



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

AUDIT OF THE BUREAU OF RECLAMATION'S KLAMATH BASIN WATER USER MITIGATION PROGRAM



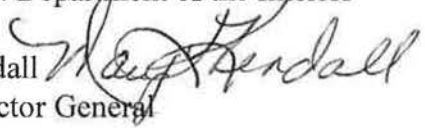
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Memorandum

OCT 11 2016

To: Estevan López
Commissioner, Bureau of Reclamation

Hilary Tompkins
Solicitor, U.S. Department of the Interior

From: Mary L. Kendall 
Deputy Inspector General

Subject: Final Report – Audit of the Bureau of Reclamation’s Klamath Basin Water User Mitigation Program
Report No. 2015-WR-080

This memorandum transmits our final report detailing our audit of the Bureau of Reclamation’s (USBR) Klamath Basin Water User Mitigation Program (WUMP). We examined whether USBR had the legal authority to enter into a cooperative agreement with the Klamath Water and Power Agency (KWAPA) to administer the WUMP and whether related expenditures were allowable. We found that USBR did not have the legal authority to enter into the cooperative agreement, resulting in \$32.2 million in wasted funds spent by KWAPA under the agreement. We make three recommendations to address the weaknesses that allowed USBR to improperly award this cooperative agreement.

In memoranda dated September 1 and September 2, 2016, USBR and the Office of the Solicitor provided the Department of the Interior’s (DOI) response. In response to our draft report, DOI did not concur with Recommendations 1 and 2. DOI concurred with Recommendation 3 despite disagreeing with the finding and stated that it was already in compliance with this recommendation. After discussions with the Department, Recommendation 3 is now addressed to the Department. Based on the response, we consider all three recommendations to be unresolved and not implemented. We are referring all three recommendations to the Assistant Secretary for Policy, Management and Budget for resolution.

If you have any questions regarding this memorandum or the subject report, please contact me at 202-208-5745.

The legislation creating the Office of Inspector General requires that we report to Congress semiannually on all audit, inspection, and evaluation reports issued; actions taken to implement our recommendations; and recommendations that have not been implemented.

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Results in Brief

The U.S. Department of the Interior (DOI), Office of Inspector General conducted an audit to determine whether the Bureau of Reclamation (USBR) had the legal authority to enter into a cooperative agreement with the Klamath Water and Power Agency (KWAPA) to administer the Water User Mitigation Program and whether related expenditures were allowable. USBR did not have the legal authority to enter into the cooperative agreement. Because the agreement was improper, the \$32.2 million that KWAPA spent over a span of 7 years was a waste of funds. In addition, we identified KWAPA expenditures that were unsupported and unallowable and have provided this information for USBR's consideration.

Only two of the five legal authorities cited by USBR—the Fish and Wildlife Coordination Act (Coordination Act) and the Reclamation States Emergency Drought Relief Act of 1991 (Drought Relief Act)—provide USBR with authority to use financial assistance, but restrict the use of funds to specific activities. The Coordination Act authorized USBR generally to provide financial assistance for the development and protection of fish and wildlife, and the Drought Relief Act authorized USBR to provide financial assistance for the development of drought contingency plans. USBR's cooperative agreement with KWAPA failed to explain how any of the assistance provided or work performed met the requirements of the Coordination Act and Drought Relief Act.

We determined that the benefits of the Water User Mitigation Program flowed primarily to irrigation contractors rather than fish and wildlife; of the \$32.2 million expended under the cooperative agreement, \$28 million was used to compensate irrigation contractors for using pumped groundwater to irrigate their lands or refraining from irrigation altogether. We also determined that none of the funds were used to develop a drought contingency plan. Finally, we determined that conflicting advice provided by the Office of the Solicitor facilitated USBR's award of the cooperative agreement.

We make three recommendations to address the weaknesses that allowed USBR to improperly award this cooperative agreement. In memoranda dated September 1 and September 2, 2016, USBR and the Office of the Solicitor provided DOI's response. DOI did not concur with Recommendations 1 and 2. DOI concurred with Recommendation 3 despite disagreeing with the finding and stated that it was already in compliance with this recommendation. Based on the response, we consider all three recommendations to be unresolved and not implemented. We are referring all three recommendations to the Assistant Secretary for Policy, Management and Budget for resolution.

Introduction

Objective

The objective of our audit was to determine whether the Bureau of Reclamation (USBR) had the legal authority to enter into a cooperative agreement with the Klamath Water and Power Agency (KWAPA) to administer the Water User Mitigation Program (WUMP) and related expenditures were allowable. See Appendix 1 for the scope and methodology of this report.

Background

USBR's Klamath Project

Authorized by Congress in 1905, the Klamath Project was designed to provide irrigation water to approximately 200,000 acres of land in Southern Oregon and Northern California. In 1999, after three different fish species affected by USBR's operation of the Project had been listed as threatened or endangered,¹ the U.S. Court of Appeals, Ninth Circuit affirmed a district court decision that water user interests were "subservient" to the Endangered Species Act (ESA).² Since then, the Project's surface water diversions have been limited by the ESA and biological opinions that require the Project to maintain sufficient instream flows in the Klamath River and adequate water levels in the Upper Klamath Lake to protect endangered species. To ensure compliance with the ESA, USBR is required to consult with the National Marine Fisheries Service (NMFS) to perform biological assessments to determine how diverting Klamath Project water for irrigation purposes will affect threatened and endangered species and then adjusts water delivery to minimize any negative effect.

USBR-Operated Water Bank Program, 2001 – 2007

ESA listings and several years of drought conditions made it difficult for USBR to balance the demands of Project irrigation contractors with the requirements for maintaining specific river flows and lake levels for endangered species. In 2001, Project operations were severely affected when USBR stopped water deliveries to the majority of irrigation contractors to meet river and lake level requirements. The disruption of water service led to civil disobedience, large-scale fish die-offs, and exacerbated competition among numerous interest groups for limited water resources. To avoid future controversy and comply with ESA requirements, and following its consultation with NMFS, USBR established and operated a water bank³ program beginning in 2001 to bridge the gap between available Project surface water supplies and contractor water demands.

¹ In 1988, two species of sucker in the Upper Klamath Lake were listed as endangered. In 1997, the California coho salmon was listed as threatened.

² *Klamath Water Users Protective Ass'n v. Patterson*, 204 F. 3d 1206, 1213 (9th Cir. 1999), *cert. denied* *Klamath Drainage Dist. v. Patterson*, 531 U.S. 812 (2000).

³ USBR referred to its efforts as a "water bank," although it never physically banked any water in the traditional sense.

The water bank began as a temporary pilot program, but USBR continued to operate the program for 7 years. Through this program, USBR reduced demand for Project water by paying some irrigators to forgo irrigating lands (land idling) and augmented available Project water supplies by paying other irrigators to irrigate their lands using pumped groundwater. USBR found that land idling resulted in uncertain amounts of surface water “saved.” Also, while groundwater pumping produced additional water supply, it could only be used intermittently because it caused significant declines in water table levels. USBR spent more than \$30 million on the water bank program before transitioning its water bank activities to KWAPA in 2008.

KWAPA Water User Mitigation Program, 2008 – 2015

In 2008, USBR awarded an \$11.25 million cooperative agreement to KWAPA to continue land idling and groundwater pumping activities under the WUMP through December 31, 2012. Established in 2008 as an intergovernmental entity, KWAPA was primarily funded by USBR through the cooperative agreement and was largely responsible for running the WUMP. According to the agreement, KWAPA was to complete a feasibility study about market-based supplementation programs, including land idling, groundwater substitution, direct pumping, and off-stream storage.

In a May 2015 briefing document to the Mid-Pacific Regional Director, a USBR Project official provided a clear description of the purpose of the WUMP and its agreement with KWAPA:

The WUMP is a program utilized by the [Klamath Basin Area Office] to bridge annual gaps between Project water supply and irrigation demand. . . . The WUMP compensates irrigators who [forgo] the use of surface water and instead pump groundwater or refrain from irrigating (e.g., land idling) for all or part of the irrigation season.

As of September 30, 2015, the agreement had been modified 19 times to expand the scope of activities, extend the performance period through December 31, 2015, and increase the total award amount to \$41.25 million, of which KWAPA had expended \$32.2 million. Of the \$32.2 million expended, KWAPA used \$28 million to compensate irrigators for pumping groundwater to irrigate their lands or forgoing irrigation all together. USBR’s Mid-Pacific Regional Director approved a further extension of KWAPA’s cooperative agreement through fiscal year 2023, but the agreement was not extended and KWAPA ceased operations on March 31, 2016.

Legal Authorities Cited by USBR

USBR’s initial cooperative agreement with KWAPA listed four Federal statutes as providing legal authority for the agreement. These statutes are briefly summarized below.

- *Fish and Wildlife Coordination Act (Coordination Act)*: The Act authorizes the Secretary “to provide assistance to, and cooperate with” Federal, State, and public or private agencies and organizations “in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat.”
- *Klamath Basin Water Supply Enhancement Act of 2000 (Enhancement Act)*: The Act authorizes the Secretary to “engage in feasibility studies” of certain proposals relating to the Klamath Project for increased project yield, improving water quality, and development of additional groundwater supplies.
- *Reclamation Reform Act of 1982 (Reform Act)*: The Act directs the Secretary to “encourage the full consideration and incorporation of prudent and responsible water conservation measures” for non-Federal recipients of irrigation water from Federal water reclamation projects.
- *Consolidated Appropriations Act, 2008 (Appropriations Act)*: The Act provides general appropriations to USBR for its general operations and management of water-related resources and related grants and agreements with State and local governments, federally recognized Indian tribes, and others.

In addition, the statement of work for Modification 5 of the cooperative agreement, dated July 13, 2010, cited the Reclamation States Emergency Drought Relief Act of 1991 (Drought Relief Act) as an additional legal authority, although it did not explain how USBR met the Act’s prerequisites.

- *Drought Relief Act*: The Act authorizes the Secretary to take certain actions to minimize losses and damages resulting from drought conditions, such as construction, management, and conservation activities; making water purchases from willing sellers if temporary contracts are used to deliver water and recover costs; and also authorizes limited financial assistance for developing drought contingency plans.

Findings

We found that USBR did not have the legal authority to enter into the cooperative agreement with KWAPA for the WUMP. Only two of the five legal authorities cited by USBR—the Fish and Wildlife Coordination Act (Coordination Act) and the Reclamation States Emergency Drought Relief Act of 1991 (Drought Relief Act)—provide USBR with authority to provide financial assistance, but restrict the use of funds to specific activities. We determined that funds awarded under that agreement were not used for the purposes stipulated in those Acts. Therefore, the \$32.2 million spent by KWAPA over a span of 7 years was a waste of funds.

In addition, we found that the Office of the Solicitor provided USBR with conflicting advice in regards to USBR’s authority for the cooperative agreement and we identified instances where KWAPA was unable to provide adequate support for its expenditures.

Cooperative Agreement Not Supported by Legislative Authority

Limited Legal Authority for the Cooperative Agreement

Only two of the five Federal statutes—the Coordination Act and the Drought Relief Act—cited in the agreement provide USBR with any legal authority to grant financial assistance, but the Acts restricted use of funds to specific allowable activities. We found that the cooperative agreement did not explain how activities performed under the agreement with KWAPA were at all related to either of these Acts. We also determined that expended funds were not used for activities authorized by the Acts.

Specific legislative authority is needed for a Federal agency to provide financial assistance through grants and cooperative agreements (see Appendix 2 for our Office of General Counsel’s legal opinion). According to opinions of the Comptroller General, and guidance published in the U.S. Government Accountability Office (GAO) Red Book, agencies have “inherent authority” to contract for supplies used to complete their mission, but “there is no comparable inherent authority to enter into assistance relationships” to benefit another entity or individual. Therefore, “the relevant legislation must be studied to determine whether an assistance relationship is authorized at all, and if so, under what circumstances and conditions.” The Federal Grant and Cooperative Agreement Act provides guidance to Federal agencies in determining “which legal instrument to use when forming a [contractual] relationship between the agency and another party.”

The U.S. Department of the Interior appears to interpret the Coordination Act to authorize USBR to provide financial assistance for the purpose of acquiring water for the protection or other benefit of fish and wildlife habitat. As we discuss in more detail later, the agreement failed to explain how the financial assistance

provided to KWAPA would actually produce a direct benefit for fish and wildlife habitat.

The Drought Relief Act gives USBR authority to fund the development of drought contingency plans through cooperative agreements. It was not possible, however, to conclude that the funding provided to KWAPA was authorized under this provision, because the agreement had no clear statement of how USBR invoked the authority and, as described in a later section, much of the funding under the Drought Relief Act was provided to KWAPA for purposes that had no relationship to drought contingency planning.

We concluded that the other statutes cited in the agreement with KWAPA—the Enhancement Act, the Reform Act, and the Appropriations Act—did not authorize the financial assistance granted under the cooperative agreement. Although the Enhancement Act authorizes the Secretary to conduct feasibility studies and was one of the authorities USBR primarily relied on, the Act does not authorize financial assistance under the cooperative agreement with KWAPA because it neither explicitly states nor implies the congressional intent to authorize the Secretary to grant any financial assistance to third parties. The USBR financial assistance analyst responsible for reviewing and approving the initial cooperative agreement also concluded that this Act does not give USBR legal authority to make financial assistance awards in the context of this agreement.

Funding Not Used for the Benefit of Fish and Wildlife

The work performed under the cooperative agreement between USBR and KWAPA did not meet the Coordination Act's purpose of providing assistance to organizations to develop, protect, rear, and stock all species of wildlife and their habitat. In addition, the agreement contained no tasks specifying how the funds would be used for the protection or other benefit of fish and wildlife. If USBR were to assert that the WUMP has a direct fish and wildlife benefit because it assists USBR in meeting ESA requirements, we would disagree because compliance with ESA requirements (including requirements for USBR to refrain from providing water for irrigation when necessary) is a condition of the Project. Thus, the \$28 million KWAPA paid to Klamath Project irrigators as compensation for land idling and pumping groundwater did not produce any additional fish and wildlife benefit (see Appendix 3). In fact, USBR's 2012 biological assessment of proposed Klamath Project operations supports our conclusion:

The WUMP will not be a tool for providing water for endangered species purposes because Reclamation proposes to first meet flows and lake levels which Reclamation believes are sufficient to avoid jeopardizing the continued existence of federally-listed species.

Any fish and wildlife benefit of the WUMP would therefore come from providing water to the National Wildlife Refuges in the Klamath Project area as recognized by specific language in KWAPA's original cooperative agreement. There are four refuges in the Klamath Project service area. The Lower Klamath Refuge is the only refuge that requires supplemental water deliveries. As shown in Figures 1 and 2, the refuge received limited water deliveries when compared with the WUMP's overall claimed supplementation of water supplies and optimal water deliveries for the refuge (95,000 acre-feet annually).

Water Supplementation versus Refuge Deliveries					
	2010	2012	2013	2014	2015
WUMP water supplementation	190,050	38,600	80,080	125,620	96,480
Refuge deliveries	16,870	47,020	43,820	19,370	17,020

Figure 1. Refuge water deliveries compared with WUMP water supplementation. All values are given in acre-feet per year. In 2011, the WUMP was not activated, and 2012 was a partial season for land idling.

Water Supplementation and Refuge Deliveries

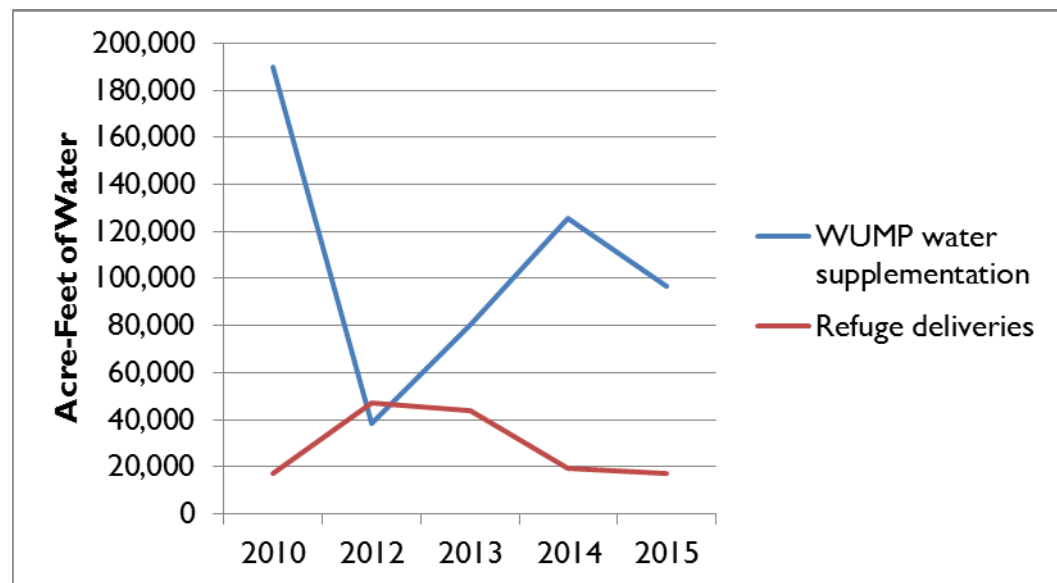


Figure 2. Refuge water deliveries compared with WUMP water supplementation. All values are given in acre-feet per year.

The amount of water provided to the refuge is not the only relevant factor. The timing of water deliveries also matters because without water during the growing season, less food is available on the refuge for migratory birds. During water-short years, such as those when the WUMP was in effect, USBR's Project

operation plans did not include any planned water deliveries for the refuge. Instead, the refuge received most of its water in September and October, after the growing season. These circumstances substantiate statements made to us by the refuge manager that the refuge did not receive a direct benefit from the WUMP, but rather received leftovers that he referred to as “scrap water.”

The USBR financial assistance analyst who reviewed and approved the initial cooperative agreement also questioned the use of the Coordination Act as a legal authority and whether the statement of work indicated that fish and wildlife would truly benefit. The analyst told us that he ultimately approved the agreement because an attorney from the Pacific Southwest Regional Office of the Solicitor performed a legal review and because USBR Mid-Pacific regional officials assured him that the water augmentation and demand reduction activities to be accomplished under the agreement would directly benefit the refuge. The analyst also required the Region to formalize this commitment by adding this statement to the agreement: “All water acquired and utilized by this program will benefit the Refuges as they are the first to be impacted by shortages, and will be the first to benefit by supplemental [water] supply.”⁴ As demonstrated in Figures 1 and 2 above, all of the water acquired and used by the program did not benefit the refuge.

Initially, the cooperative agreement required KWAPA to not only acquire options for water to supplement Project supplies, but also provide available water when necessary to meet Project requirements for the “direct benefit of fish and wildlife habitat.”⁵ USBR removed the language that water be provided for the direct benefit of fish and wildlife habitat from the agreement in Modification 5 on July 13, 2010, after USBR prepared its 2010 Project operations plan, dated April 30, 2010. The Project plan anticipated critical water shortages in 2010, which would be addressed through (1) a significant water supplementation effort through the WUMP, and (2) no water deliveries to the refuge. USBR officials in the Klamath Basin Area Office were unable to locate any documentation supporting the change to the agreement. We concluded that removal of the agreement language was not a coincidence, but rather an acknowledgment that KWAPA was not being asked to operate the WUMP for the benefit of fish and wildlife.

Funding Not Used for a Drought Contingency Plan

The Drought Relief Act gives USBR the authority to provide financial assistance for the development of drought contingency plans, but the activities funded under the cooperative agreement did not result in the development of any such plan. Modification 6 of the agreement awarded \$8 million in Federal drought funding to KWAPA. KWAPA did not account for \$3.4 million of the funding, so we were unable to determine how the funds were spent. KWAPA reported that it spent the

⁴ U.S. Department of the Interior, Bureau of Reclamation Cooperative Agreement No. 08FC200020, awarded September 26, 2008, A.3 Objective, page 2.

⁵ U.S. Department of the Interior, Bureau of Reclamation Cooperative Agreement No. 08FC200020, awarded September 26, 2008, A.5.1 Task 1, page 2.

remaining \$4.6 million for program activities such as land idling, deepening or drilling new domestic and municipal wells, various contract services, and associated administrative costs (see Appendix 4).

Of the \$4.6 million in Drought Relief Act funds that KWAPA spent on program activities, \$3 million was used to compensate irrigators for land idling. The Drought Relief Act authorizes the Secretary to take certain actions to minimize losses and damages resulting from drought conditions, including the purchase of water from willing sellers through conservation or reduced consumption. Section 101(c) of the Act, however, stipulates that the purchase of water is authorized only when temporary contracts are used to deliver water and recover the Federal Government's costs. In this case, the land idling costs were not authorized because USBR did not put repayment contracts into place and did not recover the \$3 million paid to irrigators.

In addition, USBR's agreement with KWAPA failed to explain its statutory basis for the assistance provided. USBR may have intended for some of its financial assistance provided under the Act to fall within 43 U.S.C. § 2215, authorizing it to make grants to promote the development of drought contingency plans, but many of the expenses outlined above—such as for land idling and drilling deeper local wells—have no plausible relationship to drought contingency planning.

Recommendations

We recommend that:

1. USBR discontinue funding water supplementation and demand reduction activities in the Klamath Basin unless specific legal authority is provided or obtained; and
2. USBR take steps to ensure that financial assistance agreements are not funded without specific and applicable legal authority and without a clear and accurate description of the activities to be performed.

Office of the Solicitor Provided Conflicting Advice

USBR's award of the cooperative agreement to KWAPA was facilitated by conflicting advice provided by the Office of the Solicitor. In November 2003, an attorney from the Pacific Southwest Regional Office of the Solicitor concluded that USBR did not have direct legal authority for water acquisition activities under its water bank program. The same attorney later contradicted his own conclusion by determining that USBR had legal authority for its cooperative agreement with KWAPA to administer the WUMP, even though it included the same type of water acquisition activities that were previously deemed not authorized. The details of these conclusions are described below.

In an email dated November 18, 2003, discussing “Klamath Project – Water Acquisition” under USBR’s water bank program, the attorney expressed his concern that “Reclamation does not have direct authority to acquire water.” He wrote that USBR had used the Enhancement Act’s feasibility authority for its water bank by calling it a pilot project, and that he had “recommended for some time now that [USBR] secure permanent authority for the water bank to ensure its continuation.” There was no evidence that USBR ever obtained a permanent authority to replace the Enhancement Act as its authority for Klamath Project water acquisition activities. Further, as previously discussed in this report, the Enhancement Act did not give USBR legal authority to award a cooperative agreement to KWAPA.

In the same email, the attorney also wrote that “in limited circumstances, Reclamation [USBR] can use section 14 of the 1939 Reclamation Project Act and the Fish and Wildlife Coordination Act,” but then acknowledged that “I do not see how the water bank fits within these authorities.” The attorney wrote: “The water bank is not directly for ESA purposes, rather it is for Project purposes.” At the point in time when the attorney wrote this email, USBR’s water acquisition activities included land idling and groundwater pumping. Despite this advice, USBR continued performing these activities under the water bank program until 2008, at which time it transferred the activities to KWAPA via the cooperative agreement.

On June 25, 2008, the attorney provided USBR with a legal review of the proposed cooperative agreement with KWAPA (see Appendix 5). The one-page legal review form did not include a detailed analysis and discussion of the legal sufficiency of the cooperative agreement and did not specify whether the attorney had determined that the agreement was legally sufficient. In the remarks section of the form, the attorney simply stated: “The appropriate program authority [for USBR’s cooperative agreement with KWAPA] is the Fish and Wildlife Coordination Act and the Klamath Basin Enhancement Act.”

As discussed previously, the USBR financial assistance analyst who reviewed and approved the initial cooperative agreement questioned USBR’s legal authority for the agreement, but relented based on the Office of the Solicitor’s legal review and assurances from Regional USBR officials. The Office of the Solicitor’s advice was therefore pivotal in facilitating USBR’s award of the cooperative agreement to KWAPA.

Recommendation

We recommend that:

3. The Department establish and implement new policies, procedures, and practices to ensure that financial assistance agreements are reviewed by the Solicitor for legal sufficiency and that the Solicitor's basis for approval is thoroughly explained.

No Support for Some KWAPA Costs

Because USBR had no direct legal authority to enter into the cooperative agreement with KWAPA, we question all \$32.2 million expended under the agreement as of September 30, 2015, and consider these funds wasted (see Appendix 6). Beyond the wasted funds, we identified instances where KWAPA did not provide adequate support for its expenditures—\$4.2 million of the funds we looked at lacked support or were unallowable, including \$3.4 million in drought funds (see Appendix 4) and \$733,344 of KWAPA's operating expenditures. The results of our operating expenditure testing are shown in Figure 3.

Cost Category	Tested Costs	Unsupported	Unallowable	Total Questioned Costs
Contract services (private entities)	\$55,815	\$21,127	\$0	\$21,127
Groundwater studies	415,103	154,211	0	154,211
Groundwater well monitoring /pump reading	68,154	15,000	0	15,000
Indirect cost allocation expense	143,343	0	0	0
Legal - general counsel	145,738	35,543	10,250	45,793
Contract services (Oregon State agency)	417,806	409,621	0	409,621

Cost Category	Tested Costs	Unsupported	Unallowable	Total Questioned Costs
Payroll expense	45,419	47,842	0	47,842
Rent/lease expense	61,219	39,750	0	39,750
WUMP mediation – settlements	-89,120	0	0	0
Total	\$1,263,477	\$723,094	\$10,250	\$733,344

Figure 3. Amount of KWAPA’s operating costs we questioned as unsupported or unallowable. Costs were identified as unsupported when support requested was not provided or when the documentation provided did not have sufficient detail to support costs incurred. Costs were identified as unallowable if they did not appear to support the objectives of the WUMP.

We also judgmentally selected and tested a sample of KWAPA’s contracts for land idling, groundwater pumping, and domestic and municipal well drilling (amounting to about \$5.8 million). KWAPA’s documentation was adequate to support these costs.

We are providing the results of our review of select KWAPA expenses in the interest of full disclosure. No specific recommendation to resolve these questioned costs has been made because we concluded that all funding provided by USBR under the cooperative agreement was wasted.

Conclusion and Recommendations

Conclusion

USBR did not have the legal authority to enter into a cooperative agreement with KWAPA to administer the WUMP. Only two of the five Federal statutes—the Coordination Act and the Drought Relief Act—cited in the agreement gave USBR legal authority to provide financial assistance under its agreement with KWAPA, but the Acts restricted use of funds to specific allowable activities. The cooperative agreement, however, did not explain how activities performed under the agreement were at all related to either of these Acts, and the funds were not used for authorized activities. Therefore, USBR’s use of a cooperative agreement was improper and the \$32.2 million KWAPA spent over a span of 7 years under the agreement was a waste of funds.

Recommendations and Summary of DOI’s Response to Our Draft Report

On September 1 and September 2, 2016, USBR and the Office of the Solicitor provided DOI’s response to our draft report. DOI’s response and our reply are below. We consider all three recommendations to be unresolved and not implemented and are referring them to the Assistant Secretary for Policy, Management and Budget for resolution. See Appendix 7 for the full text of the response; Appendix 8 lists the status of each recommendation.

We recommend that:

1. USBR discontinue funding water supplementation and demand reduction activities in the Klamath Basin unless specific legal authority is provided or obtained.

DOI Response: DOI did not concur with Recommendation 1. DOI asserted that the Coordination Act authorized the financial assistance granted under the cooperative agreement because the funds provided a fish and wildlife benefit by enabling USBR to meet ESA requirements while operating the Klamath Project and by allowing some water to be delivered to wildlife refuges. In addition, DOI offered two reasons, not discussed in the cooperative agreement itself, explaining why it provided funds under the agreement to meet ESA requirements:

In certain cases, Reclamation cannot stop water diversions by third parties that directly affect the agency’s operation of the Project in accordance with the ESA. Even in those cases where USBR can withhold Project water deliveries, it

faces the ongoing prospect of potential takings and/or breach of contract claims from Project beneficiaries.

DOI also stated that while contract services and administrative expenditures did not directly augment Project water supplies available for ESA compliance, these expenditures supported the WUMP and long-term sustainability of water resources in the Klamath Basin. DOI further explained that payments for domestic well drilling to mitigate or offset the impact of groundwater pumping “may have been necessary to secure continuation of the WUMP”. DOI asked that we consider amending or removing Recommendation 1 and its associated findings from the final audit report.

OIG Reply: We disagree with DOI’s assertion that the financial assistance was granted in accordance with the Coordination Act. The possible occurrence of takings or contract liability due to withholding Project water deliveries for ESA purposes does not demonstrate that the financial assistance funds benefited fish and wildlife. To the contrary, payments to USBR’s water contractors in this context, particularly for land idling, appear to be simply compensating them for an alleged loss of their property rights rather than benefiting fish and wildlife.

In addition, the agreement contained no provisions to address the additional problem of unrestricted water users diverting water that USBR intended to use for ESA purposes. If the purpose of the agreement was to prevent water users from diverting water or to offset the harm they caused, then there should have been provisions requiring KWAPA to identify such cases and address them. As there are no such provisions in the agreement, there is no evidence to support that this was a purpose of the agreement or that the payments produced the benefit described in DOI’s response.

The points made in DOI’s response with regard to providing water for refuges were not new and were addressed previously in the draft report. Instead of the WUMP being used to provide fish and wildlife benefits, either for ESA purposes or to the refuges, it was clear that the WUMP was viewed by KWAPA’s Board of Directors and other individuals as mitigation due them. This was a common theme throughout KWAPA’s final performance report, and as such, KWAPA’s Executive Director considered the WUMP to be a lost opportunity to develop long-term market-based approaches to resolving water supply issues in the Klamath Basin.

We consider Recommendation 1 unresolved and not implemented, and will refer it to the Assistant Secretary for Policy, Management and Budget for resolution.

2. USBR take steps to ensure that financial assistance agreements are not funded without specific and applicable legal authority and without a clear and accurate description of the activities to be performed.

DOI Response: DOI did not concur with Recommendation 2. DOI took the position that it implemented policies, procedures, and templates requiring the clear identification of the statutory authority for financial assistance agreements and providing assurance that the scope of work for each agreement fit within the cited statutory authority. DOI specifically cites Reclamation Manual Directive & Standard ACM 01-01, “Requirements for Award and Administration of Financial Assistance Agreements,” dated March 24, 2008, and Reclamation Acquisition Circular 16-08, “Fiscal Year 2016 Implementation Requirements for the Reclamation Manual, Directive and Standard ACM 01-01.”

DOI stated that these policies address statutory authority by requiring that an Award Instrument Determination (AID) be completed to ensure that a financial assistance agreement is the appropriate instrument used, and USBR has the delegated legislative authority to fund the proposed activities. The AID and agreement templates include sections to specifically address statutory authority, require the full text of statutory authority being used to award the financial assistance, and address the detailed scope of work. DOI further stated that its policies and procedures developed since 2008 fully address the letter and intent of this recommendation and asked that we consider amending or removing Recommendation 2 from the report.

OIG Reply: We disagree that USBR’s policies, procedures, and templates fully address the letter and intent of Recommendation 2. Although USBR’s AID and agreement templates are required to be completed for financial assistance agreements and include sections to specifically address statutory authority and scope of work, this action does not ensure that a financial assistance agreement is the appropriate instrument to be used or effectively explain and justify the use of such agreements. For example, the AID includes a section to explain the nature of the work, but there is no requirement to demonstrate a connection between the specific tasks being funded by the agreement and the specific provisions within the cited statutory authority. In addition, the AID includes a section to describe how the activity supports a public purpose, but there is no requirement to cite the Federal Grant and Cooperative Agreement Act and explain the connection between the activity and the Act.

We are concerned that without a requirement for direct linkage of the tasks to the specific language of the cited authority, USBR may continue to use

general or vague statements to justify questionable activities, as it did in the case of the cooperative agreement with KWAPA for the WUMP.

We consider Recommendation 2 unresolved and not implemented and will refer it to the Assistant Secretary for Policy, Management and Budget for resolution.

3. The Department establish and implement new policies, procedures, and practices to ensure that financial assistance agreements are reviewed by the Solicitor for legal sufficiency and that the Solicitor's basis for approval is thoroughly explained.

DOI Response: DOI concurred with Recommendation 3, but disagreed with our finding that the Office of the Solicitor provided conflicting advice as it relates to the cooperative agreement. DOI stated that the November 2003 email cited in our draft report is consistent with the attorney's conclusion that the Coordination Act and the Klamath Basin Water Supply Enhancement Act provided USBR the statutory authority for its 2008 cooperative agreement. DOI also stated that USBR's authority to directly acquire water is not even particularly relevant to the present issue because the WUMP involves cooperative assistance, not the direct acquisition of water. DOI further stated that the WUMP is technically not even a water acquisition program, but instead a program to make more project water available to meet ESA requirements and Project needs through land idling and substitute groundwater supply agreements.

DOI proposed no corrective action, stating that it is already in compliance with Recommendation 3 because existing procedures provide for sufficient legal review of financial assistance agreements. DOI cited various sections of the Departmental Manual that address Office of the Solicitor's legal reviews and explained that it has established procedures and practices, including an Acquisition and Assistance Legal Review form and working group, to standardize the legal review of financial assistance agreements since those referenced in our draft report.

OIG Reply: We stand by our finding that the Office of the Solicitor provided conflicting advice to USBR about the 2008 cooperative agreement as compared to USBR's water bank activities in 2003. While we acknowledge that the WUMP may not be a "direct" water acquisition program since the water was acquired via a cooperative agreement, it was a continuation of the water acquisition program USBR began in 2001 under its Water Bank Program—which DOI acknowledged on page 7 of its response. The subject of the November 2003 email was that USBR did not have direct legal authority for water acquisition activities (land idling and groundwater water pumping) under its water bank program—the exact

same water acquisition activities conducted under the WUMP that were considered allowed by the Office of the Solicitor in 2008.

We recognize that DOI has procedures in place to address legal reviews of financial assistance agreements, but do not believe the existing procedures provide sufficient internal controls over the legal review process given the results of this audit:

- DOI policy does not explicitly require legal reviews for financial assistance agreements, but rather advises or encourages such reviews based on descriptive criteria.
- There are no established thresholds for award amount, level of complexity, or novelty.
- The policy does not state the person or position responsible for making the determination of a legal review.

We conclude that existing policy does not establish management controls sufficient to ensure that significant financial assistance agreements and amendments will receive thorough and appropriate legal review prior to award. In addition, departmental policy (DOI-AAAP-0075) cited in DOI's response makes no mention of financial assistance (grants and cooperative agreements), but rather is directed toward contract or procurement actions.

We consider Recommendation 3 unresolved and not implemented and will refer it to the Assistant Secretary for Policy, Management and Budget for resolution.

Appendix I: Scope and Methodology

Scope

The objective of our audit was to determine—

- whether the Bureau of Reclamation (USBR) had the legal authority to enter into a cooperative agreement with the Klamath Water and Power Agency (KWAPA) to administer the Water User Mitigation Program (WUMP); and
- whether related expenditures were allowable.

To address these objectives, we researched and clarified the purpose of the program, evaluated the adequacy of the statutory authorities and USBR's use of a financial assistance agreement for the program, and reviewed the source and application of program funds. We conducted our audit from July 23, 2015, to March 8, 2016.

The announced objective of our audit included reviewing the WUMP goals to determine whether they were achieved. Because we determined that USBR did not have the legal authority for its cooperative agreement with KWAPA to administer the WUMP, we did not perform work related to Program goals.

We conducted our review in accordance with Generally Accepted Government Auditing Standards. Those standards require that we plan and perform an audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the work performed provides a reasonable basis for our conclusions.

We reviewed internal control documentation and processes for providing financial assistance. We did not include a review of USBR's information system controls as the primary objective of our review was to determine if USBR had legal authority to enter into a cooperative agreement with KWAPA. We relied on computer data provided by USBR, but our scope did not include verifying the data.

We reviewed KWAPA's audited financial statements and relied on the auditor's opinions. We also performed limited testing to evaluate the reliability of financial information provided by KWAPA. We relied on computer-generated data to the extent that we used these data to select costs for testing. Based on our test results we accepted the accuracy of the data. We took samples of costs and verified them against source documents such as contracts, invoices, and other forms of payment documentation. We did not project the results of our tests of select costs to the total population of recorded transactions.

Methodology

To accomplish the audit, we—

- gathered background information on the WUMP through prior Office of Inspector General and U.S. Government Accountability Office reports, budget documents, USBR performance reports, biological opinions, and environmental and water assessments;
- identified and reviewed U.S. Department of the Interior and USBR policies related to financial assistance;
- identified and reviewed laws and regulations related to the WUMP and the cooperative agreement;
- obtained and reviewed the cooperative agreement, including modifications and other supporting documents;
- obtained and reviewed the Pacific Southwest Regional Office of the Solicitor legal review of the cooperative agreement;
- obtained and reviewed our Office of General Counsel’s legal opinion regarding the cooperative agreement’s statutory authorities;
- obtained and reviewed selected KWAPA financial records related to the cooperative agreement, including audited financial statements;
- tested judgmentally selected samples of KWAPA’s expenditures and contract information;
- interviewed USBR officials in the Mid-Pacific Region and Klamath Basin Area Office;
- reviewed USBR’s grants officer’s technical representative’s electronic and hardcopy files related to the cooperative agreement and the WUMP;
- interviewed KWAPA officials;
- interviewed and conducted a site visit with the refuge manager at Lower Klamath National Wildlife Refuge;
- contacted the U.S. Fish and Wildlife Service and the National Marine Fisheries Service about the 2013 – 2023 joint biological opinion;
- interviewed an attorney for the Pacific Southwest Regional Office of the Solicitor to discuss our need for all information that office had regarding the Klamath water bank, the cooperative agreement with the KWAPA, and the WUMP; and
- reviewed the Pacific Southwest Regional Office of the Solicitor’s electronic and hardcopy files on the Klamath Project.

Appendix 2: Office of General Counsel's Legal Opinion


The U.S. Department of the Interior, Office of Inspector General, Office of General Counsel's final legal opinion follows on page 21.




OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

NOV 24 2015

To: Michael P. Colombo
Western Regional Manager for Audits, Inspections, and Evaluations

Through: Bruce Delaplaine 
General Counsel

From: Jon D. Pifer 
Attorney, Office of General Counsel

Subject: Cooperative Agreement for Klamath Project, Bureau of Reclamation

Issue

Whether the Bureau of Reclamation (Reclamation) is authorized to provide financial assistance to the Klamath Water and Power Authority (KWAPA) under the cooperative agreement?

Answer

Reclamation entered into the agreement with KWAPA in 2008. The agreement provides, among other things, for financial assistance to KWAPA to acquire water “for the direct benefit of fish and wildlife habitat.” The objective of acquiring water to benefit wildlife habitat appears to be generally consistent with Departmental interpretations of its authority to provide financial assistance under the Fish and Wildlife Coordination Act (FWCA). The agreement calls for KWAPA to pursue this objective primarily through paying farmers to refrain from irrigating crops (“land idling”), to use groundwater for irrigation, and to pump groundwater. However, the agreement itself fails to explain how such actions actually provide a “direct benefit” to fish and wildlife habitat, rather than solely benefiting the irrigators receiving the funds, which would not be an authorized purpose under the FWCA. For example, the agreement does not explain how an additional benefit to fish and wildlife is produced when irrigators are paid to engage in land idling, when the requirements of the Endangered Species Act would already appear to require Reclamation to maintain applicable water levels to protect endangered species.

Other statutes cited in the agreement, including the Klamath Basin Water Supply Enhancement Act; Reclamation Reform Act; and a 2008 consolidated appropriations Act, do not appear to provide the requisite authority for providing financial assistance under the agreement. The Klamath Basin Water Supply Enhancement Act, for example, authorizes Reclamation to

conduct certain feasibility studies, not to provide financial assistance such as has been paid under this agreement.

Other documents related to the agreement cite the Reclamation States Emergency Drought Relief Act of 1991 (“Drought Relief Act”). A modification to the agreement in 2010 provided additional funds to KWAPA which had been appropriated under the Drought Relief Act. KWAPA was directed to use these funds for other programs, such as digging wells, managing water acquisitions, and other activities.

As set forth in further detail below, some of the activities conducted using this funding may appear to Reclamation as if they may be consistent with certain Drought Relief Act authority, but others activities clearly do not fit within such authority. It is not possible to determine from the face of the agreement whether Reclamation properly relied on this statute in any respect because the agreement fails to explain the application of the Act to the agreement, nor establish that the prerequisites have been met for invoking the Secretary’s authority under the Act.

Federal appropriations law clearly requires agencies to have specific statutory authority for providing financial assistance to other entities. However, because the agreement fails to establish that the statutes on which it relies have been properly applied; we cannot determine that the financial assistance provided to KWAPA under this agreement was authorized.

Background

Klamath Project and Water Bank Program

Some background regarding the history of the Klamath Project is helpful to understanding the context for the cooperative agreement. During the years prior to entering into the cooperative agreement, Reclamation conducted a predecessor program known as the “water bank.” The following discussion summarizes the background of the Klamath Project and the water bank, as described in a 2005 Government Accountability Office (GAO) report to Congress.¹

The Klamath Project is a federal dam project initiated in 1905 located in southern Oregon and northern California. The project was designed to dam the Upper Klamath Lake to manage Klamath River flows, drain nearby lakes and marshlands to create approximately 200,000 acres of farmland, and provide farmers with irrigation water through canals and drains. As a result, Project operations largely determine the amount of water flowing in the Klamath River.

¹ GAO, “Reclamation Met Its Water Bank Obligations, But Information Provided to Water Bank Stakeholders Could Be Improved,” pages 1-4 (2005).

Multiple stakeholders compete for use of this water, including irrigators, tribes, federal entities, and wildlife refuges.

Drought conditions since 2000 made it difficult for Reclamation to balance the demands for water by farmers with requirements for specific river flows and lake levels for threatened and endangered species. The California coho salmon was listed as threatened under the Endangered Species Act (ESA), 16 U.S.C. § 1531, in 1997, and two species of sucker in Upper Klamath Lake were listed as endangered in 1988. In a 1999 Ninth Circuit decision, the interests of water users were declared subservient to the ESA, the result being that, as necessary, Reclamation has a duty to control the operation of the Klamath Project in order to satisfy the requirements of the ESA.²

Pursuant to the ESA, Reclamation has an obligation not to engage in any action that is likely to “take” an endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such a species. Reclamation is required to consult with the National Marine Fisheries Service (NMFS) to perform biological assessments to determine the impact of the diversion of Klamath Project water for irrigation purposes upon endangered and threatened species and to adjust water delivery to minimize the impact upon the habitat of such species.³ In a biological opinion, NMFS recommended establishing a multiyear “water bank” to provide additional river flows that would provide water to protect critical habitat. Reclamation incorporated a water bank program into its project operations plan through 2011.

GAO described the water bank as a mechanism that facilitates the transfer of water entitlements between users and uses. According to GAO’s report, Reclamation’s water bank was not a physical reservoir of water but an administrative process under which Project irrigators may volunteer to accept payment from Reclamation to pump ground water or to forego their contractual water entitlement for one irrigation season in order to make more water available for release downstream.

KWAPA Cooperative Agreement

On September 26, 2008, Reclamation first entered into a cooperative agreement with Klamath Water and Power Authority (KWAPA). The overall intent of the agreement is to grant funding to KWAPA to continue the activities previously conducted under the water bank program, which was renamed the “Water Users Mitigation Program” (WUMP). According to language contained in the agreement, the purpose is as follows:

² Klamath Irrigation District v. United States, 635 F.3d 505, 508 (Fed. Cir. 2011), (citing Klamath Water Users Protective Ass’n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999) (noting that the ESA was enacted to “halt and reverse the trend toward species extinction, whatever the cost.”) amended, 203 F.3d 1175 (9th Cir. 2000)).

³ 635 F.3d 505, 508.

KWAPA will develop the ability to provide up to 50,000 acre-feet of water to provide a supplemental source of water to the Klamath Project. Pursuant to [the Klamath Basin Water Supply Enhancement Act of 2000] the Secretary of the Department of the Interior is authorized and directed to work “with affected State, local and tribal interests, stakeholder groups and the interested public, to engage in feasibility studies of ... proposals related to ... potential for development of additional Klamath Basin groundwater supplies ... further innovations in the use of existing water resources, or market-based approaches, in order to meet growing water needs.” This cooperative agreement is to forward those objectives by allowing stakeholders to develop market-based approaches to developing groundwater supplies and other innovative means of providing additional Project water supplies.

(Section A.2). The agreement further explains that water supplementation activities under the cooperative agreement water will involve “off stream storage, direct pumping, groundwater substitution and land idling.” (Objective, A.3). According to the agreement: “All water acquired and utilized by this program will benefit the Refuges as they are the first to be impacted by shortages, and will be the first to benefit by supplemental supply.” (Objective, A.3).

The specific tasks assigned to KWAPA under the agreement include: to investigate the capability of the local water authority to manage the water supplementation program; acquire options for water; and to provide such water “when necessary to meet Project requirements for the direct benefit of fish and wildlife habitat.” (Section A.5.1, task 1).⁴ The second task is to provide a final report at the conclusion of the agreement. (Section A.5.1, task 2). The original agreement specified a conclusion date of December 31, 2012, but subsequent contract modifications have extended this date to December 31, 2015.

The “Purpose” and “Program Statutory Authority” sections of the cooperative agreement list four federal statutes as providing legal authority for the agreement: the Fish and Wildlife Coordination Act (FWCA); Klamath Basin Water Supply Enhancement Act of 2000; Reclamation Reform Act of 1982 (RRA), Section 210, and the 2008 consolidated appropriations Act for the Department of the Interior (Public Law 110-161). (Assistance Agreement, § 11; Statement of Work, § A.2, “Purpose”).

⁴ According to a draft of the Statement of Work for the agreement dated 9/24/2008, the language “for the direct benefit of fish and wildlife habitat” was inserted by a Reclamation grants official. The same official commented that “The limited delegation of the FWCA [Fish and Wildlife Coordination Act] may provide for this activity if it is demonstrated that the water acquisitions are to benefit fish and wildlife habitat.” See Reclamation document entitled “Acquisition and Assistance Management Division (AAMD) Review and Approval” dated 9/9/2008.

Between 2008 and 2014, multiple modifications were made to the agreement. We reviewed the documentation related to these modifications and determined that most were related to increasing the funding available. For example, modification 2 dated December 23, 2009 increased the total obligated amount of the agreement to \$8,000,000.

Modification 6 dated September 16, 2010 made more substantial changes. According to information recently obtained by OIG auditors, a supplemental appropriation act (Public Law 111-212) provided Reclamation with an additional \$10,000,000 for drought emergency assistance under the Reclamation States Emergency Drought Relief Act of 1991, and Modification 6 provided an additional \$8,037,687 from these funds to KWAPA to perform various other tasks, including implementing a “Municipal/Domestic Well Mitigation Program,” pursuant to which KWAPA was to reimburse land owners for the costs of digging deeper wells where their wells had run dry due to a drop in ground water levels caused by increased usage of ground water. Other tasks included coordinating with the Oregon Water Resources Department and conducting a “Groundwater Utilization Study” to determine how better to manage the WUMP in the long term and supplement water supplies for the Klamath Basin; hiring an employee to serve as an “Assistant Watermaster;” mapping the water rights in the area; coordinating the Domestic Well Mitigation program; and conducting a legal review of water right issues.

Modification 16 dated April 10, 2013 changed the specific wording of tasks 1 and 2 under the agreement for the purpose of providing “guidance requested by KWAPA on metrics for success of the program.” Among other things, we noted that task 1 was changed to state that KWAPA was to “Acquire options for water to supplement Klamath Project supplies.” Hence, the change removed the phrase “for the direct benefit of fish and wildlife habitat” discussed above, however, Modification 16 did not contain an explanation for this change.

More recently, after several interim changes, modification 18 dated July 15, 2014, increased the total amount of funding obligated for the agreement to \$38,252,686.72.

In addition to the cooperative agreement itself, we reviewed other related documents with a view toward understanding the legal basis and specific purpose for the agreement.

In a related document dated June 9, 2008, an attorney in the Regional Solicitor’s Office noted with regard to the agreement that the “appropriate program authority for the agreement was provided by the Fish and Wildlife Coordination Act and the Klamath Basin Water Supply Enhancement Act.”⁵ The Regional Solicitor further indicated in this document that “the [Reclamation Reform Act] could not be used without other supporting authority,” and that the

⁵ See Memorandum, Legal Review Of Proposed Acquisition Action, 6/9/2008.

agreement should be in the form of a cooperative agreement and not a grant, as Reclamation had originally proposed.

A memorandum from Reclamation dated December 21, 2012 concluded that the implementation and associated funding of cooperative agreement (which is referred to as the “WUMP” in this document) should be approved through 2023.⁶ This memorandum generally describes all of the activities of KWAPA under the cooperative agreement as consisting of a “study” that is being conducted under the authority of the Klamath Basin Water Supply Enhancement Act of 2000.

Statutory Authority Required for Providing Financial Assistance

A cooperative agreement is a form of federal financial assistance used to transfer something of value to a recipient in order to accomplish a public purpose as authorized by law.⁷ It is similar to a grant, except that the key difference is that the federal agency providing the assistance has more involvement with the recipient in carrying out the activity being funded under a cooperative agreement than it does in the case of a grant.

It is a fundamental principle of appropriations law that specific legislative authority is needed for a federal agency to provide financial assistance through grants and cooperative agreements.⁸ The underlying rationale for this principle is that “only the Congress is legally empowered to give away the property or money of the United States, and that when it makes grants of funds . . . it has a right to designate the purpose thereof and to surround the grant by such conditions as it chooses to impose.”⁹ As the Government Accountability Office (GAO) has explained, agencies have “inherent authority” to contract for supplies used to complete their mission, but “there is no comparable inherent authority to enter into assistance relationships” to

⁶ See Memorandum, 12/21/2012 from the Acting Regional Director, Reclamation to the Area Manager, Klamath Basin Area. Actual modifications to the agreement appear to specify an ending date of 12/31/2015.

⁷ GAO, Office of the General Counsel, Appropriations Law, Vol. II (hereinafter “GAO Red Book”), page 10-5 (3rd ed. 2006).

⁸ CMS Contract Management Services v. United States, 2013 U.S. Claims LEXIS 307, **31 (Ct. Cl. 2013), rev. and remanded on other grounds, 745 F.3d 1379 (Fed. Cir. 2014) (“[T]he relevant legislation must be studied to determine whether an assistance relationship is authorized at all, and if so, under what circumstances and conditions.”); Interpretation of Fed. Grant & Coop. Agreement Act of 1977, 1980 U.S. Comp. Gen. LEXIS 3894, 14-15 (Comp. Gen. 1980) (same).

⁹ Matter of: Syracuse University, Interest Earned on Grant Funds, 1990 U.S. Comp. Gen. LEXIS 820 (Comp. Gen. 1990).

benefit another entity or individual.¹⁰ Therefore, as the GAO advises and courts have recognized, “the relevant legislation must be studied to determine whether an assistance relationship is authorized at all, and if so, under what circumstances and conditions.”¹¹

As GAO opines, the agency’s program authority is not a matter of discretion; the requisite authority either “is there or it is not.”¹² An explicit statutory authorization using the words “grant” or “cooperative agreement” will satisfy the requirement.¹³ However, even if these word do not appear in the relevant statute, GAO holds that the authority for granting financial assistance may be present when the statute makes clear that an assistance program is intended, the “ultimate purpose of the assistance,” and the identification of a “direct recipient of the assistance.”¹⁴ For example, GAO recognized that the Medicaid statute, (former 42 U.S.C. § 1396 (1976)), which did not use these words, but in part directed the Secretary of Health, Education, and Welfare to take steps to “enable each State” to “furnish medical assistance,” authorized granting financial assistance to States.¹⁵

If financial assistance is authorized by statute, then the second step in the analysis is to determine which “instrument” – a procurement contract, cooperative agreement, or grant – is required for establishing the relationship between the government and the recipient. This is a requirement of the Federal Grants and Cooperative Agreements Act (FGCAA), 31 U.S.C. §§

¹⁰ GAO Red Book, page 10-17; see also *In re Council on Env'tl. Quality & Office of Env'tl. Quality*, 65 Comp. Gen. 605 (Comp. Gen. 1986) (“In general, every agency has inherent power to enter into contracts to provide for its needs. However, we cannot assume that agencies have the power to donate Government funds to assist non-Government entities to accomplish their own purposes, however meritorious, without clear evidence that the Congress intended to authorize such an assistance relationship. . . . Therefore, in order to provide assistance through a cooperative agreement, there must be some affirmative legislative authorization.”); *Matter of United States Info. Agency: Nat'l Endowment for Democracy Grant Admin.*, 64 Comp. Gen. 582 (Comp. Gen. 1985) (“An agency must ordinarily have statutory authority to utilize a grant mechanism to further its authorized policies or functions.”).

¹¹ GAO Redbook, page 10-18; see also *CMS Contract Management Services*, (“determinations of whether an agency has authority to enter into [cooperative agreements] in the first instance must be based on the agency's authorizing or program legislation.”)

¹² GAO Redbook, page 10-17.

¹³ See e.g. GAO Redbook, page 10-21 (observing that where Congress changed the statutory language to specifically appropriate funds to the Department of the Interior “for grants to the judiciary in American Samoa,” this “removed any doubt that the Samoan Judiciary is a grant recipient.”).

¹⁴ *Interpretation of Federal Grant and Cooperative Agreement Act of 1977*, n.6 above.

¹⁵ *Id.*

6301-6308.¹⁷ The FGCAA provides guidance to federal agencies in determining “which legal instrument to use when forming a [contractual] relationship between the agency and another party.”¹⁸ The FGCAA establishes what is sometimes referred to as the “principal purpose” test, providing that an agency “shall use a procurement contract” when “the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit of the United States Government.” 31 U.S.C. § 6303. Conversely, the FGCAA counsels that “[a]n executive agency shall use a cooperative agreement when “the principal purpose of the relationship is to transfer a thing of value” to the recipient in order “to carry out a public purpose of support or stimulation authorized by a law of the United States,” and “substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.” § 6305.

Analysis

Application of the above principles to Reclamation’s cooperative agreement with KWAPA can best be performed by considering the language of the agreement itself and each of the statutes cited in the agreement (or associated documents) as providing its legal authority. As discussed above, these include the following: Fish and Wildlife Coordination Act (FWCA); Klamath Basin Water Supply Enhancement Act of 2000; Reclamation Reform Act of 1982 (RRA), Section 210, the 2008 consolidated appropriations Act for the Department of the Interior (Public Law 110-161); and the Reclamation States Emergency Drought Relief Act of 1991, Public Law 102-250, under which funding for the changes in Modification 6 was apparently provided.

Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. §§ 661-667e, authorizes Reclamation, among other things, to provide assistance to other entities for the protection of fish and wildlife habitat at federal water development projects. This authority is provided by the following section of the FWCA which authorized the Secretary of the Interior as follows:

(1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all

¹⁷ The FGCAA is not itself an independent source of authority for an agency to make grants or cooperative agreements. See Interpretation of Fed. Grant & Coop. Agreement Act of 1977, n.6 above (“determinations of whether an agency has authority to enter into the relationship as spelled out in the instrument, whatever its label, must be found in the agency authorizing legislation, not with the FGCA Act.”)

¹⁸ GAO Redbook, page 10-15.

species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, . . .

16 U.S.C. § 661. This broadly worded statute was enacted in 1958 to enable the Secretary of the Interior to provide for “more effective integration of a fish and wildlife conservation program with Federal water-resource developments.” Pub. L. 85–624 (Aug. 12, 1958).²¹ In our view the language authorizing the Secretary to “provide assistance to, and cooperate with” other entities, suggests that the FWCA authorizes a financial assistance relationship under certain conditions.

The Department’s Solicitor has long interpreted the FWCA to allow the Secretary to enter into agreements to transfer funds to another entity in connection with Reclamation water projects for the purpose of mitigation of harm to, and restoration of, fish and wildlife habitat.²² Further guidance on the Department’s interpretation of the FWCA is found in a Delegation Order issued by the Secretary in 1996. See 255 DM 14 (4/25/1996). This Order provided that the Commissioner of Reclamation was delegated authority under the FWCA “to provide assistance, through grants or cooperative agreements, to public or private organizations for the improvement of fish and wildlife habitat associated with water systems or water supplies affected by Reclamation projects.” Id. Another Delegation Order adopted in 2010 and currently in force, provides that the Commissioner may exercise the Secretary’s authority pursuant to the FWCA and other statutes, either directly or by providing financial assistance, to do any of the following: plan, design, and construct fish passage and screening facilities; engage in projects to create or improve habitat; and, to acquire or lease water or water rights from willing sellers or lessors. See 255 DM 1 (10/5/2010). Although the 2010 Delegation Order was not in place in 2008 when the original agreement was made, we believe it provides further illustration as to the kinds of assistance activities that the Department understands as being authorized for financial assistance pursuant the FWCA.

Based on the foregoing, the FWCA appears to be an authority under which Reclamation may provide financial assistance to eligible recipients for the purpose of protecting fish and

²¹ This authority is not subject to “cost sharing” requirements (in which the non-Federal partner must supply a percentage of the total funding) in another section of FWCA (16 U.S.C. § 460l–13). See also Reclamation Manual, LND 01-01, “Implementing Cost Sharing Authorities for Recreation and Fish and Wildlife Enhancement Facilities.”

²² See generally Memorandum, To Regional Director, Reclamation, From Regional Solicitor, “Authority of the Bureau of Reclamation to Construct and Manage Future Recreation and Wildlife Mitigation and Enhancement Facilities . . .” (January 30, 1979); see also Office of the Solicitor, Partnership Legal Primer, 1st Edition, page 53 (September, 2004) (describing FWCA authority to grant financial assistance and cooperate with Federal, State and public or private agencies and organizations for habitat restoration). (Copies available from OGC).

wildlife habitat.²³ As the Department interprets the FWCA, this also allows the Department to grant funds to acquire water for the benefit of fish and wildlife, and in our view, the Department's interpretation would probably receive judicial deference if challenged.²⁴

In this case, task 1 of the agreement specified that KWAPA was to "Provide available water when necessary to meet Project requirements for the direct benefit of fish and wildlife habitat." (A.4.). Based on the above discussion, acquiring and providing water "for the direct benefit of fish and wildlife habitat" reasonably appears to be an authorized purpose under the Department's interpretation of the FWCA. So to the extent that Reclamation's financial assistance under the agreement is for that purpose, it appears it would be statutorily authorized.

Nevertheless, we cannot determine from the agreement itself that financial assistance actually is authorized, because the agreement fails to explain (beyond the mere statement) how it actually produces a "direct benefit" for wildlife. For example, under the agreement KWAPA uses funds to pay farmers for "land idling," compensating them for not receiving water from the Klamath Project to which they apparently have a contractual right. We further understand from discussions with OIG auditors, that Reclamation contends this benefits endangered species by leaving the water untapped and available as fish habitat. However, as discussed above, it appears that Reclamation is already required by the ESA to maintain appropriate water levels, so it is unclear how it further benefits wildlife to pay compensation to an irrigator to refrain from using water that may be unavailable for irrigation (due to shortages) in the first place. The agreement does not address this issue.

The agreement also references creating benefits for wildlife refuges from producing supplemental surface water by pumping groundwater, but again, the agreement does not explain how this actually benefits wildlife refuges. For example, at least one U.S. Fish and Wildlife official stated to OIG auditors that he believes the agreement does not produce any direct benefits for the Lower Klamath Basin National Wildlife Refuge, and that the refuge "sometimes" receives an indirect benefit from "left over scrap water" that is pumped out of fields after the irrigation season is over and which is not timed to wildlife needs.²⁶ The agreement contains no provisions, such as requirements for the seasonal timing of water, to specifically ensure that

²³ The types of costs chargeable to an otherwise authorized grant are, in addition to the program legislation itself, generally governed by regulations defining what are allowable costs." See generally, GAO Redbook, page 10-111, et seq.

²⁴ In general, where Congress has charged the Secretary of Interior with implementing an ambiguous statute, deference will be accorded to the agency's reasonable interpretation of its meaning. Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702, 707 (D.C. Cir. 2008).

²⁶ Audit Record of Discussion, Greg Austin, Refuge Manager, Lower Klamath Basin National Wildlife (8/20/15).

KWAPA only uses funds granted by Reclamation to pay for supplemental water that will directly produce benefits for wildlife refuges.

In our view, it is not sufficient for Reclamation to simply declare in the KWAPA agreement that its financial assistance is for the “direct benefit” for fish and wildlife habitat, without further explanation or specific provisions to ensure that such benefits are the actual aim of such assistance. Such explanation is particularly important when the granted funds are being primarily used to compensate irrigators, because it is unclear whether the alleged wildlife benefits are the real goal or a mere pretext. Reclamation cites other statutes aside from the FWCA in support of the agreement, but as discussed below, we conclude that they do not provide an alternate basis for the assistance provided to KWAPA.

Klamath Basin Water Supply Enhancement Act of 2000

The Agreement also relies on the Klamath Basin Water Supply Enhancement Act of 2000 (Enhancement Act) as a statutory authorization. The Enhancement Act, in pertinent part, provides as follows:

SEC. 2. AUTHORIZATION TO CONDUCT FEASIBILITY STUDIES.

In order to help meet the growing water needs in the Klamath River basin, to improve water quality, to facilitate the efforts of the State of Oregon to resolve water rights claims in the Upper Klamath River Basin including facilitation of Klamath tribal rights claims, and to reduce conflicts over water between the Upper and Lower Klamath Basins, the Secretary of the Interior (hereinafter referred to as the “Secretary”) is authorized and directed, in consultation with affected state, local and tribal interests, stakeholder groups and the interested public, to engage in feasibility studies of the following proposals related to the Upper Klamath Basin and the Klamath Project, a federal reclamation project in Oregon and California.

- (1) Increasing the storage capacity, and/or the yield of Klamath Project facilities while improving water quality, consistent with the protection of fish and wildlife;
- (2) the potential for development of additional Klamath Basin groundwater supplies to improve water quantity and quality, including the effect of such groundwater development on non-project lands, groundwater and surface water supplies, and fish and wildlife;
- (3) the potential for further innovations in the use of existing water resources, or market-based approaches, in order to meet growing water needs consistent with state water law.

Public Law 106–498, § 2 (Nov. 9, 2000). The plain language authorizes the Secretary “to engage in feasibility studies” “in consultation with” other non-federal interested parties. Notably, there is no indication in the Enhancement Act of any Congressional intent to authorize the Secretary to grant any financial assistance to third parties.

Although, as the GAO opinions discussed above hold, the authority for assistance relationships does not necessarily require explicit use of the terms “grant” or “cooperative agreement,” we do not find this statute to imply such a relationship here because the clear intent, as the title of the subsection explicitly states, is to authorize the Secretary to conduct feasibility studies rather than establish an assistance relationship.²⁸ In this regard, we do not find that preliminary wording in the Section above, such as “to help meet the growing water needs,” “to facilitate the efforts of the State of Oregon to resolve water rights claims,” and similar language, change this view. In context, these phrases simply describe Congress’ overall goals to be achieved by authorizing the conduct of feasibility studies. The agreement describes the Enhancement Act as directing the Secretary to “work with” other parties (Section A.2, Purpose), but this phrase does not actually appear in the statute. Although the statute is clear on these points, and therefore it is unnecessary to resort to legislative history with regard to interpretation, we also found no evidence in the relevant Senate Report of any Congressional intent to authorize cooperative agreements or grants in furtherance of the feasibility studies required under the Act.²⁹

Moreover, Section 3 of the Enhancement Act explicitly authorizes the Secretary to grant funding for certain purposes, in contrast to Section 2 cited in the agreement, which does not. Section 3 of the Enhancement Act provides that “The Secretary may enter into an agreement with the Oregon Department of Water Resources to fund studies relating to the water supply needs of nonproject lands in the Upper Klamath Basin.” Section 3 does not itself provide the Secretary with authorization to provide financial assistance to KWAPA under the cooperative agreement, because this agreement is neither with the Oregon Department of Water Resources, nor does it claim to pertain to the “water supply needs of nonproject lands.” However, Section 3 demonstrates that if Congress had intended in the Enhancement Act to also authorize the

²⁸ The reason for Congress’ enacting a specific authorization is likely 16 U.S.C. § 460l–19, which requires Congressional authorization for the Secretary to prepare a “feasibility report.”

²⁹ See e.g. 106th Cong., 2d Sess., Sen. Rept. 106–489, pg. 3–4 (October 4, 2000) (“the S. 2882 provides the Secretary of the Interior with the authority to conduct certain feasibility studies in the Klamath Basin designed to increase water supplies and improve water management and water quality in the Upper Basin.” “These studies are to be conducted in consultation with affected State, local and tribal interests, stakeholder groups, and the interested public.”).

Secretary to use cooperative agreements to grant funding for “studies” of the matters listed in Section 2, then Congress presumably would have stated that explicitly, as it did in Section 3.

Based on the above discussion we conclude that the Enhancement Act does not authorize financial assistance as provided under the cooperative agreement with KWAPA.

Additionally, the scope of authority granted by the Enhancement Act is clearly limited to conducting “feasibility studies.” The agreement does not explain how the financial assistance provided to KWAPA, which as discussed above is primarily used to pay irrigators, is for the limited purpose of conducting feasibility studies.

The statute does not define the term “feasibility studies,” but the Bureau of Reclamation Manual defines a “feasibility study” as an “evaluation of technical, economic, and financial feasibility of a proposed project based on detailed investigations....”³¹ The Manual contains detailed requirements for the completion of such a study, which do not all appear to be reflected in the cooperative agreement with KWAPA. For example, the Manual requires adoption of a “Plan of Study,” “Study Phases and Milestones,” estimation of risk, cost, climate change impacts, and completion of a peer review. There appears to be no provisions related to these steps in the cooperative agreement.

Additionally, the Manual contemplates that the process of data gathering under a feasibility study “will be the minimum necessary to reasonably assess if a plan can be implemented and to determine the social effects, environmental impacts and benefits, and economic and financial viability.” In contrast, under the cooperative agreement, activities seem to be dictated by actual project needs for water rather than limited to the “minimum necessary” to gather data to assess feasibility. Indeed, the operations now conducted by KWAPA began with the water bank program in 2000, have continued under the cooperative agreement since 2008, and are apparently intended to continue at least until 2023. This seemingly open-ended goal tends to belie the agreement’s status as a feasibility study.

Finally, if Reclamation desires to hire a third party to complete the feasibility studies Congress required in the Enhancement Act, then it must use a procurement contract rather than a cooperative agreement. As discussed above, a procurement contract is required when the purpose of the agreement is “to acquire . . . property or services for the direct benefit or use of the United States Government.” 31 U.S.C. § 6303(1). The GAO has long recognized that if an agency is obtaining the services of another party in order to relieve the agency of the need to use its own staff to discharge a statutory duty, then the required form of agreement is a procurement

³¹ Bureau of Reclamation, Reclamation Manual Directives and Standards, “CMP 09-02, Water and Related Resources Feasibility Studies” (09/13/2012).

contract.³³ Reclamation cannot use a cooperative agreement, as it did here, to procure the services of another entity to conduct feasibility studies under the Enhancement Act.

Reclamation Reform Act of 1982

The agreement also cites § 210 of the Reclamation Reform Act (RRA), 43 U.S.C. §§ 390aa-390zz-1. The RRA requires the Secretary to “encourage” water conservation by non-federal recipients of irrigation water from Federal reclamation projects, “pursuant to his authorities under otherwise existing Federal reclamation law.” 43 U.S.C. § 390jj(a). The Act also authorizes the Secretary to “enter into memorandums of agreement with those Federal agencies having capability to assist in implementing water conservation measures to assure coordination of ongoing programs.” § 390jj(c). The RRA further states: “Such memorandums should provide for involvement of non-Federal entities such as States, Indian tribes, and water user organizations to assure full public participation in water conservation efforts.” *Id.* Thus, the RRA provides some authority for agreements with applicable federal agencies to assist with these efforts; however, the cooperative agreement in this case is with KWAPA, a (non-federal) State or local entity.

As quoted above, this statute also directs the Secretary to utilize “other existing” authorities of Reclamation law to accomplish its purpose. Hence, the RRA does not provide an independent legal basis for the financial assistance paid to KWAPA. The Regional Solicitor attorney offered the same legal opinion to Reclamation in June, 2008 when he reviewed the original draft Statement of Work, where he observed that “the RRA, Section 210(a), may be cited as additional authority however it cannot be used without other supporting authority.”

Finally, the activities conducted under the cooperative agreement in this case do not even purport to be aimed at conserving water, such as by reducing consumption. For example, the efforts to pay irrigators to provide ground water seem directed at promoting use and consumption of alternative water sources. Based on the above discussion, the RRA also does not provide a legal basis for the assistance granted to KWAPA under the cooperative agreement.

³³ GAO Redbook, page 10-19; see also Honorable Eleanor Holmes Norton, 1994 U.S. Comp. Gen. LEXIS 887 (Comp. Gen. 1994) (Office of Personnel Management (OPM) should have used a procurement contract to obtain survey services because the services directly benefited OPM by providing OPM assistance in performing the agency’s statutory duty).

Consolidated Appropriations Act, 2008

The agreement also cites the 2008 Consolidated Appropriations Act, Public Law 110-161, but we did not find any discussion of its application within the agreement or in other documents. In this statute Congress made appropriations for the fiscal year ending September 30, 2008 for the Department of the Interior and other federal agencies. It provides a general appropriation to the Bureau of Reclamation of \$949,882,000 “to remain available until expended” for its general operations and management of water resources, “and related grants to, and cooperative and other agreements with, State and local governments, federally recognized Indian tribes, and others.” Public Law 110-161, Division C, Title II.

By its own terms this law only makes funding available for “grants, cooperative agreements and other agreements;” it does not provide Reclamation with an independent legal basis for entering into agreements. Hence, it does not provide an independent legal authorization for Reclamation either to enter into the KWAPA cooperative agreement or to provide KWAPA with financial assistance.

Reclamation States Emergency Drought Relief Act of 1991

The Drought Relief Act, 43 U.S.C. §§ 2201-2247, grants the Secretary broad authority to “undertake construction, management, and conservation activities that will minimize, or can be expected to have an effect in minimizing, losses and damages resulting from drought conditions.”³⁵ Under Title I of the Act, Reclamation takes what it considers “emergency response” actions to minimize losses and damages resulting from drought.³⁶ This includes an authorization for certain construction activities including drilling new private wells.³⁷ §2211(a). Other authorized drought response activities include making water purchases; providing non-financial assistance; facilitating water purchases between willing buyers and sellers; and participating in “water banks established by a State.” §2211(b)-(d).

The Act further states that the Secretary “may make water available” “on a nonreimbursable basis” (that is, without repayment of costs) for “the purposes of protecting or restoring fish and wildlife resources, including mitigation losses that occur as a result of drought conditions or the operation of a Federal Reclamation project during drought conditions.” §2212(d). Department officials have interpreted this authority as providing Reclamation with “flexibility to meet contractual water deliveries by allowing acquisition of water to meet

³⁵ 43 U.S.C. § 2242 of the Drought Relief Act also provides that “The Secretary is authorized to perform any and all acts and to promulgate such regulations as may be necessary and appropriate for the purpose of implementing this chapter.”

³⁶ See generally, <http://www.usbr.gov/drought/emergency.html>.

³⁷ 113th Cong. 1st Sess., Sen. Rep. 113-73, (July 15, 2013) (Statement of Robert Quint, Senior Advisor, Bureau of Reclamation) (reprinted at <http://www.gpo.gov/fdsys/pkg/CRPT-113srpt73/html/CRPT-113srpt73.htm>).

requirements under the Endangered Species Act, benefiting contractors at a time when they are financially challenged.”³⁸

Under Title II of the Drought Relief Act, Reclamation may assist States, Tribes, and local governments with planning and technical assistance related to drought planning, preparation, and adaptation strategies. 43 U.S.C. §§ 2221-2226. Reclamation is also specifically authorized under Title II to “provide financial assistance in the form of cooperative agreements in States that are eligible to receive drought assistance under this subchapter to promote the development of drought contingency plans.” § 2215(a). The elements of a “drought contingency plan” are defined in 43 U.S.C. § 2223.

The Title I authorities “become operative in any Reclamation State . . . only after the Governor. . . has made a request for temporary drought assistance and the Secretary has determined that such temporary assistance is merited, or upon the approval of a drought contingency plan” and terminate on September 30, 2017. 43 U.S.C. § 2214(a), (c). The Title II planning authorities are permanent and do not expire.³⁹

OIG auditors obtained information that the Governor of California officially declared a drought from June 2008 to March 2011, and January 2014 to the present; and the Governor of Oregon made drought declarations for 2010 and 2012-2015.⁴⁰ As discussed above, information was also obtained by OIG that Reclamation used funds appropriated in 2010 in Public Law 111–212 to provide drought assistance in California and Oregon under the cooperative agreement with KWAPA.⁴¹ The funding was added to the agreement in Modification 6 and used to pay for some types of activities already being conducted under the agreement, such as compensation for land idling, and also for digging deeper wells; conducting a groundwater study by the Oregon Water Resources Department; hiring an Assistant Watermaster to manage water acquisitions; mapping water rights; and conducting a legal review of water rights issues.

Modification 6 explains the various relief projects in more detail, and at least one of the agreement documents contains a citation to the Drought Relief Act. But beyond this, it appears that Reclamation did not change the language of the original agreement nor otherwise explain the potential application of the Drought Relief Act to the activities conducted under the agreement.

³⁸ Id.

³⁹ Id.

⁴⁰ The statutory language requires a “request for temporary drought assistance” (§ 2214(a)). It is unknown whether the Secretary considers a drought declaration to be the equivalent of such a request.

⁴¹ Pub. L. 111-112 § 401 (July 29, 2010), provided “For an additional amount for “Water and Related Resources”, \$10,000,000, for drought emergency assistance: Provided, That financial assistance may be provided under the Reclamation States Emergency Drought Relief Act of 1991 (43 U.S.C. 2201 et seq.) and any other applicable Federal law (including regulations) for the optimization and conservation of project water supplies to assist drought plagued areas of the West.”

As discussed above, the Drought Relief Act provides some authority to for Reclamation to enter into cooperative agreements and provide financial assistance to “promote the development of drought contingency plans.” § 2215(a). Some of the activities funded in Modification 6 might be viewed by Reclamation as being consistent with this Title II authority, but it is not possible at this time to conclude that any such funding was authorized without a clear statement in the agreement of how Reclamation is invoking this, or some other authority in the Drought Relief Act, in this particular case. But other uses of funds under the agreement clearly do not appear to be authorized under the § 2215(a) rubric of “promot[ing] the development of drought contingency plans.” This includes, for example, providing financial aid to KWAPA so it can make payments for land idling or other water purchases. Additionally, while the Act contains clear authority under Title I for Reclamation to engage in the construction of “wells drilled to minimize losses and damages from drought conditions” (§ 2211(a)), the procedure that Reclamation apparently used in funding such construction through the cooperative agreement with KWAPA, raises the likelihood that Reclamation used an inappropriate funding instrument for this activity, by relying on a cooperative agreement instead of a procurement contract. This issue is discussed above in regard to the Enhancement Act. Moreover, the agreement itself fails to establish or even mention the existence of the formal prerequisites for invoking the Title I provisions of the Drought Relief Act, such as “a request for temporary drought assistance” by the Governor of the affected State, and a determination by the Secretary “that such temporary assistance is merited.” § 2214(a).

Conclusion

Federal appropriations law clearly requires agencies to have specific statutory authority for providing financial assistance to other entities. The agreement in this case fails to establish on its face that the statutes on which it relies have been properly applied; therefore we cannot determine that the financial assistance provided to KWAPA under this agreement was authorized.

Appendix 3: Water User Mitigation Program Expenditures

Fiscal Year	Land Idling	Groundwater Pumping	Well Drilling	Administrative/ Contracted Services	Total
2009				\$150,641	\$150,641
2010	\$7,139,256	\$2,189,429		339,970	9,668,655
2011	(5,594)	166,051	\$523,388	739,139	1,422,984
2012	532,403	829,960		509,265	1,871,628
2013	1,791,525	2,350,115	29,142	446,621	4,617,403
2014	5,855,498	3,953,638	210,718	596,840	10,616,694
2015	1,525,107	1,637,906	160,425	576,098	3,899,536
Total	\$16,838,195	\$11,127,099	\$923,673	\$3,358,574	\$32,247,541

Figure 4. The amount of Federal funds spent on Water User Mitigation Program activities from 2009 to September 30, 2015.

Appendix 4: Amount of Drought Funds Spent

Program Activity	Cost
Land idling	\$ 3,034,170
Domestic well drilling	923,674
Contracted activities (private entities)	294,994
Contracted activities (Oregon State agency)	195,700
Salaries and fringe benefits	76,885
Legal reviews	27,331
Supplies and minor equipment	18,857
Travel and other administration	5,904
Subtotal	\$ 4,577,515
Funds not supported	3,460,172
Total	\$8,037,687

Figure 5. The amount of drought funds that the Klamath Water and Power Agency spent on Water User Mitigation Program activities.

LEGAL REVIEW OF PROPOSED ACQUISITION ACTION			
MP-3800 LAW-1.00			
MEMORANDUM			
To: Regional Solicitor, Pacific Southwest Region Attention: [REDACTED]			
From: Grants Officer, Acquisition Services			
Subject: Request for Legal Review of Proposed Financial Assistance Action (Solicitor Opinion) -			
In accordance with Reclamation Financial Assistance Directive (RFAD) IV.C.15, the enclosed document(s) is(are) submitted to your office for legal review:			
<input type="checkbox"/>	Coop Agreement	<input type="checkbox"/>	Grant
<input type="checkbox"/>		<input type="checkbox"/>	Modification
<input type="checkbox"/>		<input type="checkbox"/>	DOABI
XX Other: Statement of Work with P. L. 97-293, Reclamation Reform Act of 1982, Sec 210			
Action Identification # [REDACTED] <u>Grant Agreement</u> 08FC280020			
The official financial assistance file [] is [X] is not attached for reference.			
(X) CONTACT SUPERVISOR	[REDACTED]	Extension: 5148	
() CONSULTING OFFICE		Date: 6/9/08	
FOR REPLY BY THE RESPONDENT			
The proposed action has been reviewed in accordance with RFAD IV.C.15 for legal sufficiency and is:			
<input type="checkbox"/>	Approved	<input type="checkbox"/>	Disapproved as noted in remarks
<input type="checkbox"/>	Approved as noted in remarks	<input type="checkbox"/>	See remarks
Remarks: The appropriate program authority is The Fish and Wildlife Coordination Act and the Klamath Basin Enhancement Act. The RRA section 210 may be cited as additional authority, however, it cannot be used without other supporting authority per section 210(a) of PL 97-293. Also, this should be a cooperative agreement and not a grant.			
<input type="checkbox"/>	See documents	<input type="checkbox"/>	See reverse for additional remarks
Solicitor [REDACTED]			Date: 6/25/08

40

Appendix 6: Monetary Impact

Cooperative Agreement Number	Questioned Costs ⁶
RI0AC20669	\$32,247,541

⁶ We consider all of the funds used to be wasted because USBR did not have the legal authority to enter into the cooperative agreement and the costs are not recoverable.

Appendix 7: Department's Response

The U.S. Department of the Interior's response to our draft report follows on page 43.



United States Department of the Interior

BUREAU OF RECLAMATION
Washington, DC 20240

IN REPLY REFER TO

84-27410

3.1.3

MEMORANDUM

To: Office of Inspector General
Attn: Assistant Inspector General for Audits, Inspections, and Evaluations

Through: Thomas M. Iseman *Thomas M Iseman* SEP 01 2016
Principal Deputy Assistant Secretary – Water and Science

From: Estevan R. López *Estevan R. Lopez* SEP 01 2016
Commissioner

Subject: The Bureau of Reclamation's Response to the Office of Inspector General (OIG)
Draft Report, *Bureau of Reclamation's Klamath Basin Water User Mitigation Program*, Report No. 2015-WR-080

Acting For

The OIG in its July 19, 2016, draft report, *Bureau of Reclamation's Klamath Basin Water User Mitigation Program*, requested that Reclamation inform the OIG of the planned course of action to address and implement the recommendations in the subject report. The requested information is attached.

If you have any questions or require additional information, please contact Elizabeth Cordova-Harrison, Director, Management Services Office, at 303-445-2783.

Attachment

cc: Assistant Secretary – Water and Science
Attn: Kerry Rae

Office of the Solicitor
Attn: Carter Brown, Thomas Snodgrass

94-00010 (JLucero)
84-27000 (SDeMarco), 84-27400 (JCrewdson), 84-27410 (AHartman),
84-27800 (DTerrell), 84-27850 (WOrvis)
MP-110 (DGray)
(w/att)



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

SEP 02 2016

Memorandum

To: Office of Inspector General
Attn: Assistant Inspector General for Audits, Inspections, and Evaluations

From: Hilary C. Tompkins *RWT for HCT*
Solicitor

Subject: The Solicitor's Office Response to the Office of the Inspector General (OIG)
Draft Report, *Bureau of Reclamation's Klamath Basin Water Users Mitigation Program*, Report No. 2015-WR-080

The OIG in its July 19, 2016, draft report, *Bureau of Reclamation's Klamath Basin Water Users Mitigation Program*, requested the Office of the Solicitor to inform the OIG of the planned course of action to address and implement the recommendations in the subject report. The requested information is contained in the attachment to the Memorandum on this subject from the Commissioner, Bureau of Reclamation, of this date.

If you have any questions or require additional information, please contact Deputy Solicitor Ed Keable at 202-208-4423.

Attachment

cc: Estevan Lopez, Commissioner of Reclamation
Ed Keable, Deputy Solicitor

The Department of the Interior's Response to the
Office of Inspector General (OIG) Draft Evaluation Report
Bureau of Reclamation's Klamath Basin Water User Mitigation Program
Report No. 2015-WR-080

July 2016

General Comments:

While not identified as a specific recommendation to resolve, the report identifies questioned costs of \$733,344 comprised of Klamath Water and Power Agency ("KWAPA") operating expenditures. Reclamation has been working with KWAPA to obtain additional supporting documentation for those questioned costs. As part of the close-out process, the Reclamation Grants Officer will be reviewing the additional support provided by KWAPA and will make a final determination as to the allowability, allocability, and reasonableness of the costs in question.

Response to OIG Recommendations and Factual Findings

Recommendation 1: Reclamation discontinue funding water supplementation and demand reduction activities in the Klamath Basin unless specific legal authority is provided or obtained.

Interior's Response: Non-concur.

The Fish and Wildlife Coordination Act ("FWCA") authorized funding for the fish and wildlife benefits provided by the cooperative agreement. By its terms, the FWCA authorizes the Secretary to "provide assistance to, and cooperate with, private agencies and organizations in the development [and] protection . . . of all species of wildlife, resources thereof, and their habitat." 16 U.S.C. § 661. Consistent with this language, the Department has long relied upon the FWCA as authority for Reclamation to provide financial assistance to third parties for the protection of fish and wildlife. In fact, the Department has expressly delegated to the Commissioner authority to utilize the FWCA to provide cooperative assistance to third parties to improve fish and wildlife habitat and acquire or lease water or water rights from willing third parties for the purpose of mitigating the effects of Project operations.¹

¹ See 255 DM 14 (effective 4/25/1996) ("14.1 Delegation. The Commissioner, Bureau of Reclamation, is delegated so much of the authority of the Secretary under the Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq., as is necessary to provide assistance, through grants or cooperative agreements, to public or private organizations for the improvement of fish and wildlife habitat associated with water systems or water supplies affected by Reclamation projects."); 255 DM 1 (effective May 5, 2010) ("1.1 Delegation. Subject to the exceptions in

The draft audit correctly recognizes that Reclamation may properly provide financial assistance to eligible third parties under the auspices of the FWCA, where such assistance seeks to benefit fish and wildlife. As explained in the OIG legal opinion attached to the draft audit:

[T]he FWCA appears to be an authority under which Reclamation may provide financial assistance to eligible recipients for the purpose of protecting fish and wildlife. As the Department interprets the FWCA, this allows the Department to grant funds to acquire water for the benefit of fish and wildlife, and in our view, the Department's interpretation would probably receive judicial deference if challenged.

OIG Legal Opinion at 9-10 (footnotes omitted); see also *id.* at 10 (“[A]cquiring and providing water ‘for the direct benefit of fish and wildlife habitat’ reasonably appears to be an authorized purpose under the Department’s interpretation of the FWCA. So to the extent that Reclamation’s financial assistance under the agreement is for that purpose, it appears it would be statutorily authorized.”). While the OIG legal opinion and draft audit acknowledge the foundational legal authority for this arrangement, they raise factual questions about whether the cooperative agreement actually produced such benefits, focusing particularly upon the land idling and substitute groundwater supply components of the Water User Mitigation Program (“WUMP”).

The OIG legal opinion indicates that these components of the program largely benefited Project irrigators rather than fish and wildlife, specifically raising the concern that compensating farmers for land idling may not produce any additional water beyond that already required by ESA. *Id.* at 10 (“it appears that Reclamation is already required by the ESA to maintain appropriate water levels, so it is unclear how it further benefits wildlife to pay compensation to an irrigator to refrain from using water that may be unavailable (due to shortages) in the first place”). In addition, the draft audit concludes that any water delivered to the Lower Klamath National Wildlife Refuge was not of sufficient quantity or appropriately timed to meet wildlife needs.² Draft Audit at 7-8; see also legal opinion at 10-11. Finally, the draft audit separately questions whether the Drought Relief Act (“DRA”) provided authority for a few additional activities funded by a supplemental 2010 appropriation under that statute, including “deepening or drilling

Section 1.2, the Commissioner of Reclamation (Commissioner) is delegated the authority of the Assistant Secretary – Water and Science to: . . . B. Take the following actions, either directly or by providing financial assistance to non-Federal parties, pursuant to the Conservation of Wild Life, Fish and Game Act of March 10, 1934 (Pub. L. 73-121; 48 Stat. 401) as amended by the Fish and Wildlife Coordination Act of August 14, 1946 (Pub. L. 85-624; 72 Stat. 563; 16 U.S.C. 661-666c); Section 5 of the Endangered Species Act of 1973, December 28, 1973 (Pub. L. 93-205; 87 Stat. 884; 16 U.S.C. 1534); and Section 7(a) of the Fish and Wildlife Coordination Act of 1956, August 8, 1956 (70 Stat. 1122; 16 U.S.C. 742f(a)), regarding the construction and/or continued operation and maintenance of any Federal reclamation project: . . . (2) acquire or lease water or water rights from willing sellers or lessors; . . .”).

² Aside from these alleged substantive defects in the cooperative agreement, the draft audit also faults Reclamation for failing “to explain how the financial assistance provided to KWAPA would actually produce a direct benefit for fish and wildlife.” Draft at 6. In this response, Reclamation provides additional explanation of the basis for its reliance upon the FWCA.

new domestic and municipal wells, various contract services and associated administrative costs.” Draft Audit at 9. We address each of these issues below. We also note that Recommendation 1 has otherwise been addressed by virtue of the fact that the cooperative agreement with KWAPA was closed out on May 2, 2016.

A. Fish and wildlife benefits under the ESA.

In response to the ESA concerns in the draft audit, Reclamation certainly recognizes that the biological opinions applicable to the Klamath Project require the maintenance of certain water levels, both with respect to water surface elevations of Project reservoirs and stream flows in the Klamath River. However, the manner by which Reclamation actually achieves these water levels is complicated by issues concerning the potential sources of the ESA compliance water, the fact that this water is commingled with water to be delivered to project irrigators who have not entered into land idling agreements, physical limitations in the ability to meet ESA requirements, and the prospect of potential takings or contractual liability to Project irrigators. When considered in light of these factors and the effective function of the WUMP water in Project operations, it is clear that the WUMP provided critical fish and wildlife benefits authorized by the FWCA by assisting the agency in meeting the ESA’s requirements.

To begin with, the water savings realized through the cooperative agreement essentially provided the same fish and wildlife benefits as the acquisition of third party water rights for the direct benefit of fish and wildlife. There would be no question that Reclamation could purchase or lease water under the FWCA for the purpose of meeting its ESA compliance obligations, to the extent that its Project operations would otherwise result in jeopardy to listed species. Here, the land idling and substitute groundwater supply components of the cooperative agreement served this same function by, as a direct consequence of the ESA, retaining more Project water in storage and committing more Project water to instream flow uses than would have otherwise occurred under normal Project operations.³ As described in the original cooperative agreement: “In recent years, due to Endangered Species Act requirements, the Project has had to supplement supplies of water from the river with a Water Bank like program, involving land idling, ground water substitution, direct pumping and off stream storage.” Agreement at 2 (Background); see also id. (“Supplementation of water supply for the Project is necessary due to the increased deliveries for fish and wildlife purposes required by ESA. The additional water maintained in Upper Klamath Lake for suckers and the increased flow requirements in the Klamath River for coho salmon are the cause of the need for supplementation of water supplies.”); Modification 5 to agreement at Attachment 1, page 1 (“The Water Bank program allows for surface water

³ For instance, in June 2012, severe drought coupled with projections for one of the largest fall salmon runs on record prompted the “Flow Variability Team” established under the 2010 biological opinion applicable to Project operations to recommend higher base flows for the Klamath River during the month of September, in order to mitigate potential fish disease outbreak. See Memo. from Jason Phillips, Area Mngr., U.S. Bur. of Reclamation, to David Murillo, Dep. Commissioner, U.S. Bur. of Reclamation (Jun. 21, 2012). Through operation of the WUMP in 2012, which produced 30,620 acre-feet of supplemental groundwater and idled 4,051 acres of land irrigated from Upper Klamath Lake, sufficient Project water was available for Reclamation to adopt the Flow Variability Team’s recommended enhanced river flows for the month of September.

demand reduction to increase the water available in Upper Klamath Lake and Clear Lake Reservoir to meet requirements for the endangered short-nose and Lost River suckers and in the Klamath River for the endangered coho salmon.” (emphasis added); Modification 6 to agreement at Attachment 2, page 1 (describing purpose of groundwater pumping under WUMP as “provid[ing] ground water in lieu of surface water to preserve endangered species habitats”) (emphasis added).

Moreover, the ESA does not mandate the source of water from which the statute’s requirements must be met. Rather, the agency has a degree of discretion in determining how to meet its ESA compliance obligations. See, e.g., San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 643 (9th Cir. Cal. 2014) (“Our cases confirm that an action agency like Reclamation has some discretion to deviate from the BiOp and its RPAs. See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy, 898 F.2d 1410, 1418 (9th Cir. 1990) (‘We have recognized that the Secretary is to be afforded some discretion in ascertaining how best to fulfill the mandate to conserve under section 7(a)(1) [of the ESA] For example, [an action] agency is given discretion to decide whether to implement conservation recommendations put forth by the FWS.’); Tribal Vill. of Akutan v. Hodel, 869 F.2d 1185, 1193 (9th Cir. 1988) (“The agency is not required to adopt the alternatives suggested in the biological opinion [The Secretary] satisfied section 7(a)(2) if he took alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species.”). Here, Reclamation acted within its permissible discretion in establishing the water banking program under the WUMP as its chosen means of providing ESA compliance water.

The agency particularly has discretion when it is constrained in its ability to meet ESA requirements. In this case, there are numerous Project and non-Project water users that can divert water intended by Reclamation to be reserved for ESA-required lake levels and river flows, which Reclamation currently has no physical or legal means of controlling. Accordingly, in certain cases, Reclamation cannot stop water diversions by third parties that directly affect the agency’s operation of the Project in accordance with the ESA. Even in those cases where Reclamation can withhold Project water deliveries, it faces the ongoing prospect of potential takings and/or breach of contract claims from Project beneficiaries. See Klamath Irrigation Dist. v. United States, 635 F.3d 505, 522 (Fed. Cir. 2011) (holding that Reclamation may have both takings and contractual liability where it reduces deliveries to Project beneficiaries to meet its ESA obligations); see also Casitas Municipal Water District v. United States, 543 F.3d 1276 (Fed. Cir. 2008); Stockton East Water District v. United States, 583 F.3d 1344 (Fed. Cir. 2009).

Finally, Reclamation recognizes that its 2012 Biological Assessment states that “[t]he WUMP will not be a tool for providing water for endangered species purposes because Reclamation proposes to first meet flows and lake levels which Reclamation believes are sufficient to avoid jeopardizing the continued existence of federally-listed species.” However, this statement is taken out of context and does not fully describe the fact that water saved through the WUMP was commingled with other Project water. Some of this water was retained in storage to meet minimum reservoir storage requirements under the ESA, some was subsequently released to meet minimum stream flow requirements under the ESA, some was subsequently released to other Project irrigators who do not have land idling agreements, and some was delivered to the Lower Klamath Refuge. As a matter of accounting, Reclamation could have more explicitly allocated the water saved through the WUMP to ESA (and Refuge) purposes and allocated other

water in storage to deliveries to the other Project irrigators. However, the same result nevertheless ensued – the WUMP enabled Reclamation to meet ESA-required lake levels and river flows (and Refuge deliveries) that otherwise would have been in jeopardy. In fact, the 2012 Biological Assessment explicitly recognized that the WUMP provided Reclamation with operational flexibility to meet the ESA’s requirements, noting that the program does “increase flexibility in meeting water delivery needs for fish and wildlife by reducing overall agricultural surface water demand when the Klamath Project experiences water shortages.” U.S. Bur. of Reclamation, “Final Biological Assessment: The Effects of Proposed Action to Operate the Klamath Project from April 1, 2013 through March 31, 2023 on Federally-Listed Threatened and Endangered Species,” at § 4.4 (Dec. 2012). See footnote 3, above. The fact that the 2012 Biological Assessment does not fully describe the operational and accounting flexibility provided by the WUMP should not be determinative of whether Reclamation can rely upon the WUMP as a source of ESA compliance water. Thus, for all these reasons, the cooperative agreement provided a fish and wildlife benefit authorized by the FWCA by securing a voluntary reduction in water deliveries to Project irrigators and utilizing the water saved to meet the agency’s ESA compliance obligations.

B. Fish and wildlife benefits provided to the Lower Klamath Refuge.

The WUMP likewise provided substantial benefits to the Lower Klamath Refuge. The draft correctly finds that deliveries to the Refuge – ranging from a low of 16,870 acre-feet in 2010 to a high of 47,020 in 2012 over the five year period of assessment – did not meet the optimal delivery to the Refuge of 95,000 acre-feet per year. Draft Audit at 7. However, the deliveries still produced significant fish and wildlife benefits for the Refuge, both as to water that was delivered directly to the Refuge and water delivered to other end uses.

To begin with, water saved under the WUMP that was not delivered directly to the Refuge nonetheless provided benefits to its fish and wildlife resources by creating the conditions which made it possible to deliver any water to the Refuge.⁴ In this regard, the Refuge has been viewed as having a secondary priority to Klamath Project water, and its federal reserved water right (as prioritized within state water law) for wetland use is junior to the Project.⁵ Thus, the Refuge has not received water until the Project water users’ contract deliveries have been satisfied.

⁴ The FWCA does not place any restrictions on whether the benefit provided to fish and wildlife must be direct or indirect in order for an agency to provide cooperative assistance under the authority of the statute.

⁵ Solicitor’s Opinion, dated July 25, 1995, “Certain Legal Rights and Obligations Related to the U.S. Bureau of Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan (KPOP).” That opinion further states that Lower Klamath and Tule Lake refuges “receive significant quantities of return flows and other project waters which, although initially used for irrigation purposes, are beneficially reused for refuge purposes.” *Id.* at 4. These return flows from project irrigation provide additional fish and wildlife benefits to the Refuge. More recently, the Refuge has obtained a share of the Klamath Project’s 1905 water right for irrigation purposes. Amended and Corrected Findings of Fact and Order of Determination, Klamath Basin Adjudication, Oregon Water Resources Department (Feb. 28, 2014).

However, by enabling Reclamation to satisfy the ESA's requirements and water delivery obligations to Project irrigators, water saved by the WUMP for these other end uses effectively allowed the delivery of additional water stored under the program to the Refuge.

An effective metaphor for water management in the Klamath Project is to visualize the Project as a bucket. The bucket must be full (i.e., Project water contracts must be satisfied) before excess water can overflow and become available to the Refuge. The WUMP attempted to fill the bucket so that overflow could occur to the Refuge's benefit. Once filled, however, the quantity of overflow was unpredictable due to weather, and was unrelated to the quantity which was required to fill the bucket. In the absence of the WUMP, the bucket could not have been filled, and overflow could not have occurred.

Further, the WUMP water that was directly delivered to the Refuge was not merely "scrap water" that provided no fish and wildlife benefit. Draft Audit at 8. Rather, this water was delivered at a time and in sufficient quantities to meet at least a portion of the Refuge's needs at a critical time of the year. In this regard, documentation provided by Refuge in 2010 and 2016 indicates that water demand at the Refuge under "optimal" management peaks in September and October, and the target for water deliveries in these months totaled approximately 17,000 acre-feet (September) and 15,000 acre-feet (October).⁶ To similar effect, correspondence and memoranda of agreement between the Fish & Wildlife Service and Reclamation for fall water deliveries to the Refuge demonstrate the need for and Reclamation's commitment to deliver up to 20,000 acre-feet in September and October.⁷ Thus, this water was both requested by the Refuge and delivered in quantities approximating the optimal water needs of the Refuge at a critical time of the year. Although this water was admittedly not sufficient to satisfy all of the Refuge's water needs, it was far preferable to the complete denial of water that would have otherwise resulted but for the existence of the WUMP. Accordingly, the WUMP provided substantial fish and wildlife benefits to the Refuge authorized by the FWCA, both by creating the

⁶ See Dave Mauser and Tim Mayer, "Effects of the Klamath Basin Restoration Agreement to Lower Klamath, Tule Lake, and Upper Klamath National Wildlife Refuges" (2010) (Unpublished USFWS Report) at page 60, Figure 14; Email correspondence exchanged in July and August, 2016 between Klamath Basin NWR Complex Manager and Klamath Basin Area Office Acting Area Manager Jason Cameron regarding optimal water management at the Lower Klamath Refuge, as described in the Mauser and Mayer report.

⁷ See 2010 Correspondence from Klamath Basin NWR Manager to Klamath Basin Area Office Area Manager Susan Fry regarding request for fall delivery to Lower Klamath National Wildlife Refuge ("Fall water delivery to Lower Klamath National Wildlife Refuge (NWR) is crucial to the needs of hundreds of thousands of waterfowl in the Pacific Flyway."); *id.* (indicating that the requested 15,000 acre-feet of water to be delivered to the Refuge during September and October will result in "[o]ver 5,000 acres of flooded seasonal wetlands" and "will support an estimated 500,000 waterfowl for the months of Sept and October. As you know Lower Klamath has not received any Project water since November of 2009."); August 20, 2012 Memorandum of Agreement between the U.S. Fish and Wildlife Service and the Bureau of Reclamation, Klamath Project, Oregon-California (committing to deliver to the Lower Klamath National Wildlife Refuge "up to 20,000 acre-feet of Project water from Upper Klamath Lake to the Refuge at the Ady Canal . . . from August 31, 2012, through October 31, 2012").

conditions that enabled some deliveries to be made to the Refuge and by directly delivering water to the Refuge during a critical time of need in the early fall.

C. Specific ESA and other fish and wildlife benefits documented for original water banking program.

It also bears noting that the WUMP was largely a continuation of the water banking program that began in 2001, albeit with the funding administered through a cooperative agreement rather than directly by Reclamation. Reclamation repeatedly documented that the purpose of that original water banking program was to assist with meeting its ESA compliance obligations and provide other fish and wildlife benefits. For instance, Reclamation prepared a Programmatic Environmental Assessment (“EA”) for the “2001 Irrigation Demand Reduction and Groundwater Acquisition Pilot Programs” for the Klamath Project, which program was comprised of land idling and substitute groundwater supply activities similar to those undertaken by the WUMP. As described in the EA, Reclamation anticipated that the program might produce a multitude of fish and wildlife benefits, including:

- “Reduced irrigation deliveries would likely result in fewer [Lost River and shortnose] sucker losses due to entrainment by pumps and gravity diversions.” EA at 13.
- “Areas along the Lost River where ground water enters may provide refuge habitat for suckers during periods of poor water quality in the summer similar to natural refuges provided by inflow of high quality spring water at Big Springs. Groundwater acquisition that results in discharges to the Lost River would help maintain flows in the Lost River and water exchange in the Tule Lake sumps. This will likely help improve water quality compared to conditions without this pilot program.” *Id.* “Implementation of these programs would help reduce releases and maintain higher lake levels in major sucker habitats at Clear Lake, Gerber Reservoir and Upper Klamath Lake. These programs may result in higher wind erosion and sedimentation but lower sedimentation and nutrient loading by agricultural return flows. Water quality will likely improve in the Lost River from addition of groundwater.” *Id.*
- “The pilot programs would reduce demand for Project water allowing Reclamation to maintain higher lake levels in Upper Klamath Lake which has thousands of acres of wetlands providing habitat for many species, particularly waterfowl. Inundation of the wetlands is important for waterfowl nesting, feeding, and molting. *Id.* at 17.
- “The pilot programs would provide additional water for Project use. One of those uses would be maintaining flows in the Lost River which would benefit other fish species, western pond turtles, and riparian-dependent species.” *Id.*

Likewise, Reclamation’s agreements with project irrigators implementing the water bank between 2001 to 2007 included language reflecting the ESA purposes and other fish and wildlife benefits of the program.⁸ Consistent with this language, a 2010 biological opinion on project

⁸ See, e.g., 2002 agreement (“Reclamation desires to increase the water supply presently available for instream uses in 2002” and “the water bank will be an integral part of operating the

operations recognized that from 2003 to 2007, when the water bank was functioning, there was greater outflow from Upper Klamath Lake and greater river flow in the Klamath River than otherwise would have been expected under natural conditions. See Nat. Marine Fisheries Serv., “Biological Opinion: Operation of the Klamath Project between 2010 and 2018,” at 71. As a continuation of these earlier efforts, the water banking and substitute groundwater supply components of the WUMP did not suddenly change to eliminate these fish and wildlife benefits. The quoted “clear description” of the WUMP from a Reclamation briefing paper in 2015, see draft audit at 3, only describes the mechanism of the program, not its original and continuing purpose. As described in these documents, that purpose was to reduce Project water demand and allow more water to be left in reservoir storage and in the Klamath River for listed species and other fish and wildlife benefits.

D. Fish and wildlife benefits provided by contract services and administrative expenditures.

With respect to the additional program activities briefly questioned in the draft audit that utilized a portion of the \$10 million in supplemental drought funds appropriated by Congress in 2010 under the DRA, these activities likewise appear to have indirectly served the FWCA’s purposes. As an initial matter, Congress did not require Reclamation to spend these funds solely on activities authorized by the DRA. Rather, the 2010 supplemental appropriation authorized Reclamation to utilize these funds for purposes authorized by the DRA “and any other applicable Federal law (including regulations) for the optimization and conservation of project water supplies to assist drought-plagued areas of the West.” Supplemental Appropriations Act of 2010, 111 P.L. 212, 124 Stat. 2302, 2313, § 401 (emphasis added). By these terms, the appropriation authorized Reclamation to utilize the FWCA as an authority for the expenditure of these funds, to the extent the funded activities are “for the optimization and conservation of project water supplies to assist drought-plagued areas of the West.” The activities discussed below generally meet this requirement.

Granted, unlike the land idling and substitute groundwater pumping payments, the questioned contract services and associated administrative expenditures did not directly augment Project water supplies available for ESA compliance (and other fish and wildlife benefits). However, when considered from an overall programmatic perspective, these expenditures supported the objectives of the FWCA by providing the administrative and technical support necessary to the proper functioning of the program and gathering information in an effort to further the long-term

Klamath Project to assist in meeting the ESA and the Department’s tribal trust obligations over the long term.”); id. (“the Yurok Tribe has a federally recognized fishing right in the Klamath River. The fishery is one of the trust resources the Department and Reclamation are obligated to protect”); 2003 agreement (characterizing the water bank as meeting Reclamation’s objectives related to threatened and endangered species and to determine the feasibility of the program); 2005 agreement (referencing the need for additional water to meet the 2002 biological opinion water bank requirements); 2006 agreement (noting that the 2002 BiOp required Reclamation to make 100,000 acre-feet of water available to benefit coho salmon and that the landowner is willing to assist Reclamation in meeting its BiOp requirements through participation in the water bank).

sustainability of the limited water resources in the Klamath Basin available to meet fish and wildlife needs.

For instance, in order to operate the WUMP and ensure the continued availability of groundwater as a means to benefit fish and wildlife, KWAPA needed technical and coordination assistance from the Oregon Water Resources Department (“OWRD”), including the use of an assistant water master who OWRD otherwise would not have had the resources to fund. As described in Modification 6 to the cooperative agreement, the assistant water master provided a variety of functions that supported WUMP’s objectives, including monitoring and responding to unauthorized groundwater use and gathering data that will assist with improving water use efficiencies, the optimization of surface and groundwater resources, and the long-term sustainability of WUMP.⁹ These activities were all directed toward limiting inefficient and unauthorized water uses and thereby maximizing the amount of water available for fish and wildlife benefits. The various modeling, mapping, and groundwater management activities funded under the cooperative agreement likewise appear intended to support these same objectives. See, e.g., Modification 6 at Attachment 4 (pdf 76): (“This proposal would allow KWAPA in coordination with OWRD and the California Water Resources Department to conduct a survey of the various locations of the nearly 200 irrigation wells within the Klamath Project and study how this resource can best be utilized in conjunction with limited surface water in times of drought.”).

As to the domestic well drilling and deepening expenses, these payments provided mitigation to third-party water users to offset the effects of increased groundwater pumping under the WUMP.¹⁰ As a practical matter, these expenditures may have been necessary to secure the

⁹ See Modification 6 at Attachment 3 (pdf 72-73) (“It is necessary for the efficiency of water use and water management during the current circumstances that field staff are available to make water level and water use measurements, and assure that water is used as authorized. KWAPA seeks funding to contract with Oregon Water Resources Department because the department has the personnel, expertise and authority to address field needs. Funding is sought to hire a temporary position for one year to assist with responding to well interference and water use complaints, field data collection, and water regulation. In addition to water management, this position will assist in the data collection and compilation leading to a report summarizing groundwater usage during 2010 in the Klamath Project. The report will estimate the volume of water pumped, the distribution of the groundwater pumping, the groundwater response, and the distribution of where problems were observed. This information is essential when planning to address water supply needs when drought conditions adversely affect surface water supplies available for project purposes.”); id. (“Having the water right mapping completed will improve the efficiency in water management during drought conditions. . . . Additionally, [OWRD] will overlay the completed water rights mapping with recent satellite imagery for the purpose of identifying lands where water has been applied outside the authorized place of use. This will assist KWAPA, local irrigation districts, and Oregon Water Resources Department in better understanding the water need and may potentially reduce demands within some areas of the basin.”) (emphasis added).

¹⁰ See Modification 6 at Attachment 2 (“Because of the ground water pumping conducted under the WUMP (to provide ground water in lieu of surface water to preserve endangered species habitats), ground water levels have dropped approximately 25-35 feet in some areas of the

continuation of the WUMP. Absent this mitigation, local well owners may not have been willing to provide the substitute groundwater supplies upon which the program relied, and the program, together with its associated fish and wildlife benefits, may have been discontinued.¹¹ Accordingly, the domestic well drilling and deepening expenses, like the administrative activities funded under the agreement, indirectly supported the objectives of the FWCA by providing funding for activities that were deemed necessary to the proper functioning and continuation of the program. Thus, for all these reasons, the FWCA provided legal authority for all of the activities funded by the cooperative agreement, including principally the land idling and substitute groundwater supply elements of the program, as well as the administrative support, contract services, and domestic well drilling and deepening expenses.¹² We therefore request that the Office of Inspector General consider amending or removing recommendation 1 and its associated findings from the final audit report.

Responsible Official: Regional Director, Mid-Pacific Region, Bureau of Reclamation

Target Implementation Date: Not applicable.

Klamath Basin. As a result, domestic and municipal wells are either no longer able to reach the ground water aquifer or are pumping less than sufficient amounts of water. The purpose of this proposal [is] to provide immediate relief for municipal and domestic wells that no longer pump enough water to provide sufficient water for municipal and household use, or have gone dry.”).

¹¹ The Klamath Basin Area Office advises that, although the domestic and municipal well owners generally hold senior groundwater rights relative to wells pumped under WUMP, they can only pursue a well interference claim if their wells are at least as deep as the junior wells. Here, absent the well deepening or new well drilling funded by the cooperative agreement, the domestic and municipal well owners would not meet this requirement and they therefore could not require administrative closure of the junior WUMP wells.

¹² The draft audit and legal memorandum’s conclusions that the other statutes cited in the cooperative agreement generally do not provide supporting authority for the agreement are ultimately inconsequential, given the foregoing conclusion that the FWCA provided authority for the agreement. Moreover, these other statutes could potentially provide funding authority for future agreement funding similar activities, to the extent the requirements of those statutes are satisfied. For instance, where certain procedural prerequisites are met, see 43 U.S.C. § 2214(a)-(b), the DRA authorizes the Secretary to directly undertake “construction, management, and conservation activities that will minimize, or can be expected to have an effect in minimizing, losses and damages resulting from drought conditions,” including the drilling of permanent wells “to minimize losses and damages from drought conditions.” 43 U.S.C. § 2211(a). Thus, the DRA could have provided a basis for the domestic well drilling and deepening expenses in question here, if those activities had been directly funded by Reclamation rather than through a cooperative agreement. In this regard, the legal opinion leaves open the question of whether the procedural prerequisites to the applicability of Section 2211(a) were satisfied on the present facts. See Legal Opinion at 16 at n. 40. The Department reserves all arguments and positions regarding whether the other statutes addressed by the draft audit may provide a basis for future cooperative agreements and/or drought relief assistance.

Recommendation 2: Reclamation take steps to ensure that financial assistance agreements are not funded without specific and applicable legal authority and without a clear and accurate description of the activities to be performed.

Interior's Response: Non-concur.

Since 2008, the year in which the original cooperative agreement which was the subject of the audit was awarded, Reclamation has implemented a series of internal controls which address this recommendation. These internal controls included implementation of Reclamation-wide policies, procedures, and templates which require the clear identification of the statutory authority for every financial assistance agreement as well as to ensure that the Scope of Work (SOW) for each agreement fits within the cited statutory authority.

First, Reclamation Manual Directive & Standard ACM 01-01, *Requirements for Award and Administration of Financial Assistance Agreements (Grants and Cooperative Agreements)* published on March 24, 2008, Section 5.A.(6) Award Instrument Determination (AID) states: "Prior to the award of a new agreement or a modification to an existing agreement that exceeds the original estimated amount or significantly modifies the original scope, an AID must be conducted and documented. The AID ensures that a financial assistance agreement is the appropriate instrument to be utilized for the action and that Reclamation possesses the delegated legislative authority to fund the proposed activities. The determination must address the requirements of the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301 et seq.) as well as cite and document the legislative authority for the proposed action. The AID must be approved by both a GO and the regional Chief of the Contracting Office (CCO)"

Further, several sections of Reclamation Acquisition Circular (RAC) 16-08 *Fiscal Year (FY) 2016 Implementation Requirements for the Reclamation Manual, Directive and Standard (D&S)*, ACM 01-01 address the statutory authority issue. Section 6.1.(1)(b) requires the use of the Award Instrument Determination (AID) (RF-101) as a mandatory form. Section 6.1.(1)(a) requires the use of the Agreement Template (RF-120) as a mandatory form. Section 13 includes the requirement "The activities within the SOW must be clearly authorized under the statutory authority cited for the award".

Both the AID (RF-101) and Agreement Template (RF-120) includes sections which specifically address the statutory authority. For the AID, in the Statutory Authority section, it states: "Sections of the Public Law or Statute that Authorize Financial Assistance: Record verbatim the section(s) of the Statute or Public Law that provide Reclamation with authority to award a financial assistance agreement. In addition, provide a statement that directly relates the activities to be funded to the referenced authority." In the Agreement Template the first section of the agreement requires a full text entry of the statutory authority that is being used to award the Financial Assistance project.

The Agreement Template (RF-120) was developed and made mandatory for all Reclamation financial assistance agreements in 2009, for Recovery Act funded agreements, and followed in 2010 for all financial assistance agreements. These templates not only standardized the content and structure of agreements across the Bureau, but also added a level of specificity lacking in

many of the agreement formats used by the Regions, including adding a section that required the full text of the section of the statutory authority that specifically authorizes the award of financial assistance, a specific section where the detailed scope of work and milestones must be identified for the agreement, and a section for the final, approved, budget. These templates were developed with input and review by the Denver Regional Solicitor's Office.

The policies and procedures that were developed since 2008 and that are currently in place fully address both the letter and the intent of Recommendation 2. As such, we request that the OIG consider amending or removing this recommendation from the report as the 2008 agreement that was the subject of this audit is not reflective of Reclamation's current policies, procedures, and practices.

Responsible Official: Director, Management Services Office, Bureau of Reclamation

Target Implementation Date: Not applicable.

Recommendation 3: The Office of the Solicitor establish and implement new policies, procedures, and practices to ensure that financial assistance agreements are reviewed by the Solicitor for legal sufficiency and that the Solicitor's basis for approval is thoroughly explained.

Interior's Response: Concur.

The draft audit finds that the Office of the Solicitor provided conflicting advice in connection with the cooperative agreement and recommends that the Solicitor's Office adopt new policies, procedures, and practices to address this concern. We respond to this finding and recommendation in the two subsections below.

A. The Solicitor's Office provided consistent legal advice.

In addition to its finding that the cooperative agreement lacked supporting legislative authority, the draft audit finds that "USBR's award of the cooperative agreement to KWAPA was facilitated by conflicting advice provided by the Office of the Solicitor." Draft Audit at 10. The draft particularly focuses upon a November 18, 2003 email from a Solicitor's attorney allegedly stating that "USBR did not have direct legal authority for water acquisition activities under its water bank program" in place at that time. Id. According to the draft audit report, "[t]he same attorney later contradicted his own conclusion by determining that USBR had legal authority for its cooperative agreement with KWAPA to administer the WUMP, even though it included the same type of water acquisition activities that were previously deemed not authorized." Id.

The 2003 email was an internal exchange within the Solicitor's Office regarding an inquiry from Reclamation as to whether it had the authority to directly acquire water. The email in its entirety stated:

From: Sent: To: [name/email address redacted]

Sent: Tuesday, November 18, 2003 9:12 AM

To: [name/email address redacted]

Cc: [name/email address redacted]

Subject: Klamath Project-Water Acquisition

[Name redacted], I was just informed that this subject will be on the agenda for the noon Pacific time call on Klamath. My concern is that Reclamation does not have direct authority to acquire water. The water bank has used the Enhancement Act feasibility authority to date calling it a pilot project.

I have recommended to Reclamation for some time now that they need to secure permanent authority for the water bank to ensure its continuation.

Also, in limited circumstances, Reclamation can use section 14 of the 1939 Reclamation Project Act and the Fish and Wildlife Coordination Act. I do not see how the water bank fits within these authorities. The purpose of the water bank is to allow the project to meet its ESA requirements for continued operation of the Project. The Water Bank water is not for environmental purposes per se. Occasionally, the ESA is cited for authority to acquire water. The relevant section provides authority for the Secretary to acquire land or waters or interests in land or waters for ESA purposes. The water bank is not directly for ESA purposes, rather it is for Project purposes. I am also not aware that Reclamation has been delegated authority under this section of the ESA.

Are you available for today's Klamath call to discuss this issue? If you would like to discuss it prior to the meeting/call, please let me know. I would be interested to know whether you or [name redacted] have taken a different view, ie, that Reclamation can use some or all of these authorities to acquire water in similar circumstances, ie, water necessary to satisfy requirements of an ESA BO for continued project operations.

Thank you. [Name redacted]¹³

(emphasis added).

When read in its broader context, this email is not inconsistent with the attorney's subsequent conclusion in 2008 that the FWCA and the Enhancement Act provided statutory authority for the cooperative agreement. First, the key issue of concern addressed by the email was whether Reclamation had direct authority to acquire water for ESA purposes. As stated at the end of the email, the specific issue that prompted the exchange was whether "Reclamation can use some or all of these authorities to acquire water in similar circumstances, ie, water necessary to satisfy requirements of an ESA [biological opinion] for continued project operations." At that time, it appears Reclamation did not have such authority.

¹³ Consistent with these redactions, we would request a redaction in the names listed in the legal review form attached as Appendix 5 to the draft audit, to the extent that form is attached to the final audit.

The delegation of authority to Reclamation under the FWCA that was in place in 2003 did not authorize Reclamation to directly acquire water for the benefit of fish and wildlife; rather, it only authorized Reclamation to provide assistance for such purposes through cooperative agreements. See 255 DM 14.1 (effective April 25, 1996) (“14.1 Delegation. The Commissioner, Bureau of Reclamation, is delegated so much of the authority of the Secretary under the Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq., as is necessary to provide assistance, through grants or cooperative agreements, to public or private organizations for the improvement of fish and wildlife habitat associated with water systems or water supplies affected by Reclamation projects.”). It was only in 2010 that Reclamation was delegated authority to “either directly or by providing financial assistance to non-Federal parties” to “acquire or lease water or water rights from willing sellers or lessors” pursuant to the FWCA. See 255 DM 1.1.B(2) (effective Oct. 5, 2010). Thus, it was entirely appropriate for the attorney to conclude in 2003 that Reclamation did not have authority to directly acquire water under the FWCA for ESA purposes.

Second, the question of Reclamation’s authority to directly acquire water is not even particularly relevant to the present issue. To begin with, the WUMP involves cooperative assistance, not the direct acquisition of water. The program therefore falls under 1996 delegation to the Commissioner of “so much of the authority of the Secretary under the [FWCA] as is necessary to provide assistance, through grants or cooperative agreements, to public or private organizations for the improvement of fish and wildlife habitat associated with water systems or water supplies affected by Reclamation projects.” Further, the WUMP is technically not even a water acquisition program, but is instead a program to make more project water available to meet ESA and project needs through land idling and substitute groundwater supply agreements. Reclamation did not technically “acquire” any water under the program, thus bringing it outside of the scope of the issues addressed by the 2003 email.

Third, the email is inconclusive regarding the relationship of the 2003 water bank to the ESA. Granted, the sentence quoted from the 2003 email in the draft audit report states: “The water bank is not directly for ESA purposes, rather it is for Project purposes.” However, the draft audit report fails to include other language from the email stating: “The purpose of the water bank is to allow the project to meet ESA requirements for continued operation of the project.” The omitted language suggests that the water bank served both ESA and project purposes, thus negating any suggestion that the email conclusively stated that the water bank did not benefit fish and wildlife.

Finally, the attorney did not conclude in the 2003 email that the Enhancement Act failed to provide sufficient legal authority for the water banking program then in place. Rather, the attorney stated: “The water bank has used the Enhancement Act feasibility authority to date calling it a pilot project. . . . I have recommended to Reclamation for some time now that they need to secure permanent authority for the water bank to ensure its continuation.” This language merely suggests that a feasibility study does not provide “permanent authority for the water bank,” but does not question whether the 2003 water banking program then qualified as a feasibility study under the statute. Thus, when Reclamation in 2008 proposed to continue the feasibility study being implemented through the existing water bank, albeit through a cooperative agreement rather than by running the program itself, the attorney’s suggestion that the Enhancement Act continued to provide additional authority for the proposed agreement was not inconsistent with his prior email.

For all these reasons, the Solicitor's Office review of the 2008 agreement was not inconsistent with the 2003 email. Rather, that email was sent five years earlier on a different topic – namely, whether Reclamation had direct authority to acquire water under the FWCA to meet ESA requirements rather than whether Reclamation could provide cooperative assistance under the FWCA to increase water supply available for ESA compliance. The email was intended to further discussion within the Solicitor's Office as to the appropriate advice to provide the agency on its question of directly acquiring water for ESA purposes. It was not providing legal advice to the agency. As discussed above, the fish and wildlife benefits provided by the cooperative agreement provided sufficient authority for approval of the agreement in the different factual context presented by the proposed agreement in 2008.

- B. Existing procedures provide for sufficient legal review of financial assistance agreements by the Office of the Solicitor.

In connection with its finding of conflicting advice provided by the Office of the Solicitor, the draft audit report recommends that the Solicitor establish new policies and procedures to require all financial assistance agreements to be reviewed and approved by the Solicitor's Office with thorough explanations of the legal reasoning. The Solicitor's Office is committed to providing timely and accurate legal advice to the Department and bureaus and is already in compliance with this recommendation.

The Department has established a legally appropriate risk-based process for managing the legal review for financial assistance agreements. *See* Departmental Manual, 505 DM 2, Grants Administration, Procurement Contracts, Grant and Cooperative Agreements. This policy states:

2.6 . Policy Consistent with the Federal Grant and Cooperative Agreement Act and the guidance provided in this DM chapter, bureaus and offices will determine and use the appropriate instrument (i.e., procurement contract, grant agreement, or cooperative agreement) when acquiring property and services or in providing financial assistance. Files should be documented, with justification of the appropriate financial assistance instruments. Bureaus are encouraged to seek advice from the Office of the Solicitor on the selection of an award instrument, as needed. Bureaus will conduct periodic reviews to ensure compliance with this policy and will use the following criteria when determining to use a procurement contract, grant agreement or cooperative agreement . . .

(Emphasis added). Section 2.8.D. of the Departmental Manual further provides:

D. Office of the Solicitor. The Office of the Solicitor (SOL) will assist bureaus and offices with legal questions which may arise as the result of implementing the Act, the OMB guidance, and the provisions of this issuance, normally within seven (7) workdays. Cooperative agreements and grant awards, issued under well-established programs, do not require SOL review, unless requested. However, SOL will assist bureaus in review or development of new programs or policies affecting future allocations of financial assistance awards, including grants and cooperative agreements. SOL will review and advise the bureau or office, upon request, if a proposed cooperative agreement or grant is of such complexity or

novelty or exhibits intellectual property issues or potential conflicts of interest, or other such concerns to warrant legal review.

(emphasis added). Finally, Section 2.8.E(5) of the Manual states:

Bureaus and Offices. Heads of bureaus and offices will identify the actions required to carry out the policies, procedures, and guidelines established in this issuance and designate those officials responsible for them. Necessary actions include, but are not limited to:

....

(5) Obtaining review by SOL of proposed cooperative agreements and grants, regardless of dollar amount, when review is advisable because of complexity, novelty, intellectual property issues, potential conflicts of interest, or other such concerns to warrant legal review. Cooperative agreements and grant awards issued under well-established programs do not require SOL review, unless requested. However, bureaus will seek legal advice from SOL in the review or development of new programs or policies affecting future allocations of financial assistance awards, including grants and cooperative agreements.

(emphasis added).¹⁴

The Solicitor's Office legal reviews for financial assistance documents follow this Departmental process.

Furthermore, the Solicitor's Office has established procedures and practices to standardize the legal review of financial assistance agreements since the reported legal reviews identified in the draft audit report. For example, working with the Department, the Solicitor's Office has developed an Acquisition and Assistance Legal Review Form for the purpose of documenting the legal reviews. There are specific sections on the form to designate both cooperative agreements and grants. This form was most recently updated in October 2015. Pursuant to Departmental policy, this electronically fillable form is the required document for Departmental and bureau employees to seek legal review of financial assistance documents. *See* DOI-AAAP-0075, Legal Review of Contract Actions (March 2, 2016). This form was widely used long before it became mandatory.

¹⁴ Separate from these policies, the Reclamation Manual, Directive and Standards, ACM 01-01, Requirements for Award and Administration of Financial Assistance Agreements (Grants and Cooperative Agreements), provides:

(7) Legal Review. Legal review shall be obtained within 7 working days for all proposed financial assistance awards or modifications when review is advisable due to such issues as the complexity, novelty, intellectual property issues, potential conflicts of interest, questions on the applicability of a statutory authority, or other matters that may benefit from a solicitor's review. As the GO has legal responsibility for the agreement, a legal review may be required prior to award at the GO's discretion. (emphasis added).

In addition to developing a form for requesting and documenting legal reviews of financial assistance matters, the Solicitor's Office created a procurement attorneys working group several years ago. This working group meets on a regular basis to share information about this specialized area of practice, to standardize our legal advice, and to coordinate legal matters. In this forum, for example, the Assistant Solicitor – Acquisition and Intellectual Property routinely provides guidance to the attorneys who practice in this area on developments in the law and Departmental policy and procedures such as the need to use the fillable electronic form to receive requests for legal reviews and to document legal advice.

Responsible Official: Deputy Solicitor for General Law

Target Implementation Date: Not Applicable

Appendix 8: Status of Recommendations

Recommendation	Status	Action Required
I, 2, and 3	Unresolved and not implemented	<p>DOI: Reconsider recommendations and provide a plan for completing the action, including target dates.</p> <p>OIG: Refer recommendations to the Assistant Secretary for Policy, Management and Budget for resolution.</p>

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