

April 4, 2024

***Via Electronic Submission Only***

Public Comments Processing  
U.S. Fish and Wildlife Service

Subject: Docket No. FWS-HQ-NWRS-2022-0106: Comments on Proposed Rule and Policy Updates Regarding National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health

Dear U.S. Fish and Wildlife Service:

On February 2, 2024, the United States Fish and Wildlife Service (Service) published the subject proposed rule and policy updates<sup>1</sup> (proposed rule/policies).89 Fed. Reg. 7345 (Feb. 2, 2024). We urge that the Service not adopt the proposed rule/policies.

First, and of specific local concern, application of the proposed rule/policies to agricultural activities on land covered by the Kuchel Act, Pub. L. No. 88-567, 78 Stat. 850 (codified at 16 U.S.C. §§ 695k-695r) would be contrary to that statute and the congressional design for continuation of commercial agricultural production on that extremely valuable cropland.

Second, and more generally, the proposed rule/policies would impermissibly establish a presumption against allowing certain activities on refuge lands nationwide rather than following the requirements of the National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (codified as 16 U.S.C. §§ 668dd-668ee) (Improvement Act), which provides that the Service may allow activities that are not specific refuge purposes, on a case-by-case basis, for each refuge, if the activity is determined to be a compatible use.

Third, various aspects of the proposed rule/policies are highly subjective or vague. The proposed rule thus proposes sweeping, self-granted power that is undefined and would invite conflict and litigation that would not serve the public interest. It is not good policy or appropriate to promulgate these broad statements and objectives as rules with legal effect.

Fourth, while the proposed rule discusses important global concerns regarding impacts to species and ecosystems, there is no clear logic explaining why the specific elements of proposed rule would address or resolve these issues or improve the conditions of concern.

---

<sup>1</sup> These comments focus primarily on the proposed rule.

Finally, we provide comments below on other, specific issues including unanalyzed impacts that must be considered.

The undersigned commenters are directly interested in these issues due to their roles in, and association with, the Klamath Project (Project), a Bureau of Reclamation (Reclamation) project authorized in 1905 under the terms of the Reclamation Act of 1902. The Project (see map at Attachment A) provides or facilitates diversion and delivery of water to approximately 210,000 acres of high-quality irrigated land in Klamath County, Oregon, and Siskiyou and Modoc Counties, California. Of this irrigated farmland, roughly 30,000 acres lies within Tule Lake National Wildlife Refuge (NWR) and Lower Klamath NWR, and there is additionally controlled grazing on land around Clear Lake, a Project reservoir, in Clear Lake NWR.

Tulelake Irrigation District (TID) delivers water to approximately 65,000 acres of land, including 15,000-16,000 acres in Tule Lake NWR that is leased for commercial agriculture. TID also operates Sumps 1A and 1B within Tule Lake NWR (which comprise 13,000 acres) and operates D Pumping Plant, which moves water from Sump 1A to P Canal and Lower Klamath NWR.

Klamath Drainage District (KDD) delivers water to approximately 27,000 acres of irrigated land in Klamath County, Oregon. This includes 6000 acres that are within Lower Klamath NWR and KDD, commonly known as Area K. The KDD-owned and operated Ady Canal is the sole means of direct diversion and delivery of water from the Klamath River to Lower Klamath NWR.

Klamath Water Users Association (KWUA) is a non-profit corporation, formed in 1953. KWUA's members are public agencies such as TID and KDD who deliver water to irrigated land served by the Project. KWUA's mission is "to preserve and enhance the viability of irrigated agriculture for our membership in the Klamath Basin, for the benefit of current and future generations."

### **Kuchel Act Lands**

A proposed new 50 C.F.R. § 29.3(d)(6) would state: "We *prohibit* the use of agricultural practices unless they are determined necessary to meet statutory requirements, fulfill refuge purposes, and ensure biological integrity, diversity, and environmental health, and where we cannot achieve a refuge management objective through natural processes." (Emphasis added.) Other paragraphs would similarly establish prohibitions for essential agricultural management tools and technologies such as pesticide use, predator control, and use of genetically modified organisms. The agricultural and other prohibitions include vague terms and matters subject to interpretation or the vicissitudes of future management objectives.

Fundamentally, however, these proposals do not reflect an awareness or understanding of the agricultural lands subject to the Kuchel Act.

The agricultural lease lands have been farmed since the time that they were uncovered from marsh and lake bottom and became productive land. The United States received and accepted title to the lands from the States of Oregon and California for that purpose and that purpose only. These lands are integral to family farm operations, regional economies, and, by contractual and statutory compromise, provide a direct source of revenue to local public agencies including irrigation districts and counties. They are within and are served by TID and KDD and share in the ongoing costs of operation and maintenance of the Project's infrastructure.

These lands also exist in areas of abundant waterfowl and wildlife. For decades, farmers planted crops, flooded fields, and created food and habitat for migrating waterfowl along the Pacific Flyway. Birds thrive on waste grain and green browse fields.

Over time, ceded and uncovered lands that were originally leased by the federal government to growers were homesteaded and transitioned into private ownership. That process continued until the early 1950s, as veterans of World War II became the last homesteaders on ceded lease lands. In the meantime, due to intense hunting pressure, executive orders established bird refuges on ceded lands, subject to continued reclamation development.

In the 1950s, there was a public debate regarding the completion of the original homesteading design. The "homesteading versus continued leasing" debate ended in 1964, with the enactment of the Kuchel Act, which prohibited homesteading and instead directed the continued leasing of specific land units within Tule Lake NWR and Lower Klamath NWR. That direction was critical to honor other legal commitments to TID, to maintain consistency with the underlying authorizations for the Project, and to ensure continued delivery of Project water.

The Kuchel Act deals with the entirety of four NWRs in the Klamath Basin covering over 146,000 acres of public lands.<sup>2</sup> The Act dedicates these four NWRs to "wildlife conservation" to be "administered by the Secretary of the Interior for the major purpose of waterfowl management, but with full consideration to optimum agricultural use that is consistent therewith." 16 U.S.C. § 6951. The Act also provides specific directions with respect to the lease lands, constituting approximately 15,000 of the 39,000 acres within the

---

<sup>2</sup> See Notice of availability, Fish and Wildlife Service issued CCP EIS – Federal Register Vol. 81, No. 237, 89138 (Dec. 9, 2016); U.S. Fish and Wildlife Service, Lower Klamath, Clear Lake, Tule Lake, Upper Klamath, and Bear Valley National Wildlife Refuges - Final Comprehensive Conservation Plan/Environmental Impact Statement (Dec. 2016) (hereinafter referred to "CCP/EIS") at 1-25, *id.* at 4-31 & 4-37.

Public Comments Processing, U.S. Fish and Wildlife Service

RE: Docket No. FWS-HQ-NWRS-2022-0106: Comments on Proposed Rule and Policy Updates Regarding National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health

April 4, 2024

Page 4

Tule Lake NWR, and 6,000 of the 51,000 acres within the Lower Klamath NWR. *See* CCP/EIS at 1-25 and Federal Register Vol. 81, No. 237, 89138. Specifically, the “Secretary shall, consistent with proper waterfowl management, continue the present pattern of leasing [the lease lands].” 16 U.S.C. § 695n. Congress chose continued leasing, rather than homesteading, as the land management strategy that would be consistent with waterfowl management goals.

After passage of the Kuchel Act, Congress enacted statutes governing the management of refuge lands generally within the National Wildlife Refuge System, including the National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (Administration Act), as amended by the Improvement Act. Acting under those laws in December 2016, the Service issued the Final Comprehensive Conservation Plan/ Environmental Impact Statement for the Lower Klamath, Clear Lake, Tule Lake, Upper Klamath, and Bear Valley NWRs. Subsequently, on January 13, 2017, the Regional Director for the Pacific Southwest Region of the Service signed the Record of Decision.

The CCP incorporated consistency determinations for continued agricultural practices on the lease lands. These determinations were subject to four legal challenges, in which the Service prevailed on all issues.<sup>3</sup>

Soils on the lease lands are among the best in the world for crop production. Agricultural production on irrigated lease lands produces \$30 million in crop value annually, and supports hundreds of jobs, local businesses, and local governments, all while providing food, cover, water, and open space for waterfowl and other wildlife. In addition, lease land farming incorporates innovative management strategies such as the successful “walking wetlands” program and other actions that have become models for other areas; these activities are possible only if the agricultural operations are economically viable. Finally, parts of Lower Klamath NWR and Clear Lake NWR are managed for grazing under the Kuchel Act. Ranching on Clear Lake NWR lands dates to the latter 18th century.

Any alteration in management of the Kuchel Act lands would result in negative economic, socioeconomic, and environmental impacts.

Attachment B to this letter provides a more comprehensive discussion of the history and management of the so-called “lease lands” on Project-related refuges, including under the Kuchel Act and Improvement Act.

---

<sup>3</sup> *Tulelake Irrigation Dist. v. United States Fish & Wildlife Serv.*, 40 F.4th 930 (9th Cir. 2022); *Audubon Soc’y of Portland v. Haaland*, 40 F.4th 917 (9th Cir. 2022); *Audubon Soc’y of Portland v. Haaland*, 40 F.4th 967 (9th Cir. 2022).

In recent informal discussions, Service personnel have indicated that they do not believe the proposed rule/policies would apply to the lease lands or would not lead to management changes. We support that the proposed rule/policies should be irrelevant to Kuchel Act lands specifically. However, agriculture is treated as a “use” of Kuchel Act lands that must be considered and approved in compatibility or consistency determinations. Accordingly, and for additional reasons discussed later, the proposed rule/policies should not and cannot be adopted for the Kuchel Act lands.

### **Presumptions Inconsistent with Improvement Act**

The Improvement Act establishes a comprehensive, defined, and consistent process that controls the Service’s decisions to allow or disallow a use on a refuge. In general, the Service may allow a use if it is determined to be compatible with refuge purposes. 16 U.S.C. § “Compatible” means that a use “that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” 16 U.S.C. § 668ee; 50 C.F.R. § 25.12(a). The Improvement Act directed the Service to publish regulations establishing the process for determining whether a use of a refuge is a compatible use, and identified ten specific requirements related to the regulations that were to be promulgated. 16 U.S.C. § 668dd(d)(3)(B). Those regulations exist, and since their publication in 2000, have been relied upon to make required compatibility determinations, commonly in concert with the development of CCPs.

The proposed rule/policies would bypass the Improvement Act’s required process. Based on a general directive to “ensure the biological integrity, diversity, and environmental health of the [refuge] System are maintained, 16 U.S.C. § 668dd(a)(4)(B), the Service would establish prohibitions on certain activities that would apply *unless* (for example) the activity was “determined necessary to meet statutory requirements, fulfill refuge purposes, and ensure biological integrity, diversity, and environmental health, and where we cannot achieve a refuge management objective through natural processes.”

In other words, instead of allowing a use that meets the criteria for compatibility, the proposed rule/policies would disallow uses unless the activity meets a completely different set of criteria than those that are applicable to compatibility determinations. This would be improper.

### **Lack of Specificity or Relationship Between Stated Objectives and the Proposed Rule/Policies**

The “management objectives” in the proposed new Code of Federal Regulations, title 50, section 29.3(c) are broad statements of policy or management philosophies that are proposed for codification as legal requirements. In these general, subjective narratives, the Service appears to confer unbounded authority and discretion on itself. These provisions

would foster conflict and almost certainly trigger litigation by parties who contend that specific actions or inactions by the Service fail to carry out the legal mandates. Congress did not establish the stated commitments and it is not good policy or in the public interest to promulgate regulations of this sort.

The “management activities and uses” in the proposed new Code of Federal Regulations, title 50 section 29.3(d) are similarly broad in some respects but consist of prohibitions. The Service has not provided any explanation of *how* these prohibitions would accomplish stated purposes of the proposed rule.

### **Other Specific Comments**

#### *Pesticides, Predator Control*

Refuges in our region are subject to formally adopted plans for integrated pest management (IPM), under which chemical controls (including organic pesticides) are allowed only under a strictly applied pesticide use proposal process. The proposed rule would seemingly overlay that time-tested, effective process with a new prohibition that would serve no identifiable purpose other than the expression of policy preferences that do not relate to real-world land and water management.

There is a history of negative impacts resulting from failure or inability to employ timely and effective weed and pest management prevention or controls on the refuges in our area. We have witnessed ditch banks and dikes becoming carpeted with noxious weeds, and damage to crops and wildlife due to inadequate pest prevention and control. These conditions are not only detrimental on the refuges, but they also make a bad neighbor of the Service as seeds and pests move from the refuges to private lands.

In the summer of 2023, astounding numbers of grasshoppers hatched on Lower Klamath NWR and invaded private lands in the region, doing severe crop damage with lost revenue estimates being as high as \$100 million or more. The Service was unable to take any management action to control the outbreak. We are hopeful that spraying will be possible to combat the anticipated grasshopper surge in 2024.

We support IPM. We are extremely concerned that there not be a new, uncertain bar that must be cleared in order to implement IPM in a timely and effective manner.

#### *Genetically Engineered Organisms*

The proposed ban on use of genetically engineered organisms is not based on science. It would, to our knowledge, be inconsistent with other federal agencies’ consideration and

Public Comments Processing, U.S. Fish and Wildlife Service

RE: Docket No. FWS-HQ-NWRS-2022-0106: Comments on Proposed Rule and Policy Updates Regarding National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health

April 4, 2024

Page 7

approval of this tool. We anticipate, and support, comments by the American Farm Bureau Association.

Thank you for your consideration of these comments.

*s/ Bill Walker*

\_\_\_\_\_  
Board President  
Klamath Drainage District  
P.O. Box 1090  
Klamath Falls, OR 97601

*s/ Tracey Liskey*

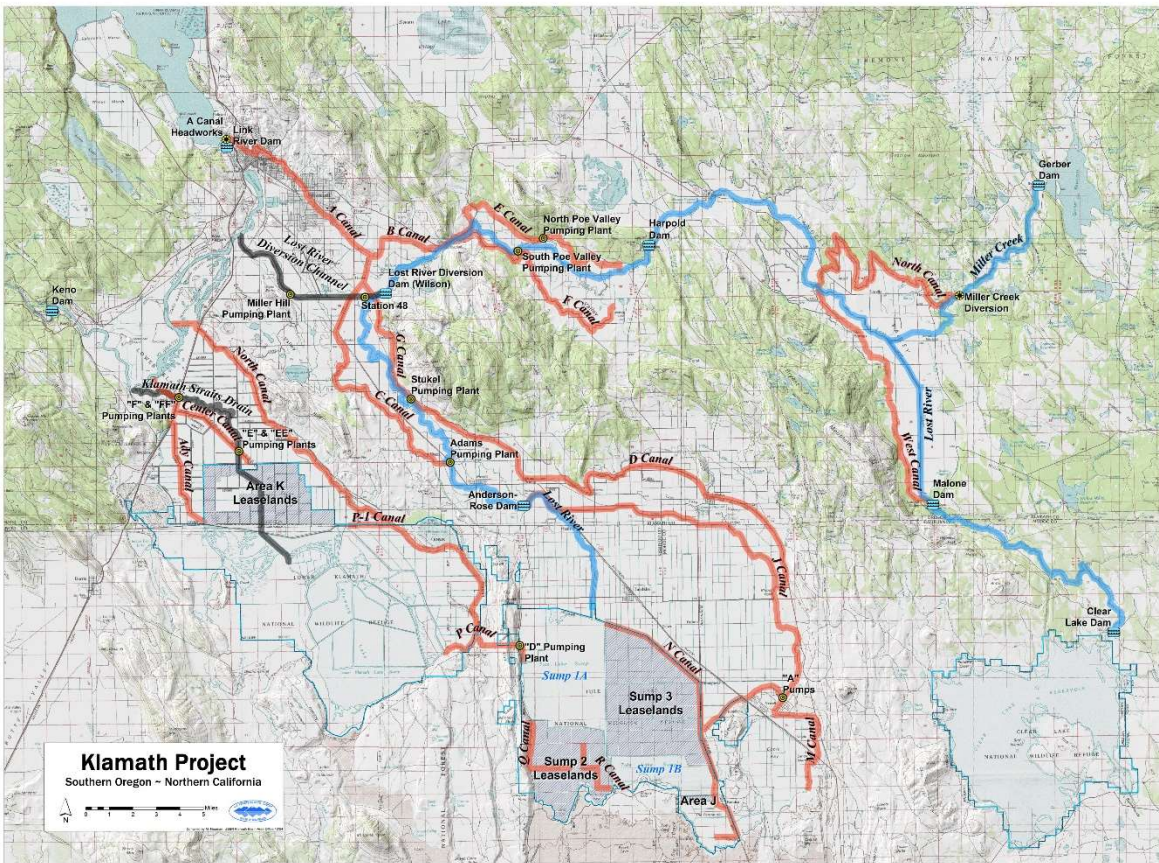
\_\_\_\_\_  
Board President  
Klamath Water Users Association  
2312 South Sixth Street, Suite A  
Klamath Falls, OR 97601

*s/ John Crawford*

\_\_\_\_\_  
Board President  
Tulelake Irrigation District  
P.O. Box 699  
Tulelake, CA 96134



**ATTACHMENT A**





## ATTACHMENT B

### HISTORY AND AUTHORITIES REGARDING KUCHEL ACT LANDS

#### 1. Geography

The Klamath Project (Project) is within the Klamath Basin, which occupies over 10 million acres in Oregon and California.<sup>4</sup> The Project straddles the border.<sup>5</sup> Project facilities deliver water to approximately 200,000 acres of irrigated land, including the lease lands.<sup>6</sup> The Tule Lake lease lands are within Tule Lake National Wildlife Refuge (NWR) and the Tule Lake Irrigation District (TID), with TID delivering water through Project works<sup>7</sup>. The Lower Klamath lease lands, known as “Area K,” are within Lower Klamath NWR, and water is provided from the Project by Klamath Drainage District (KDD).<sup>8</sup> The Lower Klamath area is separated from the Tule Lake area by a mountain known as Sheepy Ridge.<sup>9</sup>

#### 2. The Project and Reclamation and Homesteading of Its Lands

The establishment of the Project predates the existence of the refuges. The Project was one of the first reclamation projects authorized and financed pursuant to the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (codified at 43 U.S.C. § 371 et seq.) (Reclamation Act). The Reclamation Act encouraged the settlement of lands in the west and the development of agricultural economies. The Reclamation Act provided federal financing of irrigation works, with construction costs repaid by project water users. Federally owned lands within reclamation projects were to be made available to homesteaders who, upon taking ownership of the land, accepted the responsibility to undertake improvements, work the land, and pay the water charges.<sup>10</sup>

The Project’s beginnings involved cooperative, legislative actions by states and the federal government, all directed to encourage agricultural development. In 1905, Oregon and California enacted statutes to enable development of the Project. Land that was submerged and owned by the states was intended to be reclaimed, and upon the uncovering of the

---

<sup>4</sup> National Marine Fisheries Service, Biological Opinions on the Effects of Proposed Klamath Project Operations from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and Endangered Species (May 2013) at 8.

<sup>5</sup> *Id.* at 9; Final Biological Assessment, The Effects of the Proposed Action to Operate the Klamath Project from April 1, 2013, through March 31, 2023, on Federally-Listed Threatened and Endangered Species (Dec. 2012) at 1-13.

<sup>6</sup> *Id.* at 1-1.

<sup>7</sup> CCP/EIS at 1-23, 4-64, 5-130.

<sup>8</sup> *Id.* at 1-17, 5-56, 5-59.

<sup>9</sup> *Id.* at 5-53.

<sup>10</sup> *See also* Act of June 23, 1910, Pub. L. No. 61-243, 36 Stat. 592.

submerged land, title passed to the federal government for disposition under the Reclamation Act (jointly, “Cession Acts”).<sup>11</sup> Congress authorized the Secretary of the Interior to advance the Project, to lower the water levels of waterbodies in Oregon and California, and “to dispose of any lands which may come into the possession of the United States as a result thereof . . . under the terms and conditions of the national reclamation Act.”<sup>12</sup> This statute thus provided federal authorization for the development of an irrigation project on the land ceded under the Cession Acts.<sup>13</sup> The lease lands are among the uncovered lands ceded to, and accepted by, the federal government for the purpose of irrigated agriculture.

Construction of the Project began in 1906.<sup>14</sup> Delivery of Project water first occurred in 1907, and the first homestead entry of public lands was issued in 1907.<sup>15</sup> Reclaimed lands in the Tule Lake and Lower Klamath areas were made available to homesteaders and settlers as the Project began delivering water.<sup>16</sup> Simultaneously, the practice of federal leasing of ceded lands began, with the first leasing of lands for agriculture occurring by 1916.<sup>17</sup>

### **3. Pre-Kuchel Act History of Lower Klamath Refuge and the Area K Lease Lands**

In the Lower Klamath area, key reclamation infrastructure included a railroad embankment, which served as a levee across the Klamath Straits. The levee and other structures controlled the passage of water from the Klamath River to the former Lower Klamath Lake and ultimately lowered water levels to uncover land for agriculture.<sup>18</sup>

After reclamation of Lower Klamath Lake and adjacent marshlands was underway, President Roosevelt established the 81,619-acre Klamath Lake Reservation on August 8, 1908.<sup>19</sup> The Executive Order reserved “all islands situated in Lower Klamath Lake and the marsh and swamp lands unsuitable for agricultural purposes” as a “preserve and breeding ground for native birds.”<sup>20</sup> The impetus for the creation of the Klamath Lake Reservation was the excessive hunting of birds for the plume and meat markets, not the threat of agricultural

---

<sup>11</sup> Notice of Appeal filed June 6, 2020, ECF No. 245, in the matter of *Tulelake Irrigation District, et al. v. United States Fish and Wildlife Service, et al.*, Case No. 1:17-cv-00069-CL, at 2.; Declaration of Paul S. Simmons filed May 17, 2018 (Simmons Decl.), Ex. B, ECF No. 111 in the matter of *Tulelake Irrigation District, et al. v. United States Fish and Wildlife Service, et al.*, Case No. 1:17-cv-00069-CL.

<sup>12</sup> Simmons Decl., Ex. C (Act of Feb. 9, 1905, Pub. L. No. 66, 33 Stat. 714).

<sup>13</sup> *Id.*

<sup>14</sup> Eric A. Stein, Bureau of Reclamation, Klamath Project (1994) (Klamath Project Report) at 7.

<sup>15</sup> *Id.* at 8-11; B.J. Weddell, K.L. Gray, J.D. Foster, History and Ecology of Lower Klamath, Tule Lake, Upper Klamath, and Klamath Forest National Wildlife Refuges, Oregon and California (1998) (History and Ecology Report) at 2.

<sup>16</sup> CCP/EIS, Appx. M, at 9; Klamath Project Report at 31-32.

<sup>17</sup> History and Ecology Report at 95-96.

<sup>18</sup> CCP/EIS at 6-237; History and Ecology Report at 2.

<sup>19</sup> History and Ecology Report at 11.

<sup>20</sup> Lower Klamath Executive Order 924 (Aug. 8, 1908) (Order 924).

development.<sup>21</sup> Accordingly, the Executive Order prohibited the destruction of birds' eggs and nests and the killing of any native bird species.<sup>22</sup> While hunting was prohibited, the reservation was expressly "made subject to and [was] not intended to interfere with the use of any part of the reserved area by the Reclamation Service acting under the provisions of the [Reclamation Act] . . . ."<sup>23</sup>

In 1915, Executive Order No. 2200 reduced the area of the Klamath Lake Reservation. This reduction made land available for homesteaders along a portion of the reserve.<sup>24</sup>

Construction of the Project continued. In 1914, gates were installed in the structure at Klamath Straits.<sup>25</sup> The gates were permanently closed in 1917 after the formation of KDD and the execution of the 1917 agreement between KDD and the United States.<sup>26</sup> Subsequent to the 1917 contract, the United States and KDD entered into other water delivery and construction agreements regarding the Lower Klamath area, each of which confirmed the agricultural purpose of the water deliveries and reclaimed land.<sup>27</sup> The 1943 contract was approved by Congress in the Act of June 17, 1944, Pub. L. No. 78-342, 58 Stat. 279.

As Lower Klamath Lake and surrounding wetlands drained, the land's value as wildlife habitat declined.<sup>28</sup> The area became infested with "thickly growing" weeds, which fueled peat fires and created bare areas of alkaline soils.<sup>29</sup> In 1932, the Assistant Secretary of the Interior concluded that: Lower Klamath Lake could not be reflooded for use as a refuge without first (1) canceling the two existing contracts with [KDD] and reimbursing monies paid by the district, (2) obtaining legislative approval from the states of Oregon and California for use of the lands for purposes other than those contemplated by the Reclamation Act, and (3) repealing the Raker Act.<sup>30</sup>

A Bureau of Reclamation (Reclamation) engineer devised a plan in 1938 to reduce the area of Tule Lake, which had become too deep to support marsh vegetation. The plan called for reducing Tule Lake from 37,000 acres to 17,000 acres, and pumping water through a

---

<sup>21</sup> History and Ecology Report at 12-14.

<sup>22</sup> Order 924.

<sup>23</sup> *Id.*

<sup>24</sup> History and Ecology Report at 14.

<sup>25</sup> *Id.* at 14-15

<sup>26</sup> *Id.*; see also Contract Between the United States and Klamath Drainage (Nov. 30, 1917) (1917 contract).

<sup>27</sup> See Klamath Project Contract between the United States and Klamath Drainage (Aug. 24, 1921) at 3 (1921 reclamation contract); Contract between the United States and Klamath Drainage District (May 25, 1940) (canal construction agreement); Amendatory Contract Between the United States and the Klamath Drainage District (Apr. 28, 1943) (1943 revision contract affirming water delivery rights and entry of public lands).

<sup>28</sup> History and Ecology Report at 32.

<sup>29</sup> CCP/EIS at 6-237-38; History and Ecology Report at 26-27.

<sup>30</sup> History and Ecology Report at 32.

tunnel to Lower Klamath Lake.<sup>31</sup> Once water levels increased in Lower Klamath Lake and decreased in Tule Lake by 1942, waterfowl populations responded, and “impressive numbers of birds” congregated on both refuges.<sup>32</sup>

#### 4. Pre-Kuchel Act History of Tule Lake Refuge

##### a. Establishment of Tule Lake Bird Refuge

As of 1905, Tule Lake was an area of open water and marsh over about 90,000 acres. Two decades later, the former Tule Lake had been nearly eliminated. Clear Lake Dam, completed in 1910, held Lost River water (a source of water to Tule Lake) in the upper watershed, creating Clear Lake Reservoir.<sup>33</sup> By 1912, the Lost River Diversion Dam diverted other Lost River water west to the Klamath River.<sup>34</sup> With reduced flow from Lost River, Tule Lake began to recede, and pursuant to the Cession Acts and the Project authorization, the uncovered lake bed was reclaimed for agriculture.<sup>35</sup> Uncovered lands were initially leased, and then passed into private ownership through the homesteading process.<sup>36</sup> By the mid-1920s, the former Tule Lake had been reduced to just a few thousand acres.<sup>37</sup>

Similar to the Klamath Lake Reservation, the Tule Lake Bird Refuge was established in 1928 to protect birds from over-exploitation by hunting, not agriculture.<sup>38</sup> Thus, the Executive Order establishing the Tule Lake Bird Refuge made it unlawful to “hunt, trap, capture, willfully disturb, or kill any wild animal or bird . . . .”<sup>39</sup> The withdrawal of the lands for reclamation purposes was maintained, and the reservation of the lands as a bird refuge was made subject to the use of the lands “for irrigation and other incidental purposes, and to any other valid existing rights.”<sup>40</sup>

In the 1930s, water levels in Tule Lake increased, due in part to the increase in return flows as well as the completion of dikes allowing the accumulation of water in the sump.<sup>41</sup> By 1938, excess water in Tule Lake sump had actually become a problem.<sup>42</sup> Parts of the sump became too deep to support emergent vegetation while the remaining stands of

---

<sup>31</sup> *Id.* at 32-39.

<sup>32</sup> *Id.* at 57-63.

<sup>33</sup> CCP/EIS at 1-23; Klamath Project Report at 11-16.

<sup>34</sup> CCP/EIS at 1-23; Klamath Project Report at 16-17.

<sup>35</sup> CCP/EIS at 1-23.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> History and Ecology Report at 23.

<sup>39</sup> Tule Lake Bird Refuge, Executive Order 4975 (Oct. 4, 1928).

<sup>40</sup> *Id.*

<sup>41</sup> CCP/EIS at 1-23; History and Ecology Report at 40.

<sup>42</sup> History and Ecology Report at 40.

vegetation became very dense.<sup>43</sup> Thus, the proposal implemented in 1942 to reduce the size of Tule Lake and pump excess water into Lower Klamath Lake served to benefit both refuges as well as prevent fluctuating Tule Lake elevations that threatened farmland. Tule Lake sump levels are now controlled both by statute and by the 1956 contract between the United States and TID, discussed below (TID Contract).<sup>44</sup>

#### **b. Cessation of Homesteading**

As more homesteads became available and were settled, the area of publicly owned, leased lands in the Tule Lake area of the Project decreased, from 50,000 acres in 1926, to 43,000 acres in 1945, to its current size by the early 1950s after the last homestead entries.<sup>45</sup> There remained a desire locally for completion of homesteading of the remaining suitable ceded lands (i.e., the lease lands).<sup>46</sup> At the same time, wildlife advocates and sports groups opposed homesteading, citing concern with any further decrease in the size of Tule Lake NWR and the presence of activities accompanying the human occupation of private lands that might disrupt waterfowl.<sup>47</sup> The issue was addressed in the 1956 TID Contract and the Kuchel Act.

#### **c. Formation of TID and TID Contract**

Water had been delivered in the Tule Lake area for many years prior to 1956, including under agreements with private individuals and lessees. In 1952, landowners in the area formed TID, and in 1956, TID entered into an agreement with Reclamation related to service of all water within its boundaries.<sup>48</sup> The TID Contract transferred the operation and maintenance of many of the Project's major diversion facilities, pumps, canals, and drains to TID.<sup>49</sup> It established TID's water delivery obligations to its constituents, and repayment obligations to the United States for TID's share of the construction costs for the Project, and operation and maintenance costs for certain Project works.<sup>50</sup>

Presently, there are approximately 45,000 acres of private land within TID, the majority of which is ceded land settled pursuant to the Reclamation Act homesteading program.<sup>51</sup> At the time of negotiation of the TID Contract, Reclamation leased approximately

---

<sup>43</sup> *Id.* at 42.

<sup>44</sup> 16 U.S.C. § 695o; History and Ecology Report at 48.

<sup>45</sup> TID Contract at 1-2 (listing homestead entries).

<sup>46</sup> Simmons Decl., Ex. D at 3 (H.R. Rep. No. 2588 (1956)); Simmons Decl., Ex. E at 3853-55 (S. Rep. No. 2582 (1956)).

<sup>47</sup> *Id.*

<sup>48</sup> *See* TID Contract at 1-39 and Exs. 1-3 (pdf. pages 1-49).

<sup>49</sup> TID Contract at 10-13.

<sup>50</sup> TID Contract at 4-6, 8-10, 18-22.

<sup>51</sup> Tule Lake-Klamath Wildlife Refuge Hearing Transcript Re Kuchel Act Before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs United States Senate Eighty-Eighth Congress First Session on S. 784 and S. 793 (Apr. 24, 1963) at 90.

15,000 acres to farmers within TID.<sup>52</sup> The U.S. Fish and Wildlife Service (Service) farmed 2,530 acres of refuge lands to produce food and cover for waterfowl and prevent crop depredation on private lands.<sup>53</sup> The lands farmed by the Service are now known as the “cooperative” farm lands. On these lands, farmers, in lieu of rent, leave part of the fields completely unharvested.

During contract negotiation, TID and other interests advocated for actions that would lead to completion of homesteading of the agricultural lands held in Tule Lake NWR.<sup>54</sup> The homesteading “controversy” was, however, left unresolved, and the TID Contract instead recognized that the lease lands “may be opened to entry in the future.”<sup>55</sup>

However, TID obtained other major and permanent commitments for lands within the refuge. For example, article 8 of the TID Contract ensured that the area within Tule Lake NWR “farmed by the Service” (cooperative lands) would not increase in size beyond 2,500 acres, or the 2,500-acre area could be “shifted” out of Tule Lake NWR.<sup>56</sup>

Contract negotiations also focused on the repayment obligation for the Project works and facilities that serve TID, including the extent to which then-accumulated and future lease revenues (rent) should be applied to construction costs.<sup>57</sup> These repayment issues were resolved by compromise.<sup>58</sup> Under article 4 of the contract, TID also secured an entitlement to a percentage of the lease revenues paid by growers to the United States, first as a credit for construction charges and then as an annual payment to TID.<sup>59</sup> Currently, TID is entitled to 10% of the net lease revenues.<sup>60</sup>

In the Act of August 1, 1956, Pub. L. No. 84-877, 70 Stat. 799, Congress authorized the execution of the TID Contract.<sup>61</sup> That statute stipulated that neither the Act nor the TID Contract would affect decisions regarding homesteading of the lease lands, and mandated that the leasing of the lands would continue in the meantime “to provide adequate funds for the purposes of this Act and said contract and to prepare and make said lands available for the

---

<sup>52</sup> Fish and Wildlife Service, Department of the Interior, Plan for Wildlife Use of Federal Lands in the Upper Klamath Basin (Apr. 1956) at 6.

<sup>53</sup> *Id.*

<sup>54</sup> Simmons Decl., Ex. D at 3 (H.R. Rep. No. 2588 (1956)); Simmons Decl., Ex. E at 3853, 3855 (S. Rep. No. 2582 (1956)).

<sup>55</sup> TID at 2; *see also* Amended Contract with Tule Lake Irrigation District (Aug. 1, 1956) (Repayment Contract).

<sup>56</sup> TID Contract at 13.

<sup>57</sup> Simmons Decl., Ex. D at 2 (H.R. Rep. No. 2588 (1956)); Simmons Decl., Ex. E at 2-3 (S. Rep. No. 2582 (1956)).

<sup>58</sup> *Id.*; TID Contract at 4-6.

<sup>59</sup> TID Contract at 6-9.

<sup>60</sup> *Id.*

<sup>61</sup> Repayment Contract.

designated purposes.”<sup>62</sup> This continued leasing would ensure that “credits may be given and payments made to [TID] . . . in accordance with said contract . . . .”<sup>63</sup>

## 5. Enactment of the Kuchel Act

During the early 1960s, debate continued over homesteading of the remaining lease lands. Local interests advocated opening the lands to homesteaders, and wildlife advocates argued that the presence of people, houses, buildings, public roads, utilities, and other activities accompanying private ownership of land disrupts waterfowl use of the lands.<sup>64</sup> In debates preceding the enactment of the Kuchel Act, when a bill was first introduced, the Secretary of the Interior advised Congress: “[t]he [DOI] must, of course, recognize its obligations to both the reclamation project and waterfowl.”<sup>65</sup> The Secretary further advised that the bill offered a “sound solution” to removing any threat to waterfowl management, protecting agricultural uses, and recognizing the federal government’s “obligations to the local irrigation districts that must be fulfilled.”<sup>66</sup> The Secretary’s statement also referenced the Solicitor’s opinion that there are no “legal obstacles to passage,” including existing water rights, the Cession Acts, or the TID Contract.<sup>67</sup>

Congress struck a permanent compromise over homesteading in enacting the Kuchel Act in 1964. The Kuchel Act removed the Secretary’s authority to complete the homesteading of lands in TID that had originally been envisioned and retained the lands in public ownership.<sup>68</sup> The Kuchel Act achieves the dual management objectives of agricultural and waterfowl management through several additional provisions.

First, it gave statutory status to the totality of four refuges previously existing only by executive order.<sup>69</sup> Section 2 of the Act provides that such lands shall be managed for the “major purpose of waterfowl management, but with full consideration to optimum agricultural use that is consistent therewith” and that such lands shall not be opened to homesteading.<sup>70</sup>

---

<sup>62</sup> *Id.* § 4.

<sup>63</sup> *Id.* § 2(a).

<sup>64</sup> Statement of Steward L. Udall, Secretary of the Interior, on S. 1988 (Kuchel Act) to the Subcommittee on Irrigation and Reclamation, Interior and Insular Affairs, U.S. Senate (Feb. 23, 1962) at 2-5 (Udall Statement); Janzen, D.H. 1962 Testimony of U.S. Fish and Wildlife Service Director Daniel Janzen regarding Bill S. 1988 in hearings before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, U.S. Senate (Janzen Testimony) (Feb. 23, 1962) at 50.

<sup>65</sup> Udall Statement at 2.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 16 U.S.C. § 695*l*.

<sup>69</sup> 16 U.S.C. § 695*l*.

<sup>70</sup> *Id.*



Section 4 of the Act provides details regarding agricultural use of a subset of lands within the identified refuges. With respect to the lease lands, it states: “[t]he Secretary shall, consistent with proper waterfowl management, continue the present pattern of leasing [the lease lands] . . . .”<sup>71</sup> Section 4 further prescribes that the leases shall be set at prices “designed to obtain the maximum lease revenues” and shall provide for “the growing of grain, forage, and soil-building crops, except that not more than 25 per centum of the total leased lands may be planted to row crops.”<sup>72</sup> Section 4 then distinguishes the management of the lease lands from “[a]ll other reserved public lands included in section 2,” which “shall continue to be managed by the Secretary for waterfowl purposes, including the growing of agricultural crops by direct planting and sharecrop agreements with local cooperators where necessary.”<sup>73</sup>

Section 3 of the Act directs that, subject to certain limitations, 25 percent of the net lease revenues each year shall be paid to the counties in which the refuges are located.<sup>74</sup> These payments serve to replace taxes to local governments that would have been paid if the lease lands had been conveyed into private ownership.<sup>75</sup> Section 3 sets forth the further allocation of net lease revenues, including payments to TID assured under the TID Contract.<sup>76</sup> Other net revenues are allocated to costs associated with the Project that would otherwise be borne by farmers on private lands.<sup>77</sup>

## 6. The Current Leasing Program

The program of leasing ceded lands, initiated more than a hundred years ago in 1916, continues to this day. Under a 1977 cooperative agreement between agencies, the Service maintains “administrative responsibility, control, and direction” over the leasing program.<sup>78</sup> Reclamation administers the program, including advertising, bidding, awards, monitoring, and compliance.<sup>79</sup> On average, approximately 15,000 acres in Tule Lake NWR and 5,600 acres in Lower Klamath NWR are leased to local farmers.<sup>80</sup>

---

<sup>71</sup> 16 U.S.C. § 695n.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 16 U.S.C. § 695m.

<sup>75</sup> *See* Janzen Testimony at 50-51.

<sup>76</sup> 16 U.S.C. § 695m.

<sup>77</sup> Repayment Contract.

<sup>78</sup> CCP/EIS, Appx. R, at 3.

<sup>79</sup> *See id.*, Appx. R, at 6-7.

<sup>80</sup> *Id.*, Appx. G, at G-146, 345-46.

Approximately 2,500 acres in Tule Lake NWR and varying acreage in Lower Klamath NWR is “cooperatively” farmed.<sup>81</sup> Crops grown on the lease lands include barley, oats, wheat, rye, onions, potatoes, horseradish, and alfalfa.<sup>82</sup>

The lease lands also support large populations of migratory and resident birds, including species of ducks, geese, swans, colonial nesting birds, raptors, eagles, ibis, pheasant, and other upland birds.<sup>83</sup> Other wildlife using the lease lands include antelope, deer, coyotes, bobcats, and many small mammals.<sup>84</sup> Reclamation, the Service, and the lease land growers have worked together to implement innovative management strategies that benefit waterfowl and agriculture. For example, the walking wetlands program is “a 1- to 4-year fallow cycle in which croplands are flooded, taking them out of agricultural production, either seasonally (fall through spring) or year-round, then returned to agricultural production.”<sup>85</sup> The walking wetlands program suppresses soil pathogens and weeds, reduces the need for fertilizers and pesticides, and increases crop yields when the fields are put back into production.<sup>86</sup>

Pursuant to the Kuchel Act, no more than 25 percent of the lease lands are planted to row crops. While some row crops do not feed waterfowl directly, they are important rotation crops to reduce pests, improve yields for grain crops when the fields are rotated, and contribute to the Kuchel Act’s directive to maximize lease revenues.<sup>87</sup>

For the Tule Lake lease lands, TID delivers Project water to the agricultural lands and manages water operations, and the lessee growers pay TID directly for operation and maintenance of the irrigation and drainage system.<sup>88</sup> Thus, the lessees share in the costs of operation and maintenance of the Project works also relied upon by private landowners in the Project.

The lease lands directly and indirectly support the agricultural and surrounding communities in Modoc, Siskiyou, and Klamath Counties. Agricultural production on Tule Lake and Lower Klamath NWRs is estimated to be worth \$30 million per year.<sup>89</sup> The crops are estimated to support approximately 600 jobs and \$12-14 million in personal income for the area, supporting farmers, farm workers, families, agricultural-support businesses, and the local economy.<sup>90</sup> The “net lease revenue” (i.e., rent), an average of \$3.6 million annually

---

<sup>81</sup> CCP/EIS, Appx. G, at G-145, 345-46.

<sup>82</sup> *Id.*

<sup>83</sup> CCP/EIS at 5-17, 5-20-5-24.

<sup>84</sup> *Id.* at 5-25.

<sup>85</sup> *Id.* at 4-14, 5-31-5-32.

<sup>86</sup> *Id.* at 4-14, 5-49.

<sup>87</sup> CCP/EIS at 5-130-5-132; CCP/EIS, Appx. G, at G-350-351.

<sup>88</sup> CCP/EIS, Appx. G, at G-346; CCP/EIS at 4-64.

<sup>89</sup> CCP/EIS, Appx. P, at 10.

<sup>90</sup> *Id.* at P-15.

Public Comments Processing, U.S. Fish and Wildlife Service

RE: Docket No. FWS-HQ-NWRS-2022-0106: Comments on Proposed Rule and Policy Updates Regarding National Wildlife Refuge System; Biological Integrity, Diversity, and Environmental Health

April 4, 2024

Page 18

from 2006 to 2015, is also critical.<sup>91</sup> Pursuant to section 3 of the Kuchel Act, portions of the lease revenues are paid to the local counties and TID.<sup>92</sup>

---

<sup>91</sup> *Id.* at P-10.

<sup>92</sup> *Id.*; *see* 16 U.S.C. § 695m.