

Whistleblower Comments on Response to Allegations –  
OSC Files DI-15-2383 and DI-15-2452

Todd Pederson and Keith Schultz, the complainants in OSC Files 15-2383 and DI-15-2452, through their undersigned attorney, jointly file these comments on the Bureau of Reclamation's (BOR) letter response to their whistleblower allegations, dated July 6, 2016, and the accompanying Office of Inspector General "Special Report -- Review of a Cooperative Agreement between the Bureau of Reclamation and the Klamath Water Power Agency," dated March 2016 (hereinafter "OIG Special Report"). These comments are filed pursuant to 5 U.S.C. § 1213(e)(1). Complainants were granted an extension of time until August 15, 2016 to submit their comments by the OSC attorney assigned to this case, Ms. Siobhan Bradley. The consent forms for public release of these comments are attached.

As a preliminary matter, complainants note that although the BOR's letter states that it is "intended to discharge the obligation of the Secretary of Interior ... under 5 U.S.C. 1213(d)," it does not do so. The statute requires a "written report setting forth the findings of the agency head," 5 U.S.C. 1213(c), which must include, among other things, "a listing of any violation or apparent violation of any law, rule, or regulation; 5 U.S.C. 1213(d)(4), and "a description of any action taken or planned as a result of the investigation." 5 U.S.C. 1213(d)(5). The BOR report does not set forth the findings of the agency head, list legal violations or describe action taken or planned. Instead, the cover letter explains that the report is not the findings of the agency head. It claims that the accompanying OIG Special Report "was not the final OIG audit report" (although there is nothing in the report to indicate that it is not final) and that the BOR and attorneys with the Department of Interior (DOI) Solicitor's Office were still evaluating the OIG's conclusion that the challenged cooperative agreement was not legally authorized and the money spent under it was a waste of funds. The BOR letter states that BOR had not yet reached a decision on the validity of the OIG's conclusions. BOR did not present any actions that had or would be taken as a result of the investigation. Complainants were informed in a discussion with OSC personnel that because of these factors, OSC was considering this a preliminary report, and had given the BOR until September 15, 2016 to submit a final report that complies with the statutory requirements. Complainants were told that they could nevertheless take the opportunity to comment on the report, despite its preliminary nature. Complainants do so here, and reserve the right to comment on the final report to be submitted on September 15.

The OIG Special Report validates complainants' disclosure, concluding that there was no legal authority for the challenged cooperative agreement between BOR and the Klamath Water and Power Agency (KWAPA), and that the \$32.2 million spent over seven years under the agreement was a waste of funds. These conclusions, which rest on both the OIG's audit and the legal opinion of its General Counsel, are unassailable. There is no conceivable reason that the BOR should not adopt them as its final conclusions, or that OSC should accept any repudiation of them in BOR's final report. The OIG's conclusions rest on an ultimately simple and irrefutable analysis to the effect that financial assistance agreements must be specifically authorized by law, that only two of the five authorities for this agreement (the Fish and Wildlife Coordination Act and the Emergency Drought Relief Act) provide any authority for financial assistance agreements at all, and that those two laws did not authorize the activities for which funds have been expended under this assistance agreement.

While we strongly concur with the findings in the OIG Special Report, it is incomplete. The final report should identify the violations of law, include more analysis of the root causes of the BOR's illegal conduct, and identify the culpable actors, which in turn would inform the final report's delineation of remedial actions as required by 5 U.S.C. 1213(d)(4). As explained below, there has been a violation of the Anti-Deficiency Act which appears to be knowing and willful. Appropriate action under that law should be taken, including disciplinary action against the responsible parties, a referral to the Justice Department for possible criminal prosecution, and the mandated reports to the President and Congress. The complainants would make themselves available to assist the BOR in identifying the responsible parties. We also suggest below some additional remedies to correct the misconduct and prevent its recurrence.

### Root Causes and Culpability for the Illegal Conduct

The OIG Special Report appears to trace the approval of the illegal assistance agreement to contradictory legal advice from the BOR's Southwest Regional Solicitor's Office. However, we believe the problems at BOR, and the culpability for the illegal conduct, extend much further.

Prior to the challenged assistance agreement, from 2001 to 2007, BOR had operated a water bank program to augment water for irrigators from the Klamath Project by contracting with Klamath Project irrigators to idle lands, irrigate using groundwater pumping, or pump well water into irrigation canals for others to use. BOR expended at least \$30 million under this program. These are the same activities that were transitioned to KWAPA under the challenged assistance agreement in 2008. OIG Special Report, p. 3. The water bank program was claimed to be authorized under two of the same authorities as the KWAPA agreement – the Enhancement Act and the Fish and Wildlife Coordination Act. *Id.* pp. 5-6. As the OIG notes, a BOR Southwest Regional Solicitor's Office attorney had expressed concern about using these authorities for the water bank program, because the BOR did not have the authority to acquire water, and the BOR's claim that the water bank program was a "pilot project" authorized under the Enhancement Act, if it was ever legitimate, certainly could not have justified the water bank program over its seven year duration. *Id.* at 6. In addition, no report of the results of the purported "pilot project" was ever produced. *Id.* at 3. With regard to a possible authorization under the Fish and Wildlife Coordination Act, the Solicitor's Office attorney concluded that the water bank program could not fit under that authority, because it was not intended to benefit endangered species, but rather project irrigators. *Id.* at 3. Instead of ceasing the water bank program due to the lack of legal authority, it was continued for seven years, and then the program was continued another seven years under the agreement with KWAPA, now called the Water Users Mitigation Program (WUMP).

The OIG Special Report uses this analysis to conclude that the same Solicitor's Office attorney contradicted his earlier legal opinion when he signed off on the KWAPA agreement, which authorized the same activities under the same discredited authorities. However, this analysis also shows that the BOR's earlier water bank program, and the expenditure of at least \$30 million under it, was also illegal. BOR's illegal expenditures to obtain additional water for Klamath Project irrigators is a far more long-standing practice what is reflected in the KWAPA agreement. BOR has been providing illegal financial assistance to Klamath Project irrigators

since 2001, and responsibility must be assigned to all of those who approved and administered these programs for 14 years. The BOR's final report should address the illegality of the water bank program and propose remedies to hold those responsible accountable, to prevent future similar illegal conduct, and to liquidate the obligation for the illegal expenditures in accordance with the Anti-Deficiency Act.

Moreover, the responsibility for the illegal KWAPA agreement cannot be laid solely at the feet of one attorney in the Solicitor's Office who signed off on its legality despite his earlier opinion with regard to the water bank program that the same functions could not be justified under the same authorities. Reclamation officials, despite having been warned by the Solicitor's office that the water bank program was not legally justified, colluded to create an outside entity to continue the water bank program and its financial assistance to Klamath Project irrigators under the guise of a new and different program purportedly involving a "feasibility study" to "allow[] stakeholders to develop market-based approaches to developing groundwater supplies and other innovative means of providing Project water supplies." Assistance Agreement, Sec. A.2. Evidence submitted by the complainants to OSC demonstrates that Reclamation officials essentially offered the assistance agreement to the principals of the future KWAPA before it even existed. Even at the time the assistance agreement was entered, KWAPA had only existed for a few months as a Board of Directors, with no staff, no office space and no other infrastructure or equipment, all of which was subsequently funded by the assistance agreement. In other words, BOR worked with the forerunners of KWAPA to create a vehicle to continue its illegal water bank activities. While KWAPA continued the water bank's functions of providing resources to Klamath Project irrigators through payments for land idling, purchasing groundwater and other means, no feasibility study was ever conducted and no "market-based approaches" ever identified. Before OSC directed an investigation of this matter, BOR's Acting Regional Director expressed an intent to continue the KWAPA agreement through 2023, *see* OIG General Counsel Memo, p. 6 & n. 6, knowing full well that a "feasibility study" would never be completed. Those who approved, awarded and administered the assistance agreement were all well aware that its purported purpose was a sham intended as a cover for continuing the illegal water bank program, while creating a generously but illegally funded outside entity serving Project irrigators.

The OIG Special Report references documents which demonstrate that BOR officials were well aware that the purported legal authorities for the KWAPA agreement did not in fact apply, but then fails to draw the logical conclusion that these officials knowingly and intentionally violated the law. For example, the OIG Special Report quotes a May 2015 Briefing Memorandum from the BOR Acting Area Manager, which, while paying lip service to the idea of a "feasibility study," recognized the true purpose of the KWAPA agreement:

The WUMP is a program utilized by the KBAO [Klamath Basin Area Office] to bridge annual gaps between Project water supply and irrigation demand.

OIG Special Report, p. 4.

Reclamation officials were also well aware that the assistance agreement did not benefit fish and wildlife, as claimed to justify authorization under the Fish and Wildlife Coordination

Act. As the OIG Special Report points out, the 2012 biological assessment for the Klamath Project, with which Reclamation officials were certainly familiar, states:

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.

*Id.*, p. 6.

As an example, the Biological Opinion for Tule Lake requires BOR to maintain minimum lake elevations independent of the WUMP. Tule Lake is within one of the National Wildlife Refuges in the Klamath Project which are claimed to be benefitted by the assistance agreement. These minimum lake elevations must be maintained prior to and during any water supplementation activities for irrigation by the WUMP.

The Assistance Agreement did not serve a public purpose and damaged the environment.

Under the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §6301-6308, the principal purpose of a financial assistance agreement such as the one with KWAPA is to provide funds to a grant recipient to “carry out a public purpose of support or stimulation authorized by a law of the United States.” 31 USC § 6304(1) (emphasis added). While the OIG Special Report addresses the fact that the agreement is not authorized by law, it does not address the fact that the assistance agreement also funded a program which did not serve a public purpose. As the OIG found, the purported public purpose, to benefit fish and wildlife, was not actually served by the expenditures under the agreement.

[T]he agreement contained no provisions for ensuring that KWAPA’s payments would be for the protection or other benefit of fish and wildlife, and we found little evidence that they actually resulted in any such benefits. Rather, the benefits flowed to the payment recipients.

OIG Special Report, pp. 1-2.

Not only did the expenditures under the agreement (as well as the water bank program before it) not benefit fish and wildlife, they actually harmed fish and wildlife, as well as the general public interest in finding solutions to the ongoing problem of water scarcity in the Klamath Basin. While the assistance agreement and the water bank program provided a short-term bail-out to Klamath Project irrigators by providing them water or money, the excessive pumping of groundwater for a short-term fix reduced the total amount of water in the Basin and worsened the long-term problem. As the whistleblowers’ disclosure and the OIG Special Report notes, some of the money under the agreement was spent to pay individuals and local entities to deepen or drill new wells, necessitated by the lowering of the water table due to excessive pumping. OIG Special Report, p. 9. This reduction of the amount of water in the Klamath Basin system was also detrimental to the fish and wildlife which depend on that water. OSC’s report to Congress and the President should explain that BOR not only expended tens of millions of

taxpayer dollars on the water bank program and the WUMP illegally, but that these expenditures only served to worsen the water scarcity problems in the Klamath Basin, harm the environment, and divert large amounts of time and money from the work needed to find long-term solutions to water scarcity.

Further demonstrating that the expenditures under the assistance agreement were not intended to benefit fish and wildlife, the BOR never solicited its own Klamath Area Basin Office Fisheries Resources Division to study how the WUMP did or did not benefit fish and wildlife or National Wildlife Refuges. The BOR apparently had no interest in exploring that question because it knew there was no benefit to fish and wildlife or Refuges.

The lack of public purpose for the contract is further highlighted by the fact that it did not even benefit all irrigators in the Klamath Basin, much less the larger public interest. The KWAPA Board of Directors was made up entirely of Klamath Project irrigators. Non-Klamath Project irrigators within the Klamath Project boundary and adjacent to the Klamath Project (those who do not have water rights associated with the Klamath Project) were not eligible to be applicants for benefits through the WUMP, as implemented by KWAPA.

#### Violation of the Anti-Deficiency Act

The OIG Special Report did not address the fact that the expenditures under the KWAPA assistance agreement, as well as the earlier water bank program, violated the Anti-Deficiency Act, which forbids any officer or employee of the United States Government to “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. 1341(a)(1)(A). Because the OIG found that the funds expended under the assistance agreement were not authorized by law, and therefore not covered by any appropriation, it should have found that the Anti-Deficiency Act had been violated. The same would apply to the earlier expenditures under the water bank program. The Act provides that officers or employees who violate it are subject to discipline, including suspension without pay or removal from office. 31 U.S.C. 1349(a). Knowing and willful violations are subject to criminal penalties of a fine of up to \$5,000 or imprisonment for up to two years. 31 U.S.C. 1350. In addition, the head of an agency where a violation was committed must “report immediately to the President and Congress all relevant facts and a statement of actions taken.” The report is also to be transmitted to the Comptroller General. 31 U.S.C. 1351.

The Office of Management and Budget (OMB) has provided requirements for Anti-Deficiency reports. The agency head is to transmit a letter to the President through the Director of OMB. If it is suspected that the violation was knowing and willful, the letter must state the agency has submitted information to the Department of Justice. OMB Circular A-11 (2016), Sec. 145.7. The report must include the time and amount of the violation, the identity of the officer or employee responsible for the violation, all of the facts pertaining to the violation, a statement of administrative discipline or other actions taken with regard to the responsible officers or employees, a statement regarding the adequacy of administrative control prescribed by the agency, and a statement regarding any additional action taken, including new safeguards to prevent a recurrence of that type of violation. In addition to the President, the report must also be sent to the Speaker of the House of Representatives and the President of the Senate. *Id.* In

addition, when funds are expended in violation of the Anti-Deficiency Act, the agency must liquidate the obligation by requesting an appropriation from Congress or, if legally available, transferring funds from elsewhere in the agency's budget. *Id.* Sec. 145.10.

BOR's final report must direct that the required report under the Anti-Deficiency Act be prepared and submitted to the President and Congress, in the form required by OMB. BOR must identify those officers or employees responsible for the Anti-Deficiency Act violation and impose appropriate administrative discipline as well as make a referral to the Department of Justice for criminal prosecution, since the violations appear to be knowing and willful. Measures to liquidate the obligation must be taken.

#### Additional remedies

The complainants suggest the following additional remedies to address the BOR's legal violations and to prevent a repetition of this type of illegal behavior. The long-standing and far-reaching illegal behavior found here, which both wasted tens of millions of dollars and harmed the environment and long-term water availability in the Klamath Basin, necessitates the imposition of effective training and controls to prevent a recurrence, as well as measures to mitigate the environmental damage.

1. Prior to submission of any contract, cooperative agreement or grant, the project manager must submit a detailed analysis of how the legal authority applies to the activity(s).
2. Within one year, all current and future hires for BOR Mid-Pacific Region upper management (defined as Area Managers and above) are to attend 40 hours of in-person acquisition training tailored to upper management duties and responsibilities as it relates to acquisition and to include ethics.
3. Within one year, mandatory in-person whistleblower training shall be provided for all BOR employees.
4. Within one month, BOR will issue a news release notifying the public of the findings of the OIG Special Report and the remedies implemented by BOR to avoid future wrongdoing occurrences.
5. A notice of the findings of the OIG's Special Report will be included in the personnel files of all Regional Managers, Deputy Regional Managers, and Klamath Basin Area Managers who were in these positions during the seven years BOR funds were allocated to KWAPA and during the seven years of the water bank program.
6. All BOR future contracts, cooperative agreements and grants shall contain quarterly (i.e., every three months) task, objective and goal requirements for vendors to ensure that the stated tasks of the contract, cooperative agreement or grant are being met. Vendors must submit quarterly progress reports that explain how the tasks are being met.

7. All BOR CORs (Contract Officer Representatives) and GORs (Grant Officer Representatives) shall review the vendor quarterly reports for accuracy and verify that the vendor's report is accurate. CORs and GORs shall report non-compliance, corrective actions or recommendations to management who must also report the results to the Regional Director's Office.
8. All BOR managers directly connected to contracts will review COR/GOR and vendor quarterly reports and submit reports of non-compliances to their respective Regional Directors for corrective actions to ensure contract, cooperative agreement, and grant compliance. In addition, it will be the responsibility of management to ensure each COR and GOR has a manageable workload and that no one has more contracts, cooperative agreements or grants than they can properly monitor, or which are outside of their position description.
9. BOR Mid-Pacific Region must remediate the environmental impacts of water lost to pumping from the illegally funded program by providing more resources (\$62.2 million, the approximate amount of wasted funds) for environmental protection over the next 14 years, beginning with 2017. These resources are to include additional funding for existing Klamath BOR fish biologists and additional fish biologist and river ecology staff dedicated to improving and studying fish health, abundance and ecosystem restoration within the Klamath River system, with the stipulation that BOR cannot contract this work out to any other agency
10. BOR to pay complainants' attorneys' fees.

Respectfully submitted,



Paula Dinerstein

Counsel on behalf of Todd Pederson and Keith Schultz