



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

August 8, 2017

The President  
The White House  
Washington, D.C. 20500

Re: OSC File Nos. DI-15-2383 and DI-15-2452

Dear Mr. President:

Pursuant to 5 U.S.C. §1213(e)(3), the Office of Special Counsel (OSC) is forwarding Department of Interior (DOI or Interior) reports based on disclosures of wrongdoing at the Bureau of Reclamation (BOR), Mid-Pacific Region, Sacramento, California. OSC has reviewed the agency reports and, in accordance with 5 U.S.C. §1213(e), is providing the following summary of the reports, whistleblower comments, and OSC's findings.<sup>1</sup> Todd Pederson, a natural resource specialist, and Keith Schultz, a retired supervisory fish biologist, alleged that the BOR entered into an improper agreement with the Klamath Water and Power Agency (KWAPA).

OSC referred the whistleblowers' allegations to former Secretary Sally Jewell for investigation pursuant to 5 U.S.C. §1213(c). Secretary Jewell delegated responsibility to review and sign the report to former BOR Commissioner Estevan Lopez, who submitted the report to OSC on July 6, 2016. Commissioner Lopez submitted the agency's supplemental report on October 31, 2016. Acting BOR Commissioner David Murrillo submitted the agency's second supplemental report on April 5, 2017. The whistleblowers provided comments to the reports on August 15, 2016; December 29, 2016; and May 3, 2017, respectively.

### **I. The Allegations**

The Klamath Project is a BOR program that provides water to over 200,000 acres of farmland located in south central Oregon and northern California. The main sources of water

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<sup>1</sup> The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

for the Klamath Project are the Upper Klamath Lake and the Klamath River. Beginning in 2001, drought conditions and requirements of the Endangered Species Act (ESA) compelled the Klamath Project to supplement the water supply from the lake and river with a Water Bank Program. The Water Bank Program included land idling,<sup>2</sup> substitution of ground water for surface water for irrigation, direct pumping, and off-stream storage. The Water Bank Program was in place until 2007, when the BOR chose to enter into an agreement with a non-governmental organization to administer the program. The program was renamed the Water User Mitigation Project (WUMP). The BOR advertised the agreement opportunity through a financial assistance program proposal. An agreement was awarded in September 2008 to the Klamath Water and Power Agency (KWAPA), which was formed in August 2008 by representatives from California and Oregon irrigation and drainage districts within the Klamath Project. Prior to entering into the agreement, KWAPA existed only briefly as a board of directors and maintained no staff or offices.

The BOR agreement with KWAPA funded the WUMP for five years through a federal financial assistance grant with joint management by the BOR and KWAPA. Federal financial assistance grants are authorized by the Federal Grant and Cooperative Agreement Act of 1977 (FGCA).<sup>3</sup> The FGCA provides funds to grant recipients to carry out “a public purpose of support or stimulation authorized by a law of the United States.” 31 U.S.C. § 6304(1). Federal assistance agreements must be specifically authorized by statute. As a result, the DOI requires that agreements provide U.S. code citations to the statutory authority or appropriation permitting the expenditure for an authorized purpose. *See* Department of Interior Departmental Manual, 505 DM, para. 2.10(B)(2). The BOR agreement with KWAPA cited the following authorities: the Klamath Basin Water Supply Enhancement Act of 2000;<sup>4</sup> the Fish and Wildlife Coordination Act;<sup>5</sup> the Reclamation Reform Act of 1982;<sup>6</sup> and the Consolidated Appropriations Act of 2008.<sup>7</sup> The agreement was modified in 2010 to include a citation to the Reclamation States Emergency Drought Relief Act of 1991 (Drought Relief Act).<sup>8</sup>

The agreement stated that its goal was to “complete a study to examine the potential for stakeholder capability to manage market-based water supplementation programs....” KWAPA had responsibility under the agreement to develop a program to provide varying amounts of supplemental water over the first five years of the contract. The supplemental water was meant to benefit the Klamath National Wildlife Refuges and irrigators in the area and to be used to “meet Project requirements for the direct benefit of fish and wildlife habitat.” The total cost of the original contract, which covered 2008 to 2012, was \$11.25 million. The agreement was modified 17 times after 2008, with the latest modification

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<sup>2</sup> Land idling programs compensate farmers who voluntarily leave certain land unfarmed in an effort to increase available water supply to farmed land.

<sup>3</sup> 31 U.S.C. §§ 6301-6308.

<sup>4</sup> Public Law 106-498.

<sup>5</sup> Public Law 89-72.

<sup>6</sup> Public Law 97-293.

<sup>7</sup> Public Law 110-161.

<sup>8</sup> Public Law 102-250.

allowing funding of up to \$41.25 million. Prior to its termination in 2016, which is discussed below, the agreement term was extended through 2023.

a. The Legal Authorities Cited in the Agreement Do Not Authorize the Expenditure of Funds

The whistleblowers alleged that the statutes cited in the agreement did not authorize the expenditure of funds under the contract because the statutory requirements were not fulfilled.

i. *The Klamath Basin Water Supply Enhancement Act of 2000*

The Klamath Basin Water Supply Enhancement Act of 2000 authorizes the Secretary of the Interior (Secretary) to conduct feasibility and other studies. The agreement relied on Section 2 of the Act, which specifically states that the Secretary is authorized to “engage in feasibility studies of *proposals* [emphasis added]... related to the Upper Klamath Basin and the Klamath Project...” with input from “affected State, local and tribal interests, stakeholder groups and the interested public.” The statute lists three feasibility study proposals, including the potential for further innovations in the use of existing water resources, or market-based approaches, in order to meet growing water needs. The agreement stated that it promoted the objectives of the statute by allowing stakeholders to develop market-based approaches to developing groundwater and other innovative water supplies. The agreement also stated that its goal was to “complete a study to examine the potential for stakeholder capability to manage market-based water supplementation programs....” However, the specific tasks the agreement assigned to KWAPA were not to complete a study, but to acquire options for supplemental water and to report on the efforts to obtain that water. The agreement required that KWAPA develop a program to provide varying numbers of acre-feet of supplemental water for each year of the agreement.

The whistleblowers alleged that in practice, KWAPA neither included nor completed any feasibility studies. Rather, the funding for KWAPA under the agreement was allocated to obtaining groundwater for irrigators, paying farmers to idle land to increase water supplies for farmed land, compensating farmers for receiving less water during drought conditions, paying well owners whose wells were depleted by groundwater pumping under the contract, and paying basic expenses for KWAPA.

ii. *The Fish and Wildlife Coordination Act*

The Fish and Wildlife Coordination Act (Coordination Act) authorizes the Secretary to provide assistance to federal, state, and public or private agencies and organizations to develop, protect, rear, and stock all species of wildlife and protect their habitats; to make surveys and investigations of wildlife on the public domain, including lands and waters controlled by any agency of the United States; and to accept donations of lands and funds for the furtherance of those purposes. The whistleblowers alleged that the WUMP did not benefit fish or wildlife as intended. The whistleblowers noted that in a July 8, 2010 e-mail regarding modifications to the agreement, Financial Assistance Management Branch Chief Wilson

Orvis questioned whether 100 percent of the funding proposed by the modification supported fish and wildlife enhancement, as required by the Fish and Wildlife Coordination Act. Mr. Orvis asserted that “[t]he current documentation does not support this determination.” Notwithstanding these reservations, the modification was approved.

The whistleblowers also pointed to BOR documents indicating that the purpose of the programs under the agreement was not to benefit fish and wildlife. A March 10, 2010 KWAPA memorandum titled “Land Idling 2010” asserted that the Klamath Basin was facing an “economic disaster” as a result of historically low water levels in the Klamath Basin. Notably, the memorandum indicated that the ground water program was designed to “maximize agricultural production within the Klamath Project.” The memorandum stated that under the conditions at the time, deliveries of surface water would be insufficient to “produce crops on the land not being irrigated by ground water,” necessitating a land idling program. KWAPA later reiterated this goal in an August 21, 2011 request for \$2 million for a communications center, noting that the ground water program was “the primary reason that economic disaster was averted.” The memorandum and request did not address the welfare of fish and wildlife in connection with the ground water program, and there was no record of available water being used to benefit fish and wildlife refuges, as was asserted in the agreement.

iii. *The Reclamation Reform Act of 1982*

The agreement relied on § 210 of the Reclamation Reform Act, which mandates that the Secretary encourage water conservation measures in the operations of non-federal recipients of irrigation water from federal reclamation projects, where such measures are economically feasible. Section 210 also authorizes the Secretary to enter into memoranda of agreement with federal agencies having the capability to assist in implementing water conservation measures, with the involvement of non-federal entities. The whistleblowers contended that the KWAPA agreement did not relate to water conservation by recipients of irrigation water, as anticipated in the statute, but rather was focused on the development of additional water supplies. Further, the whistleblowers noted that KWAPA is not a federal agency, and thus KWAPA’s involvement as a non-federal entity was not authorized by the statute, which requires an agreement with a federal agency as a prerequisite to the involvement of non-federal agencies.

iv. *Consolidated Appropriations Act (2008)*

The 2008 Consolidated Appropriations Act (Act), upon which the agreement also relied, contained general funding for the BOR. It did not contain specific references to the Klamath Basin, KWAPA, or the WUMP. Further, the whistleblowers noted that, according to the agreement, the funding available from this Act covered only its first year, with additional funding contingent upon later congressional funding. However, no such congressional funding was cited in later iterations of the agreement. The whistleblowers contended that all subsequent modifications to the agreement cited back to the 2008 Consolidated Appropriations Act and other inapplicable statutory authority.

v. *Reclamation States Emergency Drought Relief Act of 1991*

The Reclamation States Emergency Drought Relief Act of 1991 (Drought Relief Act), cited in Modification 4 to the KWAPA agreement, dated April 8, 2010, included an additional \$25 million for the contract. The whistleblowers asserted that the agreement appeared to rely on § 2211(c) of the Act, which relates to water purchases by the BOR. Specifically, the Drought Relief Act authorizes the Secretary to purchase water from willing sellers in order to minimize drought losses and damages. The purchased water may come from project contractors through conservation or other means. Such water must be delivered pursuant to temporary contracts, which must require recovery of any costs, including interest, incurred by the Secretary in acquiring such water. However, § 2214(a) of the Drought Relief Act limits the Secretary's authority to instances where the governor of the affected state has made a request for temporary drought assistance.

The whistleblowers contended that 2014 was the only year in which the governors of both California and Oregon declared drought emergencies. Thus, funding pursuant to the Drought Relief Act was not applicable in 2010, when Modification 4 was added to the contract. Further, they maintained that any funds expended pursuant to the Drought Relief Act after 2010, other than in 2014, were similarly unauthorized.

The whistleblowers also noted that the 2014 budget for the agreement anticipated \$8.5 million for land idling and \$4.15 million for groundwater pumping, neither of which would have been authorized by the Drought Relief Act. Notably, pursuant to the Drought Relief Act, Congress appropriated \$10 million in its Supplemental Appropriations Act of 2010 "for the optimization and conservation of project water supplies to assist drought-plagued areas of the West." According to the whistleblowers, the \$10 million was not fully expended in 2010, and the remaining balance was made available to the BOR for future years in the Consolidated Appropriations Act of 2011. Thus, the whistleblowers contended that, at the most, the Drought Relief Act might have covered the remaining balance of the \$10 million, but not the \$25 million noted in Modification 4.

b. The Agreement Disregards FGCA Requirements

The whistleblowers also asserted that the agreement with KWAPA did not meet the requirements for a cooperative agreement under the FGCA. As previously noted, the FGCA requires that agencies use a cooperative agreement when "the principal purpose of the relationship is to transfer a thing of value ... to carry out a public purpose of support or stimulation ... instead of acquiring property or services." The whistleblowers contended that the funds allocated to the cooperative agreement with KWAPA benefited private irrigators rather than the public, with the remainder going toward KWAPA's operating expenses, even in years when the WUMP—the purported public purpose for the agreement—was not in operation. Further, KWAPA acknowledged that groundwater pumping and land idling are unsustainable programs. The whistleblowers noted that, in fact, groundwater pumping had a negative effect on the Klamath Basin, with groundwater in some areas dropping 25 to 35 feet, which caused wells to produce significantly reduced amounts of water or, in some cases, run

dry. As a result, an additional \$3.7 million was allocated to assist well owners dig deeper wells.

The whistleblowers further noted that a portion of the agreement's funds were paid to farmers for reduced irrigation water deliveries that occurred in the past, thus negating any incentive on the part of the irrigators to conserve irrigation water. For example, in 2010, Modification 6 to the agreement allocated \$3.7 million to compensate irrigators retroactively for two months in 2010 when they did not receive water due to low supplies. With regard to KWAPA's operating expenses, the whistleblowers explained that KWAPA was solely a board of directors at the time the agreement was executed in 2008. In order to implement the terms of the contract, KWAPA had to organize, hire staff, and obtain office space, furniture, and supplies. The whistleblowers allege that funds allocated under the contract paid these expenses related to establishing KWAPA.

c. The Agreement Created a Gross Waste of Funds

The total cost of the agreement with KWAPA, as budgeted through 2014, was approximately \$48 million. The whistleblowers noted that the initial estimated cost of the WUMP was \$11.25 million, with \$9.6 million for water contracts and \$1.4 million for KWAPA operating costs. Since its implementation in 2008, the agreement underwent at least 17 modifications, resulting in an extension through 2023 and a \$30 million budget increase through 2013. The whistleblowers alleged that the funds went toward programs that lack statutory authorization, are unsustainable, have a negative effect on fish and wildlife, and do not address water shortages in the Klamath Basin. As the modifications were implemented, the agreement moved further away from its original stated purpose of conducting a feasibility study, and funded deeper wells, vague or unspecified KWAPA purchases and construction projects, and a \$2 million computer center. The whistleblowers contended that because the agreement was not supported by statutory authority, and the stated goals of the agreement were never met, the funds allocated to the agreement constituted a gross waste of funds.

**II. The Agency Reports**

Former Secretary Jewell asked the DOI Office of the Inspector General (OIG) to complete the agency's investigation of the whistleblowers' allegations. The OIG determined that an audit of the agreement between the BOR and KWAPA, which would require nine months to complete, was necessary. The OIG submitted an interim Special Report to Secretary Jewell in March 2016, anticipating that it would submit a final report upon the completion of the audit. Former Commissioner Lopez submitted the interim Special Report, along with his cover letter, to OSC on July 6, 2016. In the Special Report, the OIG concluded that the BOR did not have the authority to enter into an agreement with KWAPA. In his cover letter, Mr. Lopez stated that the BOR and attorneys in the DOI Office of the Solicitor were reviewing the OIG's conclusions, but had not yet made a determination as to their merits.

Because the agency's report dated July 6, 2016 contained no findings by the former Secretary or the Commissioner as her delegate, OSC requested a supplemental report

outlining the Secretary's final determination on the OIG's investigation and a discussion of any corrective or disciplinary actions the agency planned to take, as required by 5 U.S.C. §§1213(c) and (d). OSC received the agency's supplemental report on November 1, 2016; it contained the OIG's final audit report and the DOI's response. The DOI did not concur with the OIG's findings.

a. The OIG Final Audit Report

The OIG Final Audit Report substantiated the whistleblowers' allegations. The OIG found that the BOR did not have the legal authority to enter into the cooperative agreement with KWAPA, resulting in \$32.2 million in wasted funds. Specifically, the OIG determined that only two of the five statutes cited in the agreement provided the BOR with legal authority to grant financial assistance: the Coordination Act and the Drought Relief Act, both of which restrict the use of funds to specific activities.<sup>9</sup> The OIG also found that the agreement did not explain how the specific activities carried out under the agreement related to the Coordination Act and the Drought Relief Act and, lack of explanation notwithstanding, that the expended funds were not used for any activities authorized by either statute.

The OIG found that the BOR interpreted the Coordination Act as granting authority to provide financial assistance "for the purpose of acquiring water for the protection or other benefit of fish and wildlife habitat." However, the agreement did not contain an explanation of how the financial assistance provided by the BOR to KWAPA would benefit fish and wildlife habitat. The OIG found that the agreement, in fact, did not benefit fish and wildlife, and contained no tasks directing how the funds would be used for such a purpose. Rather, the OIG noted that the BOR's own 2012 biological assessment of the proposed Klamath Project operations stated, "The WUMP will not be a tool for providing water for endangered species purposes because Reclamation proposes to first meet flows and lake levels which Reclamation believes are sufficient to avoid jeopardizing the continued existence of federally-listed species." Further, the OIG anticipated the BOR's position that the WUMP creates a direct fish and wildlife benefit because it assists the BOR in meeting ESA requirements. In response, the OIG argued that compliance with ESA requirements—including a requirement for the BOR to refrain from providing water for irrigation when necessary—is a condition of the Klamath Project, and payments from KWAPA to Klamath Project irrigators for land idling and pumping groundwater did not produce any additional fish and wildlife benefit.

Thus, the OIG posited that any fish and wildlife benefit of the WUMP would come from providing water to the National Wildlife Refuges in the Klamath Project area. Of the

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<sup>9</sup> The OIG concluded that the Enhancement Act, the Reform Act, and the Appropriations Act did not authorize the financial assistance granted under the cooperative agreement with KWAPA. While the Enhancement Act authorizes the Secretary to conduct feasibility studies, it does not explicitly state or imply the congressional intent to authorize the Secretary to grant financial assistance to third parties. According to the OIG, the BOR financial assistance analyst responsible for reviewing and approving the initial cooperative agreement also concluded that the Enhancement Act does not give the BOR legal authority to make financial assistance awards in the context of the agreement with KWAPA.

four refuges in the Klamath Project service area, the Lower Klamath Refuge is the only one that requires supplemental water deliveries. The OIG found that the Lower Klamath Refuge received limited water deliveries compared to the WUMP's overall water supplementation and its optimal water deliveries for the Refuge of 95,000 acre-feet annually. The OIG also determined that, during water-short years, the BOR's Klamath Project operation plans did not include any planned water deliveries for the Lower Klamath Refuge. Rather, the Refuge received most of its water in September and October of water-short years after the growing season concluded. The OIG noted that this supported statements made by the refuge manager in which he asserted that the Refuge did not receive any direct benefit from the WUMP and just received "scrap water."

In addition, the BOR financial assistance analyst who approved the original agreement stated that he also questioned its reliance on the Coordination Act. The report notes that he ultimately approved the agreement because an attorney from the Office of the Solicitor performed a legal review of the agreement and BOR regional officials stated that the activities completed under the agreement would directly benefit the refuges. The analyst required inclusion of an affirmative statement agreeing that all water acquired and utilized by the program would benefit the refuges. However, the OIG found that the water the program acquired and used did not benefit the refuges as agreed.

Notably, the BOR removed language providing a direct benefit to fish and wildlife from later iterations of the agreement. According to the OIG, in 2010, the Klamath Project proposed to address anticipated water shortages by implementing a significant water supplementation effort through the WUMP while making no water deliveries to the refuges. The OIG report noted that investigators could not find any supporting documentation for the deletion and concluded that it was an acknowledgement that KWAPA was not operating the WUMP for the benefit of fish and wildlife.

The OIG also found that the activities under the agreement did not result in a drought contingency plan as required by the Drought Relief Act. OIG investigators determined that Modification 6 to the agreement awarded \$8 million in drought funding to KWAPA, but KWAPA could not account for \$3.4 million of it. The remaining \$4.6 million was spent on land idling, deepening or drilling new wells, contract services, and administrative costs. Of that, \$3 million was used to compensate irrigators for land idling. However, the Drought Relief Act authorizes water purchases only when the government delivers water and recoups its costs via temporary contracts. The OIG found that the BOR did not execute repayment contracts for the payments and did not recover the \$3 million in costs. Thus, the OIG determined that the Drought Relief Act did not authorize the land idling costs.

The OIG further determined that the Office of the Solicitor provided conflicting advice regarding the BOR's activities. Specifically, an attorney in the Pacific Southwest Regional Office initially determined that the BOR did not have the authority to acquire water under the previous Water Bank Program. In a November 18, 2003 e-mail, the attorney noted that the BOR "did not have direct authority to acquire water" and recommended that the BOR obtain permanent authority for operation of the Water Bank Program. He stated that he did not believe the Water Bank Program fell under the authority granted in either the 1939



Reclamation Project Act or the Fish and Wildlife Coordination Act, and noted, “The water bank is not directly for ESA purposes, rather it is for [Klamath] Project purposes.”

However, the same attorney later reviewed the agreement with KWAPA and concluded that the BOR did have authority to administer the WUMP under the agreement, despite the fact that the activities were the same as those under the Water Bank Program. The OIG report noted that the attorney’s single-page review form did not contain a detailed legal analysis of the agreement. Instead, the attorney stated, “The appropriate program authority is the Fish and Wildlife Coordination Act and the Klamath Basin Enhancement Act.” The OIG highlighted that this review was determinative, because the financial analyst who questioned the legal sufficiency of the agreement ultimately approved it because of the findings in the review.

Upon finding that the agreement with KWAPA was unauthorized, the OIG concluded that the full \$32.2 million that the BOR spent under the agreement was wasted. OIG investigators also disclosed that KWAPA could not adequately support individual expenditures, including \$3.4 million in drought funds and \$733,344 for operating expenses. The OIG noted that the agreement was modified 19 times resulting in an increase of the total award amount to \$41.25 million and that the BOR had approved an extension of the agreement through fiscal year 2023. However, the agreement was not extended, and KWAPA ceased operations on March 31, 2016. Neither the OIG report nor the DOI response discussed below explained the basis for the termination of the agreement.

The OIG made several recommendations to the BOR and the DOI based on its findings, including that the BOR discontinue its water supplementation and demand reduction activities in the Klamath Basin until it obtains a sufficient legal basis for its continuance. The OIG also recommended that the BOR ensure that financial assistance agreements have legal and applicable authority to provide funding and that they contain a clear and accurate description of the relevant activities. The OIG further recommended that the DOI establish and enforce policies, procedures, and practices to ensure that the Office of the Solicitor conduct a sufficiency review of all financial assistance agreements and that its basis for approval is fully explained.

b. The DOI Response

In its response, the DOI disagreed with the OIG’s findings regarding the BOR’s agreement with KWAPA. The DOI stated that the Coordination Act expressly delegated the authority to the BOR Commissioner to provide cooperative assistance to third parties for the protection of fish and wildlife. The authority extends to the acquisition or lease of water or water rights from third parties to mitigate the effects of Klamath Project operations. While the OIG report acknowledged that the DOI has such authority under the Coordination Act, the DOI questioned the OIG’s determinations regarding the facts of the agreement with KWAPA. As noted above, the OIG found that the ESA already required the BOR to maintain appropriate water levels, making it unclear how further benefits would accrue via compensation to irrigators for refraining from using water that might be unavailable regardless. In its response, the DOI explained that the manner in which it maintains the

required water levels is complicated by several factors, including: the sources of ESA compliance water; the fact that the water is commingled with water to be delivered to irrigators who are not party to land idling agreements; physical limitations in the ability to meet the requirements; and the prospect of potential takings and contractual liability to Project irrigators. Thus, the DOI argued that the WUMP assisted the agency in meeting its ESA requirements to the benefit of fish and wildlife.

The DOI further argued that the water savings realized via the agreement was essentially the same as what would be provided through the acquisition of third party water rights for the direct benefit of fish and wildlife. The agency noted that the ESA does not dictate the source of the water used to meet the requirements for fish and wildlife and the Secretary has some discretion in determining how best to meet those requirements, particularly where the agency faces difficulty in doing so. For example, the report explained that Project and non-Project users can divert water that the BOR intends to use to meet ESA requirements for lake levels and river flows. The DOI highlighted that the agency faces takings and/or breach of contract claims where it reduces deliveries to Project beneficiaries to meet its ESA obligations.

The DOI also directly addressed the language in the 2012 biological assessment discussed above, stating that the OIG took the language out of context and that the water saved through the WUMP was commingled with Project water, which was used in varying degrees to meet ESA-required reservoir storage and minimum stream flow levels or was delivered to the Refuge. The agency acknowledged that it could have accounted for the individual water allocations, but noted that the result would remain the same: the WUMP allowed the BOR to meet the appropriate lake and minimum flow levels under the ESA. The DOI posited that, while the 2012 biological assessment did not fully explain the operational and accounting flexibility provided by the WUMP, that failure should not be used to determine that the BOR cannot rely on the WUMP as a source of ESA-compliant water.

Further, the DOI asserted that the water deliveries made to the Refuge were substantial and, although they did not meet optimal delivery levels, they still provided a significant benefit to fish and wildlife in the Refuge. The agency asserted that the water that was saved via the WUMP but not delivered to the Refuge created conditions that made it possible to make any deliveries to the Refuge. The DOI acknowledged that the Refuge has secondary priority to Project water but noted that the Coordination Act does not specify whether the benefit to wildlife must be direct or indirect for the agency to provide cooperative assistance under the statute. The agency also countered the assertion in the OIG's report that deliveries to the Refuge were "scrap water" that provided no fish and wildlife benefit. The agency highlighted that fall deliveries to the Refuge in 2010 and 2016 occurred during optimal periods for water demand and noted that the Refuge requested the deliveries, which represented their optimal water needs at a critical time of year. While the agency acknowledged that the deliveries did not meet all of the Refuge's needs, it noted that the deliveries that were completed were preferable to the denials that would have occurred without the WUMP. Thus, the DOI argued that the savings realized by the WUMP offered substantial fish and wildlife benefits to the Refuge.

The agency also relied on the BOR's statements regarding the purpose of the Water Bank Program, the predecessor to the WUMP. For example, the BOR produced an Environmental Assessment for the Water Bank Program that stated that, among other benefits, "The pilot programs would reduce demand for Project water allowing Reclamation to maintain higher lake levels in Upper Klamath Lake which has thousands of acres of wetlands providing habitat for many species, particularly waterfowl. Inundation of the wetlands is important for waterfowl nesting, feeding, and molting." In addition, the BOR's agreements with individual Project irrigators between 2001 and 2007 included language that reflected ESA purposes and the fish and wildlife benefits of the Program.

The DOI noted that Congress's 2010 supplemental appropriation authorized the BOR to utilize the funds for purposes sanctioned by the Drought Relief Act "and any other applicable Federal law (including regulations) for the optimization and conservation of project water supplies to assist drought-plagued areas of the West." The agency acknowledged that the portion of the funds used for administrative expenses did not directly benefit fish and wildlife, but argued that it did further the purpose of the Coordination Act by providing necessary support to the program. For example, the agency speculated that payments to third-party water users to mitigate increased groundwater pumping under the WUMP may have been necessary to ensure the WUMP's continuation, because, without the payments, well owners may not have provided the substitute groundwater on which the WUMP relied.

In a footnote, the DOI referenced the OIG's determination that the other statutes cited in OSC's referral do not authorize the BOR's agreement with KWAPA. The DOI determined that the question of whether the remaining statutes provide authorization is inconsequential because it interpreted the Coordination Act to provide sufficient authorization for the agreement. However, the DOI asserted that the cited statutes could provide authorization for funding in the future, provided it meets the relevant statutory requirements. For example, the agency noted that the Drought Relief Act could have authorized well drilling and deepening in this case if the BOR had directly funded the activities instead of funding them through a cooperative agreement.

The DOI further asserted that since 2008, the BOR has implemented a series of internal controls to ensure that its financial assistance agreements are executed with appropriate legal support and contain a detailed description of the activities to be performed. The agency identified policies, procedures, and templates that require the statutory basis for the agreement and ensure that the scope of work for the agreement fits within the cited statutory authority. For example, the agency noted that the BOR implemented an Agreement Template in 2010 for all financial assistance agreements, which requires the full text of the relevant statutory authority and the scope of work.

The agency did agree with the OIG's recommendation that the Office of the Solicitor adopt policies and procedures to ensure that financial assistance agreements are reviewed for legal sufficiency and that approvals are sufficiently explained, but asserted that these policies and procedures are already in place. The DOI included the full text of the November 18, 2003 e-mail from the Office of the Solicitor attorney regarding authorization for the agreement and

asserted that, in context, the attorney's questions regarding the legal basis for the agreement were not inconsistent with his later approval. The DOI noted that, in 2003, it did not appear that the BOR had the requisite authority to acquire water to meet the Project's ESA requirements, which the attorney questioned in the e-mail. The DOI clarified that the delegation of authority to the BOR in place at the time did not give the BOR authority to directly acquire water for the benefit of fish and wildlife. Instead, the BOR only had authority to enter into cooperative agreements. Given that the BOR received authority to directly acquire water in 2010, questions regarding its authority were appropriate at the time. The agency also clarified that the WUMP is not technically a water acquisition program, and therefore the BOR's authority to acquire water directly is not necessarily relevant to the cooperative agreement with KWAPA.

The DOI also asserted that the attorney who drafted the e-mail was simply questioning whether a feasibility study could provide permanent authority for the continuance of the Water Bank Program and was not questioning whether the Water Bank Program actually qualified as a feasibility study. The agency posited that the attorney's subsequent approval of the program in 2008 is therefore consistent with the language in the 2003 e-mail. However, the agency indicated that the Office of the Solicitor has established a legally appropriate risk-based process for the legal review of financial assistance agreements. The Office of the Solicitor also established new procedures and practices to standardize its legal reviews of financial assistance agreements in light of the OIG's findings, including institution of a mandatory form to document each legal review.

c. The Second Supplemental Report

In its review of the supplemental report, OSC noted that neither the OIG nor the DOI provided context for the BOR's decision to terminate its agreement with KWAPA in March 2016. OSC was concerned about the timing of the termination, as it fell within the pendency of the investigation, and requested a second supplemental report from the DOI to address these concerns. BOR Acting Commissioner David Murrillo submitted the DOI's response to OSC in April 2017.

The DOI explained that the extension of the WUMP through 2023 via the agreement with KWAPA had three purposes. First, at the time of the modification in 2012, the WUMP had operated for only two years, and decision-makers believed additional years of experience were necessary. The decision did not anticipate the three consecutive years of drought conditions that followed. Second, the BOR was facing uncertainty in 2012 regarding water supplies due to ESA requirements, Refuge needs, and other external factors, including Klamath Basin Restoration Agreement (KBRA) commitments.<sup>10</sup> Thus, the WUMP or another

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<sup>10</sup> The KBRA was an agreement, negotiated between 2005 and 2010, that included Klamath River watershed irrigators, fisheries interests, Native American tribes, and county, state, and federal government entities. The KBRA had several stated goals, including the establishment of reliable water supplies for agricultural and community uses and for the Refuges. The KBRA attempted to establish a secure but reduced water supply to irrigators in exchange for federal funding to assist with adapting to the reduced

follow-on program was believed to be necessary to study the impact of the uncertainties on the program and the program's ability to mitigate supply shortages, including to the Refuge. Finally, the BOR was anticipating the need to transition to the more long-term programs contained in the KBRA On-Project Plan, which was intended to address the shortcomings of the WUMP and to encourage innovation and the creation of market-based, sustainable mitigation methods. The On-Project Plan was considered necessary for irrigators adapting to reduced water supplies under the KBRA. Because, unlike the WUMP, the On-Project Plan would have employed long-term land-idling and groundwater contracts, the BOR believed that it would need to assist the community in establishing a market for the longer-term contracts. Thus, the On-Project Plan relied upon federal legislation implementing and funding the KBRA. The BOR intermittently planned for the follow-on program beginning in 2013, but it became clear in 2015 that the necessary funding was not forthcoming due to the high cost of implementation, competing priorities, and disagreement in the community. The KBRA expired in December 2015.

### **III. The Whistleblower Comments**

In response to the agency's initial report, the whistleblowers noted its preliminary nature and voiced agreement with the OIG's finding that the agreement with KWAPA was not statutorily authorized. The whistleblowers also posited that the OIG's apparent focus on the conflicting advice offered by the Southwest Regional Office was misplaced. Rather, the whistleblowers asserted that the issues they identified at the BOR traced back to the original Water Bank Program, which operated from 2001 to 2007. They noted that the legal advice provided at the time questioned whether the Enhancement Act provided authority for the Water Bank Program as a "pilot project," particularly for the entirety of its seven-year duration. They also noted that no report of the results of the purported pilot project was ever produced. The whistleblowers thus contended that the Water Bank Program was also unauthorized, resulting in the illegal expenditure of approximately \$30 million.

The whistleblowers redirected the responsibility for the BOR's unauthorized actions away from the Solicitor's Office attorney who offered conflicting advice and onto BOR officials, who they asserted colluded to create KWAPA to continue the unauthorized Water Bank Program under the guise of a "feasibility study." They highlighted that in actuality, neither KWAPA nor the BOR completed any feasibility study and no "market-based approaches," as referenced by the agreement, were ever identified. The whistleblowers asserted that the BOR officials who facilitated the agreement were aware that its purported purpose was pretextual, and suggested that the DOI identify those individuals and hold them accountable for the issues with both the Water Bank Program and the agreement with KWAPA. The whistleblowers thus questioned the failure of the OIG report to find that BOR officials knowingly and intentionally violated the law.

The whistleblowers also strongly argued that the agreement served no public purpose and, in fact, damaged the environment. They noted the OIG's finding that the agreement did

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water supply. The agreement was signed by non-federal entities in 2010, with the federal government's agreement to implement it to the extent possible while awaiting federal legislation and funding.

not contain provisions to protect or benefit fish and wildlife—the purported public benefit of the agreement—and that it found little evidence of any such benefits. Further, the whistleblowers explained that the agreement resulted in excessive pumping of groundwater in order to achieve a short-term solution to water scarcity for irrigators. This lowered the water table, which in turn led to additional payments to irrigators to deepen or dig new wells and was detrimental to fish and wildlife in the Klamath Basin. The whistleblowers stated that this also diverted time and funding away from the development of long-term solutions to water scarcity in the Klamath Basin system. Further, the BOR never solicited its Klamath Basin Area Office Fisheries Resources Division to complete a study on the effect of the WUMP on fish and wildlife, which indicated to the whistleblowers that such effects were not of concern to the BOR. In addition, non-Klamath Project irrigators who do not have water rights associated with the Klamath Project were not eligible to be applicants for benefits through the WUMP, reflecting that the agreement did not serve all irrigators in the Klamath Basin, let alone a larger general public purpose.

The whistleblowers also asserted that the allegedly unauthorized expenditures under both the Water Bank Program and the agreement with KWAPA constituted violations of the Anti-Deficiency Act.<sup>11</sup> They encouraged the agency to undertake an Anti-Deficiency Act investigation and identify any BOR officials implicated in the alleged wrongdoing. The whistleblowers also made a number of other recommendations to the BOR, including to require Mid-Pacific Region upper management to complete 40 hours of tailored acquisition training and to implement a system to ensure that vendors meet all contract, agreement, and grant requirements. They also recommended that the BOR remediate the environmental impacts of the water lost to pumping under the WUMP by providing additional resources for environmental protection.

The whistleblowers also commented on the agency's final report, specifically identifying the BOR's refusal to acknowledge wrongdoing as an attempt to reserve the right to resume similar activities in the future. The whistleblowers expressed disappointment at the lack of accountability by BOR officials for the implementation and oversight of the agreement and the BOR's refusal to implement any of the OIG's recommendations, particularly in light of the shortcomings highlighted in the whistleblowers' comments. For example, the whistleblowers noted that neither the BOR nor the Office of the Solicitor reviews of the agreement—conducted over its 19 modifications—identified that three of the statutes cited in the agreement were inapplicable. Indeed, in the final modification to the agreement, the BOR Regional Director relied solely on the Enhancement Act, which does not authorize a financial assistance agreement under any circumstances. The whistleblowers called attention to the agency's targeted reliance on the Coordination Act in its rebuttal of the OIG's findings, which they believe implies the agency's concurrence that the remaining statutes cited in the agreement do not provide authorization for it.

The whistleblowers questioned the adequacy of the processes identified by the agency as responsive to the OIG's recommendation to ensure that financial assistance agreements have specific legal authority and a clear and accurate description of the activities

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<sup>11</sup> See 31 U.S.C. 1341(a)(1)(A).

to be performed. The whistleblowers noted, for example, that the Award Instrument Determination form cited by the Office of the Solicitor was in place in March 2008, prior to the execution of the original agreement with KWAPA, and remained in place through 15 modifications to the agreement. The whistleblowers also noted the agency's reliance on the use of an agreement template, which was in place in 2010, during the pendency of the agreement. The whistleblowers asserted that the existence of the forms did not appear to prevent the continued approval of the agreement, despite its reliance on inapplicable statutes, and thus they called into question the realistic effectiveness of the review process in light of the OIG's recommendations.

Further, the whistleblowers noted the agency's inconsistent reliance on various statutory authorities for the agreement, arguing that if the BOR's review processes were sufficient, as the agency asserted, there would have been no such inconsistency. For example, the original agreement and the 2012 extension of the agreement relied primarily upon the Enhancement Act. In the report, however, the agency argued that the agreement could be based solely upon the Coordination Act, despite the lack of any reference to the Coordination Act in the December 2012 memorandum extending the agreement.

The whistleblowers also offered evidence supporting their contention that the benefits to fish and wildlife were never the primary purpose behind the agreement and, assuming any benefits actually accrued, were subsidiary at best. For example, the whistleblowers noted that the agreement itself states that its purpose was to conduct a "feasibility study" to develop additional groundwater supplies to meet growing water needs. In fact, the additional water supplies were needed because of increased deliveries for fish and wildlife required by the ESA. The whistleblowers referenced several other instances in which the agency repeatedly stated its intent to benefit irrigators and crop production, not fish and wildlife, and noted that in KWAPA's final report, its executive director concluded that land idling saved very little water and was very expensive. Further, the whistleblowers highlighted that the Office of the Solicitor accepted the OIG's determination that the agreement was authorized by the Coordination Act to the extent that the water it provided was for the "direct benefit of fish and wildlife habitat," but then goes on to describe only indirect and minor benefits to fish and wildlife. Indeed, the whistleblowers rebutted the agency's assertion that its limited water deliveries to the Refuge constituted a substantial benefit to fish and wildlife by noting that during the period of the deliveries, the Refuge suffered mass avian die-offs.

#### **IV. OSC's Findings**

OSC has reviewed the original disclosure, agency reports, and whistleblower comments. OSC has determined that the reports meet all statutory requirements. However, in light of the conflicting reports provided by the agency and the whistleblowers' compelling comments, OSC has determined that the agency's findings do not appear reasonable. The agency failed to provide sufficient information to support its interpretation of the relevant statutory authority, particularly in light of the OIG's thorough investigation and report. These shortcomings are summarized briefly below.

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The agency's report offers no substantive discussion of how or why its legal review failed to identify foundational mistakes in the KWAPA agreement, such as its repeated reliance on at least three inapplicable statutes. The agency asserted in its final report that its review processes were robust and required no updates or alterations. Indeed, the agency provided no discussion of its authority, other than to note that such analysis was unnecessary because the Coordination Act provided sufficient authorization for the agreement. The agreement contained no specific description of how the cited statutes authorized the financial assistance provided under the agreement, nor did it explain how the KWAPA agreement would actually benefit fish and wildlife. The agency report also failed to provide a sufficient explanation of how the activities under the agreement constituted a feasibility study as required by the Enhancement Act—particularly in light of the longevity of the program and, as the whistleblowers noted, the failure to produce reports or studies.

Moreover, while the agency asserted that the agreement with KWAPA assisted the BOR in meeting its obligations under the ESA, the information cited by the OIG and the whistleblowers makes a compelling case that the true purpose of the agreement was to benefit private irrigators, not fish and wildlife. As the OIG noted, compliance with ESA requirements is a condition of the Klamath Project, including the requirement to refrain from providing irrigation water when necessary. While the agency stated that it is within the Secretary's discretion to determine how to meet its ESA obligations, its argument relied on potential third party water diversions and the possibility that payments for well drilling "may have been necessary" to continue the WUMP as evidence to support its analysis. The agency also failed to directly address the OIG's stance that both the KWAPA board of directors and irrigators viewed compensation under the WUMP as mitigation for their alleged losses. Thus, the agency's assertion that payments to irrigators constituted additional benefits to fish and wildlife lacks a sufficient foundation.

In light of these significant shortcomings, OSC strongly urges the agency to reconsider its response to these allegations, particularly with regard to improving its legal review and approval processes.

As required by 5 U.S.C. § 1213(e)(3), OSC has sent a copy of this letter, the agency reports, and the whistleblower comments to the Chairmen and Ranking Members of the Senate Committee on Energy and Natural Resources and the House Committee on Natural Resources. OSC has also filed copies of these documents in our public file, which is available at [www.osc.gov](http://www.osc.gov). This matter is now closed.

Respectfully,



Adam Miles  
Acting Special Counsel

Enclosures