



CIRCUIT COURT OF OREGON  
THIRD JUDICIAL DISTRICT  
MARION COUNTY COURTHOUSE  
P.O. BOX 12869  
SALEM, OR 97309-0869

CHANNING BENNETT  
Circuit Court Judge  
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Re: KID v. Oregon Water Resources Department, et al  
Case No.: 20CV17922

***Sent via email only***

Counsel:

This matter came before the court on Respondents' Motion for Stay Pending Appeal following the court's issuance of its Amended Opinion granting summary judgment on Count 2 of Petitioner's Complaint and Order. For the reasons more fully stated below, Respondents' Motion for Stay is denied.

First, is a procedural issue. Respondents' have filed an appeal of a limited judgment allegedly entered after the court granted Petitioner's partial motion for summary judgment as to count number two. However, no limited judgment has been issued in this case. After entry of the court's initial opinion letter, further hearing with counsel and the review of additional briefing, the court advised counsel for the parties that an entry of limited judgment in this matter was not appropriate because counts one and two are factually intertwined and the parties for both counts are the same. Counsel for both sides agreed. In the last paragraph of the court's amended opinion letter, this Court again reiterated that the limited judgment was not appropriate and would not be issued. Instead, the court entered an Order directing the Watermaster, Danette Watson, to

perform her duties under ORS 540.740. This court does not decide nor opine whether this matter is appropriate for interlocutory appeal.

As to the merits, Respondents interpret the court's order on partial summary judgment as somehow directing Respondents, including the Watermaster, to make specific findings regarding the relative rights of parties and distribute water in accordance with those rights. Respondents' misunderstand the nature of the court's order.

Respondents, prior to the instant suit, accepted exclusive jurisdiction pursuant to ORS 540.210 over the Upper Klamath Lake ("UKL"), ". . .for the purpose of dividing or distributing the water therefrom in accordance with the respective and relative rights of the various users of water from the ditch or reservoir and shall continue the work until the necessity therefor shall cease." See ORS 540.210(2). As previously stated in the court's amended opinion letter dated October 2, 2020, incorporated herein by reference, despite having accepted the duties outlined in ORS 540.210, Respondents continue to allow the Federal Bureau of Reclamation (the "Bureau") to use Stored Water in the UKL without determining that the Bureau has an established right or license to use the Stored Water, as differentiated from Natural Flow. Respondents have been invited repeatedly to state any basis that allows the Bureau to use or Distribute Stored Water from the UKL. Despite the specific language of ORS 540.210(3), Respondents have failed or refused to make a determination of the relative and respective rights of the various users much less a determination that the Bureau has a right to use or distribute the Stored Water in the UKL.

Instead, Respondents continue to argue that this court's order directs Respondents to make specific determinations as to division or distribution of water and the respective and relative rights amongst the parties. Throughout the number of hearings in this case, and the prior mandamus action, the court has repeatedly stated that it is making no determination as to who's entitled to use the Store Water in the UKL. The court has repeatedly stated that it is the exclusive duty of the OWRD, the Water Resources Director and the Watermaster. Separately, Respondents have a duty to prevent the distribution or

use of water for purposes other than those outlined in Oregon and Federal law. Notwithstanding, Respondents have refused to make the determinations required by the Oregon Water Rights Act and specifically ORS 540.510.

It may well be that the Bureau of Reclamation has a primary establish right to the use of Stored Waters in the UKL and that the actions complained of in the Petition are within the bounds of the law. Oregon statute, however, does not permit the Respondents to simply assume that the Bureau's position is correct. Instead, the Oregon Water Rights Act and this court's order, pursuant to ORS 540.740, require the Respondents, and in particular the Watermaster, Danette Watson, to prohibit the distribution of Stored Water unless it is for a legally permissible use by parties with an established right or license to use the Stored Water.

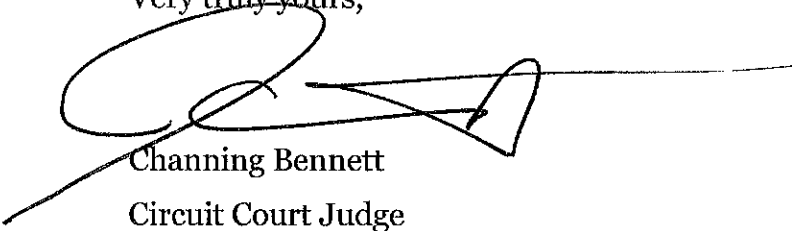
There is no doubt that there are a number of competing interests vying for the limited water in the Klamath Basin. All the more reason the Watermaster is required to ensure that the waters of the upper Klamath Lake not be distributed except in accordance with the respective and relative rights of the various uses of water from the ditch or reservoir. Further, Respondents' arguments that the Petitioner has no standing to bring this action is without merit. Respondents conceded in 20CV15606 that Petitioner had an established interest in Stored Water in the UKL. In the face of the Mandamus, Respondents' accepted exclusive jurisdiction over the UKL pursuant to ORS 540.210. It is illogical to now argue that Petitioner have no standing to force Respondents to comply with their statutory duty to make a determination of the relative and respective rights of all the interested parties. Petitioner, having an established interest in the Stored Water in the UKL, certainly has standing to demand that the Watermaster stop the distribution to any person who does not have a right, recognized by OWRD, to take and use the Stored Water.

Nothing in the court's order requires the Watermaster to make any specific determination. The court found, and the parties stipulated, that the ACCFOD, and the relative and respective rights as determined amongst those litigants, is binding on the Respondents and includes the waters of the UKL. Nothing in the Court's order precludes

the Respondents from recognizing rights asserted by other parties and determining relative and respective rights of the other parties with respect to the parties to the ACCFOD. Respondents, having accepted exclusive jurisdiction over the waters of the UKL, are required to make these determinations. The Court has so ordered.

Mr. Rietmann shall prepare the appropriate order.

Very truly yours,

A handwritten signature in black ink, appearing to read "Channing Bennett", is written over a horizontal line. The signature is stylized with a large loop at the beginning and a sharp, pointed end.

Channing Bennett  
Circuit Court Judge

mh

eC: Peter M.K. Frost, Esquire