

Date: July 14, 2016
From: Lawrence Kogan, Esq.
To: KID Board, Management and General Counsel
Re: Memorandum: Whether and How KID Should Secure Title to Klamath Project Transferred Works

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DISCUSSION

I. Introduction

This memorandum is intended to provide Klamath Irrigation District (“KID” or “District”)’s Board, Management and General Counsel a detailed overview of the potentially complex, time-consuming and costly process of acquiring title to Klamath Irrigation Project (“Project”) transferred works with respect to which the District currently bears operations and maintenance (“O&M”) responsibilities and obligations. In so doing, it revisits this counsel’s initial discussion of the title transfer process with KID Board members and patrons during the June 9, 2016 KID monthly meeting.

This memorandum identifies the steps of the title transfer process, and discusses the advantages and disadvantages of securing title transfer, the challenges posed by the title transfer process itself, and the experiences of and lessons learned by other irrigation and water conservation districts which have gone down this path. Furthermore, this memorandum identifies the various statutory/regulatory and fiduciary compliance and financial obligations KID will need to satisfy before the Bureau of Reclamation (“BOR” or “Reclamation”) will sign off on the transfer.

It is this counsel’s understanding that the last readily accessible official recorded KID Board discussion of the subject of title transfer dates back to the Board’s January 2002 Annual Meeting.¹ It certainly would be helpful to this analysis if KID Board members and/or patrons

¹ See Klamath Bucket Brigade, *Klamath Irrigation District Board Meeting Notes January 10, 2002* (Jan. 10, 2002), available at: http://klamathbucketbrigade.org/KIDBMnotes_jan02.htm (“12. Project Transfer: Steve West 10:30 The Klamath County Commissioner’s hired a law firm in Washington D.C. back in August of 2001 till December

would come forward with any additional information they have regarding the Board’s official discussion of title transfer since that time.

Apparently, the mere raising of title transfer as a subject matter for discussion during the June 9, 2016 KID Board meeting evoked high emotions among some district and non-district patrons. They complained that title transfer was a divisive concept that threatened Project unity, which was subsequently conveyed through the Herald & News,² to which I promptly responded.³ The most recent third party outreach to KID concerning the subject of title transfer appears in a correspondence dispatched to this counsel, dated June 24, 2016, from Richard Fairclo, Esq., counsel to the Klamath Basin Irrigation District (“KBID”).⁴ This correspondence, in part, sought confirmation of the impact of KID title transfer upon the priority of other Project irrigators’ water rights relative to the Project’s current A-B-C water rights priority regime.⁵

KID’s analysis of the title transfer process must begin with a review of the contract which defines the overall relationship between BOR and the KID – i.e., the “Operations Contract” No. 14-06-200-3784, executed on November 29, 1954. As the contract’s Preamble states, its primary objective was to “provide for the District to take over the operation and maintenance of certain Project works.”⁶

The BOR derives its statutory authority to transfer O&M responsibility for government-owned Project works to KID, the key Project irrigation district, in part, from Section 6 of the Reclamation Act of 1902 (32 Stat. 388, 389; 43 U.S.C. §§ 491,498). It provides that,

“...when the payments required by this act are made for the major portion of the lands irrigated from the waters of the works herein provided for, then the

2001, to do some preliminary work on title transfer. This firm has lots of experience with irrigation districts (Steve mentioned around 5 or 6) getting title and the partner who is working for Klamath has many connections with DOI, in fact used to work with Gail Norton. Irrigator’s need to get together and ask for a formal request for title. Need to ask for a DOI ‘formal process’, which will free up information and documents that we need to see if we can obtain title. Without this ‘formal process’, we’ll never have a chance. Of course, even with the ‘formal process’, we aren’t guaranteed success. This process will take several years to complete. *Maybe we could phase in title transfer with the other smaller districts first (Pioneer, Shasta, KDD, etc). But it would take an act of Congress for KID to get title.* We need to wait till the BOR (Federal government) has paid for all the maintenance updates (fish screen, new headgates, etc) before transfer to keep our liability down. Steve West also stated that having title changes the way we apply the ESA to the district but we’d still have to follow the ESA. First stage cost for a primary client is \$10,000/month but could fall to \$7,500 per month. *If the three counties (Klamath, Siskiyou, and Modoc) go together as one primary client, the cost could be split 3 ways and can save money. We need to get together will all the little districts that make up the entire Klamath Project and get busy on this”* (emphasis added).

² See Tricia Hill, *Don't Buy What Kogan is Selling on C Flume*, Herald & News Letter to the Editor (June 21, 2016), available at: http://www.heraldandnews.com/members/forum/letters/don-t-buy-what-kogan-is-selling-on-c-flume/article_3f26ea1f-5653-500a-b9c3-2214fab2f954.html.

³ See Lawrence A. Kogan, *Hill Letter Misleading to Save KID Board Payoff*, Herald & News Op-ed (June 24, 2016), available at: http://www.heraldandnews.com/members/forum/guest_commentary/hill-letter-misleading-to-save-kid-board-payoff/article_a3f106df-b7fc-5741-bee3-02fdc86e419f.html.

⁴ See Richard S. Fairclo, *Letter to Lawrence Kogan Re: Your Client Klamath Irrigation District (KID); C Flume Replacement* (June 22, 2016) (As discussed in Section V.4 below, this correspondence arose as the result of the KID Board’s tentative decision to seek an extension of the 45-day C Canal flume contractor bid period to gain maximum flexibility for the District in securing supplementary financing to compensate for a substantial BOR C Canal flume financing contract shortfall.).

⁵ See *Id.*

⁶ See Operations Contract No. 14-06-200-3784 (“Operations Contract”), at 4th Recital Paragraph.

management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby...”⁷

The BOR also derives such authority, in part, from Section 5 of the Reclamation Extension Act of August 13, 1914 (38 Stat. 686; 43 U.S.C. § 431). It states that:

“...whenever any legally organized water users’ association or irrigation district shall so request, the Secretary of the Interior is authorized, in his discretion, to transfer to such water users’ associations or irrigation districts the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe.”⁸

The 1954 Operations Contract contains two important terms which define the scope of the Project works the District may acquire: “Transferred Works”⁹ and “Reserved Works.”¹⁰

1. KID Transferred Works:

Transferred Works are irrigation works the U.S. government had constructed for the irrigation of lands located within the District” that the BOR “transferred to the District for operation and maintenance,” effective January 1, 1955.¹¹

The Transferred Works turned over to the District for care and operation and maintenance, but with respect to which title currently remains with the BOR, include the following:

- “(a) *The entire Main or “A” Canal, and the “B”, “C”, “D”, “E”, “F” and “G” Canals, including the “C-G” Cutoff (but excluding the Enterprise Hydroelectric Plant) and all their related distribution systems;*
- (b) The entire drainage system within the District, including the Melhase-Ryan drainage pumping plant and the “J” Canal North Side Parallel Drain and drainage works constructed pursuant to the agreement of November 24, 1928, as set forth in said agreement;
- (c) *All structures used in connection with the above canals, distribution and drainage works;*
- (d) The Adams and Miller Hill Pumping Plants;
- (e) The residences, outbuildings, shops, warehouses, and office buildings designated by the District pursuant to the procedure set forth in Article 5 hereof;

⁷ See *An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands, the Act of June 17, 1902*, ch. 1093 (32 Stat. 388, 389) at Sec. 6 (p. 69), available at: <https://www.usbr.gov/power/legislation/reclact.pdf>.

⁸ See 43 U.S.C. § 431 (1970); U.S. Department of Interior Bureau of Reclamation, *Reclamation Manual Directives and Standards FAC 01-05 (7/22/97)*, at p. 1, available at: <http://www.usbr.gov/recman/fac/fac01-05.pdf>. The Reclamation Manual imposes mandatory requirements on the BOR. See U.S. Department of Interior Bureau of Reclamation, *Reclamation Manual*, available at: <http://www.usbr.gov/recman/> (“The Reclamation Manual consists of a series of Policy and Directives and Standards. Collectively, these releases assign program responsibility and establish and document Bureau of Reclamation-wide methods of doing business. All requirements in the Reclamation Manual are mandatory” (emphasis added)).

⁹ See Operations Contract, at Art. 1(e).

¹⁰ *Id.*, at Art. 1(d).

¹¹ *Id.*, at Arts. 1(e), 4.

- (f) All equipment, records and supplies used in connection with the operation and maintenance of the transferred works which the United States desires to transfer with said works and which the District designates pursuant to the procedure set forth in Article 5 hereof” (emphasis added).¹²

Transferred Works also include those improvements made by the Klamath Basin Improvement District (KBID) which resulted in their BOR-approved “enlargement, extension or other modification” pursuant to the 1962 Amendatory Contract (No. 14-06-200-3784),¹³ and the related Klamath Project Extensions Contract (Contract No. 14-06-200-41-A),¹⁴ each of which was executed on April 25, 1962. The latter contract *inter alia* provided for KBID’s

“enlargement of the Miller Hill Pumping Plant, certain portions of the G and D Canal System, and the F Canal of the Klamath Project, and for the construction of the Stukel Pumping Plant [...]”¹⁵

The latter contract defined the works referenced above as either “Enlarged Works” (which also included “all lands and interest in lands required for successful construction and operation, and maintenance thereof”)¹⁶ or as “Additional Works” (“other than the Enlarged Works constructed [...] together with all lands and interest in lands required for successful construction, operation, and maintenance thereof”).¹⁷

2. USG Reserved Works:

Transferred works do not include Reserved Works. Reserved Works are

“Project works located outside the District boundaries but within Klamath County, Oregon, and Siskiyou and Modoc Counties, California, which contribute to the irrigation, drainage or flood protection of the District lands but will continue to be operated and maintained by the United States or by some agency other than the District, under contract with the United States, plus the following works located wholly or partly within the District:

- (i) The entire “J” Canal and distribution system, including the headworks and Lower Lost River Diversion Dam.
- (ii) All buildings at the Project headquarters, except those which may be transferred to the District under provisions of Article 4(e) of this contract.
- (iii) Lost River Diversion Dam and the Lost River Diversion Channel, *including all appurtenant control works.*
- (iv) The Project telephone system.
- (v) Link River Dam.

¹² *Id.*, at Art. 4(a)-(f).

¹³ *See* 1962 Amendatory Contract, at Third Preambular Paragraph, Arts. 1-2.

¹⁴ *See* Extensions Contract at Sixth Preambular Paragraph.

¹⁵ *Id.*, at Art. 1(g).

¹⁶ *Id.*

¹⁷ *Id.*, at Art. 1(h).

- (vi) Enterprise Hydroelectric Plant”¹⁸ (currently, the site of the C-Drop Hydroelectric Project).¹⁹

In light of Articles 1(d) and 4(c) of the Operations Contract, transferred works arguably include the A Canal headgate.

3. KID Assumption of U.S. Government Water Delivery Contract Obligations:

The 1954 Operations Contract also contains provisions concerning KID’s responsibility, as a key District within the Project, to deliver water to Project and non-Project patrons. KID’s water delivery responsibilities arise as the result of the District’s assumption of the U.S. government’s primary legal obligation to deliver water to Klamath Irrigation Project districts and patrons and individual non-Project lands. These districts and patrons are identified generally within Articles 13(a)-(c) and (e),²⁰ 14(a)-(b)²¹ and 15,²² and specifically within Exhibits A²³ and C²⁴ of said contract.

Historical documents reflect that “[i]rrigation delivery contracts within the Klamath Reclamation Project have a built-in priority order to be used when supplies are determined to be inadequate to

¹⁸ See Operations Contract at Art. 1(d). See also U.S. Department of Interior Bureau of Reclamation, *Finding of No Significant Impact & Final Environmental Assessment, Klamath Irrigation District – C-Drop Hydroelectric Project*, Klamath Project Mid-Pacific Region (KBAO-EA-11-006) (Oct. 2011), at Sec. 1.2, p. 6, available at: http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=8448 (“[T]he Enterprise Hydroelectric Project, was decommissioned about 50 years ago after sustaining fire damage.”) See *Id.*, at Sec. 2.3.1, p. 10 (“[T]he former Enterprise Hydroelectric Plant [...] burned and was taken out of service approximately 50 years ago.”)

¹⁹ See, e.g., Joel Aschbrenner, *C Canal Hydro Project Starts Producing Power: Facility Will Produce \$250,000 Worth of Electricity Annually*, Herald and News (May 4, 2012), available at: http://www.heraldandnews.com/members/news/frontpage/c-canal-hydro-project-starts-producing-power/article_92a87374-95a5-11e1-a316-0019bb2963f4.html; Klamath Irrigation District, *Projects - 2011 - 2012 Hydro Project*, available at: <http://www.klamathirrigation.com/page5.html>; U.S. Department of Interior Bureau of Reclamation, *Finding of No Significant Impact & Final Environmental Assessment, Klamath Irrigation District – C-Drop Hydroelectric Project*, Klamath Project Mid-Pacific Region (KBAO-EA-11-006) (Oct. 2011), *supra* at Sec. 2.3.1, p. 10.

²⁰ Section 13(a) of the Operations Contract imposes on KID the obligation to distribute the water supply it receives through the transferred works at the headgates of the main canal to the lands and water users located within the limits of the District. Section 13(b) recognizes KID’s assumption and agreement to fulfill the U.S. government’s obligations to deliver and carry irrigation and drainage water to the non-Project water users listed in Exhibit A (as amended), including individuals, irrigation districts (now part of the Project) and third party entities. Section 13(c) sets forth KID’s obligation to deliver and carry irrigation and drainage water through the transferred works to lands of the Project’s Pumping Division, or to Project lands outside the District capable of being served by the transferred works. Section 13(e) reaffirms KID’s obligation to deliver water to both District lands and non-District lands and to non-Project lands.

²¹ Section 14(a) of the Operations Contract recognizes KID’s assumption of the U.S. government’s obligations to deliver irrigation water to Tule Lake lands within KID boundaries served by the J Canal. Section 14(b) imposes on KID the obligations and responsibilities for delivering irrigation water to California lands served from the D Canal.

²² Section 15 of the Operations Contract sets forth KID’s obligation to deliver water to non-district lands located within or adjacent to the District, including lands within or near towns, consistent with then-existing and future-executed U.S. government water rental contracts, then-current individual water right applications and then-current and future Interior Secretary public notices listed in Appendix C.

²³ Exhibit A of the Operations Contract lists all of the Warren Act (non-Project) contractors (individuals and irrigation districts) entitled to delivery of water from the Project’s distribution system.

²⁴ Exhibit C of the Operations Contract lists all of the Oregon-based non-district (individual and corporate-owned) lands entitled to delivery of water from the Project’s distribution system.

meet all needs. [...] The Reclamation A-B-C Drought Plan is the ‘default’ scenario for delivering water to the Project in the event of inadequate water for all demand.”²⁵

The A-B-C regime works as follows:

“Van Brimmer Ditch Company, Klamath Irrigation District and Tulelake Irrigation District are in a position to be served first and are often characterized as ‘A’ Districts. Warren Act contractors are served after ‘A’ districts are served and are characterized as ‘B’ districts/contracts. If there is water supply surplus to “A” and “B” contract deliveries, then surplus water or ‘C’ contracts can be made and served.”²⁶

According to former KID General Counsel Bill Ganong, the BOR’s A-B-C regime distinguishes between Project lands “that could be served by gravity from Lost River and Upper Klamath Lake (referred to as ‘main districts’)” and Project lands that “could not be served by gravity from the system” – i.e., lands of a higher elevation to which water would need to be pumped (“pumping districts and “pumping lands”).²⁷ Each of the BOR contracts with the main districts, including KID, TID and Van Brimmer, contain a priority (“A”) right to water delivery, while it is possible that Van Brimmer may be adjudicated to hold a super-priority right bearing an 1883 priority date, as compared to the Project’s 1905 priority date held by KID and TID. By contrast, the BOR contracts with the pumping districts and lands refer to “surplus” or “excess” water, and indicate that districts and/or individual water users hold a lower priority of right “to receive Project water [...] subject to the prior rights of KID, TID, and Van Brimmer.”²⁸ In addition, still other water users, including a school district, a railroad and individuals, hold water rights with a lower priority subordinate to the pumping districts and lands.²⁹

²⁵ See Klamath Basin Restoration Act, *Klamath Reclamation Project Related Issues: Background/Existing ABC*, at p. 1, available at: http://resighinirancheria.com/Documents/KBWU_KBRA_Why_Support.pdf.

²⁶ *Id.*

²⁷ See William M. Ganong, *Response to Questions about Oregon Water Law and BOR's Drought Plan and Legislation in the Context of the Klamath Basin Restoration Agreement*, Memorandum to Klamath Water Users Association (Dec. 23, 2009), at p. 3, available at: <http://nebula.wsimg.com/3a3e9e6261df3b97a0f62d0499fc4096?AccessKeyId=F79F3BB35D44F5CEBBA5&disposition=0> (“In the available literature and contracts, the Bureau of Reclamation has consistently taken the position that the Klamath Project facilities were being developed primarily for the benefit of land that could be served by gravity from Lost River and Upper Klamath Lake. The initial map shows the Lost River Diversion Channel, and the initial plan included diverting the flow of Lost River to the Klamath River to dry up the area of Tule Lake, and then to make that land available for entry and homesteading. The early correspondence and other documents refer to the Klamath Irrigation District as the ‘main division’ and the area that was initially under Tule Lake or in the proximity of Tule Lake, as the ‘Tule Lake division.’ The correspondence and documents refer to the other land now in the Klamath Project as ‘pumping land’ or ‘pumping districts,’ indicating that to serve those lands with water from the Klamath Project, it would be necessary to pump that water to a higher elevation, and that those lands could not be served by gravity from the system.”).

²⁸ See *Id.* at p. 3 (“In making Contracts with the ‘pumping districts,’ the Bureau relied on statutory authority provided to it under the 1911 Warren Act to make Contracts for delivery of irrigation ‘water excess to the needs of the main project.’ Therefore, all of the Contracts made by the Bureau of Reclamation for delivery of water in the Klamath Project, except those of KID, TID, and Van Brimmer, provide that the rights of those districts and/or individual water users to receive Project water are subject to the prior rights of KID, TID, and Van Brimmer. The Contracts made under the Warren Act are commonly referred to as ‘B’ contracts because those served through the facilities operated and maintained by KID are described on ‘Exhibit B’ of the US – KID 1954 Contract.”).

²⁹ See *Id.* (“[The 1954 KID Operating Contract] also includes an ‘Exhibit C’ which lists several contracts that are subordinate to the contract rights of KID and the Warren Act contracts. Those entities and people receiving water under the contracts listed on Exhibit C are commonly referred to as ‘C’ water users.”)

In the opinion of such counsel, this A-B-C regime, however, is not limited to issues of priority. He believes that said regime extends to “other contract issues such as equitable sharing of the cost of O & M for storing and delivering that water.”³⁰

II. KID’s Acquisition of Transferred Works, But Not Reserved Works

1. The Process

Article 35(a) of the Operations Contract describes a three-step process for O&M contract termination that also can result in KID’s acquisition of title to transferred works. Article 35(a) specifically excludes from contract termination, and consequently, title acquisition of all BOR reserved works.³¹

First, “[a]ll amounts of money owed by the District to the United States under provisions of this and other contracts [must be] paid in full.”³² To make this determination it will be necessary to receive from the BOR a true and correct final accounting of the net balance of the KID’s portion of Project capital costs and operation and maintenance (O&M) expenditures.

Second, “[t]he District [must] notif[y] the United States that it no longer has any foreseeable need for technical or administrative services from the United States of the types mentioned in subdivision (ii) of Article 16 hereof.”³³ Such services include “bookkeeping, accounting, engineering, legal, drafting, clerical or other technical or administrative services.”³⁴

Third, “[t]he United States [must] relinquish[] its title to the transferred works.”³⁵

Section 6 of the Reclamation Act of 1902 provides the Bureau with the authority to convey title to transferred works to nonfederal government entities. It

“says that the projects built by Reclamation are to be owned by Reclamation until such time as Congress determines that ownership of the projects or facilities should be conveyed to someone other than Reclamation. [...] Congress envisioned that while project beneficiaries might take operational

³⁰ See William M. Ganong, *Response to Questions about Oregon Water Law and BOR’s Drought Plan and Legislation in the Context of the Klamath Basin Restoration Agreement*, Memorandum to Klamath Water Users Association (Dec. 23, 2009), at p. 6, available at: <http://nebula.wsimg.com/3a3e9e6261df3b97a0f62d0499fc4096?AccessKeyId=F79F3BB35D44F5CEBBA5&disposition=0>.

³¹ See Operations Contract at Art. 35(a) (“35.(a) All obligations of the District to make payments to the United States under Article 16 hereof, *except those required by subdivisions (iii) and (vii) of Article 16*, shall terminate...” (emphasis added)). See also Operations Contract at Art. 16(iii) (“...the estimate annual costs of operating and maintaining the reserved works, except for the charges provided in subdivision (vii) hereof, as determined by the Secretary”) and Art. 16(vii) (“[e]stimated water rental charges or estimated costs of operation and maintenance for lands within the District supplied with water from the “J” Canal...”).

³² See *Id.*, at Art. 35(iii).

³³ See *Id.*, at Art. 35(ii).

³⁴ See *Id.*, at Art. 16(ii).

³⁵ See *Id.*, at Art. 35(i).

responsibility, full ownership would remain with the United States until Congress decides something else.”³⁶

In 1995, the Bureau released a framework for determining the eligibility of federal projects for title transfer, which was updated in 2004.³⁷ This title transfer framework provides a “general set of policies and criteria to govern the process of developing a title transfer agreement which would then become the basis of legislation to authorize title transfer for each specific project.”³⁸ There are six general criteria:

1. “The Federal Treasury, and thereby the taxpayers’ financial interest must be protected”;
2. “There must be compliance with all applicable State and Federal laws”;
3. “Interstate compacts and agreements must be protected”;
4. “The Secretary’s Native American trust responsibilities must be met”;
5. “Treaty obligations and international agreements must be fulfilled”;
6. “The public aspects of the project must be protected.”³⁹

According to the Title Transfer Framework, the BOR will pursue negotiations with interested transferees “where the issues associated with transfer are relatively easy to resolve” and “there is consensus among the stakeholders.”⁴⁰ In addition, the proposed transfer “must have the consent of other project beneficiaries,” and any substantive objectives raised by another beneficiary must be resolvable.⁴¹ Furthermore, the proposed transferees must demonstrate their management competence, ability to ensure the project remains legally compliant, willingness to assume full liability for project O&M-related matters, and technical capability to ensure project safety.⁴²

2. Elaborated Process

The criteria used to determine eligibility for title transfer have since become more rigorous. Based on the six criteria discussed above, the BOR, in conjunction with the National Water Resources Association and the Family Farm Alliance,⁴³ developed and disseminated a Title Transfer Checklist in 2009⁴⁴ that arguably imposes additional burdens on prospective transferees.

³⁶ See James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at pp. 16-19, available at: <http://nebula.wsimg.com/db491b5b10e3bccd2a1e3b7560f5c9ed?AccessKeyId=2C708116A178947E6F43&disposition=0&alloworigin=1>

³⁷ See U.S. Department of Interior Bureau of Reclamation, *Framework for the Transfer of Title Bureau of Reclamation Projects* (Aug. 7, 1995, updated Sept. 2004) available at: http://www.usbr.gov/title/framework_title_transfer_2004_revision.pdf.

³⁸ See U.S. Department of Interior Bureau of Reclamation, *Title Transfer of Projects and Facilities of the Bureau of Reclamation*, available at: <http://www.usbr.gov/title/>.

³⁹ *Id.*, at pp. 2-3.

⁴⁰ *Id.*, at p. 3.

⁴¹ *Id.*

⁴² *Id.*, at p. 4 (“Potential transferees must be competent to manage the project and be willing and able to fulfill all legal obligations associated with taking ownership of that project, including compliance with Federal, State, and tribal laws that apply to facilities in private ownership and assumption of full liability for all matters association with ownership and operation of the transferred facilities. Potential transferees must be able to demonstrate the technical capability to maintain project safety on a permanent basis and an ability to meet financial obligations associated with the project.”)

⁴³ See U.S. Department of Interior Bureau of Reclamation, *Title Transfer of Projects and Facilities of the Bureau of Reclamation*, *supra*.

⁴⁴ See U.S. Department of Interior Bureau of Reclamation, *Title Transfer Checklist* (2009), available at: http://www.usbr.gov/title/Title_Transfer_Checklist-2009.doc.

For example, the District and the Bureau must together consider, when going through the checklist, whether all “interested parties” (e.g., beneficiaries (contractors), stakeholders and members of the general public) have been notified of the potential transfer. Such interested parties include *inter alia* federal, state and local governments, environmental groups, tribes and congressional staff.⁴⁵

The BOR also must undertake certain steps. These include:

1. Establishing a title transfer team;
2. Completing an analysis of the assets under consideration for transfer;
3. Preparing an initial estimate of transaction costs;
4. Preparing an initial estimate of valuation.⁴⁶

In addition, the District Board must adopt a resolution expressing its intent to pursue title transfer.⁴⁷

Both parties, furthermore, must draft and sign: 1) a Memorandum of Agreement setting forth the activities and costs for which each party will be held responsible;⁴⁸ 2) a Title Transfer Agreement identifying what each party will get from the transfer, the extent of any mitigation required and the terms and conditions for payment;⁴⁹ and 3) a Post-Transfer Governance Agreement describing the “[g]overnance structure for operating and managing project facilities and lands after [the] transfer (among partners) (as appropriate).”⁵⁰

The District, as prospective transferee, must ensure it complies with various procedural statutes, including the National Environmental Policy Act (“NEPA”),⁵¹ the National Historic Preservation Act,⁵² the Endangered Species Act and the Clean Water Act.⁵³ The District also must secure land appraisals for previously withdrawn lands, undertake a hazardous materials review, engage in tribal consultation, and be able to meet all state requirements.⁵⁴ The transaction costs for these activities will likely be shared equally by the parties depending on the relative benefits received.⁵⁵

Moreover, the District and the BOR must pursue title transfer legislation in a joint and collaborative manner. They must:

1. “Jointly develop legislation to ratify [the] agreements[;]
2. Jointly present [the] agreement[s] to Congress[;]

⁴⁵ *Id.*, at Checklist Items 24-25, pp. 6-7.

⁴⁶ See U.S. Department of Interior Bureau of Reclamation, *Bureau of Reclamation Title Transfer Process* (Feb. 2011), at p. 7, available at: http://www.usbr.gov/title/Reclamation_title_transfer_process_2_2011.ppt.

⁴⁷ *Id.*, at p. 9.

⁴⁸ *Id.*

⁴⁹ *Id.*, at p. 11.

⁵⁰ *Id.*

⁵¹ *Id.*, at p. 10 (An environmental assessment (“EA”) and environmental impact statement (“EIS”) may be required).

⁵² *Id.* (Section 106 compliance and State Historic Preservation Officer (“SHPO”) consultation may be required).

⁵³ See U.S. Department of Interior Bureau of Reclamation, *Title Transfer Checklist* (2009), *supra* at Checklist Items 4 and 16.

⁵⁴ See U.S. Department of Interior Bureau of Reclamation, *Bureau of Reclamation Title Transfer Process* (Feb. 2011), *supra* at p. 10.

⁵⁵ *Id.*, at p. 5. (“50/50 for NEPA compliance, 100% for non-Federal real estate aspects, and 50/50 for HazMat survey” (review)).

3. Ensure the legislation “authorizes implementation of [the] “Agreement” which is referenced[;] and
4. Jointly support passage.”⁵⁶

III. The Administration’s and Congress’ Views Toward Conveyance of Title to Transferred Works

On February 27, 2014, the Senate Subcommittee on Water and Power of the Committee on Energy and Natural Resources convened a hearing to discuss current water and power bills then before Congress.⁵⁷ Among the bills being considered was S.2034. S.2034, the “Reclamation Title Transfer Act of 2014,”⁵⁸ “would give Reclamation the authority to transfer certain uncomplicated projects to willing recipients.”⁵⁹ Reclamation’s representative, Robert Quint, expressed the Obama administration’s support for such legislation.

“The Department has long recognized the value providing programmatic authority for the transfer of title for facilities that are non-controversial and typically single purpose. We believe S. 2034 would achieve this goal and we support the bill.”⁶⁰

Mr. Quint’s prepared testimony provides more detail about this legislation. Section 3(a) of the Act authorized Reclamation to establish a program enabling the agency, “[a]ssuming funds are appropriated [...] “to proactively identify and analyze the potential public benefits from the transfer out of federal ownership.”⁶¹ Section 3(b) of the Act authorized the Secretary to convey all right, title, and interest of the United States in and to any eligible facility “without a further Act of Congress that meet[s] certain eligibility criteria [...] identified in Section 5.”⁶²

S.2034’s Section 5 criteria would have essentially codified and further elaborated upon BOR’s title transfer framework and the title transfer checklist the agency, the National Water Resources Association and the Family Farm Alliance had jointly developed, as discussed above. In other words, these criteria would have required the Secretary to determine, in consultation with the Governor(s) of the State(s) in which the Project is located, *that the proposed transfer*: 1) “does not have an unmitigated significant effect on the environment;” 2) “is uncomplicated” because: i) “there is no significant opposition to the proposed transfer; ii) the eligible facility is “not hydrologically integrated with other Federal or non-Federal water projects;” iii) “the eligible

⁵⁶ *Id.*, at p. 12.

⁵⁷ See Hearing Before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources, United States Senate, *Current Water and Power Bills* (on S. 1419, S. 1771, S. 1800, S. 1946, S. 1965, S.2010, S. 2019, S. 2034, H.R. 1963), S. Hrg. 113-284, 113th Cong., 2d Sess. (Feb. 27, 2014), available at: <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg88043/pdf/CHRG-113shrg88043.pdf>.

⁵⁸ See S.2034, *Reclamation Title Transfer Act of 2014*, 113th Cong., 2d Sess. (Feb. 24, 2014), available at: <https://www.gpo.gov/fdsys/pkg/BILLS-113s2034is/pdf/BILLS-113s2034is.pdf>.

⁵⁹ See S. Hrg. 113-284, *supra* at p. 2.

⁶⁰ See *Statement of Robert Quint, Senior Advisor, Bureau of Reclamation, Department of the Interior*, in S. Hrg. 113-284, *supra* at p. 15.

⁶¹ See *Id.*, at p. 18. See also *Statement of Robert Quint, Senior Advisor U.S. Department of the Interior Before the Energy and Natural Resources Committee Subcommittee on Water and Power U.S. Senate on S. 2034 The Reclamation Title Transfer Act of 2014* (Feb. 27, 2014), available at: <http://www.usbr.gov/newsroom/testimony/detail.cfm?RecordID=2544>.

⁶² See *Statement of Robert Quint, Senior Advisor, Bureau of Reclamation, Department of the Interior*, in S. Hrg. 113-284, *supra* at p. 18. See also S.2034, Sec. 3(b).

facility is not generating significant quantities of electric power sold to, or eligible to be sold to, power customers;” and iv) “the parties to the transfer [are] able to reach agreement on legal, institutional, and financial arrangements relating to the conveyance;” 3) is consistent with the Secretary’s responsibility: i) “to protect land and water resources held in trust for federally recognized Indian tribes;” and ii) “to ensure compliance with any applicable international treaties and *interstate compacts*” (emphasis added); and 4) is in the financial interest of the United States.”⁶³

Significantly, Section 6 of the Act would have absolved Reclamation of all legal liability “arising out of any [federal government] act, omission, or occurrence based on [its] prior ownership or operation of the conveyed property,” *except for* those liabilities arising from such prior ownership under “Federal environmental laws, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.),” for which the government will continue to be held responsible.⁶⁴

Fortunately, S.2034 did not go very far in the Democrat-controlled Senate, even though it had been introduced three days earlier into the Senate Committee on Energy and Natural Resources by Democratic Senator Brian Schatz of Hawaii.⁶⁵ S.2034’s Section 8, in particular, contained a virtual poison pill which would have ensured that any approved title transfer of Reclamation-owned property *did not “affect or interfere with [...] any interstate compact, decree, or negotiated water rights agreement”* (emphasis added).⁶⁶

Presumably, the bill’s author had in mind such agreements as the Klamath Basin Restoration Agreement (“KBRA”), the Upper Klamath Basin Comprehensive Agreement (“UKBCA”) and the Klamath Hydroelectric Settlement Agreement (“KHSA”) (now superseded by the Amended KHSA and the new Klamath Power and Facilities Agreement (“KPFA”). Apparently, the Obama administration did not expend much political capital to shepherd this bill through Congress and believed the bill would not likely secure passage in the Republican-controlled House of Representatives. The administration’s concerns were arguably justified given former House Public Lands and Environmental Regulation Subcommittee Chairman (and current House Natural Resource Committee Chairman) Rob Bishop’s support for title transfer of federal lands⁶⁷ and criticism of Reclamation’s title transfer process,⁶⁸ and former House Natural Resource

⁶³ See S.2034, Sections 5(b)(1)-(2), 5(b)(2)(A).

⁶⁴ *Id.*, at Sec. 6(b).

⁶⁵

⁶⁶ See S.2034, Sec. 8(b)(1)(C).

⁶⁷ See U.S. Congressman Rob Bishop, *Bishop Statement on Report Analyzing Transfer of Federal Lands to the State of Utah*, Press Release (Dec. 2, 2014), available at: <http://robbishop.house.gov/news/documentsingle.aspx?DocumentID=397672>; Utah’s Public Lands Initiative Coordinating Office, *Rob Bishop’s Public Land Initiative – Status Report* (Nov. 30, 2013), available at: <http://publiclands.utah.gov/tag/transfer-of-public-lands/page/4/>; http://robbishop.house.gov/uploadedfiles/pli_staff_report_112013.pdf.

⁶⁸ See Congressman Rob Bishop, *Bold Thinking Needed on Title Transfer*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 15, *supra* (“The title transfer process is much costlier and time consuming than anticipated. The word expedited is not synonymous with the Reclamation title transfer process. There have been only 27 title transfers in the last 20 years. Many of those occurred in the late 1990s and early 2000s. They are down to a trickle, and only two title transfers are now pending before the U.S. House of Representatives. [...] Local water users have proven they can do a better job with something they own rather than a project owned by federal bureaucracy.”).

Committee Ranking Member Doc Hasting’s opposition to federal support of dam removal⁶⁹ (including as proposed in the KHSA).⁷⁰

At the very least, the title transfer framework and title transfer checklist can help irrigators to identify potential stakeholders and the need to engage them in consultation at the beginning of the title transfer process. According to BOR’s chief advisor on title transfer,

“a stakeholder is anyone who cares about the operations of the project and can gunk up the works if you do not include them or consult with them.”⁷¹

Before deciding to move forward on title transfer, the KID Board and management should carefully consider the costs versus benefits of (relative risks associated with) private ownership of Project works and the District’s related assumption of responsibility for fulfilling federal government water delivery contracts. They also must consider the costs and burdens the title transfer process entails.

IV. Lessons Learned From Case Examples - Title Transfer and Title Transfer Process Experiences Advantages/Disadvantages of Transferring Title to Federal Works; Recommendations

Congressman Bishop has emphasized that “t[here] have been only 27 title transfers in the last 20 years.”⁷² As the following case examples reveal, the reasons for this have mostly to do with the title transfer process rather than with the transfer of property ownership itself.

According to Reclamation’s chief advisor on title transfer,

“To date, most of the completed transfers have, in general, been single-purpose facilities. This might include the entirety of a single-purpose project or the single-purpose features—canals and laterals—of a larger project.”⁷³

It is Reclamation’s general position that “title transfer is not right for every district [and...] is a good option for [only] some,” given the patience, willingness to engage with stakeholders and public transparency required.⁷⁴ However, this view overlooks the real reasons why irrigation districts decide to pursue title transfer.

1. Reasons for Seeking Title Transfer:

a. Preservation of Water Rights

⁶⁹ See U.S. House of Representatives Committee on Natural Resources, *Hastings: Dam Removal Extremists Falsely Attack Latest BiOp*, Press Release (May 20, 2010), available at: <http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=186777>.

⁷⁰ See U.S. House of Representatives Committee on Natural Resources, *Hastings Statement on Draft Klamath Dam Removal Proposal*, Press Release (Sept. 30, 2009), available at: <http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=147150>.

⁷¹ See James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 18.

⁷² See Congressman Rob Bishop, *Bold Thinking Needed on Title Transfer*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 15, *supra*.

⁷³ See James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 19.

⁷⁴ See *Id.*

The Loup Basin Reclamation District and Farwell and Sargent Irrigation Districts of Nebraska and Kansas originally sought transfer of title to Reclamation works in order to preserve their water rights. Apparently, Reclamation changes to the rules of contract renewal (e.g., modification of their contract templates) had potentially jeopardized irrigator water rights. In particular, Reclamation had discussed raising the water level of a particular reservoir due to environmental concerns during the height of the irrigation season (August), beyond what the districts thought was necessary.⁷⁵ In addition, Reclamation had apparently reduced the term of the contract's renewal period from 40 years to 25 years.⁷⁶

Similarly, members of the Nevada-based Pershing County Water Conservation District had always wanted to benefit from the increased flexibility and value associated with owning and controlling the district's pasturelands and water rights.⁷⁷ Apparently, severe droughts had persuaded the district board and management that, "[t]itle transfer w[ould] help [them] do some of things [they] need[ed] to do to ensure that [their] irrigators g[ot] available water to grow their crops."⁷⁸ As a result, they set out to acquire and did acquire "more than 36,000 acres [of land], 49,000 of water diversion rights from the Humboldt River, and 115,000 acre-feet of water storage rights in Rye Patch Reservoir."⁷⁹

b. *Improve Management of Property and Buildings to Reduce Costs and Derive Revenues*

The members of the Washington State-based Yakima-Tieton Irrigation District had long sought to secure control and ownership of all of the project's buildings and lands to better manage and derive revenues from them. Following title transfer, the district demolished certain buildings not needed for the project and sold some land parcels through a public bid process without Reclamation involvement.⁸⁰ Members of the Wyoming-based Fremont-Madison Irrigation District, meanwhile, were prompted to investigate title transfer of project facilities to reduce costs and bureaucratic challenges following Reclamation's 1996 turnover of O&M responsibilities to Island Park and Grassy Lake Dams to the district.⁸¹

Similarly, as the Elephant Butte Irrigation District of New Mexico and the El Paso County Water Improvement District #1 of Texas assumed more and more functions from Reclamation as the result of the transfer of operations and maintenance responsibilities over the Rio Grande Project, they increasingly sought to "gain title to project drains, canals, laterals, and rights-of-way."⁸²

c. *Secure State Construction Loan Financing*

⁷⁵ See John Crotty, *Life Before Title Transfer in the Loup Basin*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 10, *supra*.

⁷⁶ *Id.*

⁷⁷ See Bennies Hodges, *Seeing a Strong Conviction Through: The Humboldt Project Title Transfer*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at pp. 22-23.

⁷⁸ *Id.*, at p. 22.

⁷⁹ *Id.*, at p. 23.

⁸⁰ See Rick Dieker, *Transferring Properties: A Lesson in Perseverance*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 25, *supra*.

⁸¹ See Dale Swensen, *Transferring Water Conveyance Facilities: Fremont-Madison Irrigation District*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 26, *supra*.

⁸² See Gary Esslinger, *The Benefits of Transfer: Running the District Like a Farm*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 30, *supra*.

The Provo River Water Users Association (“PRWUA”) is a Utah-based nonprofit corporation providing a supplemental water supply from the Provo River Project to metropolitan water districts, cities, a conservation district, and mutual water companies and irrigation companies.⁸³ It initially pursued title transfer from Reclamation of the open Provo Reservoir (Murdock) Canal (PRC) and corridor and the Pleasant Grove office and shop property to secure the funding needed from the Utah Board of Water Resources to enclose the canal⁸⁴ within a 21-mile long, 10.5-foot diameter pipeline.⁸⁵ Although it was then believed that Utah State law required the State Board to acquire title to such assets once transferred to PRWUA, PRWUA subsequently learned from its attorneys that its transfer of such assets to the State could jeopardize the Association’s federal nonprofit tax status. PRWUA ultimately decided to delay Reclamation’s title transfer of such assets until after it could secure State law changes “that enabled the [State Board] to loan state funds without the need to acquire title to the lands or water rights.”⁸⁶

2. Title Transfer Experiences:

a. *Advantages*

As House Natural Resources Committee Chairman Rob Bishop, a strong advocate of transferring title to federal lands to local hands, has stated,

“Local ownership (1) promotes nonfederal financing to improve projects as opposed to relying on the unpredictable federal appropriations process, (2) cuts down on onerous federal paperwork requirements, (3) means that water users do not have to rely on artificially expensive federal studies and overhead costs when they actually own the facility, (4) increases the value of lands and water rights that are tied to an improved local project, (5) can help the environment and enhance human safety.”⁸⁷

In addition, title transfer also benefits the federal government by relieving Reclamation of the liability associated with that portion of the Project.⁸⁸

The Bureau of Reclamation’s chief advisor on title transfer has readily acknowledged that Reclamation ownership of irrigation project lands and infrastructure can interfere with and actually impair efficient management of the project.

“Reclamation’s ownership, and the associated obligations, can get in the way of efficient management. For example, if an electricity provider approaches the

⁸³ See *Written Statement of G. Keith Denos, General Manager Provo River Water Users Association*, before the House Natural Resources Committee Subcommittee on Water and Power, Hearing on H.R. 255 - Clarifications to the Provo River Project Transfer Act, 113th Cong., 1st Sess. (May 23, 2013), available at: <http://docs.house.gov/meetings/II/II13/20130523/100898/HHRG-113-II13-Wstate-DenosK-20130523.pdf>.

⁸⁴ See Provo River Water Association, *2014 Annual Report*, at p. 8, available at: <http://www.prwua.org/annualreports/annualreport-prwua-2014.pdf>.

⁸⁵ See U.S. Department of the Interior Bureau of Reclamation Upper Colorado Region, *Reclamation Transfers Ownership of the Provo River Aqueduct*, Press Release (Nov. 3, 2014), available at: <http://www.usbr.gov/uc/feature/ProvoRiverAD/index.html>.

⁸⁶ See Provo River Water Association, *2014 Annual Report*, *supra* at p. 8.

⁸⁷ See Congressman Rob Bishop, *Bold Thinking Needed on Title Transfer*, *Irrigation Leader*, Vol. 7, Issue 3 (March 2016), at p. 15, *supra*.

⁸⁸ *Id.*

district about a crossing of project lands, or the district wants to change a canal to make it more efficient, it must get permission from Reclamation.”⁸⁹

In particular, this BOR advisor has emphasized how federal ownership of an irrigation project renders any proposed action affecting federal lands and/or infrastructure a “major federal action”⁹⁰ requiring BOR’s undertaking of an environmental assessment pursuant to NEPA.

“Even though the water users operate and maintain the project, they must get permission from Reclamation, and they may have to complete an environmental assessment on a part of a canal that may not have been disturbed in 100 years. Since the project is owned by the United States, it is a [major] federal action for the purposes of the National Environmental Policy Act (NEPA).”⁹¹

Such advisor has likewise acknowledged that, following conveyance of transferred works, the same activity proposed to take place on District lands or in District waters would not trigger federal environmental compliance (NEPA) obligations given the absence of a “federal action.”

“But, when you take the United States out of the mix, it is not a federal action and does not require federal environmental compliance” (emphasis added).⁹²

Title transfer does not, however, relieve a district and/or its patrons from the state and local environmental compliance obligations arising from such activities.

i. Title Transfer Promotes Nonfederal Financing to Improve Projects

Acquisition of title to former federal project assets enabled the Nebraska and Kansas irrigation districts to secure additional financing to underwrite maintenance and construction projects, including through the bonding of major projects.⁹³ Ownership of such assets also has enabled

⁸⁹ See James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 16.

⁹⁰ 40 C.F.R. § 1508.18(a) of NEPA defines the term “major federal actions” as actions with effects that may be major and which are potentially subject to Federal control and responsibility. “Major” actions are “significant” actions within the meaning of 40 C.F.R. § 1508.27(a)-(b), if they result in severe impacts on “society as a whole (human, national), the affected region, the affected interests, and the locality. Federal actions “new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies,” as well as “new or revised agency rules, regulations, plans, policies or procedures; and legislative proposals (§§ 1506.8, 1508.17).” 40 CFR § 1508.18(b) provides that “federal actions” fall within one of four categories, including: “(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 4 U.S.C. 551 et seq.[:]; (2) *Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based* [:];” (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive [:]; (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities” (emphasis added).

⁹¹ *Id.*

⁹² See James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 16..

⁹³ See Kris Polly, *Life After Title Transfer in the Loup Basin: A Conversation With Matt Lukasiewicz*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 6, available at: <http://nebula.wsimg.com/db491b5b10e3bccd2a1e3b7560f5c9ed?AccessKeyId=2C708116A178947E6F43&disposition=0&alloworigin=1>.

the districts to look beyond Reclamation “for federal, state and local [grant] dollars to do studies that cost much less than if Reclamation had participated.”⁹⁴ Similarly, title transfer of the enclosed Provo River Canal afforded the Utah-based water user association the opportunity of using the land as security for future transactions.

ii. Title Transfer Reduces Costs and Onerous Federal Paperwork Requirements; Improves Efficiency of Asset Operations

The Nebraska and Kansas irrigation districts which successfully navigated the title transfer process discovered, for example, that their acquisition of title to former project works enabled them to investigate and make structural changes to their local reservoir without the need to work through Reclamation – i.e., the required “permitting studies, engineering studies, paperwork” associated with undertaking a structural project.⁹⁵ This saved them the extra costs and charges that Reclamation would otherwise have imposed in addition to the costs the districts incurred for engineers and studies, which typically delayed the process. Following title transfer, these districts “could use their own engineers at half the cost and get the repair work done.”⁹⁶ In addition, “[l]ocal control and state support [has] help[ed the districts to undertake] many of the maintenance or improvement projects they need to operate,” while local control has provided the districts with the flexibility needed to deliver water efficiently and effectively.⁹⁷

Similarly, the Washington State irrigation district that acquired title to federal project land and buildings found that, “[u]ltimately, ownership of the parcels and buildings enabled [it] to consolidate its facilities and manage its properties.”⁹⁸ The district demolished three buildings not needed for project purposes, and also “sold some parcels through a public bid process” without Reclamation involvement.⁹⁹

Furthermore, following title transfer, the Wyoming irrigation district discovered that Reclamation no longer came out to inspect district facilities on a regular basis.¹⁰⁰ It also learned that the acquisition of title to lands subject to federal easements extinguished the Reclamation Reform Act reporting requirements tied to the district’s use of those easements.¹⁰¹ In addition, upon Reclamation’s transfer of title one of its diversion dams to the district, the district was able, without securing Reclamation review and approval, to work with another federal agency (the Federal Energy Regulatory Commission) and to “ma[k]e a deal with a local utility to build a 3.3-megawatt project at the diversion dam”¹⁰² that financially benefits the district rather than the Bureau.

⁹⁴ See John Crotty, *Life Before Title Transfer in the Loup Basin*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 11, *supra*.

⁹⁵ See Kris Polly, *Life After Title Transfer in the Loup Basin: A Conversation With Matt Lukasiewicz*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 5, *supra*.

⁹⁶ See John Crotty, *Life Before Title Transfer in the Loup Basin*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 10, *supra*.

⁹⁷ See Kris Polly, *Life After Title Transfer in the Loup Basin: A Conversation With Matt Lukasiewicz*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 6, *supra*.

⁹⁸ See Rick Dieker, *Transferring Properties: A Lesson in Perseverance*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 25, *supra*.

⁹⁹ *Id.*

¹⁰⁰ See Dale Swensen, *Transferring Water Conveyance Facilities: Fremont-Madison Irrigation District*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 27, *supra*.

¹⁰¹ *Id.*

¹⁰² *Id.*

Moreover, the New Mexico irrigation district discovered following title transfer, that its engineering crews no longer had to secure Reclamation review and approval of designs for district facilities, and that it could bring all of its work in-house and expand its engineering department.¹⁰³ This has enabled the district's board and management to avoid the use of expensive outside contractors at substantial cost savings, and thereby, to ensure more efficient and cost-effective delivery of district water.¹⁰⁴

iii. Title Transfer Increases Land Values and Water Rights Tied to an Improved Local Project

The Nebraska and Kansas irrigation districts were able, following title transfer, to repair and invest district capital into district-owned dam and other infrastructure assets, thereby increasing their value. For example, these districts installed six dewatering wells below one acquired dam to help with seepage, installed automation to improve the operation of canals and laterals, installed new river gates and automation at another acquired dam, and, with state collaboration, installed a new fish-way bypass to assist with fish migration on the river serving them.¹⁰⁵

The Nevada irrigation district that acquired title to former federal lands and associated water rights discovered that such ownership has increased the value of the conveyed lands on a per-acre basis. The districts' "constituents now own their own lands and water rights, [and this] makes them more valuable."¹⁰⁶ Similarly, following title transfer, the New Mexico irrigation district was able to convert canals into pipe and to build its own radial gates and propellers for its own hydropower turbines.¹⁰⁷ The district discovered, in other words, that its investment of district labor and monies into district-owned capital assets¹⁰⁸ increased the value of those assets.

b. *Disadvantages*

i. Potential Insurance Liability May Arise From Title Transfer of Dam or Reservoir

At least one Washington State insurance adviser has found that "the greatest new exposure related to title transfer is the liability associated with dams and reservoirs."¹⁰⁹ According to such adviser, "some [insurance] companies will not insure districts if they have that exposure," while others will require irrigation districts to complete a separate application, the answers to which may result in increased premiums or non-coverage. "Owning a dam or reservoir also will likely warrant higher liability limits which increases insurance costs."¹¹⁰ He also advises irrigation districts interested in pursuing title transfer to consider the age and condition of water storage

¹⁰³ See Gary Esslinger, *The Benefits of Transfer: Running the District Like a Farm*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 31, *supra*.

¹⁰⁴ *Id.*

¹⁰⁵ See Kris Polly, *Life After Title Transfer in the Loup Basin: A Conversation With Matt Lukasiewicz*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 6, *supra*.

¹⁰⁶ See Bennies Hodges, *Seeing a Strong Conviction Through: The Humboldt Project Title Transfer*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at pp. 23, *supra*.

¹⁰⁷ See Gary Esslinger, *The Benefits of Transfer: Running the District Like a Farm*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 31, *supra*.

¹⁰⁸ *Id.*

¹⁰⁹ See Joel Pearson, *New Dam Liability: Risk Management and Title Transfer*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 32, *supra*.

¹¹⁰ *Id.*

and distribution facilities and “state laws on the safety of dams and reservoirs.” In cases where the desired facility is approaching its useful life, he has especially warned districts to assume exposures only for post-transfer operation of the facility – and not for the design and construction of the facility.¹¹¹

The Nebraska and Kansas irrigation districts discovered that the transfer of title to dams and related infrastructure raised certain potential liability issues. Liability could attach, for example, if someone was injured as the result of a gate being left open, a trespass into a restricted area (such as onto a diversion dam to fish), and a structure lacking “proper signage” and/or not being “properly blocked off.”¹¹² Conversely, these districts also discovered that “there are state statutes that protect [them from flood disasters in connection with] “the reservoir [lake] and any accidents that may happen up there.”¹¹³ Consequently, these districts, which had previously procured insurance “on all of [their] grounds, buildings, and equipment” and in the event a broken canal caused crop destruction, found that their insurance costs after title transfer, including on their newly acquired reservoir, were not any higher than before the transfer.¹¹⁴ Although the districts were now compelled to insure the reservoir, the all-in insurance cost did not rise because of the use of higher deductibles.¹¹⁵

Similarly, prior to taking title to federal works, the New Mexico irrigation district had their attorneys investigate the adequacy of state protections against tort claims. The district discovered that, as long as the district uses its canals for storage and the diversion of water, state tort law protections applied “if one of the canals or ditches breaks and floods private property.”¹¹⁶ The district also learned, however, that it would lose such state tort protections “if the use of the canal or its banks changes to a trail or a bike path,” unless legislation necessary to cover such changes was first secured.¹¹⁷

ii. Federal NEPA, NHPA, CWA and ESA Compliance as a Condition of Title Transfer

The transfer of title to irrigation works and the enactment of congressional legislation to facilitate it each constitute “major federal actions.”¹¹⁸ Consequently, as a condition of title transfer, the Elephant Butte Irrigation District (“EBID”) of New Mexico and the El Paso County Water Improvement District #1 (“EPCWID”) of Texas were required following passage but before enactment of congressional title transfer legislation to conduct environmental, historical and cultural assessments¹¹⁹ meeting the requirements of the National Environmental Policy Act (“NEPA”), the National Historic Preservation Act (“NHPA”), the Clean Water Act (“CWA”)

¹¹¹ *Id.*

¹¹² See Kris Polly, *Life After Title Transfer in the Loup Basin: A Conversation With Matt Lukasiewicz*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at pp. 5-6.

¹¹³ *Id.*, at p. 5. See also John Crotty, *Life Before Title Transfer in the Loup Basin*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 11.

¹¹⁴ *Id.*, at p. 6.

¹¹⁵ *Id.*; See also John Crotty, *Life Before Title Transfer in the Loup Basin*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 11.

¹¹⁶ See Gary Esslinger, *The Benefits of Transfer: Running the District Like a Farm*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 31.

¹¹⁷ *Id.*

¹¹⁸ See 40 CFR § 1508.18(a)-(b); 40 CFR § 1508.27(a)-(b).

¹¹⁹ See Gary Esslinger, *The Benefits of Transfer: Running the District Like a Farm*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 30.

and the Endangered Species Act. For example, “[t]he hazardous materials study required that EBID conduct mitigation on 30 sites. EBID hired an archeologist to conduct a cultural resources study.”¹²⁰ In addition, EBID worked with stakeholder groups such as Ducks Unlimited “to preserve duck habitat in EBID drains” by converting drains into duck habitats.¹²¹ “The group provided EBID with information about when ducks or quail were hatching, and [the district] made sure [its] maintenance operations did not disturb them.”¹²²

3. Title Transfer Process Experiences:

Water users first began pursuing title transfer in the late 1980s and early 1990s,¹²³ well before Reclamation introduced the current title transfer process. Not surprisingly, most, if not all, of the problems these irrigation districts encountered in securing title to federal project assets arose from the uncertainties and complexities surrounding an unfamiliar and evolving process.

a. *Length and Duration of Process*

The case examples reveal that the most commonly cited complaint was the length and duration of the process. Indeed, they showed that the title transfer process took generally from 8 to 20 years to complete.¹²⁴ This should not be accepted as a hard and fast rule, however. Arguably, both the BOR’s and irrigation district’s lack of experience and familiarity with the process gave rise to errors and omissions that were responsible, in part, for the delays that ensued.

b. *Seeking Congressional Liaison Prior to Engaging Reclamation and Stakeholders*

The title transfer process involves the participation and buy-in of many parties. In several of the case examples, the districts endeavored to secure title transfer legislation prior to engaging with stakeholders and/or Reclamation, and in each case, it delayed the title transfer process by several years.

For example, the Nebraska and Kansas-based Loup Basin Reclamation District and the Farwell and Sargent Irrigation Districts pursued title transfer in the mid-1990’s aligned with 10 other districts across Nebraska and Kansas. Despite the political pressure in favor of title transfer this

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 16.

¹²⁴ See John Crotty, *Life Before Title Transfer in the Loup Basin*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 10, *supra* (Loup Basin Reclamation District and Farwell and Sargent Irrigation Districts (Nebraska and Kansas) – 8 years); Bennies Hodges, *Seeing a Strong Conviction Through: The Humboldt Project Title Transfer*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 23, *supra* (Pershing County Water Conservation District (Nevada) – 20 years); Rick Dieker, *Transferring Properties: A Lesson in Perseverance*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 25, *supra* (Yakima-Tieton Irrigation District (Washington State) – 10 years); Dale Swensen, *Transferring Water Conveyance Facilities: Fremont-Madison Irrigation District*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 27, *supra* (Fremont-Madison Irrigation District (Wyoming) – 10 years); Gary Esslinger, *The Benefits of Transfer: Running the District Like a Farm*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 31, *supra* (Elephant Butte Irrigation District (New Mexico) and El Paso County Water Improvement District No. 1 (Texas) - 5 years to secure transfer title legislation, but 20 years to resolve litigation of an ongoing dispute over compliance with the post-transfer operation and maintenance agreement obligations of the two districts).

legislation sought to create, it was soon thereafter withdrawn because the districts' failure to first engage interested stakeholders created an even stronger political backlash.¹²⁵

The Pershing County Water Conservation District in northwest Nevada encountered the same resistance when it introduced several bills in Congress that would have conveyed the district's pasturelands and secured irrigator water rights before securing NEPA clearance.¹²⁶ The district's congressional efforts succeeded only after it had engaged all concerned potential stakeholders, including both inside and outside interest groups, and the general public.¹²⁷

The Washington State-based Yakima-Tieton Irrigation District experienced a similar phenomenon. Although the district had secured congressional assistance to introduce standalone title conveyance legislation in the U.S. House and Senate, it failed to ensure that the bill addressed issues raised by a local conservation group which succeeded in holding it up for 2 years.¹²⁸

The Fremont-Madison Irrigation District of Wyoming committed a similar error by pursuing legislation before engaging with stakeholders or Reclamation. The district had been concerned that if it "went through the Reclamation process, spent a lot of money, and then the legislation failed, it would be all for naught."¹²⁹ In fact, even after having thereafter engaged members of the environmental community, such as Trout Unlimited, and American Rivers, about their concerns (e.g., the liability arising from the potential failure of a to-be-transferred dam), the district suffered a 2-year delay because of American Rivers' objections to the operations and management agreement the district and these groups had negotiated without Reclamation's participation.¹³⁰ The district devoted 2 additional years to negotiating a memorandum of agreement with Reclamation during which time it also "hired a lobbyist to help shepherd the legislation through Congress," which was ultimately enacted.¹³¹

The Elephant Butte Irrigation District of New Mexico and the El Paso County Water Improvement District #1 of Texas experienced similar resistance when they originally sought to secure title transfer legislation prior to engaging with Reclamation or stakeholders. Even with U.S. Senators Pete Domenici and Jeff Bingaman and U.S. Congressman Joe Skeen in their corner, it was only after they made "repeated attempts to pass legislation to transfer the project [that the districts'] delegation was able to place title transfer language into the Reclamation Projects Authorization and Adjustment Act of 1992."¹³²

¹²⁵ See John Crotty, *Life Before Title Transfer in the Loup Basin*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 10, *supra*. See also James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 17.

¹²⁶ See Bennies Hodges, *Seeing a Strong Conviction Through: The Humboldt Project Title Transfer*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 23, *supra*. ("We did the process backwards. The district did not want to spend significant time and money to complete the National Environmental Policy Act (NEPA) process, only to not have it go through Congress. So with the help of Congressman Gibbons, we were able to condition the transfer on the completion of the NEPA work. However, the NEPA process took 13 years from the passage of the legislation in 2002 to 2015...")

¹²⁷ *Id.*, at p. 22.

¹²⁸ See Rick Dieker, *Transferring Properties: A Lesson in Perseverance*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at pp. 24-25, *supra*.

¹²⁹ Dale Swensen, *Transferring Water Conveyance Facilities: Fremont-Madison Irrigation District*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), at p. 26, *supra*.

¹³⁰ *Id.*, at p. 27.

¹³¹ *Id.*

¹³² See Gary Esslinger, *The Benefits of Transfer: Running the District Like a Farm*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 30.

c. *Dealing With Bureau of Reclamation Deception*

As the Provo River Water Users Association (“PRWUA”) unfortunately learned in their efforts to secure title transfer of the irrigation works included within the recently completed 10-year Provo River construction project, the U.S. Bureau of Reclamation can be less than an honest broker. Although Reclamation and Congress had authorized 2004 legislation to effectuate title transfer to the PRWUA of a 100-year-old 21.5 mile-long open-air irrigation project canal and associated works¹³³ without Reclamation funding,¹³⁴ Reclamation subsequently (after substantial completion of the project) took the legal position that said legislation did not authorize transfer of title to the canal *as it was then encased* within a 10.5 foot diameter steel pipe.¹³⁵

“The Transfer Act calls for transfer of the Provo Reservoir Canal, which is defined in the Act as the canal and associated land and facilities ‘acquired, constructed, or improved by the United States as part of the Provo River Project, Deer Creek Division...as in existence on the date of enactment of this Act’ [October 30, 2004]. The Regional Solicitor for the United States Department of Interior has advised Reclamation that completion of the Project prior to title transfer negates Congress’ authority and directive to transfer the canal to the Association, as set forth in the Transfer Act, *because the newly enclosed pipeline itself was not ‘in existence’ in 2004*” (emphasis added).¹³⁶

Fortunately for the PRWUA, Utah’s congressional representatives were able to ensure passage of appropriate legislation (H.R. 255¹³⁷ and S. 211,¹³⁸) in 2014 that amended the 2004 Provo River

¹³³ See Marc Haddock, *Plans in Place to Enclose 100-year-old Provo Canal*, *Deseret News* (March 15, 2010), available at: <http://www.deseretnews.com/article/700015275/Plans-in-place-to-enclose-100-year-old-Provo-canal.html?pg=all> (“Enclosing the canal, which runs from the mouth of Provo Canyon to Point of the Mountain, will save water, increase the water-carrying capacity of the canal and create a trail system through north Utah County, officials said. It also will enclose one of the area’s most inviting nuisances — an open canal with steep banks. In its 100-year history, the canal has claimed between 30 and 40 lives, and it poses a flooding threat to nearby homes.”).

¹³⁴ See *Written Statement of G. Keith Denos, General Manager Provo River Water Users Association*, before the House Natural Resources Committee Subcommittee on Water and Power, Hearing on H.R. 255 - Clarifications to the Provo River Project Transfer Act, 113th Cong., 1st Sess. (May 23, 2013), *supra* p. 1. See also Statement of Robert Quint, Senior Advisor Bureau of Reclamation U.S. Department of the Interior Before the Natural Resources Committee Subcommittee on Water and Power United States House of Representatives, *H.R. 255 - Clarifications to the Provo River Project Transfer Act May 23, 2013*, 113th Cong., 1st Sess., available at: <http://docs.house.gov/meetings/II/II13/20130523/100898/HHRG-113-II13-Wstate-QuintR33219-20130523-SD001.pdf> (“The majority of the \$150 million cost of piping the canal was born by the Association, the Central Utah Water Conservancy District, the Jordan Valley Water Conservancy District, and the Provo Reservoir Water Users Company. Federal funding applied to the project was \$39 million provided by the Department’s Central Utah Project Completion Act Office. This amount, provided under the water conservation provisions of the Central Utah Project Completion Act, ensured that 8,000 acre-feet of conserved water would be made available to the Secretary to provide in-stream flows on the lower Provo River. These flows benefit fish and wildlife including the endangered June sucker, a species native only to Utah Lake and its tributary streams. Reclamation provided no funding to the piping project.”).

¹³⁵ *Id.*, at p. 2.

¹³⁶ *Id.*

¹³⁷ See H.R.255 - *To amend certain definitions contained in the Provo River Project Transfer Act for purposes of clarifying certain property descriptions, and for other purposes* (113th Cong.), available at: <https://www.congress.gov/bill/113th-congress/house-bill/255/>.

¹³⁸ See S.211 - *S.211 - A bill to amend certain definitions contained in the Provo River Project Transfer Act for purposes of clarifying certain property descriptions, and for other purposes*, (113th Cong.), available at: <https://www.congress.gov/bill/113th-congress/senate-bill/211>.

Project Transfer Act to provide for title transfer of the encased canal,¹³⁹ which was thereafter enacted into law.¹⁴⁰ Ultimately, the Act required the PRWUA and its patrons to bear a portion of the Project's total cost equal to the outstanding original construction debt the organization owed on the open-air canal.¹⁴¹

4. Title Transfer/Title Transfer Process Recommendations:

a. *District Board-Management Alignment and Cautious Handling of Government Agencies*

The Nebraska and Kansas-based Loup Basin Reclamation District and the Farwell and Sargent Irrigation Districts strongly recommend, before pursuing title transfer, that the district board and management are on the same page, and that district negotiations with the Bureau of Reclamation and state agencies are handled with caution.¹⁴² The Yakima-Tieton Irrigation District (“YTID”) of Washington State and the Fremont-Madison Irrigation District (“FMID”) of Wyoming, furthermore, recommend that district management secure the full support of the district board given the duration of the title transfer process and the need to explain it to and answer questions from district patrons and constituents.¹⁴³

b. *Retain Title Transfer Expert, Ensure District Title Transfer Representative Continuity, Presume Higher Costs, and Expect Unsound Science*

The Pershing County Water Conservation District (PCWCD) of Nevada strongly recommends, prior to engaging in the title transfer process that, districts retain a title transfer expert, ensure the continuity of their lead title transfer representative, and anticipate the need to double the estimate of costs to be shared among patrons via per-acreage assessments. In addition, districts should prepare themselves to address unexpected issues that may be raised by Reclamation or stakeholders, particularly, those not based on sound reasoning or science.¹⁴⁴

¹³⁹ See H. Rept. 113-200, 113th Cong., 1st. Sess. *Amending Certain Definitions Contained in the Provo River Project Transfer Act for Purposes of Clarifying Certain Property Descriptions, and for Other Purposes*, at p. 2, available at: <https://www.congress.gov/113/crpt/hrpt200/CRPT-113hrpt200.pdf> (“Despite the intent of P.L. 108–382 to convey to the Association all right, title, and interest of the United States to the PRC facilities, an agreement on the terms of title transfer could not be reached between various local parties. However, the PRC enclosure project was eventually completed using a combination of financial sources. Due to the enclosure of the PRC prior to execution of the title transfer, the Bureau of Reclamation contends that the definition of ‘canal’ in current law is no longer legally sufficient to convey what is now a piped PRC. Amending the definition of the PRC to reflect its enclosure will allow for the completion of the title transfer originally intended in federal law” (emphasis added).).

¹⁴⁰ See (P.L. 113–129, 128 Stat. 1723 (July 25, 2014) 113th Cong.), available at: <https://www.congress.gov/113/plaws/publ129/PLAW-113publ129.pdf>.

¹⁴¹ See Provo River Water Association, *2014 Annual Report*, *supra* at p. 8 (“The Act required that the Association prepay to Reclamation at title transfer the portion of its construction repayment obligation attributable to construction of the PRC. The Association levied a special assessment to its shareholders of \$5.30 per share in August 2014 to cover the estimated prepayment obligation. In October 2014 the prepayment amount was set at \$511,878.59 and a check from the Association for this amount was presented to Reclamation at the title transfer ceremony.”).

¹⁴² See John Crotty, *Transfer From the Board Perspective: A Conversation With Arlan Hostetler*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 14.

¹⁴³ See Rick Dieker, *Transferring Properties: A Lesson in Perseverance*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 25. See also Dale Swensen, *Transferring Water Conveyance Facilities: Fremont-Madison Irrigation District*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 27.

¹⁴⁴ See Bennies Hodges, *Seeing a Strong Conviction Through: The Humboldt Project Title Transfer*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 23.

c. *Any Agreed Upon Drought Management Plan Should Protect District's Water Storage Rights*

The Fremont-Madison Irrigation District (“FMID”) of Wyoming strongly recommends that, to the extent districts enter into formal drought management plans as a condition to title transfer, they should ensure they preserve their valuable water storage rights in adjacent lakes and/or reservoirs.¹⁴⁵

d. *Consider Water Delivery Responsibilities, Interstate and/or International Issues, and the Age, Condition and Type of District Infrastructure to be Transferred and Managed*

The Elephant Butte Irrigation District (“EBID”) of New Mexico and the El Paso County Water Improvement District #1 (“EPCWID”) of Texas recommend that potential title transferees thoroughly investigate their post-transfer water delivery responsibilities before going forward with the title transfer process.

As a condition of title transfer, EBID and EPCWID had to address questions raised by other irrigation districts concerned about future water deliveries within the federal irrigation project. “Because EBID deliver[ed] water into the Texas portion of the Rio Grande Project and vice versa, the districts had to negotiate a [post-title transfer] operational agreement to share the responsibilities of delivering water between the two states,” based on a previously executed memorandum of understanding.¹⁴⁶ In addition, EBID ultimately decided not to take title transfer of several dams given the interstate and international “compact obligations to deliver water to Texas and Mexico.” EBID concluded that “[i]t was not in [their] best interest to take on the dams,” because “[i]f anything happened to those dams,” it would affect the U.S. government’s ability to ensure their proper functioning and to secure sufficient monies to carry out its international obligations.¹⁴⁷

The EBID also strongly recommends that districts “take inventory of [their] aging infrastructure and the cost of replacement or rehabilitation,” and assess whether they “have the wherewithal, the maintenance capability, and the equipment to operate and maintain their own facilities.”¹⁴⁸ Districts should “[c]onsider taking only those portions of [their] project that [they] can afford to operate, maintain and replace” themselves - i.e., without the need to outsource repairs to third parties, which can be quite costly.¹⁴⁹ The KID Board and Management must consider each of the above-cited factors when considering the particular features of the Klamath Irrigation Project, the relationships between the KID and other Project irrigation districts, and the broader ongoing political dynamic at play in the Klamath Basin.

¹⁴⁵ See Dale Swensen, *Transferring Water Conveyance Facilities: Fremont-Madison Irrigation District*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 27.

¹⁴⁶ See Gary Esslinger, *The Benefits of Transfer: Running the District Like a Farm*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 30.

¹⁴⁷ *Id.*, at p. 31.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

V. Potential Legal Issues that May Arise Incident to Title Transfer of Project Transferred Works

A number of issues and obligations may arise as part of title transfer. They “include: endangered and threatened species concerns, cultural resources issues, hazardous materials concerns, treaties and compacts (international/Indian and interstate), ITAs, and compliance with a variety of EOs (e.g., wetlands, flood plains, pollution prevention, environmental justice, and others).”¹⁵⁰ In effect, there are two general processes that must be undertaken prior to preparing a title transfer agreement: a NEPA analysis and a cultural resources review process.¹⁵¹

1. Potential Federal Statutory (NEPA, ESA, NHPA, CWA, FWCA) Compliance Obligations:

a. *NEPA*

As previously discussed, the proposed transfer to KID of title to Project transferred works currently under BOR’s ownership and control will be treated as a “major federal action” for purposes of NEPA (42 U.S.C. § 4321, et seq.),¹⁵² and Interior Department regulations implementing NEPA (43 C.F.R. Part 46).¹⁵³ Consequently, the BOR must prepare, at KID’s expense, an environmental assessment (“EA”) of the potential impacts of title transfer to determine whether a full environmental impact assessment (“EIA”) must be performed.¹⁵⁴ The EA and/or EIA will then be reviewed by the White House Council on Environmental Quality.

Transfer to KID of title to Project transferred works will also likely engender legal compliance obligations with respect to “endangered and threatened species concerns, cultural resources issues, hazardous materials concerns, [...interstate...compacts], [...Indian] treaties and [...] compliance with a variety of EOs (e.g., wetlands, flood plains, pollution prevention, environmental justice [...]).”¹⁵⁵ Therefore, “the NEPA process will [likely] integrate the requirements of other statutes, such as the FWCA [Fish and Wildlife Coordination Act], NHPA [National Historic Preservation Act], ESA [Endangered Species Act], and other laws and EOs.”¹⁵⁶

b. *ESA*

For as long as the BOR retains title and ownership of the KID’s transferred works, including the C Canal flume replacement, the BOR and its sister agencies, including both the Fish and Wildlife

¹⁵⁰ See U.S. Department of Interior Bureau of Reclamation, *Reclamation’s NEPA Handbook* (Feb. 2012), at Sec. 4.14, p. 4-13, available at: http://www.usbr.gov/nepa/docs/NEPA_Handbook2012.pdf.

¹⁵¹ See James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 18.

¹⁵² See 40 C.F.R. § 1508.18(a)-(b) and 40 C.F.R. § 1508.27(a)-(b). See also U.S. Department of Interior Bureau of Reclamation, *Reclamation’s NEPA Handbook* (Feb. 2012), *supra* at Sec. 3.1, p. 3-1 (“NEPA compliance is triggered by a discretionary Federal action that is subject to Reclamation control and responsibility (40 C.F.R. 1508.18)”; See U.S. Department of Interior Bureau of Reclamation, *Title Transfer of Projects and Facilities of the Bureau of Reclamation*, *supra*. (“title transfer is considered a ‘major Federal Action’ under both the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).”)

¹⁵³ See 43 C.F.R. Part 46.

¹⁵⁴ See United States Environmental Protection Agency, *National Environmental Policy Act Review Process*, available at: <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.

¹⁵⁵ See also U.S. Department of Interior Bureau of Reclamation, *Reclamation’s NEPA Handbook* (Feb. 2012), *supra* at Sec. 4.14, p. 4-13.

¹⁵⁶ See *Id.*, at Sec. 3.15, p. 3-20.

Service (“FWS”)¹⁵⁷ and the U.S. Department of Commerce/National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NMFS”), will continue to be responsible for implementing Section 7 of the Endangered Species Act (“ESA”). If, however, title to BOR transferred works is conveyed to KID, ESA Section 7 which is applicable only to federal agencies would no longer apply. KID, nevertheless, would remain subject to other protective sections of the ESA such as Section 9 and Section 10.¹⁵⁸

ESA Section 7(a)(2) “imposes a duty on all federal agencies to insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species.”¹⁵⁹ “Agencies fulfill this duty by consulting informally and formally with the Act’s two expert agencies” – the U.S. Department of Interior’s Fish & Wildlife Service and the U.S. Department of Commerce’s National Marine Fisheries Service.¹⁶⁰ ESA Section 7 consultations “are designed to assist federal agencies in fulfilling their duty to ensure federal actions do not jeopardize the continued existence of a species or destroy or adversely modify critical habitat.”¹⁶¹

“Formal consultation requires the acting federal agency to produce a Biological Assessment and the expert agency to produce a Biological Opinion.”¹⁶² “Biological opinions document NMFS’ opinion [concerning] whether [] [f]ederal action is likely to jeopardize continued existence of listed species, or result in the destruction or adverse modification of critical habitat.”¹⁶³ . Clearly, the development of the joint 2013 biological opinion issued by DOI-FWS and NOAA-NMFS¹⁶⁴ triggered such a consultation. The BiOp “analyzes the effects of the ongoing operations of Reclamation’s Klamath Project through March 2023 on federally listed threatened and

¹⁵⁷ See U.S. Department of Interior Fish and Wildlife Service, *Endangered Species Act: Section 7(a)(2) Section 7 Consultation*, available at: <http://www.fws.gov/midwest/Endangered/section7/index.html>; U.S. Department of Interior Fish and Wildlife Service, *Endangered Species Section 7 Consultation*, available at: <https://www.fws.gov/midwest/endangered/section7/section7.html>; U.S. Department of Interior Fish and Wildlife Service, *Endangered Species – Consultations Overview*, available at: <http://www.fws.gov/endangered/what-we-do/consultations-overview.html>.

¹⁵⁸ See e.g., U.S. Department of Interior Bureau of Reclamation, *Humboldt Project Conveyance Final Environmental Impact Statement* (Sept. 2005), at “Table EX-1-Summary of Impacts,” p. xiv, available at: http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=2342.

¹⁵⁹ See 16 U.S.C. § 1536(a)(2) (2012). See also U.S. Department of Interior Bureau of Reclamation, *Reclamation’s NEPA Handbook* (Feb. 2012), *supra* at Sec. 3.15.1, p. 3-21.

¹⁶⁰ See Robin Kundis Craig, *Is There Really a Duty to Consult? Section 7 of the Endangered Species Act, Federal Water Management, and the Discretionary Function Requirement*, presented at the American Bar Association Section of Environment, Energy, and Resources 31st Annual Water Law Conference (Las Vegas, Nevada June 5-7, 2013), at p. 1, available at: http://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2013/06/31st_annual_waterlaw_conference/conference_materials_portal/BestPaper_Craig_Robin-paper.authcheckdam.pdf.

¹⁶¹ See U.S. Department of Commerce National Oceanic and Atmospheric Administration, National Marine Fisheries Service, *Consulting with Federal Agencies (ESA Section 7)*, available at: <http://www.nmfs.noaa.gov/pr/consultation/>.

¹⁶² *Id.*, at p. 2, citing 16 U.S.C. § 1536(b)(3)(A) (2012); 50 C.F.R. § 402.14(h)(3) (2012).

¹⁶³ *Id.* therefore, the Court “read § 402.03 to mean what it says: that § 7(a)(2)’s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is required by statute to undertake once certain specified triggering events have occurred.”

¹⁶⁴ See National Marine Fisheries Service and United States Fish and Wildlife Service, *Biological Opinions on the Effects of Proposed Klamath Project Operations from May 31, 2013 Through March 31, 2023 on Five Federally Listed Threatened and Endangered Species* (May 2013), available at: <https://www.fws.gov/klamathfallsfwo/news/2013%20BO/2013-Final-Klamath-Project-BO.pdf>.

endangered species, including but not limited to, the endangered Lost River and shortnose suckers and the threatened coho salmon and their designated critical habitat.”¹⁶⁵

KID should expect that BOR of the current administration will likely seek to require as a condition of title transfer a signed written agreement ensuring KID’s *post*-transfer compliance with BOR interagency determinations regarding the joint Klamath Project BiOp. BOR will pursue this condition because, upon title transfer to KID of the headgate to Canal A, which is a transferred work under the 1954 Operations Contract,¹⁶⁶ BOR will no longer be able to prevent the release of Upper Klamath Lake water flows into the Project without constructing another structure between the lake and the Canal A headgate.

The likelihood that BOR will seek to maintain control over diversions from Upper Klamath Lake to the Klamath Irrigation Project in implementation of the ESA has only grown since the recent filings by three California-based tribes. On May 12, 2016, and June 24, 2016, respectively, the Hoopa Valley Tribe and the Yurok and Karuk tribes of northwestern California filed notices of intent to sue Reclamation and NOAA-NMFS under ESA Sections 7, 9 and 11 on account of such agencies’ failure to enforce the joint BiOp.¹⁶⁷ These notices also call upon these agencies to initiate an interagency consultation to reexamine and strengthen the BiOps *at the expense of Klamath Project irrigators’ water and land rights*.¹⁶⁸ In particular, the tribes allege the need to curtail future water flows from Upper Klamath Lake to the Project, in favor of diverting them to the Klamath River. According to the tribes, this will enable river levels remain high enough to prevent *C Shasta* bacterial infections and to enable Coho salmon reintroduction into the upper basin,¹⁶⁹ consistent with the Klamath Power and Facilities Agreement and the Amended Klamath Hydroelectric Settlement Agreement.

While the Hoopa Valley Tribe ESA filing was not unexpected since it is not a party to any of the Klamath Basin Agreements, there are many who were likely surprised by the Yurok Tribe filing given its status as a KBRA and KHSA signatory. However, a close examination of the now-defunct KBRA reveals that the Yurok Tribe had never been required to relinquish its right to bring suit under the ESA. In addition, the KBRA had only limited the tribe’s right to bring suits asserting tribal trust theories of federally reserved off-reservation fishing and water rights until

¹⁶⁵ See U.S. Department of Interior Bureau of Reclamation, *Biological Opinion on Klamath Project Operations Delivered*, Press Release (June 3, 2013), available at: <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=43324>.

¹⁶⁶ See Operations Contract, at Articles 4(a) and (c) (“Transferred Works Turned Over to District [...] (a) The entire Main or ‘A’ Canal [...] and] (c) All structures used in connection with the above canals [...]”).

¹⁶⁷ See Hoopa Valley Tribe Press Release, *Hoopa Tribe Sues Feds, Claims Inadequate Salmon Protection*, Times Standard (May 17, 2016), available at: <http://www.times-standard.com/article/NJ/20160517/NEWS/160519866>; Hoopa Valley Tribe, *Notice of Violations of the Endangered Species Act*, Morissett, Schlosser, Jozwiak & Somerville (May 17, 2016), available at: <http://bloximages.chicago2.vip.townnews.com/heraldandnews.com/content/tncms/assets/v3/editorial/4/07/407df701-2936-5397-8915-3d372350f76b/573d548d22386.pdf.pdf>. See also Will Houston, *Yurok Tribe Threatens to Take Legal Action Over ‘Massive Fish Disease Outbreaks,’* Yurok Tribe Press Release (June 24, 2016), available at: <http://www.times-standard.com/article/NJ/20160624/NEWS/160629931>; Yurok Tribe Office of the Tribal Attorney, *Sixty-Day Notice of Intent to Sue Pursuant to the Endangered Species Act: Failure to Reinitiate Consultation on the Klamath Reclamation Project* (June 24, 2016); Karuk Tribe, *Karuk Files 60 Day Notice of Intent to Sue NMFS and BOR Over ESA Violations*, Press Release (June 24, 2016), available at: <http://www.karuk.us/index.php/departments/natural-resources/dnr/132-dnr-ecrmp>; Karuk Tribe, *Notice Violation and Intent to File Suit Under the Endangered Species Act* (June 14, 2016), available at: http://www.karuk.us/images/docs/dnr/16-06-24_NOI_ESA_BOR.pdf.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

after the anticipated new restrictions that had been placed on Upper Klamath Lake diversions to the Klamath Irrigation Project had been violated.¹⁷⁰

c. *NHPA*

NEPA Section 101(b)(4) (42 U.S.C. § 4331) requires BOR, as an agency of the federal government, to preserve “...important historic, cultural and natural aspects of our national heritage...” within the meaning of the National Historic Preservation Act (“NHPA”). NHPA Section 106 requires BOR to consider “the effects of its undertakings on historic properties,” including “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places (National Register).” This NHPA provision also requires BOR to consult with State Historical Preservation Officers and with Tribal Historical Preservation Officers concerning their activities. In addition, BOR must not only “provide adequate opportunities for public involvement” and consultation in this process, but also must consult with Indian tribes “when they attach religious and cultural significance to historic properties that may be affected by an undertaking.”¹⁷¹

Although NEPA and the NHPA are separate statutes, 36 CFR Part 800.8 requires BOR to effectively integrate its “Section 106 responsibilities as early as possible in the NEPA process.” This means that BOR should “plan [its] public participation, analysis, and review in such a way that [it] can meet the purposes and requirements of both statutes in a timely and efficient manner.” In other words, BOR must “include cultural resources in EAs and EISs by referencing the relevant cultural resource consultation processes.”¹⁷² If BOR is unable to complete all of the NHPA Section 106 steps prior to finalization of NEPA documentation, that documentation “must contain commitments for Reclamation to fulfill its Section 106 responsibilities, generally in either an MOA or a programmatic agreement.”¹⁷³

KID Board members may recall the NEPA/NHPA process that BOR had pursued prior to approving the C Canal Flume Replacement Project. Since the State Historic Preservation Officer (SHPO) had “determined the C Canal Flume is a historic property eligible for inclusion in the National Register of Historic Places,”¹⁷⁴ the proposed project had been deemed to constitute an undertaking requiring NHPA compliance. Additionally, since “the removal of the C Canal Flume was found to constitute an adverse effect on the historic property,”¹⁷⁵ BOR had been required to negotiate with the State Historic Preservation Officers “a memorandum of agreement (MOA) [entailing the completion of specified mitigation measures] to resolve the adverse effect to the C Canal Flume.”¹⁷⁶

¹⁷⁰ See Klamath Basin Restoration Agreement (2010), Sections 15.3.6.A, 21.3.1.B.iii, available at: <https://klamathrestoration.gov/sites/klamathrestoration.gov/files/Klamath-Agreements/Klamath-Basin-Restoration-Agreement-2-18-10signed.pdf>.

¹⁷¹ See U.S. Department of Interior Bureau of Reclamation, *Reclamation’s NEPA Handbook* (Feb. 2012), *supra* at Sec. 3.15.6, p. 3-27.

¹⁷² See *Id.*, at p. 3-28.

¹⁷³ *Id.*

¹⁷⁴ See U.S. Department of Interior Bureau of Reclamation, *Finding of No Significant Impact – C Canal Flume Replacement, Klamath County, Oregon* (2015 EA-008) (Dec. 15, 2015), at p. 5, available at: http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=23998.

¹⁷⁵ *Id.*, at p. 6.

¹⁷⁶ *Id.*, at pp. 6, 11.

Similarly, NHPA regulations treat the title transfer process as an “adverse effect” for purposes of the NHPA.¹⁷⁷ Thus, BOR will likely choose to involve the Advisory Council on Historic Preservation (“ACHP”) in this process to ensure the “resolution of adverse effects (and any agreed to mitigation)” incident to the title transfer process.¹⁷⁸ The ACHP is “an independent Federal agency that promotes the preservation, enhancement, and productive use of our Nation’s historic resources.”¹⁷⁹ Consequently, to reassure the ACHP and State and Tribal Historic Preservation Officers that KID’s securing title to transferred works will not adversely affect historic or cultural properties, the current administration’s BOR is likely to require KID to enter into a post-transfer Memorandum of Agreement (“MOA”) requiring it to undertake certain potentially restrictive and costly mitigation measures. The KID Board must carefully review the NHPA conditions BOR would impose on title transfer before entering into any such MOA.

d. CWA

All potential Reclamation actions, including conveyance of federal title to Project transferred works to nonfederal parties, must consider impacts to wetlands, as required by the U.S. Clean Water Act (“CWA”).¹⁸⁰ “Wetlands generally include swamps, marshes, bogs, wet meadows, seasonal wetlands such as vernal pools and prairie potholes, and other similar areas.”¹⁸¹ CWA Section 404, administered by the U.S. Army Corps of Engineers, requires a permit for any “excavation or discharge of dredged or fill material into jurisdictional wetlands.” “All regulatory requirements for wetlands under CWA Section 404 and all state laws and regulations regarding fish and wildlife management w[ill] continue to apply to the project, regardless of ownership.”¹⁸²

CWA Section 401 requires “projects that involve discharge or fill to wetlands or navigable waters” to obtain certification of compliance with state water quality standards.¹⁸³ CWA Section 402 requires “construction projects that exceed 1 acre of clearing activities and that have the potential to discharge to surface water bodies” to obtain a National Pollutant Discharge Elimination System (NPDES) stormwater permit prior to construction activities.¹⁸⁴

CWA Section 303(d) requires states to identify water bodies that do not meet water quality objectives and are not supporting their designated beneficial uses. According to the joint FWS-NMFS BiOp, “[m]uch of the Klamath basin is currently listed as water-quality impaired under section 303(d) of the Clean Water Act.”¹⁸⁵ This includes Upper Klamath Lake from which waters are diverted directly into the Project at the Canal A headgate, the Upper Klamath River

¹⁷⁷ *Id.* See also 36 CFR Part 800.5(a)(2)(vii) (“Adverse effects on historic properties include, but are not limited to: [...] (vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.”).

¹⁷⁸ See U.S. Department of Interior Bureau of Reclamation, *Reclamation's NEPA Handbook* (Feb. 2012), *supra* at Sec. 3.15.6, p. 3-28.

¹⁷⁹ See *Id.*, at p. 3-28.

¹⁸⁰ See P.L. 92-500, as amended (33 U.S.C. 1251 et seq.).

¹⁸¹ See *Id.*, at p. 5-5.

¹⁸² See e.g., U.S. Department of Interior Bureau of Reclamation, *Humboldt Project Conveyance Final Environmental Impact Statement* (Sept. 2005), *supra* at “Table EX-1-Summary of Impacts,” p. xiv,

¹⁸³ See, e.g., U.S. Department of Interior Bureau of Reclamation Pacific Northwest Regional Office, *Finding of No Significant Impact - Inland Avian Predation Management Plan* (PN-FONSI 14-03) (Jan. 2014), at p. 157, available at: <http://faolex.fao.org/docs/pdf/usa144320.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ See National Marine Fisheries Service and United States Fish and Wildlife Service, *Biological Opinions on the Effects of Proposed Klamath Project Operations from May 31, 2013 Through March 31, 2023 on Five Federally Listed Threatened and Endangered Species* (May 2013), *supra* at Sec. 7.10.1, p. 69.

between Keno Dam and Link River Dam which feeds the Lost River Diversion Canal entering the Project, and the Lower Lost River flowing within the Project near Tule Lake which receives waters from the Lost River Diversion Canal.¹⁸⁶ In addition, Oregon has listed as water-quality impaired the Sprague, Williamson, and Wood Rivers, which “are tributaries to UKL, and affect its water quality because they provide inflows to the lake and downstream habitats, and transport suspended sediments, nutrients, organics, and other particulate and dissolved constituents to the lake.”¹⁸⁷ Oregon, California and USEPA have developed total maximum daily loads (“TMDLs”) for the Upper Klamath Lake and the Klamath River that estimate the maximum amount of pollutants that can be added to these water bodies and still protect identified beneficial uses.¹⁸⁸

It is possible that BOR’s anticipated encasement of A Canal within steel pipe may result in construction, dredging and/or filling activities that impair one or more of these water bodies. It also is possible that KID’s anticipated post-conveyance ownership of Project transferred works may possibly engender one or more of these activities affecting one or more of these water bodies. In the event either or both of these scenarios materialize, KID will be required to set forth a plan, subject to BOR approval, for securing proper before-the-fact federal and state permits to ensure that all applicable CWA compliance requirements will be satisfied.

e. *FWCA*

Section 2 of the Fish and Wildlife Coordination Act (FWCA) of 1958, as amended (16 USC §§ 661 et seq.) (“FWCA”) states that “wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs.”¹⁸⁹ FWCA Section 2 also requires federal agencies, including Reclamation, to consult with USFWS and state wildlife agencies “whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage.”¹⁹⁰ These consultations are generally incorporated into Section 404 of the Clean Water Act, NEPA, or other federal permit, license, or review requirements.¹⁹¹ No consultation under the FWCA is required, however, if the proposed actions would not alter any stream or body of water.¹⁹²

It is not apparent at this time that BOR’s conveyance of title to KID of Project transferred works will result in or be followed up by any impoundment or diversion of water, channel deepening, or stream control or modification for navigation or drainage purposes. However, if, as BOR has contemplated, KID will be required to undertake O&M work to Canal A that will entail the encasement of Canal A within a steel pipe,¹⁹³ it is possible that stream and canal waters will be impounded and/or diverted, thereby requiring an FWCA consultation and analysis.

¹⁸⁶ See *Id.*, at Table 7.2 Impaired Water Bodies Within the Action Area, p. 70.

¹⁸⁷ *Id.*, at p. 71.

¹⁸⁸ *Id.*, at p. 69.

¹⁸⁹ See P.L. 85-624, *the Fish and Wildlife Coordination Act*, 72 Stat. 563 (Aug. 12, 1958), at Sec. 2,

¹⁹⁰ *Id.*

¹⁹¹ See, e.g., U.S. Department of Interior Bureau of Reclamation Pacific Northwest Regional Office, *Finding of No Significant Impact - Inland Avian Predation Management Plan* (PN-FONSI 14-03) (Jan. 2014), *supra* at p. 158.

¹⁹² *Id.*, at p. 159.

¹⁹³ See Email from James Gale, USBOR, to Hollie Cannon, KID Interim Manager, *re: A Canal Bike Path* (June 28, 2016), (“Hollie, Piping the A Canal is on the big picture...the estimate for just construction is about 350M in 2014 funds. That does not include enviro, engineering, etc. This does not include the political fallout for the 78 storm water drains that neither one of us likes. The City, County and State will have to develop a stormwater system that takes the water from these 78 inlets. j”) (emphasis added).

2. Potential Tribal Trust Obligations:

Aside from violating the ESA, the Hoopa Valley Tribe and the Yurok Tribe 60-day notices implied and expressly stated, respectively, that the BOR's and NMFS' failure to implement the joint BiOp would also violate the federal trust obligation the U.S. government owed to the tribes to protect their federally reserved off-reservation fishing and water rights. For example, the Hoopa Valley Tribe's notice alleged that the "Tribe holds federally reserved fishing rights in the Klamath and Trinity Rivers, and a federal reserved water right to support the fishery. [...] Adverse impacts to the ESA listed Coho fishery that result from Reclamation's and NMFS' actions directly impair and injure the Tribe and its sovereign, legal, economic and cultural interests."¹⁹⁴ The Yurok Tribe's notice-of-intent-to-sue similarly alleged that presidential "Executive Orders [...] vested the Yurok Tribe with 'federally reserved fishing rights [which are] well-established by Federal and California courts and the U.S. Department of the Interior. [...] The Yurok Tribe, its culture, economic stability, and sovereignty are directly impacted by BOR and NMFS actions and resulting ESA violations."¹⁹⁵

The Yurok Tribe's 60-day notice however, explained these tribal trust obligations with greater specificity, comparing them to a moral and ethical ("equitable") duty.

"It is well established that the United States 'has charged itself with moral obligations of the highest responsibility and trust,' toward tribes and their members. When making decisions impacting trust resources, federal agencies have a substantial duty to protect 'to the fullest extent possible' the tribe's reserved rights and the resources upon which those rights depend. This duty exists for all federal government actions, regardless of whether there is express regulatory language mandating the consideration of tribal reserved rights."¹⁹⁶

Arguably, these tribal trust claims are based, in part on Secretarial Order 3206, which applies to federal actions that "may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights."¹⁹⁷ Sections 3(B) and 3(C), respectively, define the terms "tribal trust resources"¹⁹⁸ and "tribal rights."¹⁹⁹

¹⁹⁴ See Hoopa Valley Tribe, *Notice of Violations of the Endangered Species Act*, Morissett, Schlosser, Jozwiak & Somerville (May 17, 2016), *supra* at p. 2, citing *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *United States v. Adair*, 723 F.2d 1394, 1411 (1984).

¹⁹⁵ See Yurok Tribe Office of the Tribal Attorney, *Sixty-Day Notice of Intent to Sue Pursuant to the Endangered Species Act: Failure to Reinitiate Consultation on the Klamath Reclamation Project* (June 24, 2016), *supra* at p. 2, citing *Parravano, v. Maten*, 70 F.3d 541 (9th Cir. 1996), *cert. denied*, 518 U.S. 1016 (1996); *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986); *United States v. Wilson*, 611 F.Supp. 813 (N.D. Cal. 1985), *rev'd on other grounds sub. nom.*, *Eberhardt*, 789 F.2d 1354; *Pacific Coast Federation of Fishermen's Assoc. v. Sec'y of Commerce*, 494 F. Supp. 626 (N.D. Cal. 1980); *Arnett v. Five Gill Nets*, 48 Cal. App. 3d 454 (Cal. App. 1975); Memorandum Opinion of the Solicitor, John D. Leshy ('Solicitor's Opinion'), M-36979 (Oct. 4, 1993).

¹⁹⁶ See *Id.*, at p. 5, citing *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972); *Nw. Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).

¹⁹⁷ See U.S. Department of Interior, *Secretarial Order 3206 - American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997), at Sec. 1, available at: http://www.nmfs.noaa.gov/sfa/reg_svcs/Councils/Webinar/secretarial_order.pdf ("This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their

It is sufficient for purposes of this memorandum that the KID Board is aware that these federally recognized tribes have asserted two claims. First, they have alleged that BOR's and NMFS's failure to implement the BiOp constitutes a statutory violation of the ESA. Second they have alleged that BOR's and NMFS' failure to implement the BiOp constitutes a fiduciary violation of said agencies' tribal trust obligation. Thus, in addition to conditioning title transfer upon KID's continued adherence to ESA interagency determinations regarding the BiOp, the BOR of the current administration will likely seek to condition title transfer upon KID's agreement to remain subject to BOR's tribal trust obligation. KLG has prepared a separate memorandum that discusses the broader legal significance of a successful claim of violation of the tribal trust obligation.

3. Potential Water Delivery Obligations to Other Klamath Project Districts:

Section I.3 of this memorandum identifies and discusses the U.S. government's responsibility to ensure delivery of water to both Project and non-Project patrons. Although the water delivery contracts with each such patron have remained in the U.S. government's name, the 1954 KID Operations Contract makes clear that KID had long ago assumed the BOR's contractual obligations to deliver water to such parties.

The District's contractual obligations and responsibilities to deliver water to these patrons would cease, however, when the 1954 contract is terminated incident to conveyance of title to the transferred works (namely, the canals, their related distribution systems and the structures used in connection with such canals). KID must be attentive to assuring these other districts and patrons that their water will continue to be delivered as currently provided for following title transfer. KID can ensure such parties post-title transfer water deliveries by negotiating with BOR an agreement to continue the existing arrangements, subject to the understanding that KID patrons' water rights will be governed by Oregon and California state law while non-KID patrons' water rights will be determined under the Project's current A-B-C water right priority system. The details of such arrangements can be spelled out for BOR in a Post-Transfer Governance Agreement of the type mentioned in Section II.2 of this memorandum upon further study. The KID Board also should consider the pros and cons entering into district-to-district contracts with BOR approval.

The interests of other districts in securing KID's commitment to continue its assumption of U.S. government water delivery obligations recently became apparent in connection with the C Canal Flume Replacement Project. Under the mistaken or "publicly manufactured" belief that KID's longtime delay in making permanent repairs to the flume coupled with a potential 60-day KID Board extension of the C Canal flume construction contractor bid period would result in catastrophic failure of the flume, the counsels of three Project irrigation districts (Sunnyside

responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation." *Id.*

¹⁹⁸ See *Id.*, at Sec. 3(B) ("The term 'tribal trust resources' means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.").

¹⁹⁹ See *Id.* at Sec. 3(C) (The term 'tribal rights' means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies." *Id.*

Irrigation District (“SID”)²⁰⁰ and Van Brimmer Ditch Co. (“Van Brimmer”)²⁰¹) threatened legal action in the event water deliveries were interrupted. Both the SID and Van Brimmer letters emphasized KID’s legal obligation to deliver water to their districts and the latter sought assurances that KID’s insurance policy would cover their patrons in the event of interruption.

The Klamath Basin Irrigation District (“KBID”) letter, meanwhile, threatened legal action “[if] KID asserts that the ‘A’ superiority would allow reduced deliveries because of KID’s failure to complete the repairs or replacement of the flume...”²⁰² In addition, the letter sought clarification of KID’s thoughts on KBID’s water priority position relative to other districts if the A-B-C priority system were terminated incident to the privatization of the Klamath Project. It asserted that once the Project goes private SID’s water priority interests are essentially the same as KID’s water priority interests.²⁰³ Further examination of this issue is warranted considering the differences between federal and state-based water rights, and the potential for persuading other irrigation districts to join KID in seeking title transfer.

4. Potential Insurance Liabilities/Obligations:

Based on the discussion in Section IV.2.B.i above, KID would not acquire title to the types of transferred works bearing substantial risks of failure and damages resulting therefrom, that would compel it and its patrons to pay demonstrably higher insurance premiums to compensate for such risks. KID would have to acquire reserved works such as Link River Dam or Upper

²⁰⁰ See Richard S. Fairclo, *Letter to Lawrence Kogan Re: Your Client Klamath Irrigation District (KID); C Flume Replacement* (June 22, 2016), *supra*. (“Klamath Irrigation District has the obligation to assure the delivery of irrigation water, including through the C Flume. The high volume water delivery structure has been at risk for years and presently has engineering flow restrictions placed upon it, both of which your client is aware. Without structural improvement or replacements, total failure will certainly happen as the structure continues to deteriorate. [...] To date, KID has delayed in making the repairs resulting in engineering restrictions on irrigation water flow through the flume. [...] Failure by KID to take action and any further delays will certainly cause damages. Damages to the SID landowners could include partial to total failure of crops. [...] KID would certainly be the focus of lawsuits by my client and its landowners, should such damages occur.”)

²⁰¹ See Nathan J. Ratliff, *Emailed Letter to Nathan R. Reitmann and Lawrence Kogan Re: C Flume Water Deliveries/Van Brimmer Ditch Company*, Parks & Ratliff, P.C. (June 22, 2016) (“By way of this letter, please be notified of Van Brimmer Ditch Company’s intent to bring legal action in the event that any of its water deliveries are interrupted as a result of any limitation or malfunction, catastrophic or otherwise, that would interfere with the deliveries of water to which Van Brimmer Ditch Company is legally entitled. I have also been instructed to request information, including any applicable insurance policies, relating to insurance coverage that would be available to any third party injured as a result of KID’s failure to deliver water, particularly, Van Brimmer Ditch Company.”) *Id.*, at p. 1.

²⁰² See Richard J. Fairclo, *Emailed Letter to Nathan Reitmann and Lawrence Kogan Re: Your Client Klamath Irrigation District (KID)* (June 24, 2016), *supra* at p. 2..

²⁰³ See *Id.* (“Reports have been made that KID is considering attempting to substitute KID for the functions and ownership of the United States within the Klamath Project. This seems surprising to me, because in the past, KID has sided with the United States and restricted delivery to my client based upon the legal basis of our respective districts’ contracts with the United States (so called ‘A’ and ‘B’ contracts). *I am anxious to talk about the new inter district contracts you are proposing, as there would no longer be any legal basis for asserting the superiority of KID water deliveries. I remind you that our districts have essentially equal water rights.* My client is very interested in your proposal of privatizing the Klamath Project that should elevate my client’s position to that of a so called “A” districts for water deliveries. However, there are many other items requiring discussion regarding privatizing the Klamath Project, including issues of the Endangered Species Act; Tribal Trust; Clean Water Act; NEPA; new individual contracts for deliveries to the many districts and even more non-district individuals with contracts, third party liability and public liability issues. These and other items associated with transfer of reserved works have been discussed many times over the decades, however, discussion may again be appropriate, if your client is interested” (emphasis added))

Klamath Lake which are owned by the federal government to incur that level of risk and associated cost. Nevertheless, KID will likely acquire title to aging infrastructure which must be properly assessed for structural integrity and ongoing maintenance so that the risks associated with such transferred works can be adequately compensated for by an appropriately priced insurance product.

VI. Recap & Conclusion

This memorandum is intended to provide a detailed overview of the potentially complex, time-consuming and costly process of acquiring title to KID Project transferred works, which engenders congressional liaison as well as extensive public stakeholder engagement. The memo begins by explaining the BOR-KID Operating Contract provisions that are relevant to this process, including the importance of those provisions concerning KID's obligations to deliver water to other Project irrigation districts and non-Project lands. The memo also explains the purposes behind and the pros and cons of acquiring title to Project transferred works as revealed by the numerous irrigation and water districts that have been willing to document their experiences. In addition, the memo discusses the various statutory/regulatory and fiduciary compliance obligations the KID can expect to encounter and be expected to fulfill to BOR's satisfaction before the agency will sign off on the transfer.

This memo clearly shows that the title transfer process is certainly not for the faint of heart, but rather for those irrigation district managements and boards of directors which have collectively committed themselves to securing freedom of operation and action from Reclamation. The Project has remained under the control of Reclamation since its inception, and BOR has invested heavily in keeping its resident irrigation districts within the Project by creating new ways of providing federal "welfare" benefits" to them. The Klamath Basin Agreement negotiations, however, challenge BOR's ability in the future to maintain these benefits for the entire Project irrigation community because of the water and land use concessions that will need to be made to satisfy the ESA and tribal trust-related demands of the Klamath, Hoopa Valley, Yurok and Karuk Tribes. Consequently, BOR either cannot or will not protect all irrigator water and land rights because of its obligation, as a federal agency, to preserve tribal off-reservation fishing and water rights consistent with such obligations.

Clearly, title transfer offers KID a way to escape many of the daily operational, compliance and financial burdens BOR continues to impose as the result of its ongoing economic and regulatory control over KID in administering the Project. Indeed, the following negative KID experiences with the BOR serve as a sobering testament to the level of control that BOR actually exercises over KID and its patrons at their expense: 1) KID's recent unsuccessful attempt to negotiate with BOR a fair and equitable financing agreement to provide the District with sufficient funds to replace the C Canal flume; 2) the very costly and burdensome plan designs and revisions of plan designs and accompanying regulatory approvals BOR had required KID to satisfy in order to secure its approval of the C Canal flume replacement project and C Drop hydroelectric project; 3) the limitations BOR continues to place upon water diversions from Upper Klamath Lake to the District as the result of the agency's implementation of the joint FWS-NMFS Biological Opinion covering Upper Klamath Lake and Klamath River; and 4) the likely expected adverse impacts on District irrigator water use and land rights and values resulting from: a) the BOR's planned further curtailment of Upper Klamath Lake water diversions to the Project; b) the BOR's directive to construct fish entrainment devices in District canals, dikes and streams, and

imposition of strict new ESA regulatory requirements, consistent with the terms and conditions of the defunct KBRA, the new KPFA, the proposed Wyden-Merkley Amendment to the Senate Energy bill now being reviewed by a congressional conference committee; and c) the BOR's likely capitulation to the California tribes' calls for an interagency consultation to revise the BiOp in service to the BOR' federal government Indian trust obligations.²⁰⁴

KID, however, must be willing and able to stay the course and jump through all of the necessary hoops to extricate itself from the Project and secure its freedom. This will require discipline, perseverance and patience as well as an adequate budget. As the examples provided in this memo clearly show, each of the irrigation and water districts that have pursued transfer of title to Project transferred works has had, for the most part, an overwhelmingly positive and successful experience which not a single one of them has regretted.

Although KID has recently assumed a greater than \$10 million debt obligation to replace the C Canal flume at BOR's insistence, which may hinder or delay title transfer, such debt, by itself, should not necessarily prevent KID from ultimately securing title transfer, all things being considered. According to James Hess, BOR's chief title transfer advisor, being paid out is not a requirement for title transfer.

“Being paid out does not necessarily simplify a title transfer and does not necessarily suggest that it is a good candidate. It just means that the financial arrangements are satisfied. *By the same token, having an outstanding repayment obligation does not mean it is not a good candidate*” (emphasis added).²⁰⁵

This same advisor also has noted that:

“To date, most of the completed transfers have, in general, been single-purpose facilities. This might include the entirety of a single-purpose project or the *single-purpose features—canals and laterals—of a larger project*. In general, the more issues and stakeholders there are, the more complexities we will face. Where there are multiple beneficiaries of a project that Reclamation has managed, there is the added complexity of how the project will be managed after Reclamation is removed from the picture” (emphasis added).²⁰⁶

His observations strongly suggest that it is more than possible for KID to overcome the likely complexities it will face during its pursuit of title to Project transferred works, especially if it proceeds in a prudent and methodic manner and avoids unnecessary distractions.

Considering all of the above, KID must remember that one presidential administration's BOR is not likely to behave the same as another presidential administration's BOR. The current

²⁰⁴ See Lawrence Kogan, *The Wyden-Merkley Amendment: The Dog that 'Don't Hunt,'* Capital Press (June 26, 2016), available at: http://www.koganlawgroup.com/uploads/The_Wyden-Merkley_Amendment_-_The_Dog_That_Don_t_Hunt_.pdf; See also Lawrence Kogan, *The Myths, Lies & Deceptions of the Klamath Basin Agreements* (7/25/16), available at: http://www.koganlawgroup.com/uploads/The_Myths_Lies_Deceptions_Behind_the_Klamath_Basin_Agreements_7-25-16_.pdf.

²⁰⁵ See James Hess, *Transfer of Title*, Irrigation Leader, Vol. 7, Issue 3 (March 2016), *supra* at p. 19.

²⁰⁶ *Id.*

administration has overwhelmingly expressed its preference for environmental and tribal interests at the expense of irrigator interests. The current administration has expressed its preference by the tenacity with which, and the bold and arguably illegal manner in which, it has single-mindedly proceeded to non-transparently execute and implement the Klamath Basin Agreements, despite growing Klamath Project and non-Project irrigator opposition. One may reasonably expect that these ideologically and philosophically motivated initiatives will come to an end if November's political winds sweep into national office a presidential candidate from the other political party who favors returning fully paid-for western federal project lands back to the irrigators who best know how to manage them.

KID should not, however, bank on this or any other outcome. Instead, it should immediately try to secure an independent third party title transfer expert from outside the Klamath Basin area to guide it through each of the many steps of the title transfer process. Washington, D.C.-based [Water Strategies LLC](#) is, perhaps, one such expert organization, while the Klamath Falls-based [Family Farm Alliance](#), certainly is not, and should be avoided at all costs because of its lack of objectivity and its considerable emotional investment in the Klamath Basin Agreements.

-- END --