



United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Region
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, OR 97603-9365

JUN 23 2016

IN REPLY REFER TO:

KO-300
WTR-4.00

Mr. Brent Cheyne
President, Board of Directors
Klamath Irrigation District
6640 KID Lane
Klamath Falls, OR 97603

Subject: C Flume Replacement Project (Project) – Contract No. 16-WC-20-4838 (Contract)
Klamath Project, Oregon-California

Dear Mr. Cheyne:

The Bureau of Reclamation is in receipt of the enclosed letter, dated June 17, 2016, from Klamath Irrigation District's (KID) legal counsel, Lawrence Kogan. We will address his chief concerns herein, but after reviewing Mr. Kogan's letter, we are uncertain of KID's intent regarding the Contract, and for that matter, the Project in its entirety.

Mr. Kogan questions whether the \$5,500,000 that Reclamation currently has available in Fiscal Year 2016 funds suggests that Reclamation is not committed to fully funding the Project as provided in the Contract. Consistent with prior discussions with KID regarding the anticipated phasing of the Project and corresponding costs, Reclamation currently has up to \$5,500,000 in Fiscal Year 2016 funds available to advance KID for use towards the Project. Reclamation has requested additional appropriations in Fiscal Years 2017 and 2018 to complete the anticipated funding requirements for the Project, subject to appropriations by Congress.

Reclamation understands that Project costs may escalate and KID is currently authorized, pursuant to Oregon Revised Statutes section 545.301 and the corresponding 269-16 vote of district electors, to borrow up to \$10,000,000 from the United States for the Project. As provided in Article 4(a) of the Contract, "The United States shall provide funds...in an amount that shall not exceed \$7,450,000; *Provided*, That [KID] may request additional funds in writing to complete the XM work and the United States may provide such additional funds subject to approval of the Contracting Officer in accordance with Federal Reclamation law and policy" (emphasis added).

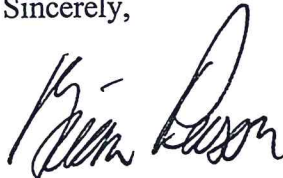
Regarding the requirement that KID expend \$1,712,000 of its funds prior to the advancement of Federal funds for the XM work pursuant to the Contract, this point was discussed at the initial public negotiation session between KID and Reclamation, held on February 24, 2016, as well as in prior technical meetings with KID. This requirement is not stipulated in the contract, rather its

basis is paragraph 5.B. of Reclamation Manual Directives and Standards, *Extended Repayment of Extraordinary Maintenance Costs* (PEC 05-03). The amount was arrived at based on financial information submitted by KID on January 26, 2015. It is Reclamation's understanding that KID has this amount available to expend towards the Project based on the approximately \$1.3 million of additional revenues KID has collected since increasing its assessment rates in November 2013, in response to the need to repair or replace the C Flume.

I assure you that Reclamation has acted in good faith and has been transparent with KID throughout the negotiation of the executed contract. We are not attempting to alter the Contract terms post-execution, but rather are committed to assisting KID by securing funds as identified above and by honoring the Contract as executed. However, in light of the assertion made in Mr. Kogan's letter that he has advised KID to treat the contract as void *ab initio*, we ask that you please apprise us in writing at your earliest convenience if it is KID's intention to honor the Contract. We obviously cannot advance funds to KID absent a commitment for repayment, and we have other competing demands for Reclamation funding. If KID does not intend to honor the contract, we also request that you provide us with your plans for funding the Project, or alternatively, your plans for making longer-term temporary repairs to the C Flume.

Reclamation hopes this information dispels any misunderstanding regarding the Contract. As we have from the outset, Reclamation remains committed to working collaboratively and openly with KID to see the successful completion of the Project. If you have any questions regarding the information contained in this letter, please contact me at 541-883-6935, or via e-mail at bperson@usbr.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Person". The signature is fluid and cursive, with a large initial "B" and "P".

Brian Person
Acting Area Manager

Enclosure



Lawrence Kogan, Esq. NY, NJ, DC
Of Counsel:
James Wagner, Esq. MA
Fred B. Wilton, Esq. MA

June 17, 2016

Mr. Brian Person
Acting Area Manager
United States Department of Interior
Bureau of Reclamation
Mid-Pacific Region
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, OR 97603-9365

Re: C Flume Replacement Project Funds - Contract No. 16-WC-20-4838
Klamath Project Oregon-California

Dear Mr. Person,

I am in receipt of the June 15, 2016 correspondence addressed to KID Chair, Brent Cheyne, entitled above, setting forth what aspires to be a clarification of the status of the BOR funding of the above-referenced Project. Yet, neither the explanation provided, nor the printed medium on which it appears lends clarity to this issue for the benefit of the KID board, management and patrons.

As far as I can discern, the letter states that, "Reclamation has up to \$5,500,000 in Fiscal Year 2016 funds available to advance KID for use towards the Extraordinary Maintenance (XM) work" described in Article 3 of the C Flume Repayment Contract. Although the funds now claimed to be authorized and available are \$300,000 higher than what Mario Manzo, Federico Barajas and David Murillo had represented to Congressman Doug LaMalfa's Senior Staff Member, Erin Ryan and me during our June 7 meeting in the Bureau's Sacramento offices (\$5.2 million), this amount falls far (approximately \$2 million or 26%) short of the \$7,450,000 loan amount designated in Article 4(a) of the Contract.

In addition, your letter states that, "[p]lease note, however, as stated in Article 29 of the Contract, additional funds are subject to appropriation from Congress." It was and remains the District's understanding that Article 29 (which absolves Reclamation from all legal liability for failure to provide funds to the District needed for the C Flume Replacement Project that are contingent upon Congressional appropriations or agency allotment) applies only to *additionally* requested funds needed to complete the XM work. In other words, Article 29 applies only to funds *exceeding* the \$7.45 million loan amount that the BOR is *obligated* to provide pursuant to Article 4(a) of the Contract, *whether or not* all of the \$7.45 million is currently available. To suggest otherwise evidences an unapproved reinterpretation of the Contract's terms and conditions.

Your letter also strongly implies that the total previously authorized loan amount of \$10 million is no

longer available. If true, this would render the \$5.5 million of currently available funding, which is approximately \$4.5 million or 45% less than the \$10 million authorization, *and \$3 million or 35% less than the winning contractor's unreliable \$8.5 million low bid*, severely inadequate to meet the financial needs of the C Flume Replacement Project. Consequently, it would require KID to impose greater per acreage assessments on its patrons than previously anticipated, as the total all-in cost of the Contract which has yet to be conclusively determined by Adkins Engineering is likely to rise above \$10 million! Page | 2

Your letter, furthermore, states that,

“As previously discussed the availability of Federal funds for the work is contingent upon KID first expending at least \$1,712,000 of its funds towards the work. KID will need to provide adequate documentation to Reclamation of such expenditures. [...] Following expenditure of KID's funds, as discussed above, Reclamation will provide funds to KID for the XM work, consistent with Article 4 of the Contract.”

The C Flume Replacement Contract, however, nowhere mentions a District obligation to expend or report the expending of *any* amount of District funds *prior to* the Bureau making the loan amount available. I also do not recollect any such condition precedent being discussed or mentioned during the three (March 24, April 21 and June 7) BOR C Flume Replacement Project financing meetings I attended; nor do any of the correspondences exchanged between Reclamation and myself evidence such a contingency. To the contrary, Article 4(b) of the Contract enables the District to request that the Bureau dispense funds in advance of the XM work (e.g., to purchase materials and supplies) in installment amounts the Contracting Officer determines are necessary.

Moreover, I became aware only yesterday evening (June 16) of the meeting that you and Federico Barajas had convened earlier in the day with KID Board members Cheyne and Knoll and KID Interim Manager, Hollie Cannon. Apparently, following the media reporting of KID's June 9 public board meeting, the purpose of the June 16 meeting was to confirm whether the District intends to move forward with the Contract/Project. Based on your letter, it would appear that this new contingency was raised for the very first time at that meeting without my being informed.

Indeed, it would appear that these not so subtle changes to the Contract's terms and conditions represent a rather material unilateral post-execution modification of the Contract by the Bureau which has not been clearly disclosed to or agreed upon by KID. Such changes also seem to demonstrate Mr. Murillo's ongoing refusal to abide by our previous understanding that all C Flume Repayment Contract-related negotiations with Bureau contracting officers or counsel are to be undertaken by and brought to the attention of District counsel.

In light of the tactics the Bureau has employed to-date to entrap the District, in my absence, in a one-sided, take-it-or-leave-it contract the terms and conditions of which now seem to have changed like the skin of a chameleon, I have advised my client to proceed with the utmost caution. In fact, I have advised my client to treat the Contract executed on May 31, 2016 as void *ab initio* on the grounds that it was entered into under duress and false pretenses. Your June 15 correspondence only confirms these concerns.

KID deserves the opportunity to reach an informed decision regarding whether and how to proceed with this Contract free from BOR pressure, taking into consideration the nonlethal consequences of allowing the 45-day contractor bid period to expire. Until that time, I demand that the Bureau immediately provide for the record a further clarification of the Contract's funding terms and conditions.

Very truly yours,

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Lawrence A. Kogan

Lawrence A. Kogan, Esq.
Managing Principal

Cc: David Murillo, Director, BOR Mid-Pacific Regional Office
Mario Manzo, BOR Mid-Pacific Regional Office
Frederico Barajas, BOR Mid-Pacific Regional Office
Grant Knoll, KID Board
Ken Smith, KID Board
Dave Cacka, KID Board
Greg Carleton, KID Board
Hollie Cannon, KID Interim Manager
Nathan Reitmann, KID General Counsel
Doug LaMalfa, U.S. Congressman
Greg Walden, U.S. Congressman