RIETMANN LAW, P.C.

May 14, 2021

U.S. Bureau of Reclamation
Attn: Jared Bottcher, Interim Area Manager
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, Oregon 97603

RE: KID Operations

Mr. Bottcher:

The Klamath Irrigation District ("KID") is in receipt of Reclamation's April 2, 2021 letter effectively asserting that any diversion of water by KID contrary to BOR directives is a violation of KID's 1954 contract. We are also in receipt of Reclamation's May 12, 2021 letter informing KID that Reclamation is unilaterally reinstalling the bulkheads on the A-Canal.

Reclamation maintains that KID's delivery of water contrary to Reclamation's directives would violate Article 13(b) and 13(f) of that contract captioned "Amendatory Contract Between the United States of America and the Klamath Irrigation District," dated November 29, 1954 (hereafter, the "1954 Contract"). Article 13(b) of the 1954 Contract provides that KID will assume Reclamation's water delivery obligations under certain contracts with third parties listed in Exhibit A and will "carry out . . . to the satisfaction of the Secretary, all the obligations imposed upon the United States" by those contracts. Article 13(f) provides that KID will "make no water deliveries under contracts mentioned in this article at times when notified by the Secretary that the contracting parties are not entitled to delivery of irrigation water because of nonpayment of charges due the United States, or for other reasons."

1. These Contractual Provisions are Irrelevant to KID's Landowners

Neither Article 13(b) nor 13(f) is in any way relevant to KID's delivery of water to its own landowners. Articles 13(b) and 13(f) solely relate to KID's assumption and discharge of the United States' obligations to deliver water to *other* Reclamation contractors. *See* Article 13(b)("The District hereby assumes and agrees to carry out…*to the satisfaction of the Secretary,* all the obligations *imposed upon the United States by the contracts listed on Exhibit A*."); Article 13(f) ("The District agrees that it will make no water deliveries *under contracts mentioned in this article* at times when notified by the

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Secretary that the contracting parties are not entitled to the delivery of irrigation water because of nonpayment of charges due the United States, or for other reasons).

Exhibit A to the 1954 Contract lists 110 separate Reclamation contracts of which KID assumed the United States' responsibilities. *None* of these contracts are the contracts by which water is supplied to KID. KID's 1905 contract is simply not mentioned in Article 13. Reclamation plainly cannot direct KID to curtail water deliveries to its own landowners based on these provisions of KID's contract, which pertain solely to KID's performance of its water delivery obligations to third-party contractors.

2. The 1954 Contract Does Not Grant Reclamation Total Discretion to Curtail Diversions

Article 13(f) of the 1954 Contract states: "The District agrees that it will make no water deliveries under contracts mentioned in this article at times when notified by the Secretary that the contracting parties are not entitled to the delivery of irrigation water because of **nonpayment of charges due the United States, or for other reasons**." It appears Reclamation is arguing that the final clause of this sentence provides virtually unlimited authority for it to direct KID to cease water deliveries. In particular, Reclamation asserts it may direct KID to cease water deliveries so that Reclamation may meet its obligations under the Endangered Species Act. This is simply not the meaning of the contract under any reasonable interpretation.

Federal law governs the interpretation of contracts entered into pursuant to federal law and to which the government is a party. *Smith v. Cent. Ariz. Water Cons. Dist.*, 418 F3d 1028, 1034 (9th Cir. 2005). For guidance, courts look to general principles of contract interpretation in understanding a particular provision or clause. *See Kennewick Irr. Dist. v. United States,* 880 F.2d 1018, 1032 (9th Cir.1989). "A written contract must be read as a whole and every part interpreted with reference to the whole." *Shakey's Inc. v. Covalt,* 704 F.2d 426, 434 (9th Cir. 1983). "Preference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory." *Kennewick* at 1032.

Particularly applicable here are the related principles of interpretation known as *ejusdem generis* and *noscitur a sociis*. Noscitur a sociis—meaning "a word is known by the company it keeps"—has been specifically used by the Supreme Court to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Yates v. United States*, 574 U.S. 528, 543 (2015) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)); *see also Wayne Land and Mineral Grp. LLC v. Delaware River Basin Comm'n*, 894 F.3d 509, 532 (3d Cir. 2018) ("[R]ules of contract interpretation advise us to interpret the meaning of a word by considering the words associated with it."); *Alice F. v. Health Care Serv. Corp.*, 367 F. Supp. 3d 817, 825 (N.D. Ill. 2019) (describing

ejusdem generis and noscitur a sociis as "principles of contract interpretation"); Williston on Contracts, Section 32:6 and 32:10.

Here, the phrase "other reasons" does not mean literally *any* reason, and is necessarily limited by the preceding phrase "nonpayment of charges due the United States." Even a very generous and broad interpretation of the "other reasons" clause would suggest it only applies when a District for which KID is discharging the United States' delivery obligations breaches that contract. Because the goal of contract interpretation is "to discern and enforce the parties' mutual intent at the time the contract was formed," *Thor Seafood Corp. v. Supply Mgmt. Servs.*, 352 F. Supp. 2d 1128, 1131 (C.D. Cal. 2005), "other reasons" obviously could not refer to obligations of the United States under the Endangered Species Act. The 1954 Contract predates the Endangered Species Act, which was passed in 1973, by almost two decades.

Additionally, Reclamation's contention that it may deprive third-party contractors of water they are entitled to under their water rights, and then use the water to meet its ESA obligations, would render Reclamation's water delivery obligations to the third-party contractors entirely illusory. *See Kennewick*, 880 F.2d at 1032.

This interpretation would also suggest that Reclamation and KID were empowered to modify or amend the terms of other District's contracts. Reclamation has presented no authority suggesting that was either the intended effect of the "or for other reasons" clause or that it would be legally permissible for other contracts to be amended without the consent or knowledge of the parties thereto. This interpretation flies in the face of both basic contract law and common sense.

The third-party contractors KID is being directed to curtail own private water rights entitling them to make beneficial use of live flow and/or stored water in Upper Klamath Lake reservoir ("UKL"). These contractors have entered into contracts with Reclamation for delivery of the water they own the rights to beneficially use. Whether the "other reasons" provision of KID's contract authorizes KID to curtail water deliveries to third-party contractors therefore depends on the terms of the contract between the third-party contractors and Reclamation, which KID has assumed.

KID's obligation to deliver water to third parties is identical to the obligations KID assumed under Reclamation's contracts. Therefore, whether "other reasons" exist for Reclamation to direct KID not to deliver water to third parties is dictated by the terms of those incorporated contracts between Reclamation and the various third parties. As Reclamation has previously acknowledged, at least some of these third-party contracts leave Reclamation with no authority to deny water deliveries. For example, Reclamation has previously admitted:

> The recognition by the United States of Van Brimmer's right to the perpetual use of 50 second-feet of water in Article 15 (of Van Brimmer's contract) prevents Reclamation from curtailing water deliveries below that amount. Article 20 provides further evidence of the understanding that the United States is obligated to deliver 50 second-feet of water by stating that the United States is not obligated to deliver more than that amount of water. The specific acknowledgement by the United States of Van Brimmer's right to 50-second-feet in Article 15 provides no discretion for Reclamation to reduce the amount of water which Reclamation must deliver.

What is more important than Reclamation's prior admissions, however, is the fact that *none* of these contracts comprehend Reclamation's ability to curtail water deliveries to meet separate obligations it might one day have under the Endangered Species Act. The majority of these contracts predate the existence of that Act by decades, and only delivery obligations that the United States has assumed since 1973 *may* have contemplated a carve-out for such purposes.

Aside from the reasons set forth above, Reclamation's proposal that the "for other reasons" language of KID's contract is really an "any reasons" clause that provides Reclamation carte blanche to curtail deliveries is contrary to other basic principles of contract interpretation. For example:

- A written contract must be read as a whole and every part interpreted with reference to the whole. Reclamation's current interpretation of KID's water delivery obligations to other contractors ignores the provisions of KID's contract providing that "[f]or lands outside the District boundaries…water shall be delivered in the quantities, at the times and at the points of diversion…as required from time to time by contractors that have executed contracts with the United States in such manner as to meet obligations which the United States has assumed under said contracts." Reclamation's interpretation also ignores all the provisions of the various third-party contractual obligations KID has assumed, which plainly impose nondiscretionary water delivery obligations.

- Articles 26 and 27 of the 1954 Contract state the United States will "use all reasonable means to guard against" a shortage in the quantity of water, and that both parties must "exercise due diligence to remove" their inability to fulfill a contractual obligation due to an "uncontrollable force." While the United States does not have any control over how much precipitation falls in the Klamath Basin, the United States has many reasonable means to guard against shortfalls in water, including not flushing stored water down the Klamath River without first acquiring water rights permitting such a release. Put differently, while the United States may not be able to increase the overall quantity of water available,

it *can* control whether there is a "shortage" of needed water under the contracts, by either acquiring water rights or compensating farmers for the agreement not to exercise their rights. This would prevent there from being a shortage in a given year. Where the United States elects not to do this, and to simply flush stored water down the Klamath River, it is in fact creating a shortage of Project water in violation of the 1954 Contract.

3. Section 9 of ESA does not authorize Reclamation to preemptively curtail KID diversions

Section 9 of the Endangered Species Act also does not provide Reclamation with the ability to act pre-emptively. Instead, "the Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured." *Babbitt v. Sweet Home Chapter of Comm. for a Great Oregon*, 515 U.S. 687, 703 (1995). "The § 7 directive applies only to the Federal Government, whereas the § 9 prohibition applies to 'any person.' Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that § 9 does not replicate, and § 7 does not limit its admonition to habitat modification that 'actually kills or injures wildlife.'" *Id.*; *see also Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1095 (E.D. Wash. 2006) ("This 'after-the-fact enforcement' does not prevent threats to listed species; that task is accomplished through § 7."). Whatever Section 9 liability *might* arise from water rights holders exercising their water rights and requiring KID to perform its non-discretionary water delivery obligations, it does not provide a lawful basis for KID—or Reclamation—to refuse to fulfill its contractual obligations. The existence or non-existence of Section 9 liability is inherently an after-the-fact question which neither KID nor Reclamation has a contractual right to pre-judge.

There are obvious reasons why this must be true: particularly, it is well-established that take liability under Section 9 incorporates principles of proximate cause. *See Babbitt v. Sweet Home Chapter of Comms. For a Great Oregon*, 515 U.S. 687, 700 n.13 (1995) (noting take liability is subject to the "ordinary requirements of proximate causation and foreseeability"); *Natural Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 487 (E.D. Cal. 2018) ("It is well established that principles of proximate cause apply to Section 9 claims."); *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012) ("It is well accepted that proximate cause is an element of ESA Section 9 claims."). Proximate cause is not an easy determination to make, particularly in the ESA context: "The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary. . . . Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Nat. Res. Def. Council*, 347 F. Supp. 3d at 486–87. The determination of proximate cause is a legal conclusion that a court must make upon weighing the particular facts of a case. *See Hemi Grp., LLC v. City of New York*, 559 U.S. 1 at 13–14 (2010) (noting an allegation that something "directly caused" harm is a "legal conclusion about proximate cause"); *AXIS Surplus Ins. Co. v. Intracorp Real Estate, LLC*, No. C08-1278-JCC, 2009 WL 10676292, at *6 (W.D. Wash. Nov. 19, 2009) ("The

determination of what was the efficient proximate cause of the loss is a legal conclusion, based on factual assessment."). There is no way for KID or Reclamation to conclude, in advance, both that a particular diversion of water will in fact cause a specified instance of take prohibited by Section 9, and that that instance of take was proximately caused by that particular diversion.

This is especially true where, as here, Reclamation is currently diverting massive quantities of live flow in UKL through the Link River Dam. These massive discretionary diversions, which have been occurring for some time, are the proximate cause of UKL being below the boundary conditions of the 2020 BiOp. What is more, if KID performs its nondiscretionary water delivery obligations and delivers live flow to its landowners or third-party contracts, this will only impact the elevation of UKL if Reclamation chooses to unlawfully divert stored water in UKL to the Klamath River. In such scenario, Reclamation would be the proximate cause of any drop in UKL lake elevation – not KID.

Reclamation's contention that it has authority to predetermine whether any landowner's use of water violates Section 9 of the ESA plainly violates the due process rights of water right holders in the Klamath Project. "The right to the use of water constitutes a vested property interest which cannot be divested without due process of law." *Skinner v. Jordan Valley Irr. Dist.*, 137 Or. 480, 491 (1931), *opinion modified on denial of reh'g,* 137 Or. 480 (1931). Reclamation serving as both judge and jury and depriving water rights holders of their constitutionally protected property interest in their water rights based on a pre-judgment of Section 9 liability without notice or meaningful opportunity to be heard before an impartial jury clearly violates the procedural due process rights of landowners within the Klamath Project.

Moreover, neither Reclamation nor KID is liable under Section 9 for any "take" that occurs as part of a non-discretionary legal obligation to deliver water. Federal courts have held that "that a federal agency that is legally required to take an action pursuant to federal law, such as by implementing non-discretionary terms in an otherwise valid water delivery contract, that agency cannot be the proximate cause of Section 9 take by undertaking that non-discretionary action." *Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1239 (E.D. Cal. 2017). Because, under the 1954 Contract, KID merely stepped into the shoes of Reclamation in providing these water deliveries, it cannot be *more* liable than Reclamation would be for fulfilling the same mandatory delivery obligation.

4. Reclamation reinstallation of bulkheads violates KID's 1954 contract

It is our understanding that Reclamation has physically taken control of the A-Canal headworks this morning simultaneously with the transmittal of its May 12, 2021 correspondence, by reinstalling the bulkheads in the A-Canal to make delivery of water

physically impossible.[1] Reclamation is doing this *without having even asked* KID to reinstall the bulkheads itself. This plainly violates KID's 1954 Contract, irrespective of any other issue addressed in this letter.

The fundamental purpose of the 1954 Contract was for KID to "take over operation and maintenance of certain Project works" from Reclamation, in exchange for which KID agreed to assume all of Reclamation's delivery obligations. Although the 1954 Contract allows Reclamation to "resume operation and maintenance of the transferred works" in certain circumstances—i.e., for violating the contract and failing to cure the violation for a period of one year—Reclamation does not even claim KID has violated its contract. *See* 1954 Contract, Article 21(a).

Moreover, even if KID *had* violated its contract and failed to cure it, the 1954 Contract requires specific prior notice be provided to KID:

> Prior to resuming operation and maintenance, the Secretary shall give the District written notice of his intent to exercise such option, which notice shall inform the District of the specific provisions of this contract which have been violated or the obligations that are in default, shall describe the property and works to be returned to the custody of the United States and shall name the date on which return to the United States shall be effected, which date shall be not less than sixty (60) days after the date of notice sent to the District.
>
> *See* 1954 Contract, Article 21(b).

Contrary to Article 21(b), Reclamation has: (1) resumed operational control of the A-Canal without providing sixty (60) day notice, and (2) failed to identify in its "notice" any specific provision KID has violated or is in default of. Additionally, Reclamation cannot claim that its resumption of operational control was to make an emergency repair pursuant to Article 7(d), as that is only permitted "[i]n event of major disaster to, or failure of, the transferred works, or any part thereof, which results in damage of such severity or magnitude that immediate repairs to the transferred works are imperative, in the opinion of the Secretary to protect against substantial hazard to life or property." Quite plainly, this is not that circumstance.

[1] Note that, to date in 2021, KID has not diverted any water in the A-Canal due to Reclamation's prior threats to reappropriate the irrigation works in violation of the parties' 1954 Contract.

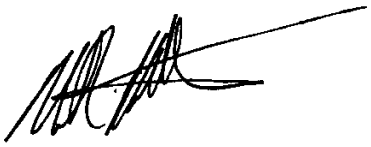
5. Reclamation is liable for all damages directly or indirectly resulting from its resumption of operational control of the A-Canal

Ordinarily, Article 21(g) protects the United States from liability for damages that directly or indirectly result from Reclamation resuming operational control of Project works "as provided in this contract." Here, however, Reclamation has not resumed operational control of the A-Canal "as provided in [the 1954 Contract]." Therefore, to the extent litigation is filed against KID due to its inability to deliver water to other contractors, Reclamation is not indemnified by the 1954 Contract from paying the costs of both defense and indemnity to KID for any damages sought by these water rights holders.

6. KID is reassuming operational control and removing bulkheads

Given all of the above, KID is resuming operational control of the A-Canal and other irrigation works under the 1954 Contract. This includes removing the bulkheads so KID may at least fulfill its obligation to deliver the 3,000 acre-feet of water referenced in Reclamation's letter when it becomes available.

Sincerely,



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