



MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item D, August 27, 2020
Water Resources Commission Meeting

Delegation of Authority to Implement the Provisions of ORS 540.220 and OAR 690-250-0160 in the Klamath Basin

I. Introduction

The Oregon Water Resources Department (“Department”) requests the Water Resources Commission to delegate its authority as provided in ORS 536.025(2) and ORS 540.220(1) to the Director. The requested delegation order would allow the Department to implement provisions of OAR 690-250-0160 and require payment in advance for the services requested by the Klamath Irrigation District (KID) pursuant to ORS 540.210 to distribute water from the Upper Klamath Lake reservoir (UKL reservoir) in accordance with the water users’ relative rights.

The services requested by KID necessitate a substantial commitment of Department staff time and resources to continue a timely investigation in aid of taking charge of the UKL reservoir under ORS 540.210-270 to fully understand the water budget and use of water pursuant to water rights of record. The investigation will provide the basis for Department actions to fairly regulate and distribute water and monitor changing conditions.

II. Background

Upper Klamath Lake is part of a complex water storage and delivery system. The system receives water from the Williamson River, Wood River, numerous other streams, and natural groundwater discharges. Water rights have been recognized which are authorized to divert stored water and natural flow directly from the lake, and rights are recognized to divert stored water and natural flow from the Klamath River below Link River Dam.

The U.S. Bureau of Reclamation is the owner of the storage right for the UKL reservoir. Determined claim KA 294 authorizes the Bureau of Reclamation to store a maximum annual volume of 486,828 acre-feet of water in Upper Klamath Lake. Stored water from KA 294, along with groundwater discharges and natural streamflow entering Upper Klamath Lake, are the sources of water for determined claim, KA 1000, which authorizes KID and other users to apply up to a maximum of 3.5 acre-feet per acre for irrigation purposes from March 1 through October 31.

III. Disputes over Water Regulation and Distribution in 2018 and 2020

In general, the watermaster is not responsible for distributing water within district boundaries, or between the primary stored water right holder and the secondary water right holder that uses the stored water. As a result, the Department has not historically distributed water related to the Klamath Project.

During the 2018 irrigation season, the KID sued the Department and the District 17 Watermaster in state court seeking to compel the watermaster to “take charge” of the UKL reservoir under ORS 540.210. The Marion County Circuit Court agreed with KID that ORS 540.210 imposes a mandatory obligation on the Department to take an action when a water user disagrees with the owner of a reservoir “relative to the distribution of water” from a reservoir. The Department commenced an investigation after the court ruling. However, at the end of the 2018 irrigation season, and before the investigation could be concluded, the KID notified the Department that the matter was of no further practical importance. The Department terminated the investigation.

In early April of 2020, the Department received notice from the KID that it again disputed the Bureau of Reclamation’s distribution of stored water from the UKL reservoir and requested the Department take charge of the UKL reservoir pursuant to ORS 540.210¹. The following provides a brief summary of the numerous actions this year:

- The Department took charge of UKL reservoir for the purpose of distribution in accordance with the relative rights of the various lawful users and immediately commenced an investigation, which is ongoing and discussed further in Section IV of this report.
- On April 16, 2020, the Department formally notified KID and the Bureau of Reclamation that it had taken charge of the UKL reservoir pursuant to ORS 540.210 by issuing a Notification of Dispute and Investigation in Aid of Distribution².
- On April 17, the KID sued the Department seeking a Writ of Mandamus to compel agency action pursuant to ORS 540.210.

¹ Under ORS 540.210(1), “[w]henver any water users from any ditch or reservoir either among themselves or with the owner thereof are unable to agree relative to the distribution or division of water through or from” the reservoir, the owner of the reservoir or “any water user” may apply to the watermaster of the district in which the reservoir is located, by written notice. The notice must “set forth the facts” of the dispute and ask the watermaster to “take charge” of the ditch or reservoir for the purpose of making “a just division or distribution of water from it to the parties entitled to the use” of the water.

² ORS 540.210(2) provides that the watermaster “shall then take exclusive charge of the ditch or reservoir for the purpose of dividing or distributing the water” from the reservoir “in accordance with the respective and relative rights of the various users of water from the” reservoir (emphasis added). The statute further states that the distribution and division of the water from the reservoir “shall be made according to the relative and respective rights of the various users from the reservoir” as determined by the Water Resources Director, by decree of the circuit court, or by written contract between all of the users (emphasis added). ORS 540.210(3).

- On April 21, the Marion County Circuit Court issued an Alternative Writ of Mandamus.
- On April 23, the Department issued an Interim Order Concerning Release of Stored Water directing the Bureau of Reclamation with respect to releases of stored water from UKL reservoir, making a further showing of the ongoing efforts to reach a fully informed determination of the just distribution of stored water from UKL reservoir.
- On April 24, the Commission delegated its investigatory authorities as provided in ORS 536.026.
- On May 1, the Department sent administrative subpoenas requesting additional information to the Bureau of Reclamation, KID, and PacifiCorp. Responses to the queries are available on the Department's website at <https://www.oregon.gov/owrd/programs/regulation/KlamathRegulation/Pages/default.aspx>.
- On May 12, the mandamus lawsuit was dismissed without further action by the circuit court and the court entered judgment.
- On May 14, KID filed a new lawsuit in Marion County Circuit Court against the Department and the watermaster seeking an injunction under ORS 540.740 and another claim to compel agency action under ORS 540.210 and the Administrative Procedures Act.
- On June 18, the judge heard arguments on the injunction claim and took that claim under advisement.
- On July 30, the judge issued an opinion letter approving KID's motion for partial summary judgment on the injunction claim under ORS 540.740 and denying the Department's motions on the same claim.

IV. Taking Charge under ORS 540.210 – Update on Efforts to Date

Following notice from KID of a dispute under ORS 540.210 in early April, the Department began to take charge of the UKL reservoir. The first step in taking charge is to understand the system that needs to be managed.

On April 24, the Commission delegated its investigative authorities under ORS 536.026 to the Director. The delegation allows the Department to conduct public hearings, issue subpoenas for the attendance of witnesses and the production of records and documents, administer oaths, and receive "such pertinent and relevant proof as may be considered necessary or proper to carry out the duties of the Commission and Water Resources Department" under ORS 540.210 among other authorities.

Following the Commission's Delegation Order of April 24, 2020, the Department continued its investigation. Management of stored water is complex when the reservoir is across or on a natural stream, as is the case with the UKL reservoir. The Department's investigation is seeking sufficient information to determine the quantity of stored water existing at the time, the rate of flow into and out of the reservoir, the quantity of water being used (diverted), whether it is natural flow or stored water, and which diversions are entitled to receive stored water (when and how much). Distribution in accordance with relative rights necessitates the Department to gather an extraordinary amount of information, including data on diversion types, locations, headgate and measuring devices, and amounts of water diverted in 2020.

As part of its investigation, the Department requested information from the Bureau of Reclamation, PacifiCorp, and the KID. All three entities quickly responded. The Department also mailed out 20 requests-for-information to secondary water right holders with a right to water from Upper Klamath Lake. Some water users indicated that water use measuring devices are not present, and that their diversion rates and volumes this year and in the past are unknown. The Department also mailed 16 requests-for-information to water users diverting from the Klamath River below Link River dam. A number of these water users, through their attorney, objected to providing the requested information.

The information received to date has been made publicly available on the Department's website at: www.oregon.gov/owrd/programs/regulation/KlamathRegulation/Pages/default.aspx

The information gathered so far is a significant start, but it is anticipated that additional information will be needed from these entities and other water users diverting water from UKL reservoir and from the Klamath River below Link River Dam. In addition to the investigation conducted thus far, the Department believes it will be necessary to issue additional administrative subpoenas and requests-for-information and hold a hearing so as to receive all pertinent and relevant proof necessary to understand this complex water system and ensure that distribution is in accordance with relative rights.

V. Payment for Services under ORS 540.210

ORS 540.220 requires that the water users pay for the cost of distribution under ORS 540.210. Specifically, ORS 540.220(1) provides that a watermaster may appoint an assistant to take charge of the reservoir involved in the distribution or division of water under ORS 540.210. Such assistant "shall be paid" by the water users from the reservoir "for the cost of distribution" and the Water Resources Commission may require the payment be made in advance (emphasis added). Given the complexity of the UKL system, a number of personnel may be needed to work on the investigation, regulate and distribute water, and monitor changing conditions. The types of positions that may be needed to provide assistance for this effort include watermasters, assistant watermasters, and surface water hydrologists.

Collecting payment for the services the Department is providing is critical to assuring the Department has the capacity to provide timely and accurate distribution services pursuant to ORS 540.210. The Department will need sufficient resources to continue the investigative work and

ultimately distribute the water from UKL reservoir in accordance with the “respective and relative rights of the various users of water.” Attachment 1 provides an initial estimate of the potential compensation and expenses needed to proceed with the investigation through the next phase of assessing points of diversion around UKL reservoir and below Link River Dam in aid of creating a distribution list for water management. Attachment 1 is intended to provide an example of the estimated costs but is not intended to be all inclusive and may be subject to revision and refinements as the Department gets a better understanding of the scope of the work and staff resources needed to do that work.

The Department’s collections authority under Oregon Administrative Rules 690-250-0160 represents an existing delegation by the Commission to implement the provisions of ORS 540.220. In April of this year, the Commission delegated its investigative authorities to the Department but directed the Department to return at a future time for the Commission to consider whether to require the water users to pay in advance the estimated compensation and expenses of the assistant(s) involved in the investigation and distribution effort.

VI. Request for Commission Delegation

KID’s request for the Department to take charge of the UKL reservoir under ORS 540.210 necessitates a substantial commitment of Department staff time and resources to perform a timely investigation to fully understand the water budget and the water rights of record, fairly regulate and distribute water, and monitor changing conditions. At this point in the investigation, the Department believes it is the appropriate time to request the Commission to allow the Department to proceed with its collections authority as provided in OAR 690-250-0160.

The Director requests the Commission delegate its authority to allow the operation of OAR 690-250-0160 such that the Department may seek payment in advance for the services it will provide to conclude its investigation, proceed with the distribution of water, and provide necessary regulatory and monitoring activities. ORS 536.025 authorizes the Commission to delegate to the Department its decision-making authority in ORS 540.220(1) regarding payment in advance for the costs of distribution.

VII. Summary

The Department requests the Commission delegate its authority to the Director to allow collection of payment in advance for purposes of taking charge of UKL reservoir pursuant to ORS 540.210.

VIII. Alternatives

The Commission may consider the following alternatives:

1. Delegate authority to the Director to require water users to pay in advance the estimated compensation and expense of the assistant(s) involved in the distribution or division of water pursuant to ORS 540.210 as provided in OAR 690-250-0160 and in the proposed delegation order in Attachment 2.

2. Do not delegate to the Director the authority in ORS 540.220(1) such that the operation of OAR 690-250-0160 may not come into effect for the purposes of the ongoing investigation.
3. Defer the decision and request additional information.

IX. Director's Recommendation

The Director respectfully recommends the Commission approve the action in Section VIII, Alternative 1 of this report.

Attachments:

1. Initial Costs for Staff Resources to Aid in the Investigation and Distribution of Stored Water
2. Proposed Delegation Order

Table of Initial Estimates of Potential Compensation and Expenses for staff Resources to Aid in the Investigation and distribution of Stored Water. Estimates provided below are subject to revision.

Task	Staff hours, mileage, and lodging	Estimated compensation and expenses
Investigation conducted to date, including administrative subpoenas, requests for information, and communication to water users	187 hours	\$10,285
Inspect 30 PODs around UKL; follow-up with measuring device orders; compliance check and inspections	185 hours 810 miles 5 nights lodging	\$11,293
Inspect 85 PODs below Link River Dam; follow-up with measuring device orders; compliance check and inspections	485 hours 5,000 miles 10 nights lodging	\$30,695
	Total Estimated Compensation and Expenses	\$41,988

STATE OF OREGON
WATER RESOURCES COMMISSION

In the Matter of an Investigation)	
in Aid of Distribution Pursuant to)	DELEGATION ORDER
ORS 540.210)	
)	
Klamath Irrigation District)	
<i>Disputant,</i>)	
)	
U.S. Bureau of Reclamation)	
<i>Reservoir Owner.</i>)	

RECITALS

WHEREAS, pursuant to ORS 540.210(1), whenever any water users from any reservoir, either among themselves or with the owner of the reservoir “are unable to agree relative to the distribution or division of water through or from” the reservoir, either the owner or the water user may apply to the watermaster of the district in which the reservoir is located, by written notice, setting forth the facts, and asking the watermaster to “take charge” of the reservoir “for the purpose of making a just division or distribution of water from it to the parties entitled to the use thereof;”

WHEREAS, ORS 540.210(2) provides that the watermaster “shall then take exclusive charge” of the reservoir “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 reservoir and ORS 540.220(1) provides that the watermaster “may appoint an assistant” and the assistant “shall be paid by the water users” from the reservoir “for the cost of the distribution” and further that the Commission “may require the water users to pay in advance the estimated compensation and expense of the assistant”;

WHEREAS, on April 3, 2020, the Klamath Irrigation District (“KID”) submitted a written notice to the Water Resources Department (“Department”) asserting a dispute between the KID and the U.S. Bureau of Reclamation (“BOR”) and seeking the Department to “take charge” of the Upper Klamath Lake (“UKL”) reservoir for the purpose of distributing water stored in UKL reservoir to the parties entitled to the use thereof;

WHEREAS, the Department commenced to take charge of UKL reservoir and, on April 16, 2020, issued a NOTIFICATION OF DISPUTE AND INVESTIGATION IN AID OF DISTRIBUTION (“Notification”) to the BOR, to PacifiCorp and to the KID;

WHEREAS, on April 17, 2020, the KID filed suit in the Marion County Circuit Court and the Court issued an ALTERNATIVE WRIT OF MANDAMUS commanding the Department, to the extent it had not already taken charge of UKL reservoir, to “take exclusive charge of the 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 to exist,” effective April 21, 2020. (*Klamath Irrigation District v. Oregon Water Resources Department* 20CV15606);

WHEREAS, on April 24, 2020, the Commission issued an order delegating to the director the authority to “exercise any or all” of the Commission’s investigatory powers in ORS 536.026 as is “necessary or proper to carry out the duties in ORS 540.210 – 270,” and further directed that the Director shall check in “from time to time” to provide updates and information on the progress of the Department’s efforts to investigate and distribute water including to request the “Commission to determine whether payment by water users for the distribution must occur prior to the distribution.”

NOW THEREFORE, the Department has informed the Commission on the progress of the investigation in aid of distribution and has requested the Commission to determine whether payment by water user for the distribution of water may occur prior to distribution and the Commission orders as follows.

ORDER

The Commission delegates to the Director the authority to require the water users to pay in advance the estimated compensation and expenses of the assistant involved in the distribution or division of water as provided in OAR 690-250-0160.

DATED this ____ day of August 2020

MEG REEVES, Chair
Oregon Water Resources Commission