



RIETMANN LAW, P.C.

August 26, 2020

Oregon Water Resources Commission
725 Summer Street NE, Suite A
Salem, Oregon 97301

RE: Klamath Irrigation District Comments
Agenda Item D, August 27, 2020

Commissioners:

Our office represents the Klamath Irrigation District (“KID”), which owns water rights and delivers water to approximately 122,000 acres of land within the Klamath Reclamation Project.

The Oregon Water Resources Department (“OWRD”) is asking that you approve a delegation order authorizing OWRD to charge Klamath farmers tens of thousands of dollars for purported costs associated with OWRD’s distribution of water from UKL pursuant to ORS 540.210.

For the reasons that follow, we strongly encourage the Oregon Water Resources Commission (“Commission”) to table consideration of the delegation order until at least its next meeting and direct OWRD to engage in a dialogue with KID and other stakeholders in the meantime.

1. OWRD is seeking Commission authority to impose costs on Klamath farmers without *any* individual notice or dialogue with KID

OWRD is asking the Commission to approve a delegation order that would purportedly enable OWRD to charge Klamath farmers tens (if not hundreds) of thousands of dollars. OWRD is bringing this proposal to the Commission for approval *without* having any prior conversation with KID and other Klamath farmer representatives.

It is a standard good governance practice (and common courtesy) for agencies to at least try and engage the taxpayers they exist to serve before making governmental decisions impacting them. One would expect the level of stakeholder engagement to be particularly high where, as here, OWRD is seeking to directly impose substantial financial costs on a well-defined stakeholder group. However, that has not occurred. Moving forward with

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OWRD's proposal, without any prior stakeholder engagement, sends a very poor message to Klamath farmers.

2. OWRD's failure to timely perform its statutory duties has caused Klamath farmers more than \$120,000,000.00 million in damages

KID first asked OWRD to take exclusive charge of Upper Klamath Lake ("UKL") for purposes of distributing the water to the persons entitled to it *in 2018*. KID made this request for purposes of resolving a very specific dispute between itself and the United States Bureau of Reclamation on whether Reclamation may distribute water out of UKL for instream purposes when it does not have a water right authorizing it to do so.

OWRD responded to KID's 2018 request by refusing to do anything. Consequently, KID went to court and obtained an order compelling OWRD to fulfill its statutory duties in accordance with ORS 540.210. Despite the Court order, OWRD engaged in dilatory tactics and avoided taking any action until the irrigation season was at its end and KID informed OWRD that its assistance was no longer necessary. KID seriously considered bringing an action for contempt against OWRD at this time. However, it ultimately refrained from doing so upon the hope that next time KID asked OWRD to take charge of UKL the agency would take its responsibility seriously.

Subsequently, in 2020, KID again asked OWRD to take exclusive charge of UKL reservoir and stop the United States Bureau of Reclamation from using stored water in UKL without a water right. KID made the request upon learning that Reclamation was imminently prepared to distribute approximately 50,000 acre-fee of stored water for purposes of artificially enhancing stream flows in California without a water right. Yet instead of faithfully performing its duties under ORS 540.210 in response to KID's request, OWRD sent KID a "Notice of Dispute and Investigation in Aid of Distribution" that was not at all responsive to KID's request.

Consequently, KID filed another lawsuit. OWRD defended the lawsuit by telling the Court that it had already taken charge of UKL by issuing its "Notice of Dispute and Investigation in Aid of Distribution" document. The Court rejected this argument and issued a writ of mandamus compelling OWRD to take exclusive charge of UKL reservoir and distribute the water to the persons entitled to it in accordance with ORS 540.210.

Thereafter, OWRD issued an order to Reclamation that did not require Reclamation to do anything other than provide OWRD with information and allowed Reclamation to use approximately 50,000 acre-feet of stored water in UKL reservoir for instream purposes without a water right. OWRD then certified to the Court that it had complied with the Court's writ.

3. OWRD staff report indicates the agency plans to exceed its lawful authorities in imposing costs on Klamath farmers, likely giving rise to more litigation against OWRD

OWRD's staff report suggests the agency may seek to charge Klamath farmers for "a number of personnel" such as "watermasters, assistant watermasters, surface water hydrologists" to carry out the agency's mandatory duties under ORS 540.210. However, the applicable law only authorizes OWRD to charge water users for the "estimated compensation and expenses" of *an* assistant the watermaster *may* choose to appoint to help perform its duties under ORS 540.210. *See*, ORS 540.220. It does not authorize OWRD to charge water users for "a number of personnel."

Similarly, the OWRD staff report indicates the agency may seek to impose costs involved in ordering certain measuring devices. However, applicable statute only allows for recovery of these types of costs when "necessary and proper." Based on the OWRD staff report, it appears that most of measuring devices it seeks to require the installation of are wholly unnecessary to the performance of OWRD's duties under ORS 540.210. Furthermore, most of the information that might be gathered through the installation of such devices is irrelevant to the task at hand or the information is already readily available from existing sources.

Beyond the above, ORS 540.270 plainly states that "nothing contained in ORS 540.210 to 540.260 shall be applicable to the distribution of water from the irrigation systems or works of irrigation districts or district improvement companies unless requested by the district." This statute plainly precludes OWRD from conducting a completely unnecessary investigation in aid of distribution that is focused on resolving water distribution questions other than the water distribution question KID asked OWRD to resolve.

KID is very concerned that the Commission granting OWRD authority to impose costs, without engaging in any prior conversation with KID and others, is very likely to result in OWRD interpreting its authority to impose costs in an expansive manner, which is contrary to law, thereby giving rise to litigation that could have been avoided if there had been prior communication with KID and other stakeholders.

4. Nearly everything OWRD is proposing to do is unnecessary

KID asked OWRD to take exclusive charge of UKL reservoir pursuant to ORS 540.210 for purposes of resolving a very specific dispute concerning Reclamation's distribution of stored water through the Link River Dam without a water right to the detriment of KID and others who actually hold water rights to use the water. Once this

OWRD's certificate to the Court that it had complied with the writ was plainly a false return. However, since OWRD had already allowed Reclamation to unlawfully use stored water for the flushing flow without a water right, the writ proceeding was no longer the correct form of action for addressing the issue. Consequently, KID filed another lawsuit, this time seeking an injunction pursuant to ORS 540.740.

On July 30, 2020, the Court issued its opinion in KID's injunction lawsuit. The Court found that KID was entitled to an injunction against OWRD and rejected all of OWRD's claims to the contrary. Among other things, Court found that **"OWRD has wrongfully allowed the release of Stored Waters from the UKL for uses by the Bureau..."** and that **"OWRD's failure is a deprivation of a precious resource belonging to the people of Oregon."** Additionally, the Court found that **"OWRD's failure is also an infringement of property rights of established users..."** and that **OWRD was "fully apprised on and aware of these facts."** The court's opinion provides that OWRD is to stop allowing the release of stored water from 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.

OWRD has indicated that it intends to spend taxpayer dollars seeking a stay and appealing the Court's decision. OWRD apparently intends to do this even though the decision merely requires OWRD to perform its clear statutory duty and performance of this duty will not adversely impact any person or species in Oregon. As a result, KID will be forced to spend tens of thousands of additional dollars in attorney fees defending OWRD's appeals – which again, will not benefit any person or species in Oregon if OWRD is somehow successful.

OWRD's failure to timely perform its statutory duties has cost Klamath farmers hundreds of thousands of dollars in attorney fees. OWRD's failure to perform its statutory duties has also deprived Klamath farmers of water they hold water rights to with an estimated value of at least \$120,000,000.00. Now, OWRD is going to the Commission, without engaging in any prior dialogue with KID, and asking the Commission for authority to charge Klamath farmers for performance of the same statutory duties OWRD has unlawfully refused to perform for more than two-years.

If OWRD had promptly performed its duties in accordance with law when KID asked it to do so in 2018 and 2020, KID would have absolutely no objection to paying OWRD for the reasonable costs associated therewith that the agency is entitled to charge KID under law. However, in view of the staggering monetary damages OWRD has caused Klamath farmers throughout its inexplicable failure to perform its mandatory statutory duties in accordance with law, KID strongly objects to OWRD seeking Commission authority to impose further costs on Klamath farmers, without any prior discussion, *in advance of OWRD actually performing such duties in accordance with law.*

specific dispute is resolved, OWRD's duty under ORS 540.210 is fulfilled as the necessity for OWRD's involvement no longer exists. *See*, ORS 540.210(1) and (3).

OWRD's first task in resolving the dispute it has been asked to resolve is to make a determination of whether Reclamation has a water right authorizing it to divert stored water from UKL reservoir for instream purposes. If Reclamation does not have such a right, OWRD should then issue an order to Reclamation prohibiting it from distributing stored water from UKL reservoir for such purpose without a water right. If Reclamation complies with the order, the dispute is resolved. If Reclamation ignores the order and refuses to comply, or legally contests the order, OWRD would need to pursue further enforcement efforts and/or defend Reclamation's challenge to the order. Only if these legal processes came to conclusion, and KID or another party were contending Reclamation was still not complying, would it be necessary for OWRD to determine the amount of stored water being distributed from UKL through Link River Dam at any particular point in time. Regardless of whether any such need might arise at some hypothetical point in the future, that need does not exist today. What is more, if this situation were to arise, the information OWRD needs to make such determinations with a sufficient certainty to make a proper distribution is readily available from Reclamation, KID, and a handful of other sources.

The point is that nearly all the activities OWRD is telling the Commission it must engage in to comply with ORS 540.210 are completely unnecessary and wasteful, particularly at the present point in time. All OWRD needs to be doing at the present time is develop an order, which complies with the judgment the Court is imminently prepared to enter in the KID v. OWRD litigation. None of the other activities in which OWRD is engaging, or preparing to engage, are necessary. Every determination OWRD needs to make can be made with readily available information and simple math.

5. Conclusion

OWRD's failure to perform its statutory duties in accordance with law has already caused great harm to Klamath farmers. The Commission's adoption of the proposed delegation order would only worsen matters and is likely to result in expensive and protracted litigation that could have been avoided through good faith dialogue with KID and other stakeholders. KID strongly encourages the Commission to table consideration of this matter and direct OWRD to engage in discussions with KID and other stakeholders about a reasonable and appropriate manner of proceeding that complies with the law.

Sincerely,



Nathan R. Rietmann