

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ELLEN F. ROSENBLUM  
Attorney General of Oregon  
J. NICOLE DEFEVER #191525  
SARA VAN LOH #264704  
Senior Assistant Attorneys General  
YOUNGWO JOH, OSB #164105 (admitted *pro hac vice*)  
Assistant Attorney General  
Oregon Department of Justice  
100 SW Market Street  
Portland, OR 97201  
Telephone: (503) 881-9008  
Fax: (971) 673-5000  
Email: Sara.VanLoh@doj.state.or.us  
*Attorneys for Oregon Water Resources Department and  
Director Byler*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**YUROK TRIBE, PACIFIC COAST  
FEDERATION OF FISHERMEN'S  
ASSOCIATIONS, and INSTITUTE FOR  
FISHERIES RESOURCES,**

Plaintiffs,

v.

**U.S. BUREAU OF RECLAMATION, and  
NATIONAL MARINE FISHERIES  
SERVICE,**

Defendants,

and

**KLAMATH WATER USERS  
ASSOCIATION,**

and

**THE KLAMATH TRIBES,**

Intervenor-Defendants,

Case No. 3:19-cv-04405-WHO  
Related Cases No. 3:16-cv-04294-WHO  
No. 3:16-cv-06863-WHO  
**OREGON WATER RESOURCES  
DEPARTMENT'S COUNTERCLAIM  
AGAINST THE UNITED STATES OF  
AMERICA**

Judge: Honorable William H. Orrick

1 **UNITED STATES OF AMERICA,**  
2 Cross-Claimant,  
3  
4 **KLAMATH WATER USERS**  
5 **ASSOCIATION,**  
6 and  
7 **OREGON WATER RESOURCES**  
8 **DEPARTMENT,**  
9 Crossclaim-Defendants,  
10 and  
11 **KLAMATH IRRIGATION DISTRICT,**  
12 Defendant-Intervenor.

13 **INTRODUCTION**

14 1. The Oregon Water Resources Department (OWRD) files this counterclaim against  
15 the United States of America, seeking a permanent injunction requiring either (1) that the U.S.  
16 Bureau of Reclamation cease releasing stored water from the Upper Klamath Lake, if this Court  
17 determines that such releases are unlawful under Reclamation’s water-rights permits, as argued  
18 by Crossclaim-Defendant Klamath Water Users Association, or (2) that Reclamation provide  
19 OWRD with sufficiently detailed information moving forward to demonstrate that each future  
20 release is specifically required by the Endangered Species Act (ESA), if this Court concludes that  
21 the ESA preempts Oregon law restricting Reclamation’s use of stored water in the Upper  
22 Klamath Lake.

23 2. Section 8 of the Reclamation Act of 1902, which authorizes Reclamation to  
24 operate the Klamath Project in Southern Oregon and Northern California, expressly requires  
25 Reclamation to comply with state water law in those operations. 43 U.S.C. § 383. In its  
26 crossclaim, the United States asserts that the ESA preempts Oregon’s water law under the  
27 Supremacy Clause; according to the United States, OWRD therefore has no authority to restrict  
28

1 releases from the Upper Klamath Lake.<sup>1</sup> But preemption applies only to the extent that there is a  
2 direct conflict between state and federal law. Where no conflict exists, Reclamation must comply  
3 with state law, which means proceeding in conformity with Oregon water law, as administered by  
4 OWRD, in Reclamation's operation of the Klamath Project.

5 3. OWRD is entitled to relief under the Administrative Procedure Act, 5 U.S.C.  
6 §§ 701–706, Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and Title 15, Chapter 45  
7 of the Oregon Revised Statutes.

8 4. OWRD is alternatively entitled to relief under Oregon's Uniform Declaratory  
9 Judgments Act, Or. Rev. Stat. §§ 28.010–28.160, Section 8 of the Reclamation Act of 1902, 43  
10 U.S.C. § 383, and Title 15, Chapter 45 of the Oregon Revised Statutes; or this Court's power to  
11 hear traditional equitable claims to enjoin violations of federal law.

#### 12 **PARTIES**

13 5. Counterclaimant Oregon Water Resources Department is a state agency that  
14 administers the laws governing the allocation of surface water and groundwater resources in  
15 Oregon.

16 6. Counterclaim-Defendant is the United States of America, acting through the U.S.  
17 Bureau of Reclamation, an agency within the U.S. Department of the Interior. Reclamation has  
18 primary authority over operations of the Klamath Project.

#### 19 **JURISDICTION**

20 7. This is a compulsory counterclaim under Federal Rule of Civil Procedure 13(a).  
21 The claim arises out of the transaction or occurrence that is the subject matter of the United  
22 States' crossclaim, and it does not require the addition of a nonparty over whom the Court cannot  
23 acquire jurisdiction.

24 8. Alternatively, this is a permissive counterclaim under Federal Rule of Civil  
25 Procedure 13(b).

26  
27  
28 <sup>1</sup> The United States also asserts that state law is preempted by the Yurok and Hoopa  
Valley Tribes' federal reserved water rights. *See, e.g.*, Crossclaim ¶¶ 10, 111–114, ECF No. 963.

1 **FACTUAL AND LEGAL BACKGROUND**

2 **I. OREGON WATER LAW**

3 9. In Oregon, all waters from any source belong to the public. Or. Rev. Stat. §  
4 537.110. With some exceptions, all water users must obtain a permit or license from OWRD to  
5 use water. A water user may legally divert water only under the permit's terms, using the water  
6 only for a beneficial purpose without waste. Beneficial purposes may include, for example,  
7 irrigation, domestic and industrial water supply, recreation, and livestock watering. *See, e.g.*, Or.  
8 Admin. R. § 340-041-0180.

9 10. Oregon's water law is based on the doctrine of prior appropriation, which means  
10 the first person to obtain a water right on a stream is the last person to be shut off in times of low  
11 streamflows. The date of a water user's permit application is usually the priority date of the water  
12 right. Senior water-rights holders may use the entirety of their water right before junior water-  
13 rights holders receive any water.

14 11. Oregon is divided into water districts, each managed by a watermaster appointed  
15 by OWRD's director. Or. Rev. Stat. §§ 540.010, 540.020. In times of water shortage, Oregon  
16 watermasters respond to calls from water users and determine who has the right to use water  
17 according to seniority of the relevant water rights. *Id.* § 540.045(1)(b). When a dispute arises  
18 between water users regarding the distribution or division of water from a reservoir, the  
19 watermaster, upon a user's request, takes exclusive charge of the reservoir to divide or distribute  
20 the water per the respective rights of the users. *Id.* § 540.210.

21 12. A general stream adjudication involves the determination of water rights arising  
22 either from alleged use (or intent to use) initiated prior to the effective date of the Water Rights  
23 Code in 1909, or from the federal government's authority to reserve the use of water as an  
24 element of a reservation of federal or tribal land. *Id.* § 539.200. The director of OWRD carries out  
25 such adjudications under the procedures set forth by Oregon statute. *Id.* § 539.005 *et seq.*

26 13. Under those procedures, OWRD receives statements from claimants on which it  
27 determines the relative rights of those claimants. *Id.* §§ 539.015–539.021. When necessary,  
28 OWRD investigates the claims and holds hearings for contested claims. *Id.* §§ 539.030–539.120.

1 After the conclusion of the contests and compilation of the relevant data, OWRD issues findings  
2 of facts and an order of determination, which determines and establishes the several rights to the  
3 waters of a stream. *Id.* § 539.130. Following that, OWRD files a copy of the findings of facts and  
4 order of determination in state circuit court, which then proceeds with automatic judicial review  
5 of OWRD’s findings and determinations. *Id.* §§ 539.130–539.150. While the review proceeds in  
6 circuit court, OWRD must follow the division of water set forth in the director’s order. *Id.* §  
7 539.170.

8 14. Prior to the issuance of the findings of fact and order of determination, OWRD  
9 does not have the authority to regulate either in favor or against the claims asserted in the general  
10 stream adjudication. That is because OWRD’s regulation authority is limited to “water rights of  
11 record.” *Id.* § 540.045(1). By their nature, pre-Water Rights Code rights and federal reserved  
12 rights are not “of record.”

## 13 **II. UPPER KLAMATH LAKE**

14 15. Prior to modification by humans, the outlet of Upper Klamath Lake was over a  
15 basalt dike located at the extreme southern end of the lake. That dike, which formed natural falls,  
16 is the headwaters of the first-mile stretch of the Klamath River, which is known as the Link River.

17 16. The Link River discharges into Lake Ewauna. Historically, Lake Ewauna  
18 overflowed into Lower Klamath Lake, which was a large natural marsh that extended from  
19 Klamath River into California and covered approximately 94,000 acres. Much of the area in  
20 Oregon has been reclaimed for agricultural purposes.

21 17. The Klamath River leaves Lake Ewauna, flowing in a generally southerly and  
22 westerly direction. Near Keno, the stream narrows and enters the John C. Boyle Reservoir. It then  
23 leaves the state, flowing in a southwesterly direction for about 208 miles where it reaches its  
24 estuary at the town of Klamath, California.

## 25 **III. THE KLAMATH PROJECT**

26 18. In 1902, the U.S. Congress passed the Reclamation Act of 1902, which authorized  
27 the Secretary of the Interior to examine, survey, locate, and construct irrigation works for the  
28 storage, diversion, and development of waters.

1           19.     In 1905, the United States notified Oregon of its intent to use the waters of the  
2 Klamath Basin in Oregon in the operation of works for the utilization of water as provided by the  
3 Reclamation Act.

4           20.     Also in 1905, the Secretary of the Interior authorized the construction of the  
5 Klamath Project, which is “a federal reclamation project that provides water for the irrigation of  
6 approximately 230,000 acres in southern Oregon and northern California.” Crossclaim ¶ 1, ECF  
7 No. 963.

8           21.     In the decades following authorization of the Klamath Project, facilities were  
9 constructed and previously existing facilities were improved and incorporated into the project;  
10 those facilities include the various dams and canals for the Project.

11           22.     Construction of the Link River Dam at the outlet of Upper Klamath Lake began in  
12 1920 and finished in 1921. The dam was built to allow storage of water in the lake and to allow  
13 regulation of that storage for the benefit of Klamath Project irrigation.

14           23.     Following modifications to the reef of Upper Klamath Lake, construction of the  
15 Link River Dam, and modifications to a nearby canal (the so-called A-Canal), lake waters were  
16 able to be utilized through controlled storage, discharge, and diversion.

17 **IV. THE KLAMATH BASIN ADJUDICATION**

18           24.     The Klamath Basin is located in south central Oregon and northwestern California.  
19 The portion of the drainage basin located in Oregon encompasses the major portion of Klamath  
20 County and smaller parts of Jackson and Lake counties. Stream systems within the Klamath River  
21 Drainage Basin include Crater Lake, Upper Klamath Lake, Williamson River, Sprague River,  
22 Wood River, and drainage from the easterly slopes of the Cascade Mountains.

23           25.     In 1975, Oregon began a general adjudication of surface water rights in the  
24 Klamath Basin. The adjudication includes over 730 claims to water rights based on either pre-  
25 1909 or federal reserved water-right theories and includes over 5,600 contests to those claims.  
26 OWRD has administered the initial phases of the adjudication, including receipt of claims and  
27 contests, conduct of contested cases, and preparation of the Findings of Fact and Order of  
28 Determination. On February 28, 2014, OWRD submitted the Amended and Corrected Findings of

1 Fact and Order of Determination (ACFFOD) for the Klamath Basin with the Klamath County  
2 Circuit Court.

3 26. Under the ACFFOD, Reclamation has a right to store water in the Upper Klamath  
4 Lake for the benefit of irrigation-water-rights holders, under provisionally determined claim KA  
5 294. As determined in the ACFFOD, multiple water users share a water-rights claim, KA 1000,  
6 which includes the right to use water stored by Reclamation in the Upper Klamath Lake for  
7 beneficial use.

8 **V. OWRD’S REGULATION OF THE UPPER KLAMATH LAKE**

9 27. On April 17, 2020, Klamath Irrigation District (KID) filed suit against OWRD in  
10 Marion County Circuit Court, alleging that OWRD unlawfully allowed Reclamation to release  
11 stored water through Link River Dam, which Reclamation purportedly did to comply with the  
12 ESA, without an established water right for that purpose. KID obtained an order requiring OWRD  
13 to take exclusive charge of the Upper Klamath Lake. *See* Or. Rev. Stat. § 540.210. OWRD did so.

14 28. KID subsequently filed another lawsuit on May 14, 2020, alleging that OWRD  
15 continued to allow Reclamation to release stored water without determining whether Reclamation  
16 had a water right to do so. On October 13, 2020, the Marion County Circuit Court ordered  
17 OWRD to immediately stop the distribution, use, or release of stored water from the Upper  
18 Klamath Lake without first determining that the distribution, use, or release is for a permitted  
19 purpose by users with an established right, license, or permit. The court later entered judgment,  
20 which finalized that order as an injunction. OWRD appealed that judgment, and that appeal is  
21 currently pending.

22 29. As directed by the Marion County Circuit Court, OWRD issued an order on April  
23 6, 2021, directing Reclamation to “immediately preclude or stop the distribution, use or release of  
24 stored water from the [Upper Klamath Lake], in excess of amounts that may be put to beneficial  
25 use under KA 1000 downstream of the Link River Dam.”

26 30. The April 6, 2021 order also noted that OWRD had “cause to believe” that  
27 Reclamation would “at some future date, release legally stored water through the Link River Dam  
28 to comply with the Bureau’s federal tribal trust obligations and ESA obligations.” The order ends

1 with a paragraph stating that the order in no way altered Reclamation’s other obligations, under  
2 either state or federal law:

3                   Nothing in this order alters, relieves or releases any person, state, or  
4                   federal agency from any and all rights, duties or obligations arising  
5                   from other sources of law including without limitation other state  
6                   laws or rules, federal laws and related federal agency regulations,  
7                   federal or state court orders, or contracts.

6           31.     On July 2, 2021, and July 28, 2021, OWRD issued notices of violations to  
7 Reclamation, finding that Reclamation had violated the April 6 order and directing Reclamation  
8 to come into compliance.

9           32.     On October 1, 2021, both KID and the United States filed petitions for judicial  
10 review of the April 6 order. *See Klamath Irrigation Dist. v. Or. Water Res. Dept.*, No.  
11 21CV39570 (Marion Cnty. Cir. Ct.) (KID’s petition); *United States v. Or. Water Res. Dept.*, No.  
12 1:21cv01442 (D. Or.) (United States’ petition). Oregon law authorizes persons who are adversely  
13 affected or aggrieved by an agency’s final order to seek judicial review of the order. Or. Rev.  
14 Stat. §§ 183.484, 536.075. It further provides that, if a party files a petition for judicial review,  
15 OWRD cannot take enforcement action unless it or the Water Resources Commission denies the  
16 stay:

17                   The filing of a petition in either the circuit court or the Court of  
18                   Appeals shall stay enforcement of the order of the commission or  
19                   the department unless the commission or the department determines  
20                   that substantial public harm will result if the order is stayed. If the  
21                   [Water Resources] commission or the department denies the stay,  
22                   the denial shall be in writing and shall specifically state the  
23                   substantial public harm that will result from allowing the stay.

21 *Id.* § 536.075(5). That statute is commonly referred to as an “automatic stay.”

22           33.     Neither the Water Resources Commission nor OWRD denied the stay. As a result,  
23 the automatic stay deprives OWRD of its authority to take any further enforcement actions related  
24 to the April 6 order.

25           34.     Additionally, after filing its appeal, OWRD filed a motion with the Oregon Court  
26 of Appeals, seeking a stay of the Marion County Circuit Court’s judgment. On December 17,  
27 2021, the appellate court granted the stay and, on its own motion, expedited the appeal. That  
28 appeal is currently pending.



1 **FIRST CLAIM FOR RELIEF**  
2 **(Violation of the Administrative Procedure Act, the Reclamation Act of 1902, and Oregon**  
3 **Revised Statutes, Title 15, Chapter 540)**

3 35. OWRD realleges by reference the allegations set forth in paragraphs 1–34 above.

4 36. The Administrative Procedure Act waives sovereign immunity and creates a  
5 private right of action for injunctive relief against federal agencies and their officers where the  
6 agency’s action causes a legal wrong within the meaning of a relevant statute. 5 U.S.C. § 702.  
7 The Court may grant injunctive relief under 5 U.S.C. § 706.

8 37. Section 8 of the Reclamation Act of 1902 provides the statutory authority for  
9 Reclamation to operate the Klamath Project. Section 8 expressly provides that state laws “relating  
10 to the control, appropriation, use, or distribution of water used in irrigation” continue to govern  
11 reclamation projects such as the Klamath Project. 43 U.S.C. § 383. Specifically, “the Secretary of  
12 the Interior, in carrying out the provisions of [the] Act, shall proceed in conformance with such  
13 [state] laws . . . .” *Id.* “The goal of section 8 is to ensure that all water rights within a state,  
14 including those associated with federal reclamation projects, are subject to a uniform set of state  
15 laws.” *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citing *California v.*  
16 *United States*, 438 U.S. 645, 668–69 (1978)).

17 38. Under Oregon law, Reclamation may legally divert, release, or use water in  
18 accordance with the terms of its water-rights permit. Under the ACFFOD, Reclamation may store  
19 water in the Upper Klamath River for the benefit of water users, and for the purpose of irrigation,  
20 under claim KA 294.

21 39. A dispute between water users and Reclamation has arisen regarding the legality  
22 of Reclamation’s releases from Link River Dam. OWRD has taken exclusive charge of the UKL  
23 and has the authority and the obligation to determine the extent of the disputing parties’ water  
24 rights.

25 40. Whether the Court agrees with the KWUA that the ESA does not apply to the  
26 Klamath Project or agrees with the United States that Oregon water law cannot prevent  
27 Reclamation from complying with the ESA, state law requires OWRD to ensure that, to the extent  
28 there is no direct conflict with the ESA, Reclamation complies with the limitations in its water-

1 rights permit. OWRD therefore seeks an injunction requiring Reclamation to either cease  
2 unlawfully releasing water or provide OWRD with sufficiently detailed information to establish  
3 that the quantity of particular releases through the Link River Dam are required by the ESA.

4 **SECOND CLAIM FOR RELIEF**  
5 **(Claim for declaratory relief under Or. Rev. Stat. § 28.020)**

6 41. OWRD realleges by reference the allegations set forth in paragraphs 1–34 above.

7 42. Under Oregon Revised Statute § 28.020, any party whose legal relations are  
8 affected by a constitutional or statutory provision may obtain a declaration of its legal relations  
9 under those provisions.

10 43. This Court has jurisdiction over this state-law counterclaim under 28 U.S.C.  
11 § 1367.

12 44. Section 8 of the Reclamation Act waives the United States’ sovereign immunity  
13 for this state-law claim by providing, “the Secretary of the Interior, in carrying out the provisions  
14 of [the] Act, shall proceed in conformance with such [state] laws.” 43 U.S.C. § 383. The acts and  
15 omissions challenged by OWRD involve the United States’ carrying out the provisions of the  
16 Reclamation Act through the Bureau of Reclamation.

17 45. Under the Supremacy Clause of the U.S. Constitution and under the Reclamation  
18 Act, only actual conflicts with federal law preempt state-law water rights.

19 46. Without sufficiently detailed information about the quantity and purpose of water-  
20 releases by Reclamation from the Link River Dam, OWRD is unable to properly administer water  
21 rights for Upper Klamath Lake. That is because, without that information, OWRD cannot  
22 determine whether Reclamation’s water releases preempt state-law water rights due to an actual  
23 conflict with federal law.

24 47. The United States, through Reclamation, has released water through the Link  
25 River Dam without providing sufficiently detailed information about the quantity of those  
26 particular water releases, due to its view of its obligations to OWRD under the Reclamation Act,  
27 the ESA, the Supremacy Clause, and state water law.  
28

1 48. The United States' failure to provide sufficiently detailed information about the  
2 quantity of particular water releases through the Link River Dam therefore obstructs OWRD's  
3 ability to properly administer water rights related to Upper Klamath Lake. An injunction  
4 requiring the United States, through the Bureau of Reclamation, to provide sufficiently detailed  
5 information would cure that obstruction.

6 49. Injunctive relief based on a declaration issued under Oregon Revised Statute  
7 § 28.020 is authorized by Oregon Revised Statute § 28.080.

8 **THIRD CLAIM FOR RELIEF**  
9 **(Traditional equitable claim to enjoin violations of federal law)**

10 50. OWRD realleges by reference the allegations set forth in paragraphs 1–34 above.

11 51. Federal courts have jurisdiction to hear traditional claims for equitable relief to  
12 enjoin violations of federal law by federal officials. *Armstrong v. Exceptional Child Ctr.*, 575  
13 U.S. 320, 327 (2015).

14 52. Section 8 of the Reclamation Act waives the United States' sovereign immunity  
15 for this federal claim by providing, "the Secretary of the Interior, in carrying out the provisions of  
16 [the] Act, shall proceed in conformance with such [state] laws." 43 U.S.C. § 383. The acts and  
17 omissions challenged by OWRD involve the United States' carrying out the provisions of the  
18 Reclamation Act through the Bureau of Reclamation.

19 53. By providing that state laws "relating to the control, appropriation, use, or  
20 distribution of water used in irrigation" continue to govern reclamation projects" and that the  
21 United States is to "proceed in conformance with such [state] laws," Section 8 of the Reclamation  
22 Act further requires the United States to comply with state water law, except when state law is  
23 inconsistent with Congressional directives.

24 54. The Marion County Circuit Court issued a judgment requiring OWRD to  
25 determine whether Reclamation has released and will continue to release stored water through  
26 Link River Dam without a state-law right to do so.

