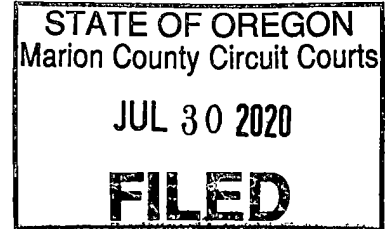




CIRCUIT COURT OF OREGON  
THIRD JUDICIAL DISTRICT  
MARION COUNTY COURTHOUSE  
P.O. BOX 12869  
SALEM, OR 97309-0869

CHANNING BENNETT  
Circuit Court Judge  
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July 30, 2020

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*Sent via email only*

Re: KID v. Oregon Water Resources Department, et al  
Case No.: 20CV17922

Counsel:

This matter came before the court for hearing on Petitioner Klamath Irrigation District's (KID) Motions for Temporary Restraining Order (TRO) and Motion for Partial Summary Judgment; and Respondents' Oregon Water Resources Department (OWRD), Byler and Watson's Cross Motion for Summary Judgment. The Court reviewed the Motions, Responses and Replies of each of the respective parties and had the benefit of oral argument by counsel. At the beginning of oral argument, Petitioner opted to forego hearing on the TRO as it is wholly subsumed by the Motion for Partial Summary Judgment. Having reviewed the pleadings with attached affidavits; heard oral argument; reviewed the court's file and being fully advised on the premises, for the reasons more fully articulated below, Petitioner's Motion for Partial Summary Judgment is GRANTED, in part; and Respondents' Cross Motion for Summary Judgment is DENIED.

### FINDING OF FACTS AND CONCLUSIONS OF LAW

This case involves the use of Stored Water in the Upper Klamath Lake Reservoir (UKL). Stored Water in the UKL is the property of the People of the State of Oregon. The UKL and Link River Dam, one of several dams which control water in the UKL, are part of the United States Bureau of Reclamation's (the "Bureau") Klamath Project as established by Federal and State Law. The Bureau contracts with the State of Oregon, through the OWRD, to manage the Klamath Project. The Bureau has a right to store water in the

UKL but does not have an established right or OWRD issued permit or license allowing for the use of Stored Water in the UKL. Stored Water is a separate and distinct source of water from the Natural Flow of surface water in the UKL.

Petitioner KID is an Irrigation District and quasi-municipal corporation organized under ORS Chapter 545. Plaintiff KID has a secondary use permit, issued by OWRD, allowing the use of Stored Water in the UKL, for Irrigation, a beneficial use. KID, and the members it serves, have a property interest in the Stored Water, retained in the UKL.

In 20cv15606, Klamath Irrigation District v. Oregon Water Resources Department, et al, KID filed for an Alternative Writ of Mandamus asking this Court to Order OWRD to take exclusive charge of the UKL pursuant to ORS 540.210. KID asserted, as they do in the instant litigation, that Respondents were allowing the Bureau to use Stored Water from the UKL via release through the Link River Dam, with no established right to do so. KID asserted that the Bureau's unpermitted use of Stored Water in the UKL impaired KID's right to use Stored Water. After hearing, the Alternative Writ of Mandamus was allowed. On April 23, 2020, OWRD, Byler and Watson confirmed that they had complied with the court's Order and took exclusive charge of the UKL pursuant to ORS 540.210. Having taken exclusive charge of the UKL, ORS 540.210 requires OWRD to take charge 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 to exist." See ORS 540.210(2)

Notwithstanding having exclusive charge of the UKL and a statutory duty to divide or distribute water from the UKL "in accordance with the respective and relative rights of the various users of water from the . . . reservoir. . ." Respondents' continued to allow the Bureau to use Stored Water from the UKL despite having failed to determine whether the Bureau had any right to the use of the Stored Water. The instant suit was brought when KID was notified that the Bureau was planning to and did release large volumes of Stored Water from the UKL without an established right to use that water. KID has asserted that the Bureau has NO established or permitted right to use the Stored Water in the UKL. The Respondents have not rebutted this assertion. Nor have Respondents determined the respective and relative rights of the various users of UKL waters, despite a clear statutory duty to do so.

The parties agree that Natural Flow and Stored Water in Water is scarce in the Klamath Basin and all acknowledge that the Klamath Project has been the subject of voluminous and vigorous litigations in both State and Federal Courts for more than a century. There

is no dispute that KID holds a secondary use permit. KID asks this Court to order that the Amended and Corrected Finding of Fact and Order of Determination (ACFFOD) adjudication, which is currently pending approval in the Klamath County Circuit Court, is the final determination of the respective and relative rights of the various water users of the UKL. However, pursuant to ORS 540.210, OWRD is required to determine the respective and relative rights of the various users of water in the UKL. While the ACFFOD may ultimately be adopted by the Klamath Circuit Court and compel OWRD to adopt it as it applies to the UKL, the Klamath Circuit Court has not yet made that final determination and it would not be prudent for this Court to make orders regarding the applicability of the ACFFOD to this dispute.

All water within the state from all sources of water supply belongs to the public. ORS 537.110. Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise. ORS 537.120. Unless specifically exempted, all beneficial uses of water requires a permit for appropriation. ORS 537.130. The Water Rights Act, allows for the issuance of limited licenses to use or store surface or ground water. ORS 537.143. The Water Rights Act also allows for issuance of a permit to use stored water. ORS 537.147. No party has provided this court with law or fact which allows the Bureau the right to use Stored Water in the UKL without a permit or license. To the contrary, ORS 540.720 provides “No person shall use without authorization water to which another person is entitled, or willfully waste water to the detriment of another. The possession or use of such water without legal right shall be prima facie evidence of the guilt of the person using it.”

Despite taking exclusive charge of the UKL pursuant to 540.210, OWRD has failed to determine the respective and relative rights of the various users of Stored Water retained in the UKL. OWRD has wrongfully allowed the release of Stored Waters from the UKL for uses by the Bureau without OWRD determining whether the Bureau had a right, permit, or license to appropriate the Stored Water in the UKL. OWRD’s failure is a deprivation of a precious resource belonging to the People of Oregon. OWRD failure is also an infringement of property rights of established users, permittees and licensees. Respondent Watson has been fully apprised on and is aware of these facts. Despite actual knowledge, Watson has allowed the discharge of Stored Water through the Link River Dam for use by the Bureau without an established right, permit or license to use the Stored Water in the UKL.

Accordingly, Respondents are ordered to stop releasing Stored Water from the UKL without determining that the release is for a permitted purpose by users with an established right, license or permit to use the Stored Water in the UKL.

Verified Correct Copy of Original 7/30/2020

Mr. Rietmann shall prepare and submit an appropriate Order within 14 days of this letter opinion.

Very truly yours,



Channing Bennett  
Circuit Court Judge

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