



BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF A DISPUTE)
 BETWEEN THE U.S. BUREAU OF)
 RECLAMATION AND THE KLAMATH)
 IRRIGATION DISTRICT)
)
 Klamath Irrigation District)
Petitioner,)
)
 Bureau of Reclamation)
Reservoir Owner.)

**ORDER REGARDING
 RELEASE OF WATER
 STORED UNDER
 DETERMINED CLAIM
 KA 294**

To: The U.S. Bureau of Reclamation
 Jared Bottcher, Acting Area Manager
 6600 Washburn Way
 Klamath Falls, OR 97603-9365

NOTICE: This is a Final Order other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, shall be deemed denied.

I. RELEVANT AUTHORITIES

A. Regulation of Determined Claims

Pending a hearing on the Amended and Corrected Findings of Fact and Order of Determination¹ (ACFFOD) in the Klamath County Circuit Court, “the division of water from the stream involved in the appeal shall be made in accordance with the order of the Director.”²

¹ The ACFFOD is the Director’s order of determination regarding claims filed in the Klamath Adjudication and is currently under review in the Klamath County Circuit Court.

² ORS 539.170.

The rules of the Commission authorizing the distribution of Determined Claims in the ACFFOD are provided in Oregon Administrative Rules (OAR) Chapter 690 Division 250.³

A “reservoir” includes a modified natural lake such as Upper Klamath Lake (UKL), in which water is collected for beneficial use or purpose.⁴ “Legally stored water” means any “water impounded in a reservoir under the provisions of an established right to store water.”⁵ “Use of legally stored water is governed by the water rights, if any, which call on that source of water” with use further limited to that amount of water that may be put to beneficial use without waste. “Any legally stored water released in excess of the needs of the water rights calling on that source of water shall be considered natural flow” which, in the absence of a water exchange, may be diverted according to the next water right in priority or becomes part of the natural stream and is subject to reappropriation.⁶

Water rights for the beneficial purpose of irrigation authorize use of legally stored water or natural flow which may be diverted according to the instantaneous rate of diversion measured in cubic feet per second (cfs) specified in the right, up to the amount that may be put to a beneficial use without waste.⁷ Water not immediately put to beneficial use is left in the watercourse where the next person in priority may divert their instantaneous rate. In this way, the maximum beneficial use of the water by users according to relative priorities may be made.⁸

³ The rules of the Water Resources Commission are adopted pursuant to ORS 540.145 which authorizes the Water Resources Commission to adopt rules to “secure the equal and fair distribution of water in accordance with the rights of the various users” which rules “shall apply to all water rights that have been established * * * “[u]nder an order of the Commission or the Water Resources Director in proceedings for the determination of relative rights to the use of water * * *.”

⁴ OAR 690-250-0010(13). Modifications of the outlet of UKL along with the construction of the Link River Dam around 1916 allow the UKL to be operated and managed as a reservoir between the elevations of 4,136 and 4,143.3.

⁵ OAR 690-250-0010(10).

⁶ OAR 690-250-0150(4); *Jones v. Warm Springs*, 162 Or 186, 195 (1939) (Water discharged to the natural stream with no intent to recapture it becomes part of the natural stream and is subject to reappropriation.).

⁷ OAR 690-250-0010(3); *Cookinham v. Lewis*, 58 Or 484 (1911) (Explaining the process for appropriating water for storage and the subsequent beneficial use of stored water.); *Bennett v. City of Salem*, 192 Or 531, 543 (1951) (An appropriator is never entitled to divert more water than is actually put to beneficial use, reasonable transmission losses excepted); *In re Water Rights of Deschutes River and Tributaries*, 134 Or 623, 644 (1930) (“The right of a prior appropriator is paramount, and the right is limited to such an amount of water as is reasonably necessary for such use and project as may be fairly within contemplation at the time the appropriation is made.”); *Tudor v. Jaca*, 178 Or 126, 143 (1945) citing *Bolter v. Garrett*, 44 Or 204 (1904) for the proposition that the use of water appropriated “must not only be beneficial to the lands of the appropriator, but it must also be reasonable in relation to the reasonable requirements of subsequent appropriators.”

⁸ *Benz v. Water Resources Comm’n*, 94 Or App 73, 81 (1988) citing *Jones v. Warm Springs Irrigation District*, 162 Or 186, 198 (1939) for the proposition that a junior appropriator’s water right cannot be exercised until the senior appropriator’s right has been satisfied such that “a party who has a prior right to a certain quantity of water from a watercourse is entitled to the water only to the extent needed or used for that purpose,” such that the next person in priority may take their right as they are entitled to it.

A right to use water for irrigation purposes is also limited to a total volumetric duty (measured in acre-feet per acre (AF)) that constitutes the total quantity of water that may be diverted during an irrigation season.⁹

B. Injunctive Relief Against Action of the Watermaster

“Any person who may be injured by the action of any watermaster may appeal to the circuit court for an injunction. The injunction shall only be issued in case it can be shown at the hearing that the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights to the use of water.”¹⁰

II. FINDINGS OF FACT

A. Klamath Irrigation District v. Oregon Water Resources Department, Thomas Byler, Danette Watson, Case No. 20CV17922

1. On April 3, 2020, the Oregon Water Resources Department (Department) received a written notice from the Klamath Irrigation District (KID) asserting a dispute between the KID and the U.S. Bureau of Reclamation (Bureau) regarding the distribution of water stored in UKL. KID asserted that the Bureau was not distributing water stored under Determined Claim KA 294 to those entitled to use water pursuant to Determined Claim KA 1000 but was instead releasing water from UKL pursuant to the Endangered Species Act and federal tribal trust responsibilities. The notice requested that the watermaster take charge of UKL reservoir and ensure that stored water is not released through the Link River Dam except to meet the needs of state-recognized water rights calling on that source.¹¹
2. On May 14, 2020, the KID filed a petition in Marion County Circuit Court seeking injunctive relief under ORS 540.740 claiming that the watermaster did not carry the ACFOD into effect by failing to stop the Bureau from releasing water from UKL except to satisfy state-recognized water rights. *Klamath Irrigation District v. Oregon Water Resources Department, Thomas Byler, Danette Watson* (20CV17922).
3. On October 13, 2020, the Marion County Circuit Court ordered the Watermaster District 17, “pursuant to ORS 540.740” to:

* * * immediately stop the distribution, use and/or release of Stored Water from the UKL without determining that the distribution, use and/or release is for a permitted purpose by users with existing water rights of record or determined claims to use the Stored Water in UKL.

⁹ OAR 690-250-0010(12)(defining “rate” and “duty” of water for irrigation); OAR 690-250-0010(9)(definition of “irrigation season”).

¹⁰ ORS 540.740.

¹¹ On April 17, 2020, KID filed a Petition for Alternative Writ of Mandamus in the Marion County Circuit Court. *KID v. WRD* (20CV15606). The court issued an Alternative Writ of Mandamus commanding the Department to take charge of UKL and distribute water, pursuant to ORS 540.210, to the extent it had not already done so. This case was dismissed on May 12, 2020. The Department continues to dispute the application of ORS 540.210 and does not concede it is an appropriate authority for the actions KID seeks.

The term “existing water rights of record” has the meaning provided in ORS 540.045(4). The term “determined claim” has the meaning provided in Section 1, chapter 445, Oregon Laws 2015 (which is published in the Oregon Revised Statutes as a note following ORS 539.170).

4. On October 14 and 15, 2020, the Watermaster District 17 investigated and considered the best available information to determine whether legally stored water from UKL was passing through the Link River Dam. On October 15, 2020, the Watermaster District 17 determined that legally stored water was not passing through the Link River Dam.¹²
5. On January 22, 2021, the OWRD issued a determination on the status of releases from UKL through the Link River Dam and concluded that legally stored water was not passing through the Link River Dam.
6. On February 23, 2021, the OWRD issued a second determination concluding that legally stored water was not passing through the Link River Dam.
7. On March 30, 2021, the OWRD issued a third determination concluding that legally stored water was not passing through the Link River Dam.

B. State Water Rights Calling on Stored Water in UKL

8. The Bureau’s Klamath Project (“Project”) was established in accord with federal legislation and state legislation in 1902 and 1905, respectively. The Bureau built and owns the facilities, known as the works in the Project area. UKL is a modified natural lake and is one of the three reservoirs in the Project which also comprises eight dams, five major pumping plants, 19 canals, and other works.
9. Among other authorities, the Bureau operates the Project pursuant to the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388, and acts amendatory thereof and supplementary thereto) as well as other federal laws and regulations, including but not limited to the Endangered Species Act of 1973 (ESA) (16 U.S.C. §§1531-1544, 87 Stat. 844, as amended.).
10. The Bureau is the sole owner of Determined Claim KA 294. KA 294 provisionally authorizes the Bureau to store a maximum annual volume of 486,828 AF of water in UKL between elevations 4,136 feet and 4,143.3 feet, relative to the Bureau’s Klamath Basin Datum.

¹² Also, on October 15, 2020, the Department filed a Notice of Appeal in the Oregon Court of Appeals (Case No. A174754) which was ultimately dismissed on the grounds that the October 2020 Order was not final for purposes of appeal. Respondents also moved for a stay from the Circuit Court, which was also denied. Respondent also sought relief from the Oregon Supreme Court which was denied (Case No. S068104).

11. The volume of water stored in UKL above elevation 4,136 feet is estimated based on an elevation capacity curve, or rating, provided by the Bureau, and using the weighted mean lake level as reported by the United States Geological Survey (USGS). The most recent rating provided by the Bureau indicates the maximum storage volume for KA 294 (486,828 AF) is met when the lake elevation is at 4,142.48 feet.¹³
12. The Link River Dam is a federally owned dam located on the Link River. The storage and release of water pursuant to KA 294 from UKL is through the Link River Dam, which is operated, in part, by PacifiCorp pursuant to permits issued by the Federal Energy Regulatory Commission.
13. KA 294 is the only state-recognized right which authorizes the appropriation and storage of water in UKL for subsequent beneficial uses.¹⁴ KA 1000 is the only state-recognized water right that authorizes the beneficial use of water stored pursuant to KA 294.
14. The KID and 20 other Klamath Project Water Users (together the KPWU) and the Bureau are co-owners of Determined Claim KA 1000. KA 1000 provisionally authorizes the diversion of natural flow from UKL and water stored in UKL pursuant to KA 294 for beneficial use by the KPWU both upstream and downstream of the Link River Dam.¹⁵ KA 1000 does not specify what amount of water must be taken from natural flow as opposed to stored water and does not prohibit the taking of water from both sources simultaneously.
15. Pursuant to KA 1000, KID may divert up to 1,150 cfs (subject to beneficial use without waste) through the A Canal for irrigation during the irrigation season March 1 through October 31, with a priority date of May 19, 1905.
16. Downstream of the Link River Dam, and pursuant to KA 1000, there are 34 authorized points of diversion from the Klamath River. The majority of these diversions have an authorized season of use from March 1 to October 31 and two irrigation districts also maintain an additional season of use from November 1 to February 28. These 34 points of diversion have a total authorized instantaneous maximum diversion rate of 1,572.51 cfs.

¹³ The weighted mean lake level of UKL is monitored and reported by the USGS. Four separate lake stage gages are operated and maintained by the USGS, and the data from each gage are entered into an equation to calculate the weighted mean lake elevation. The provisional lake elevation data are available at the website: https://waterdata.usgs.gov/or/nwis/uv/?site_no=11507001&agency_cd=USGS

¹⁴ KA 622 is not considered a right to store water; rather this Determined Claim authorizes monthly lake levels in the UKL for the beneficial purpose of establishing and maintaining a healthy and productive habitat to preserve and protect the Klamath Tribes' hunting, fishing, trapping and gathering rights on former reservation lands. The lake level right has a priority date of time immemorial, but pursuant to an agreement between the Klamath Project Water Users, the Klamath Tribes, the United States Bureau of Indian Affairs, and the Department, this right is subordinated to August 9, 1908.

¹⁵ KA 1000 erroneously refers to KA 293, but this is a typographical error.

C. The Department's Method for Determining Water Stored in UKL Pursuant to KA 294

1. Calculating Storage Release

17. The equation the Department is using to calculate stored water releases is:

$$\{eqn 1\} \text{ Storage Release} = \text{Link River Flow} - (\text{UKL Inflows} - \text{UKL Diversions}_{KA1000})$$

with the storage release in excess of water rights then calculated as:

$$\{eqn 2\} \text{ Excessive Storage Release} = \text{Storage Release} - \text{Downstream Diversion}_{KA1000}$$

If either equation results in a zero or negative value, then no storage release unrelated to water rights is occurring.

Description of the variables used in the equation:

Link River flow data are available from a USGS stream gage (USGS 11507500) operated on the river.

UKL inflows represent the total amount of natural flow coming into the lake from surface water, groundwater, and precipitation. Some of these inflows are measured directly (e.g., Wood and Williamson River stream gages) while others must be estimated (e.g., groundwater inflows) as explained below.

UKL Diversions_{R_{KA1000}}: The largest UKL Diversion, the A Canal, is monitored by a gage accessible at this link: <https://www.usbr.gov/pn-bin/wyreport.pl?site=acho¶meter=qj&head=yes> There are 12 authorized points of diversion from UKL above the Link River Dam included in KA 1000. Additionally, there are 10 state-certificated water rights and 8 non-KA 1000 determined claims each exceeding 1 cfs for the use of natural flow from UKL. These 18 non-KA 1000 water rights and determined claims have a combined total of 23 authorized points of diversion from UKL. Because the majority of these points of diversion do not have measuring devices installed, their diversion rates are estimated using the authorized diversion rate on the determined claim or water right.¹⁶

Downstream Diversions_{R_{KA1000}}: Gages monitor three of the KA 1000 diversions below UKL; the Lost River Diversion Channel (LRDC), the North Canal, and the Ady Canal. There are 34 authorized points of diversions identified under the KA 1000 below the Link River Dam and approximately 61 other diversions from the Klamath River downstream of the Link River Dam not associated with KA 1000. The ungaged diversions and individual pump diversions are currently estimated. As of April 6, 2021, there are minimal amounts of water diversion occurring below Link River Dam.

¹⁶ Efforts are underway to develop a more sophisticated mechanism of estimating these numerous smaller users that divert water directly from UKL, including inventorying each POD and working with the landowner to install measuring devices.

2. Calculating Inflows

18. To manage the water rights and determined claims and distinguish between natural flow and stored water, the Department must quantify gross inflows to UKL, which as of the date of this order it has calculated, using the best information available to it.
19. Stream tributaries constitute one component of inflow that contributes to UKL. Tributary inflows include the Williamson River, Wood River, Sevenmile Creek, Crystal Creek, Thomason Creek, and Fourmile Creek. These streams and their tributaries are listed as sources on KA 294.¹⁷
20. Groundwater contributions and direct precipitation are also estimated inflows that contribute to UKL.

3. Calculating Inflows in Relation to Outflows

21. The Department reconciles the total UKL inflow estimate against the change in UKL contents and the outflows based on a water balance of the lake performed periodically, expressed as the following equation:

$$\{eqn 2\} \textit{Reconciled UKL Inflows} = \textit{Change in UKL Contents} + \textit{UKL outflows}$$

Adjustments to the estimated un-gaged inflow components are made based on this reconciliation to ensure the UKL water balance is satisfied.

Description of the variables used in the equation:

The **change in UKL contents** is based on contents derived from the USBR elevation capacity table using the average UKL elevation from four USGS lake level gages.

UKL outflows consist of lake evaporation, outflows through the Link River and A Canal, and 23 other authorized diversions greater than 1 cfs directly from UKL. Lake evaporation is currently estimated using weather station data from two nearby AgriMet sites.¹⁸ Flow through the Link River and A Canal is measured with gages. The other diversions from the UKL are currently estimated.

¹⁷ Gaged inflow streams include the Williamson and Wood Rivers, and Sevenmile Creek. On November 5, 2020, the Department issued a FINAL ORDER MEASURING DEVICES to the Bureau requiring installation of measuring devices on Sevenmile Creek, Thomason Creek, Fourmile Creek, and Crystal Creek. On December 30, 2020, the Bureau requested reconsideration of this order, and on February 23, 2021, the Department notified the Bureau that it is reconsidering its order. At the time of the issuance of this order, the Department is working with the Bureau to evaluate the viability of installing gages on Crystal Creek and Fourmile Creek.

¹⁸ The Department estimates evaporation by a Penman-Monteith equation that uses weather data from two USBR AgriMet weather stations just north and south of UKL. Evaporation estimates are adjusted for local lake conditions based on comparisons of the Penman-Monteith derived estimates with concurrent evaporation data on UKL from a study completed by USBR in 2015.

22. The evaporation estimate is charged against the storage account, thus increasing the accounting of what has been stored since the beginning of the year, and decreasing the amount remaining to be stored under the 486,828 acre-foot storage limit in KA 294.
23. As of the date of this order, and based on the best information available to it, the Department calculates that inflows to UKL exceed water passing Link River Dam and no stored water is passing through the Link River Dam.

D. The Bureau's Plan for Discharging Stored Water from UKL

24. On March 12, 2021, the Bureau issued a letter to the KPWU and provided a copy of the letter to the Watermaster District 17. OWRD understands the letter to confirm the Bureau's conclusion that:
 - a. The Bureau is required to operate the Project in accordance with Biological Opinions (BiOps) issued by the National Marine Fisheries Service in 2019 and the U.S. Fish and Wildlife Service in 2020 as provided in its Interim Operation Plan; and
 - b. That these BiOps require certain water surface elevations in UKL and require release of water into the Klamath River below Iron Gate Dam in California and, as a result and based on the best available information on water availability, water is currently unavailable from the UKL and the Klamath River for irrigation purposes within the Klamath Project.
 - c. The Bureau directed the KPWU to delay diversions of water from UKL and the Klamath River until further notice. The Bureau stated that the delay would extend at least through April 15, 2021.
25. Estimated forecast inflows into UKL during April indicate that inflows into UKL will decrease significantly relative to inflow values observed over the winter and early spring.

III. CONCLUSIONS

1. As of the date of this order, and according to the best information available to it, the Department concludes that legally stored water is not passing through the Link River Dam.
2. The Department has cause to believe that the Bureau will, at some near future date, release legally stored water through the Link River Dam to comply with the Bureau's federal tribal trust obligations and ESA obligations.
3. Based on the anticipated inflows into UKL during April, the Department believes that legally stored water will constitute a portion of the waters passing the Link River Dam.

4. While it remains in effect, the order of the Marion County Circuit Court dated October 13, 2020, compels the watermaster to comply with its directives.

IV. DISCUSSION

The Department is obligated to comply with the Marion County Circuit Court order dated October 13, 2020 while it remains in effect. Notwithstanding the order's directive, the Department has identified no source of state law that authorizes the watermaster to prohibit the distribution, use or release of stored water from UKL as directed in the October 13, 2020 order.

The rules of the Water Resources Commission contained in OAR Chapter 690 Division 250 apply to distribution of water in accordance with the ACFFOD. "Use of legally stored water is governed by the water rights, if any, which call on that source of water" but the rule does not preclude the possibility that other authorities may also govern.¹⁹

With regard to regulation of surface water pursuant to a complaint of water shortage or unlawful use, the "watermaster may begin regulation if investigation reveals a valid complaint of water shortage or unlawful use."²⁰ In this case, the contemplated release of stored water through the Link River Dam may reveal a valid complaint of water shortage, but the Marion County Circuit Court demands an order before the Department's investigation is completed. In this case, it is also not clear that every release of stored water other than "for a permitted purpose by users with existing water rights of record or determined claims to use the Stored Water in UKL" is thereby "unlawful."

ORS 540.740 directs that any person "who may be injured by the action of any watermaster" appeal to the circuit court for an injunction. The injunction, "shall only be issued in case it can be shown at the hearing that the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights to the use of water." In this case, there is neither an order of the Water Resources Commission nor a decree of the court determining the existing rights to the use of water. Notwithstanding whether there is injury,²¹ the statute does not support the action demanded by the Marion County Circuit Court.

¹⁹ OAR 690-250-0150(4).

²⁰ OAR 690-250-0100(2).

²¹ This order is not intended to waive respondents' assertion that the Circuit Court lacks any evidence that KID has standing under ORS 540.740 or has established injury within the meaning of ORS 540.740 or any other defense.

V. ORDER

1. The Bureau is ordered to immediately preclude or stop the distribution, use or release of stored water from the UKL, in excess of amounts that may be put to beneficial use under KA 1000 downstream of the Link River Dam.
2. For the purposes of this order, the term “existing water rights of record” has the meaning provided in ORS 540.045(4). The term “determined claim” has the meaning provided in Section 1, chapter 445, Oregon Laws 2015 (which is published in the Oregon Revised Statutes as a note following ORS 539.170).
3. Nothing in this order alters, relieves or releases any person, state, or federal agency from any and all rights, duties or obligations arising from other sources of law including without limitation other state laws or rules, federal laws and related federal agency regulations, federal or state court orders, or contracts.

DATED this 6th day of April, 2021.



THOMAS M. BYLER, Director
Oregon Water Resources Department