

October 7, 2016

**RESPONSE TO OIG “DRAFT” REPORT – AUDIT OF THE BUREAU OF  
RECLAMATION’S KLAMATH BASIN WATER USER MITIGATION PROGRAM  
REPORT NO. 2015-WR-080**

This statement by the Klamath Water Users Association (KWUA) is intended to provide information and perspective regarding the report issued by the Department of the Interior Office of Inspector General (OIG) on the Bureau of Reclamation’s Klamath Basin Water User Mitigation Program (WUMP). The report alleges various improprieties in regard to a Cooperative Agreement between the U.S. Bureau of Reclamation (Reclamation) and the Klamath Water and Power Agency (KWAPA) for implementation of WUMP, a type of water-banking program intended to reduce the use of Klamath River water by Klamath Project irrigators. The program helped free up Project water supplies that were instead used to benefit fish and wildlife habitat. In general, the report alleges that Reclamation did not have authority to enter into the Cooperative Agreement in question, “resulting in \$32.2 million in wasted funds spent by KWAPA under the agreement.”

The allegations contained in the report may lead to sensational and inaccurate characterizations of events and a presumption of wrongdoing. These allegations affect the interests and reputation of KWUA members. As such, we are compelled to provide a description of shortcomings of the report and KWUA’s view of the relevant history and context, both with respect to Reclamation’s authority and KWAPA’s performance in executing its contractual duties consistent with applicable rules and regulations.

**KEY POINTS**

- The central conclusion of the report is that attorneys within the Department of the Interior disagree with each other about whether the program has specific congressional authorization and whether the program fulfills certain legal requirements.
- There are no allegations that any farmer did anything wrong. Farmers decided (or not) to participate in a program that Reclamation believed was properly authorized and implemented according to law.
- The report claims that the WUMP does not benefit fish and wildlife as required by law. In fact, the program freed up irrigation water for use by a National Wildlife Refuge and for endangered fish species in the Klamath River.
- The WUMP was widely publicized, and KWAPA conducted all of its meetings in public, with notice to the public.
- The report claims that Reclamation has no obligation to ‘compensate’ irrigators for the loss of water needed to satisfy the Endangered Species Act (ESA) requirements. This is by no means certain. Courts are currently weighing the question of whether farmers with

water rights, regarded as property by state law, are entitled to compensation when their supplies are reduced for ESA purposes.

- The program was consistent with a 2010 Klamath settlement agreement among approximately 40 parties including two states, three tribes, and various conservation groups, which called for exactly this type of program on an interim basis, and encouraged the Department of the Interior to use existing authorities to implement activities supported in the settlement.

### **KWUA, KWAPA BACKGROUND**

KWUA and KWAPA had overlapping memberships but are separate entities formed for different purposes.

KWUA is a *non-profit organization*, formed in 1953, whose members are primarily irrigation districts and similar entities holding contracts with Reclamation for the diversion, delivery, and use of water in the Klamath Project. KWUA member districts deliver water to land that sustain approximately 1,200 family farms and ranches in south-central Oregon and northern California. KWUA addresses policy and regulatory issues that affect the interests of its members. KWUA has been steadfast in its support for continuing to innovate solutions for doing business in different and better ways in the Klamath Basin.

KWAPA, on the other hand, was an interstate agency, known as an *intergovernmental agency* or *joint exercise of powers agency* that can be thought of as a legal partnership whose members are irrigation districts. KWAPA had the powers of a public-agency irrigation district but focused on Klamath Project-wide water management issues and similar matters. KWAPA was formed in 2008 because of the perceived need for public organization with its legal authorities to conduct activities anticipated by the Klamath Settlement Agreements. These included implementation of programs through arrangements similar to the Cooperative Agreement that is the focus of the OIG report.

As discussed below, the Cooperative Agreement under scrutiny has been consistent with efforts to address Klamath Basin challenges in a constructive manner. It has provided valuable and useful information to Reclamation and the Project irrigation community about ways to manage the system differently in order to provide benefit for the Basin's various communities, interests, and environmental needs.

### **OVERVIEW**

The WUMP and Cooperative Agreement involved entering contracts with parties that have water rights who agree to forego or reduce use of water from the Klamath River. This sort of "water banking" program in the Klamath Project, although sometimes going under different names, has occurred, and been widely publicized, over a period of 15 years. It was first conducted by Reclamation itself; in fact, at one time Reclamation was *required* by law to conduct the program. In more recent years, Reclamation transitioned the administration of the program to KWAPA, under strict conditions that KWAPA has faithfully upheld, with a goal to evaluate the local agricultural community's ability to administer the program.

The remainder of this response states the allegations individually and outlines the history of the water banking program in question.

## RESPONSES

It appears that the OIG's primary findings against Reclamation fall into two general categories: (1) Reclamation did not have legal authority to enter into a cooperative agreement with KWAPA, and; (2) that the program did not meet goals for benefiting fish and wildlife and thus the expenditures under the agreement constitute a gross "waste" of funds.

## REPORT

First, it is imperative to understand that this report is **only a draft** and that it has not incorporated any revision resulting from a formal response from the responsible or affected parties (Reclamation, KWAPA and USFW). Therefore, the information contained therein should not be treated as fully vetted, complete, or accurate. In fact, the cover page of the report states:

**This is a draft report of the Office of Inspector General (OIG). It is subject to revision and is being made available solely to those having responsibilities concerning the subjects discussed for their review and comment, after which the official report of the OIG will be issued.**

It is our understanding that the official report will be made public the week of October 10.

## ALLEGATION 1

Reclamation did not have legal authority to enter into a cooperative agreement with KWAPA. Specifically, the agreement between KWAPA and Reclamation does not serve a public purpose as required by the statutory authority cited in the agreement.

## RESPONSE

The current Cooperative Agreement was entered into by Reclamation based on authority in: PL 89-72, the *Fish and Wildlife Coordination Act*; PL 106-498, the *Klamath Basin Water Supply Enhancement Act of 2000*; PL 97-293, the *Reclamation Reform Act of 1982*; and, PL 110-161, the *Consolidated Appropriations Act*.<sup>1</sup>

There is long-standing precedent for Reclamation's participation in this type of water banking arrangement and to enter into agreements for a third party to administer and/or develop such programs, including for purposes of investigating their results and alternative approaches. The list below provides background related to the development of water reduction efforts in the Klamath Basin and Reclamation's involvement over the years.

- From 1999 – 2000, KWUA developed a water marketing study and plan.
- In 2000, Reclamation provided a grant to further develop and administer such a program.
  - KWUA developed a pilot, dry-year reserve program and competitive bid proposal for consideration by Reclamation.
  - This proposal was ultimately rejected by Reclamation in favor of its own program.

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<sup>1</sup> Assistance Agreement #08FC200020.

- In February of 2001, a small number of irrigators participated in a Reclamation-approved, land idling program. This was the first “water-bank” type of activity in the Klamath Project and irrigators were accepted based on a competitive bid process under which they agreed not to irrigate land in exchange for a proposed price.
- In April of 2001, because of two competing and uncoordinated Biological Opinions that applied that year, Reclamation announced there would be no water deliveries for Klamath Project irrigators.
  - This action devastated local communities and economies and had similar negative impacts on over 400 species of fish and wildlife, many of which rely on food and habitat provided by agricultural activity in the Klamath Project.
  - This action also brought to the forefront major questions, still pending, regarding federal agency liability for damages for takings of water rights: issues that are minimized through the planned transactional approach of the water banks.
- In 2002, at the request and with support of Reclamation, KWUA developed a new water bank proposal.
  - KWUA’s Water Bank committee met more than 30 times and invested thousands of man hours in developing a 65-page report/proposal for the creation of a long-term water bank.
  - Reclamation again did not accept KWUA’s water bank proposal, but developed its own approach.
- In its 2002 Biological Assessment for proposed operation of the Klamath Project, an assessment required under the ESA, Reclamation recommended establishment of a water bank.
- Later in 2002, the National Marine Fisheries Service (NMFS) issued a Biological Opinion (BiOp) for the operation of the Klamath Project; the BiOp, as part of its “reasonable and prudent alternatives” for the operation of the Klamath Project, directed the establishment of a water bank.
  - This BiOp thus effectively stated that in order to be in compliance with the ESA, Reclamation should pursue water from land idling and groundwater pumping, and that this should occur regardless of actual hydrological conditions. Over the course of the 10-year BiOp, the water bank requirements were set out as follows:
    - 2003 – 50,000 Acre Feet (AF)
    - 2004 – 75,000 AF
    - 2005-2011 – 100,000 AF
- In subsequent Klamath Project ESA consultations (the first occurring in 2008), a water bank was incorporated into the agency’s Proposed Action and included in recent Biological Assessments.
- In September of 2008, KWAPA entered into a Cooperative Agreement with Reclamation to “allow stakeholders to develop market-based approaches to developing groundwater supplies and other innovative means of providing Project water supplies.” This is the water-market program at the center of the allegations.
- It is our understanding that appropriations for the program have ordinarily been based on the budget requests of the Department of the Interior. Also, in 2010, Senator Merkley of Oregon sponsored an amendment to the *Supplemental Appropriations Act, 2010* (PL 111-212; see also PL 111-212) that included an additional \$10 million in drought relief, and

some of this funding was based on, and used, for a goal of expanding the program at that time.

- As a result of KWAPA's administration of the Cooperative Agreement, the water management coordination between irrigators, districts, the states of Oregon and California, Basin Tribes, conservation groups, and the federal government has increased significantly. These improved relationships are in addition to the benefits to the public and wildlife.
- KWAPA's administration of the agreement will ultimately have less effect on the region's aquifer than if the federal government still administered the program outlined in the 2002 BiOp. KWAPA's Cooperative Agreement study, unlike the previous federally-managed water bank, does not require annual pumping of groundwater.

The history of authorized, and at times *required*, water market/banking programs supported by Reclamation over the last decade stands in contrast to the charges that the Cooperative Agreement was not authorized or was counter to public purposes. Further, the Klamath Settlement Agreements described above support the operation of the program. Under the Klamath Basin Restoration Agreement (KBRA), signed by 40 non-federal parties in 2010, the parties agreed that KWAPA will develop and implement a long-term "on-project plan" to align water supply and demand in the Klamath Project agricultural area. They also support an interim program that would include the very tools KWAPA has employed in the Cooperative Agreement, specifically referring to a "water leasing and purchase program" to reduce water diversions. The settlement parties also support KWAPA assuming administrative functions under that program. Consistent with the collaborative settlement process, parties encouraged agencies to use existing authorities to implement programs consistent with the KBRA, and the Department of the Interior did so, for the WUMP and other activities, in accordance with its understanding of its authorities. KWAPA's and Reclamation's activities under the Cooperative Agreement are consistent with the objectives, although of course the KBRA terminated at the end of 2015 for other reasons.

## ALLEGATION 2

KWAPA has never undertaken the goal of benefiting fish and wildlife and the expenditures under the agreement constitute a gross waste of funds.

## RESPONSE

These funds were not wasted. The Cooperative Agreement does include a goal of benefiting fish and wildlife, and the OIG report is flawed in its claim that the program has not served that goal. The purpose of the Cooperative Agreement as described in section A.2 states in part:

*Pursuant to PL 106-498 the Secretary of the Department of the Interior is authorized and directed to work "with affected State, local and tribal interests, stakeholder groups and the interested public to engage in feasibility studies of . . . proposals related to . . . [the] potential for development of additional Klamath Basin groundwater supplies . . . [and] further innovations in the use of existing water resources, or market-based approaches, in order to meet growing water needs." This agreement is 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.*

The objective of the Cooperative Agreement as described in section A.3 states in part:

*The objective of this project is to complete a study to examine the potential for stakeholder capability to manage market-based water supplementation programs . . . . Supplementation of water supply for the Project is necessary due to the increased deliveries for fish and wildlife purposes required by the ESA . . . .*

The tasks to be completed, as described in section 5.1 of the Cooperative Agreement, are as follows:

*Task 1: Investigate into the capability of the local water authority to manage a water supplementation program within the Klamath Project. Acquire options for water to supplement Klamath Project supplies. Provide available water when necessary to meet Project requirements for the direct benefit of fish and wildlife habitat. Account for problems and successes. Provide annual reports of progress.*

*Task 2: The final Report will be completed and distributed to the agencies and local interested parties. The final report will provide information on the quantity of water options acquired, by year; types of water and volumes of each type; . . . problems encountered in acquiring available water; successes in acquisition; and information on how the process could be better managed.*

The program helped provide Project water supplies that directly benefit fish and wildlife habitat. Further, during drought years, KWAPA's programs have resulted in farmers planting cover crops on fallowed fields that provide significant amounts of food and habitat resources for wildlife, especially migratory birds. The water not used on these idled fields is available to provide increased lake levels and instream flows for the benefit of fish. Furthermore, groundwater substitution (whereby owners of wells agree to substitute groundwater for surface water) has kept water in some canals and conveyances that otherwise could be dry. This has provided benefits for multiple species of wildlife including otters, pond turtles, shore birds, waterfowl, and others. Recent BiOps from the U.S. Fish and Wildlife Service and NMFS have redirected water towards fish protected under the ESA and have caused significant negative impacts to National Wildlife Refuges. The programs described in the Cooperative Agreement have provided much-needed replacement habitat on private lands. To say that KWAPA has not addressed this important goal to benefit fish and wildlife is not true.

The KWAPA board and staff administered the program consistent with rules and regulations related to cooperative agreements. When necessary, staff members have enhanced their knowledge related to federal contracting and administration in order to make sure the work was consistent with federal guidelines. Staff have also coordinated with Reclamation on this program on a monthly, if not weekly, basis. KWAPA was required by law each year to undergo a

significant financial audit from an accredited firm. KWUA is aware of no problems related to the outcome of their annual audits and therefore deduce that the funds were not wasted.

### **CONCLUSION**

There is well over a decade's worth of precedent for programs such as the one administered by KWAPA. This program and its predecessors may consist of transactions with irrigation parties, but they also benefit fish and wildlife and the public, and are consistent with long-term visions for our Basin. This program has been an important component to Klamath Project operations and should continue to be. We look forward to a timely resolution of the issue so that the family farmers and ranchers of the Klamath Project can adequately plan for their future.

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