the East Side irrigation districts. Approximately \$3 million was to be spent each of following two years for water supply contracts, resulting in a total projected cost of water supply contracts (including land idling) for three years of \$38,736,259. **Id. at 7**. The remaining approximately \$3 million in the three year budget was to be used to pay the expenses of KWAPA, including salaries, administrative expenses, office space, equipment, travel, computer systems and legal and public relations expenses. **Id. at 2-4**. While it appears that not all of the funds budgeted for 2010 were actually expended, we do know that as of 2013, nearly \$34 million had been obligated under the Contract and another \$14 million was budgeted for 2014, without the completion, or even commencement, of a feasibility study. Like the earlier budgets, the 2014 budget also allocates all funds to KWAPA's salaries, fringe benefits, travel, Board expenses, employee training, equipment, computer systems, supplies and other direct and indirect expenses; as well as for contracts for groundwater pumping, land idling, and consultants. There is still nothing allocated for feasibility studies. **Ex. 3**.

On December 21, 2012, BOR extended the length of the contract to 2023, purportedly under the authority of the Klamath Basin Water Supply Enhancement Act of 2000. **Ex. 9.** The extension was again based on the need for more time to conduct feasibility studies, given that only two years since the 2008 commencement of the Contract – 2010 and 2012 – presented water shortages “required to activate the WUMP.” **Ex. 9 at 1.** In a stunning distortion of language worthy of George Orwell, BOR claimed that the purchase of groundwater and land idling under the Contract, as well as future planned activities such as purchasing water outside the Klamath Project, were the feasibility study. *Id.* No actual studies are referenced, nor is any reason why a feasibility study could not be conducted in years without actual water shortages. By stating that only two years presented conditions necessary to “activate the WUMP,” BOR reveals that the WUMP, and therefore the Contract, is directed solely at expending funds to assist irrigators in times of shortage, not at any feasibility study. Clearly no study of the type authorized under the Water Supply Enhancement Act has been conducted or is planned.

Nor does BOR ever explain why millions of dollars were spent, or under what authority, in years when the WUMP was not “activated.” In those years, presumably all of the funds went to creating and supporting the infrastructure of KWAPA, even though it was not actually carrying out any functions under the Contract or under any purported statutory authority for the Contract.

In sum, the claim that the purpose of the Contract was to conduct feasibility studies authorized in the Klamath Basin Water Supply Enhancement Act of 2000 appears to be a charade masking the use of federal funds for an entirely different purpose.

## 2) **The Fish and Wildlife Coordination Act, Public Law 89-72**

The Fish and Wildlife Coordination Act (FWCA) is also improperly cited as authority for the Contract, because the WUMP does not benefit fish or wildlife as required under the FWCA. In **Exhibit 10**, the Regional Office of the BOR questions whether the FWCA requirement of a benefit to fish and wildlife is being met, which would require using 100% of project funds “to supply in-stream flows and refuge water, not for supply to water users.” (Emphasis supplied). The Regional Office official states that “[t]he current documentation does not support this determination,” pointing out that the documentation describes “land idling” as intended “to ensure an adequate supply for the remaining land,” *i.e.*, for irrigators, not fish and wildlife.

Several other Contract-related documents confirm that Contract funds were used to benefit irrigators, not fish and wildlife:

- A KWAPA memo dated March 10, 2010 entitled “Land Idling 2010,” **Exhibit 11 at 1**, describes the land idling and groundwater programs as “designed to maximize agricultural production within the Klamath Project,” and notes that the land idling program is intended to “increase the water allotment for the remaining acreage.”

- An April 8, 2010 email from BOR Klamath Basin Area Office manager Susan Fry describes a modification of the Contract providing an additional \$25 million to support the land idling program as “due to drought conditions indicating that deliveries of surface water for the Klamath Project will be of insufficient quantity to produce crops for the Main Portion of the Klamath Project.” **Ex. 12.**
- The Contract modification supplying funds for the East Side of the project describes the land idling program for the East Side as to be implemented when surface water deliveries will not be sufficient “to produce crops,” and as intended to “increase the water allotment for the remaining acreage.” **Exhibit 4 at 2.**
- In KWAPA’s August 31, 2011 request for an additional \$2,000,000 for a Central Communications Center at its offices, **Exhibit 13 at 1**, the 2010 groundwater program is described as “a tremendous success and was the primary reason that economic disaster was averted.” In other words, it served the economic interests of irrigators, not fish and wildlife.

This documentation demonstrates that statements in the Contract concerning the provision of water to benefit National Wildlife Refuges and fish and wildlife habitat do not describe the reality of how the funds have been spent. **Exhibit 1 at 2, § A.3** states that the “All water acquired and utilized by this program will benefit the Refuges as they are the first to be impacted by shortages and will be the first to benefit by supplemental supply.” The Contract also states that KWAPA will “Provide available water when necessary to meet Project requirements for the direct benefit of fish and wildlife habitat.” **Id. at § A.5.1., Task 1.** The budgets and other documents concerning the Contract do not reveal water use to benefit refuges or fish and wildlife, as opposed to irrigators, or explain how acquiring water options and idling land, for which the major portion of the federal funds have been expended, has benefited refuges or fish or wildlife. In fact, the excessive groundwater pumping under the Contract described below could well have been a detriment to fish and wildlife by indirectly reducing surface water in the Klamath Basin.

### 3) The Reclamation Reform Act 1982, Section 210

Section 210 of the Reclamation Reform Act of 1982 (RRA), 43 U.S.C. 390jj, reads as follows:

**SEC. 210: Water Conservation**

(a) Implementation of program by non-federal recipients. The Secretary shall, pursuant to his authorities under otherwise existing Federal reclamation law, encourage the full consideration and incorporation of prudent and responsible water conservation measures in the operations of non-Federal recipients of irrigation water from Federal reclamation

projects, where such measures are shown to be economically feasible for such non-Federal recipients.

(b) Each district that has entered into a repayment contract or water service contract pursuant to Federal reclamation law or the Water Supply Act of 1958, as amended (43 U.S.C. 390b), shall develop a water conservation plan which shall contain definite goals, appropriate water conservation measures, and a time schedule for meeting the water conservation objectives.

(c) The Secretary is authorized and directed to enter into memorandums of agreement with those Federal agencies having capability to assist in implementing water conservation measures to assure coordination of ongoing programs. Such memorandums should provide for involvement of non-Federal entities such as States, Indian tribes, and water user organizations to assure full public participation in water conservation efforts.

This statutory provision does not authorize the Contract because the subject of the Contract here is not water conservation measures by recipients of irrigation water, but the development of additional water supplies. Moreover, the statutory provision authorizes memoranda of agreement between the Department of Interior and Federal agencies, which KWAPA is not, and “involvement” of non-Federal entities in the agreements with Federal agencies. Since there is no agreement with a Federal agency, there is nothing for KWAPA’s “involvement” to derive from.

#### **4) Consolidated Appropriations Act, 2008, Public Law 110-161**

Other than general appropriations for the BOR, there is nothing in this Act that would appear to fund this Contract. Moreover, the Contract recites that funding from this source only covers the first year of the Contract (\$3,750,000, see **Ex. 1, p. 3, § A.5.2**), and states that additional funding is contingent on subsequent Congressional funding. **Ex. 1 at 8, § B.7**. No such additional Congressional funding is cited anywhere in the Contract documentation. Instead, all of the subsequent modifications to the Contract providing additional funds continue to recite the same inapplicable statutory authority as cited in the original Contract, with the exception of the citation to the Reclamation States Emergency Drought Relief Act of 1991 cited in one 2010 modification, discussed below.

#### **5) Reclamation States Emergency Drought Relief Act of 1991**

Modification 4, **Ex. 4**, dated April 8, 2010, adds the Reclamation States Emergency Drought Relief Act of 1991, Public Law 102-250, 43 U.S.C. 2201 *et seq.*, as additional authority for the Contract. **Id. at 5**. The section which appears to apply is Section 101(c) of the Act, 42 U.S.C. 2211(c):

Water purchases by Bureau. In order to minimize losses and damages resulting from drought conditions, the Secretary may purchase water from willing sellers, including, but not limited to, water made available by



Federal Reclamation project contractors through conservation or other means with respect to which the seller has reduced the consumption of water. Except with respect to water stored, conveyed or delivered to Federal and State wildlife habitat, the Secretary shall deliver such water pursuant to temporary contracts under section 102 [43 USC § 2212]: *Provided*, That any such contract shall require recovery of any costs, including interest if applicable, incurred by the Secretary in acquiring such water.

This law is not cited in any other modification.

Modification 4 adds \$25 million in funding to the Contract to support land idling, to be expended between April 8, 2010 and October 31, 2010. ***Id.* at 3.** By the terms of the Drought Relief Act, funding is only available when the governors of the affected states have made a request for temporary drought assistance and the Secretary of Interior has determined that it has merit. Section 104(a) of the Act, 43 U.S.C. 2214(a). In fact, 2014 was the only year during the tenure of the Contract in which the governors of both California and Oregon declared drought emergencies either statewide or in the Klamath Basin. Thus, this authority did not apply in 2010 when the funds purportedly authorized under this authority were to be expended. Nor could any other funds expended after 2010 other than in 2014 qualify under this law. The 2014 budget allocates \$8.5 million for land idling and \$ 4.15 million for groundwater pumping. ***Ex. 3 at 3.*** We do not have information as to how much was actually spent for these functions in 2014. However, as shown below, it is unlikely that most or all of any such expenditures were authorized by the Drought Relief Act.

While the 2010 Modification No. 4 supplies \$25 million for land idling, the 2010 budget prepared the month following the execution of that Modification acknowledges that the money being budgeted for supplemental water based on that Modification would not be available unless appropriated by Congress. The budget narrative states that the Oregon and California delegations were then attempting to secure funds to mitigate the drought, and that the budget was only a proposal for expending whatever funds were actually so allocated. ***Ex. 8 at 1.*** In fact, the only money actually appropriated by Congress under the Drought Relief Act from 2010 to the present appears to be \$10,000,000 in the Supplemental Appropriations Act of 2010, 111 P.L. 212, 124 Stat. 2302, 2313, “for the optimization and conservation of project water supplies to assist drought-plagued areas of the West.” That \$10 million was not all expended in 2010, and the unexpended balance was made available to BOR for future years by the Continuing Appropriations Act 2011, 111 P.L. 242, 124 Stat. 2607, 2610-2611.

Thus, at the very most, the Drought Relief Act could have authorized whatever remained of the \$10 million appropriated in 2010 for land idling and groundwater purchases in 2014. Even putting aside the requirement for gubernatorial declarations of drought emergencies, at the very most \$10 million of the funds spent under the Contract at any time could have been authorized by the Drought Relief Act.

In sum, it is evident from the above that BOR misused the authorities cited in the Contract and acted without authority to expend federal funds to the benefit of KWAPA and project irrigators.

### **B. The Contract Lacks a Public Purpose, as Required by the FGCA.**

The Contract here also violates the FGCA because authorizing the expenditure of nearly \$48 million has not served a truly “public purpose.” It has benefitted only Klamath Project irrigators, and not fish and wildlife or National Wildlife Refuges as claimed, or any other “public purpose.” *See* 31 USC §§ 6304(1); 6305.

As shown above and below, numerous contract-related documents demonstrate that the funds expended under the Contract have gone primarily to benefit private irrigators by supplying additional water or compensating them for losses they sustained due to water shortages in the Klamath Basin, and for payments to well owners who were damaged by the groundwater pumping under the Contract. The remaining funds have gone to support the infrastructure and expenses of KWAPA, even in years when it was not operating the project which was the subject of the Contract, the WUMP. KWAPA is an organization supporting private irrigators.

Federal funds have even been used to compensate farmers for reduced irrigation water deliveries that had already occurred – *i.e.* without any function of inducing them to forgo the use of irrigation water to conserve water for the remaining farm land. The September 15, 2010 Modification No. 6 to the Contract supplies \$3.7 million to retroactively compensate irrigators who had not been supplied water for two months in 2010 due to inadequate water supplies. **Exhibit 14, Attachment 1.**

Large amounts of federal funds have gone to support the infrastructure and expenses of KWAPA, which barely existed prior to this Contract. KWAPA was nothing but a Board of Directors that met once a month or less, even well after the Contract was entered in October 2008. **Exhibit 15 at 2.** KWAPA noted that in order to implement the Contract, it essentially had to create its organization, including “establish an entity which can legally conduct business;” staff the Agency; and obtain office space, furniture, equipment and supplies. ***Id.* at 1.** It is federal money under the Contract which has funded these functions and more. *E.g.*, **Ex. 1, Attachment 2, Budget Information at 1; Ex. 8 at 6-7; Ex. 16 at 7, 10-11.**

Moreover, rather than serve a public purpose, the Contract has funded an expensive, unsustainable and ultimately counter-productive response to the ongoing problem of water scarcity in the Klamath Basin – solely to provide a short-term bail-out to irrigators. Despite having spent nearly \$48 million on these programs, KWAPA admits that both groundwater pumping and land idling are unsustainable. *See Ex. 16 at 1* (“it is clear that groundwater pumping of the scale of 2010 is not sustainable.”) The excessive pumping caused groundwater in some areas of the Klamath Basin to drop 25 to 35 feet, causing private and municipal wells to run dry or produce insufficient amounts of water. **Ex. 14, Attachment 2 at 1.** As a result, nearly \$3.7 million in funding was approved to aid those

well owners to dig new or deeper wells. **Ex. 14 at 2 and Attachment 2.** Land idling (paying farmers to forgo use of irrigation water in a given year) is also admittedly unsustainable. See **Ex. 16 at 1** (“It is the opinion of KWAPA management that land idling is an inefficient and costly option in the water balance equation and should only be used as a last resort.”)

In other words, federal funds have been wasted on stop-gap, unsustainable measures that only worsened the long-term problem, and served only to put money in the pockets of irrigators for the short term. The expenditure of these funds has diverted large amounts of time and money from the work needed to find long-term solutions to water scarcity in the Klamath Basin.

### **III. Gross Waste of Funds**

As explained in the preceding section, BOR has engaged in a gross waste of federal funds, expending nearly \$48 million on programs which, besides lacking any statutory authorization, were admittedly unsustainable, inefficient and costly, and ultimately only worsened the long-term problem of water shortages in the Klamath Basin by depleting groundwater. Only certain private irrigators, those within the Klamath Project, benefitted, and only for the short term. The promised benefits for fish and wildlife and National Wildlife Refuges were non-existent.

The entire cost of the WUMP Contract was initially estimated at \$11.25 million which allocated approximately \$9.6 million for water contracts and \$1.4 million for supporting KWAPA’s personnel, salaries, fringe benefits, supplies and equipment. **Ex. 1 at Attachment 3, Budget Information at 1.** However, after a series of modifications the cost was escalated to nearly \$48 million and its tenure increased from 2012 to 2023.

The Contract was modified at least 17 times through 2013 with a \$30 million budget increase through 2013 and another approximately \$7 million increase through 2014, and with task changes which led even further afield from the purported original contract purpose of conducting a feasibility study. These new projects included payments to well owners to dig new or deeper wells, payments to irrigators for past losses of irrigation water, unspecified “construction,” and a two million dollar computer center.

None of the modifications ever considered conducting an evaluation to determine whether the objectives of Contract were being fulfilled, whether the feasibility study that was purportedly the subject of the Contract was actually being conducted, or how the project was benefitting fish and wildlife, as required by the Fish and Wildlife Coordination Act, or wildlife refuges, as claimed in the original Contract. Apart from the fact that none of these expenditures were legally authorized, many appear excessive and bloated for what they purport to fund, and in some cases KWAPA was given a blank check for expenditures on unspecified projects.

A few significant modifications are listed below:

- (i) Modification No 4, 2010, **Exhibit 4 at 1**, increases funding under the original Contract to by \$25 million, with another \$3 million later added for the East Side of the Project, **Ex. 12**, 100% of which was to be expended to mitigate the effect of the drought on irrigators. Twenty-five million dollars was allocated for land idling; \$4.75 million for water supply contracts to be paid to owners of wells to pump ground water; and \$3 million for similar services for the East Side of the Klamath Project (which was not included in the initial budget). **Ex. 8 at 1, 4-5**. In addition, over \$650,000 was budgeted for just one year for the expenses of the KWAPA office and staff, equipment purchases, janitorial services, office lease, health insurance, telephone and cellular bills of employees, travel and board and lodging expenses, utilities, annual audits and administrative expenses. **Id. at 2-4**. It appears that federal funds were supporting 100% of the cost of operating the KWAPA office and its staff and activities.
- (ii) A 2010 modification supplying \$3.75 million to irrigators who did not receive irrigation water for two months due to water shortages, “that normally would have been available to them.” **Ex. 14. Attachment 1**.
- (iii) A 2011 modification obligating \$4.2 million for the contract, **Ex. 17**, including \$2.4 million for construction of unspecified “high value [construction] projects.” **Ex. 16 at 11**.
- (iv) A 2011 modification approved an additional \$2 million for setting up a “Central Communications Center” at the KWAPA office. **Ex. 18**. The stated purpose was to provide knowledge required for “coordination of water orders and deliveries.” **Ex. 13**. The budget breakdown for this project evidences that \$1.6 million was given to a private firm to identify, purchase and set up the computer systems and software, **id. at 5**, and the balance of the funds were used to pay salaries of KWAPA employees, travel, supplies, equipment, office space and employee training. **Id. at 4-5**. Twenty thousand dollars was budgeted to “modify” 500 square feet of office space. **Id. at 5**.

These modifications further evidence that the Contract is not directed at doing a feasibility study, is not intended to benefit fish and wildlife, and is not directed at water conservation, but instead represents a large infusion of federal funds to run a non-federal agency which is not performing any functions that BOR is authorized to fund. Moreover, these modifications evidence that BOR has approved highly bloated budgets, including significant expenditures for unknown purposes, amounting to a gross waste of funds.

### **C. Abuse of Authority**

BOR failed to meet federal requirements in applying for and justifying the use of federal funds. BOR abused its authority in entering into the Contract in general in that it

provided for the expenditure of funds for unauthorized, and therefore illegal purposes. In addition, it further abused its authority in not following proper procedures to authorizing particular expenditures under the Contract.

For any modification or request for additional funds, it is required that BOR submit SF 424, application for financial assistance, with a detailed technical evaluation (prepared by the project officer, intended to determine whether applicant's proposed budget has technical merit). KWAPA is also required to submit a justification for the modification and a detailed budget with a line item narrative, which must be approved by BOR. before the funds are disbursed. **Exhibit 19** is an email exchanges within the BOR showing that additional funds have been allocated for land idling without any SF 424 technical evaluation, and BOR is trying to backfill the required documentation.

The BOR's Area representative sent an email to her staff stating that " It is imperative that we move the modification forward, if this money shows up and we can't move it ASAP we are cooked.....we need to get a 424 that covers this possible additional money."

This abuse of authority further demonstrates that expenditures under the Contract were not properly scrutinized or monitored, and that required evaluations and approvals were viewed as empty formalities to be evaded if possible.

### **CONCLUSION**

In sum, it is clear that the Contract and the funds committed under it are not authorized by any federal statute, and do not serve a public purpose as required by the FGCA. Both KWAPA and BOR have illegally used the federal funding not only for unauthorized purposes, but highly wastefully. They have not achieved, or even attempted to achieve, the purported objective of the Contract to produce a feasibility study, but instead have used the funds to purchase water and pay for land idling and to pay the expenses for the operation of KWAPA, as well as for other projects even further afield from the original purported Contract purpose. These actions amount to violations of law and regulations, gross waste of funds, and abuse of authority.