



RIETMANN LAW, P.C.

April 24, 2018

Transmitted via email to: *Danette.M.Watson@oregon.gov*

Oregon Water Resources Department
Attn: Danette Watson, Watermaster for Division 17
305 Main Street
Klamath Falls, Oregon 97601

RE: Request for OWRD to immediately take exclusive charge of Upper Klamath Lake to reduce discharges from Link River Dam and allow KID to divert 350cfs

Ms. Watson:

Our firm represents the Klamath Irrigation District (“KID”). Pursuant to ORS 540.210, KID is requesting that the Oregon Water Resources Department (“OWRD”) take exclusive charge of Upper Klamath Lake for the purpose of distributing water therefrom in accordance with the respective and relative rights of the various users.

The facts and circumstances giving rise to this matter are as follows:

1. Section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior to comply with state law regarding the control, appropriation, use, or distribution of water. 43 U.S.C. § 383.
2. The rights to use and store water in Upper Klamath Lake are being determined in the Klamath Basin Adjudication.
3. The Amended and Corrected Final Order of Determination (“ACFOD”) in the Klamath Adjudication was filed with the Klamath County Circuit Court on February 28, 2014.
4. The ACFOD is presently in full force and effect. ORS 539.130(4).
5. Water from Upper Klamath Lake must be distributed in accordance with the ACFOD unless or until the Klamath County Circuit Court stays the ACFOD, either fully or in part. ORS 539.170; ORS 539.180.

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6. The ACFOD has not been stayed either fully or in part.
7. The ACFOD provides that the U.S. Bureau of Reclamation (“BOR”) owns the “right to store water in Upper Klamath Lake *to benefit the separate irrigation rights recognized for the Klamath Reclamation Project.*” ACFOD, Pg. 68. (emphasis added).
8. The ACFOD grants KID and its landowners the right to divert and beneficially use the water that BOR stores in Upper Klamath Lake for the purpose of irrigation. ACFOD, Pg. 70.
9. The ACFOD does not grant BOR any water right to use stored water in Upper Klamath Lake for the purpose of enhancing instream flows below Iron Gate Dam.
10. BOR does not otherwise have a permit or certificate under the Oregon Water Rights Act authorizing it to use water stored in Upper Klamath Lake for the purpose of enhancing instream flows below Iron Gate Dam.
11. BOR is using water stored in Upper Klamath Lake without a water right to enhance instream flows below Iron Gate Dam in California.
12. Although the KID Board of Directors voted to begin delivering irrigation water to its landowners on April 23, 2018, BOR asserts that KID and its landowners cannot exercise their rights under the ACFOD by diverting water for irrigation.
13. BOR is justifying its actions on its need to comply with a 2013 Biological Opinion (2013 BiOP) issued under the Endangered Species Act (“ESA”) as well as a court decision arising under the ESA that obligates BOR to provide certain flows below Iron Gate Dam. *See, Hoopa Valley Indian Tribe v. Bureau of Reclamation et al* (U.S. District Court Northern District of California, 3:15-cv-04294).
14. Neither the 2013 BiOp nor the court’s decision in *Hoopa Valley Indian Tribe* grants BOR a water right or stays the ACFOD. Additionally, while the ruling in the Hoopa Valley Indian Tribe case requires BOR to provide certain enhanced flows below Iron Gate Dam, *it does not mandate that the enhanced flows be met with water from Upper Klamath Lake.*
15. If BOR wants to distribute water from Upper Klamath Lake in a manner that does not comply with the ACFOD, it may do so by seeking and obtaining a stay in the Klamath Basin Adjudication in accordance with ORS 539.180. However, to date,

BOR has neither requested nor been granted a stay of the ACFOD in the Klamath Basin Adjudication.

16. By using stored water in Upper Klamath Lake to provide enhanced flows below Iron Gate Dam without a water right and simultaneously asserting that KID and its patrons cannot use water from Upper Klamath Lake in accordance with the ACFOD, BOR is causing severe economic harm to KID, its patrons, and the entire Klamath Basin community.

In summary, there is disagreement between BOR and KID as to how water from Upper Klamath Lake should be divided and distributed. Therefore, KID is requesting that OWRD immediately take exclusive charge of Upper Klamath Lake for the purpose of dividing and distributing the water therefrom in accordance with the respective and relative rights of the various users as determined in the ACFOD.

Specifically, at this immediate point in time, KID is asking OWRD to distribute 350 cfs from Upper Klamath Lake to KID through the A-Canal. KID is also requesting that OWRD correspondingly reduce flows from Link River Dam to no more than 1,000 cfs.

In making this very limited requested, KID is not waiving its right to all water KID and its patrons are capable of putting to beneficial use and entitled to receive under the ACFOD. Similarly, KID is not waiving its right to have releases from Link River Dam further reduced. Rather, KID is limiting its immediate request of OWRD in the foregoing manner based on the practical recognition that BOR's failure to comply with the ACFOD has put it in a precarious legal situation that BOR cannot correct overnight. OWRD taking control of Upper Klamath Lake and taking the limited steps set forth herein to divide and distribute the waters in accordance with the ACFOD will mitigate some (albeit not all) of the damage being cause to KID and its patrons, afford BOR a reasonable period of time to seek a stay of the ACFOD and/or obtain water from other sources to meet ESA requirements, and enable BOR to meet all of its various legal obligations in the meantime. Naturally, if BOR fails to promptly seek a stay of the ACFOD or does not secure water from other sources to meets its ESA obligations, KID will ask OWRD to more fully enforce its rights under the ACFOD.

OWRD has a mandatory duty to take exclusive charge of Upper Klamath Lake and divide and distribute the water in the manner KID is requesting. *See*, ORS 540.210; ORS 540.170; 540.145; OAR 690-250-0150; *Hawes v. Devos*, 2009 WL 646216 (2009) (“ORS 540.145 is mandatory not discretionary”). “Use of legally stored water is governed by the water rights, if any, which call on that source of water.” OAR 690-250-0150. The ACFOD sets forth the water rights governing the use of water stored in Upper Klamath Lake. The ACFOD is in full force and effect and has not been stayed. The ACFOD entitles KID to the immediate 350 cfs distribution it is requesting and also grants KID the right to demand

that releases of water from Link River Dam be immediately reduced to 1000 cfs (instead of the 1450 cfs currently being released).

Please let me know immediately whether OWRD will fulfill its mandatory obligation to take control of Upper Klamath Lake and divide and distribute water consistent with the ACFOD as KID is requesting.

Sincerely,

A handwritten signature in black ink, appearing to read 'N. Rietmann', with a long horizontal line extending to the right.

Nathan R. Rietmann

Cc: Tom Byler, Director Oregon Water Resources Department