

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF AN INVESTIGATION)	
IN AID OF DISTRIBUTION PURSUANT)	DETERMINATION ON STATUS
TO ORS 540.210)	OF RELEASES FROM UPPER
)	KLMATH LAKE THROUGH
Klamath Irrigation District)	THE LINK RIVER DAM
Petitioner,)	
)	
Bureau of Reclamation)	
Reservoir Owner.)	

I. AUTHORITIES

On April 10, 2014, the Oregon Water Resources Department issued its Amended and Corrected Findings of Fact and Order of Determination (“ACFFOD”). The ACFFOD contains the Department’s findings and determinations as to claims filed in the Klamath Basin Adjudication and constitutes the final order of the Director. Since the order was entered in the Klamath County Circuit Court, and until a certified copy of the judgment order or decree of the court is transmitted to the Director, the division of water from streams involved in the adjudication “shall be made in accordance with the order of the director.”¹

The Oregon Water Resources Commission has adopted rules to secure the equal and fair distribution of water in accordance with the rights of the various users. These rules, contained in Oregon Administrative Rules (“OAR”) Chapter 690 division 250, shall apply to all water rights that have been established under an order of the Water Resources Director in proceedings for the determination of relative rights to the use of water.²

According to the Commission’s rules, water distributed for irrigation is allocated according to the allowed instantaneous rate of diversion (measured in cubic feet per second or “cfs”) and is limited by the total volumetric duty (measured in acre-feet per acre or “AF”) that may be diverted during an irrigation season.³ The Commission’s rules also define “Legally Stored Water” as “[a]ny water impounded in a reservoir under the provisions of an established right to store water.” A “[r]eservoir” is a “[a] natural or artificial lake or pond in which water is collected for beneficial use or purpose.”⁴ The Commission’s rules governing the allocation of stored water state that:

¹ ORS 539.170.
² ORS 540.145.
³ OAR 690-250-0100; OAR 690-250-0010(12).
⁴ OAR 690-250-0010(10) and (13).

Use of legally stored water is governed by water rights, if any, which call on that source of water. *Any legally stored water released in excess of the needs of water rights calling on that source of water shall be considered natural flow*, unless such release is part of a water exchange under the approval and control of the watermaster.⁵

With regard to determining “the needs of water rights calling on that source of water,” the watermaster must consider that water users are entitled to divert only the instantaneous rate that they can put to beneficial use up to the maximum rate and only to the extent water is needed to fulfill the use to which it has been appropriated.⁶ For example, a water user may be entitled to a duty of three AF per acre by volume over the irrigation season, but a water user will not want to divert the full duty all at one time lest they flood their fields. Instead, instantaneous rate is prorated over the irrigation season up to the volumetric duty for the season. Water not immediately used 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.⁷

Finally, where there is a dispute between water users and the owner of a reservoir, water is distributed from a reservoir by the watermaster in accordance with the relative rights of the water users.⁸ The existing dispute is detailed in the next section.

II. BACKGROUND

On April 3, 2020, the Oregon Water Resources Department (“Department”) received a notice of dispute from the Klamath Irrigation District (“KID”), pursuant to ORS 540.210, asserting a dispute between the KID and the U.S. Bureau of Reclamation (“Bureau”). On April 16, 2020, as required by ORS 540.210, the Department took charge of the Upper Klamath Lake reservoir and issued its NOTIFICATION OF DISPUTE AND INVESTIGATION IN AID OF DISTRIBUTION to the Bureau, KID and PacifiCorp.

On April 17, 2020, KID filed a Petition for Alternative Writ of Mandamus in the Marion County Circuit Court (*Klamath Irrigation District v. Water Resources Department* (20CV15606)). On April 21, 2020, the Marion County Circuit Court issued an Alternative Writ

⁵ OAR 690-250-0150(4) (emphasis added).

⁶ *Bennet 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.

⁷ *Benz v. Water Resources Com’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.

⁸ ORS 540.210(3).

of Mandamus commanding the Department to take charge of Upper Klamath Lake reservoir to the extent it had not already done so and to divide or distribute the water in accordance with the relative and respective rights of the various users of the reservoir and to continue the work until the necessity ceases to exist.

On April 23, 2020, the Department issued its INTERIM ORDER CONCERNING RELEASE OF STORED WATER to the Bureau ordering the Bureau to cease releasing stored water from Upper Klamath Lake except in accordance with the relative and respective state law rights calling upon the stored water unless and until the Bureau provided information to the Department including (a) the timing and the rate of release of stored water authorized by secondary state law rights calling upon the stored water, and the corresponding names of the water users whose state law rights call upon that water; (b) the rate of release(s) in excess of the needs of water users with state law rights calling on that stored water that may be considered natural flow as provided in ORS 540.045(3); and (c) the rate and volume of each release, and the source(s) of legal authority for each release of stored water released for a purpose other than to satisfy state law rights.

On April 28, 2020, the Bureau provided its *First Supplemental Response to Interim Order Concerning Release of Stored Water* providing the technical information regarding release, including deliveries of stored water to the A Canal and listing the legal authorities upon which it relied to release stored water for a purpose other than to satisfy state law rights, namely the Endangered Species Act (16 U.S.C. §§ 1531 *et seq.*), federal reserved water rights and tribal trust obligations.

On May 12, 2020, the Marion County Circuit Court entered a judgment of dismissal of the mandamus case (20CV15606). 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 failed to carry the ACFFOD into effect. The petition also sought an order compelling agency action under the Administrative Procedures Act, ORS 183.490, based on the Department's obligation under ORS 540.210 to take charge of Upper Klamath Lake reservoir upon notice of a dispute between water users and the reservoir owner (*Klamath Irrigation District v. Oregon Water Resources Department, Thomas Byler, Danette Watson* (20CV17922)).

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 [Upper Klamath Lake] 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.

On October 14 and 15, 2020, the Watermaster District 17 immediately investigated and considered the best available information on inflows to Upper Klamath Lake and outflows passing the Link River Dam. On October 15, 2020, the Watermaster District 17 determined that

Legally Stored Water was not passing the Link River Dam. *Declaration of D. Watson*, ¶ 3 (“* * * I have no basis to conclude that stored water is being released from Link River dam.”).

On January 7, 2021, the Department asked the court to reconsider its assertion of jurisdiction pursuant to ORS 540.740. The court, in its denial of that request, emphasized the obligation reflected in the October 13 order to make “a determination.” *KID v. OWRD 20CV17922*, Order Jan. 7, 2021 (emphasis omitted). The Department hereby reaffirms and brings current the Watermaster District 17’s determination, based on the best available information that, as of the date of this determination, water passing the Link River dam is not Legally Stored Water.

The Department further concludes that, in the exercise of the ongoing obligation, pursuant to ORS 540.210, to divide or distribute the water in accordance with the relative and respective rights of the various users of the reservoir and to continue the work until the necessity ceases to exist, that an updated determination will be made whenever circumstances change materially but no less frequently than every 30 days throughout 2021.

Subsequent determinations may lead to the Department issue an order requiring the Bureau to stop the distribution, use and/or release of Legally Stored Water from the Upper Klamath Lake. This order would be issued in the event that the watermaster determines that Legally Stored Water is passing the Link River Dam other than in accordance with ORS 540.410 (prior notice required from reservoir owners using the bed of a stream) the ACFFOD, and/or the October 13, 2020 Order.

III. FINDINGS OF FACT

The following findings of fact are based on the best available information and data available to the Department at the time this determination is made. The Department expects that as its investigation in aid of distribution proceeds it may achieve more information and data.

The Project and Determined Claims KA 294 and KA 1000

1. 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. Upper Klamath Lake is a natural lake and is also one of the three reservoirs in the Project which also comprises eight dams, five major pumping plants, 19 canals, and other works.
2. The Bureau is the sole owner of Determined Claim KA 294 (“KA 294”). KA 294 provisionally authorizes the Bureau to store a maximum annual volume of 486,828 acre feet (“AF”) of water in Upper Klamath Lake between elevations 4136 feet and 4143.3 feet, relative to the Bureau’s Klamath Basin Datum. The source of water for KA 294 is water flowing into the lake from the Williamson River and all of its tributaries including the Sycan and Sprague Rivers, the Wood River, Crooked Creek, Sevenmile Creek, Thomason Creek, Fourmile Creek, and Crystal Creek

and all their tributaries. The fill season (being that time that water may be appropriated and stored) begins January 1 of each year and ends on December 31 of each year.

3. Based on KA 294, water present in Upper Klamath Lake between the elevations of 4136 feet and 4143.3 feet, relative to the Bureau's Klamath Basin Datum, is Legally Stored Water up to a maximum annual volume of 486,828 AF. There are no other water rights or determined claims authorizing storage of water in Upper Klamath Lake.
4. The volume of water stored in Upper Klamath Lake is estimated based on an area 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 is met when the lake elevation is at 4142.48 feet.
5. The weighted mean lake level of Upper Klamath Lake 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
6. The Bureau, KID and 20 other Klamath Project Water Users (together the "KPWU") are co-owners of Determined Claim KA 1000 ("KA 1000"). KA 1000 provisionally authorizes the diversion of live flow from Upper Klamath Lake and water stored in Upper Klamath Lake under KA 294 for beneficial use by the KPWU upstream of the Link River Dam and downstream of the Link River Dam.⁹
7. Under KA 1000, KID may divert up to 1,150 cfs through the A Canal for irrigation during the irrigation season March 1 through October 31, with a priority date of May 19, 1905. KA 1000 permits KID (and other KPWU members) to divert either live flow or water stored in Upper Klamath Lake but does not allocate rights between the two sources or require either source to be available to KPWU.

The Link River Dam

8. KA 1000 does not direct the operation of the Link River Dam.
9. The Link River Dam is a federally owned dam located on the Link River at the head of the Klamath River. The Link River Dam regulates flow from Upper Klamath Lake Reservoir. The Link River Dam does not have the ability to distinguish between live flow and Legally Stored Water. The Link River Dam is a reinforced concrete slab structure with a height of 22 ft and a crest length of 435 ft. The reservoir has a capacity of 735,000 AF and is operated by PacifiCorp,

⁹ KA 1000 erroneously refers to KA 293, but this is a typographical error.

subject to Klamath Project rights. (“Reclamation: Managing Water in the West” Bureau of Reclamation, Public Affairs Office <http://www.usbr.gov/mp/kbao/>)

10. PacifiCorp and its predecessor have operated Link River Dam since its construction was completed in 1921. PacifiCorp has operated Link River Dam, at Reclamation’s direction, since 1997, when Reclamation assumed discretionary responsibility for specifying Klamath River flows and Upper Klamath Lake elevations consistent with Reclamation’s 1997 Operations Plan. PacifiCorp’s operation of Link River Dam at Reclamation’s direction was also reflected in the amendment and extension of the 1956 Link River Dam operating agreement (Contract No. 14-06-200-5075), in 2006 (“2006 Amendment”). The 2006 Amendment made clear PacifiCorp is to operate the dam “. . . consistent with the Klamath Project Annual Operations Plan and Reclamation’s discretionary responsibility, and as directed by the Contracting Officer.” The 2006 Amendment was extended until April 17, 2008. PacifiCorp and Reclamation continue to operate Link River Dam at Reclamation’s direction, and in accordance with the terms of the 2006 Amendment. This includes releasing water from Link River Dam, at Reclamation’s direction, to support surface flushing flows downstream in the Klamath River. (Letter to Jeff Nettleton (BOR) from Mark Sturtevant dated April 21, 2020 (concerning release of water from Link River Dam)).
11. PacifiCorp owns and operates the Klamath Hydroelectric Project, Federal Energy Regulatory Commission (FERC) License #2082, located within Oregon and California. The project consists of the following developments: East Side and West Side developments on the Link River; Keno Dam; Fall Creek development on Fall Creek, a tributary to the Klamath River; J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate developments, all on the Klamath River. Iron Gate is the most downstream development of the hydroelectric project. Fall Creek, Copco No. 1, Copco No. 2, and Iron Gate developments are located in California, the other developments are located in Oregon.
12. PacifiCorp (previously the California Oregon Power Company) holds Certificate 24508 with a priority date of February 24, 1919, and pursuant to this right may use up to 1,000.00 cfs for the generation of 5341 theoretical horsepower using water from the Link River at the Link River Dam in the East Side Power Plant. This water right is subordinated to any appropriations of water at points above Upper Klamath Lake or its tributaries, for irrigation, or for storage for irrigation purposes for use on lands in Oregon.

Diversions upstream of the Link River Dam

13. A total of 28 water rights (15 certificated water rights and 13 determined claims) authorize the diversion of water from Upper Klamath Lake. KA 1000 is one of the 12 determined claims that allows diversion from Upper Klamath Lake and from the Link River upstream of the Link River Dam.

14. Pursuant to KA 1000 water may be diverted up to a total rate of 189.6 cubic feet per second (“cfs”) from 12 points of diversion around Upper Klamath Lake for the beneficial purpose of domestic and irrigation of 154,955.9 acres March 1 through October 31 of each year with year round domestic and incidental livestock uses. KA 1000 includes one additional point of diversion, the A Canal, which is located on the Link River with a maximum diversion rate of 1,150 cfs.
15. The 15 certificated water rights and 12 remaining determined claims (not including KA 1000) may divert natural flow from Upper Klamath Lake up to a cumulative diversion rate of approximately 239.72 cfs. None of these certificated water rights or determined claims may divert any Legally Stored Water.

Diversions downstream of the Link River Dam

16. PacifiCorp operates the West Side Power Plant pursuant to KA 168 and generates power using 205 cfs of water with a priority date of December 11, 1891. The installed capacity of the West Side Plant is 0.6 MW. The West Side Plant is directly downstream of the Link River Dam.
17. PacifiCorp operates the East Side Power Plant with water from two separate water rights: the 150 cfs right claimed in KA 167 and 1000 cfs under Certificate No. 24508, with a priority date of February 24, 1919. The East Side Plant has a theoretical maximum capacity of approximately 6142 theoretical horsepower with the 1150 cfs water right, given a 47-foot head. The East Side Plant is directly downstream of the Link River Dam.
18. PacifiCorp holds a State of Oregon Hydroelectric License for Project No. 180 which authorizes the use of up to 2,500 cfs of the waters of the Klamath River for the generation of up to 131,534 theoretical horsepower through the J.C. Boyle Dam which is downstream from the Link River Dam. The date of priority for this appropriation of water is April 17, 1951. The water right granted under the license is subject and subsequent in point of right of use to any prior appropriation of the waters of the Klamath River or its tributaries, and to any permits granted by the State Engineer of Oregon, or his successors having jurisdiction in this matter, to the use of the waters of Klamath River and its tributaries for domestic, stock or irrigation purposes on or after April 17, 1951. (License Article 9.)
19. Also downstream of the Link River Dam, and under KA 1000, the Klamath Drainage District (KDD) may divert 600 cfs from the North Canal and Ady Intake control structures from November 1 through February 28. The ADY District Improvement Company may divert 14.51 cfs from points of diversion along the Klamath River downstream of Link River Dam from November 1 through February 28.

Stored Water in Upper Klamath Lake

20. At this time, the total gaged inflows plus the estimated groundwater inflow to Upper Klamath Lake exceeds the amount of water passing through the Link River Dam; therefore the water passing through Link River Dam is natural flow as opposed to Legally Stored Water.

DATE	UKL Lake Elevation (USBRKB Datum, FT)	A- Canal Flow (CFS)	Link River Flow (CFS)	Stored Water Passed Link River Dam (AF)	UKL Storage (AF)	UKL Elevation Greater Than 4136 FT	KA 294 Remaining to Store (Max Storage 486,828 AF)	Stored since Jan 1, 2021 (AF)	USGS Gage 11504115 Wood River (CFS)	USGS Gage 11502500 Williamson (CFS)	Gaged Inflow into UKL (CFS)	GW Discharge Estimate to UKL (CFS)	Inflow Available for Diversion Around UKL or Storage (CFS)	Measured Diversions below LRD (CFS)
1/1/2021	4139.28	0	533	0	222,577	3.28	264,251	695	347	533	880	320	667	51.8
1/2/2021	4139.31	0	522	0	224,668	3.31	262,160	2,786	340	538	878	320	676	48.7
1/3/2021	4139.33	0	578	0	226,062	3.33	260,766	4,180	352	543	895	320	637	49.2
1/4/2021	4139.34	0	609	0	226,759	3.34	260,069	4,877	373	557	930	320	641	50
1/5/2021	4139.38	0	580	0	229,576	3.38	257,252	7,694	383	545	928	320	668	50.6
1/6/2021	4139.40	0	523	0	230,998	3.4	255,830	9,116	365	550	915	320	712	51.1
1/7/2021	4139.44	0	457	0	233,843	3.44	252,985	11,961	378	550	928	320	791	50.7
1/8/2021	4139.47	0	434	0	235,994	3.47	250,834	14,112	367	553	920	320	806	47
1/9/2021	4139.50	0	561	0	238,182	3.5	248,646	16,300	366	542	908	320	667	48.9
1/10/2021	4139.52	0	621	0	239,640	3.52	247,188	17,758	362	542	904	320	603	47
1/11/2021	4139.53	0	579	0	240,369	3.53	246,459	18,487	361	537	898	320	639	47.2
1/12/2021	4139.58	0	595	0	244,041	3.58	242,787	22,159	341	538	879	320	604	49.3
1/13/2021	4139.61	0	607	0	246,268	3.61	240,560	24,386	419	555	974	320	687	47.8
1/14/2021	4139.65	0	572	0	249,236	3.65	237,592	27,354	465	553	1018	320	766	48.5
1/15/2021	4139.67	0	557	0	250,727	3.67	236,101	28,845	423	561	984	320	747	45.5
1/16/2021	4139.70	0	558	0	252,971	3.7	233,857	31,089	386	564	950	320	712	47.3
1/17/2021	4139.72	0	560	0	254,467	3.72	232,361	32,585	379	557	936	320	696	47.3
1/18/2021	4139.74	0	572	0	255,963	3.74	230,865	34,081	377	551	928	320	676	46.6

21. On January 1, 2021, the surface elevation of Upper Klamath Lake was 4139.28 feet. On January 18, 2021, the surface elevation of the Upper Klamath Lake was 4139.74 feet, an increase of 0.46 feet. (USGS stage data, USBR datum).
22. As of January 1, 2021, a total of 222,577 AF of Legally Stored Water remained in Upper Klamath Lake and was carried over under KA 294 from the 2020 fill season of January 1, 2020 to December 31, 2020. On January 18, 2021 there was 255,963 AF of Legally Stored Water in Upper Klamath Lake.
23. Between January 1, 2021 to January 18, 2021, the amount of Legally Stored Water in Upper Klamath Lake increased by 34,081 AF.

IV. ULTIMATE FINDINGS OF FACT

24. As of the date of this determination, water is being stored in Upper Klamath Lake and inflows into the lake exceed outflows such that water passing through the Link River Dam does not constitute the release of Legally Stored Water.
25. As of the date of this determination, the KDD and ADY District Improvement Company may divert up to 614.51 cfs through the North Canal and Ady Intake control structures (from November 1 – February 28) of water from the Klamath River at points of diversion downstream

of the Link River Dam. The water diverted constitutes live flow as opposed to water stored in Upper Klamath Lake.

26. PacifiCorp may generate power from water passing through the Link River Dam.
27. As of the date of this determination, water from Upper Klamath Lake may not be appropriated and used for irrigation at points of diversion upstream of the Link River Dam.

V. CONCLUSIONS

1. The water passing the Link River Dam is natural flow.
2. No Legally Stored Water is presently passing the Link River Dam.
3. The natural flow passing through the Link River Dam may be beneficially used to generate power.
4. The natural flow passing through the Link River Dam is in excess of the needs of those water users with a right to divert live flow or water stored in Upper Klamath Lake above the Link River Dam.
5. The natural flow passing through the Link River Dam is not waste.

VI. DISCUSSION

To comply with the court's October 13, 2020 order and discharge its ongoing obligation under ORS 540.210, the Department has determined based on the best available information and data that, presently, waters that are flowing through the Link River dam are not Legally Stored Water, they are natural flows.

Natural flow comprises water that is in excess of the needs of irrigators upstream of the Link River Dam who, at this time, are not diverting water from the Upper Klamath Lake for a beneficial use. Water that is not presently put to a beneficial use remains in the Klamath River to be diverted and used pursuant to "live flow" rights as the ADY District Improvement Company and the KDD possess downstream of the Link River Dam.

Natural flow in the Klamath River may be beneficially used to generate hydropower downstream of the Link River Dam. Natural flow may also be left instream where it constitutes public water that is subject to appropriation.

VII. DETERMINATION

As of the date of this determination, water passing through the Link River dam is not Legally Stored Water. As such, the Watermaster District 17 may not order the cessation of release of this water.

The Department and Watermaster District 17 will continue to monitor conditions in the Upper Klamath Lake throughout 2021, or until such time as the necessity therefore shall cease to exist and will issue a status determination on a monthly basis or as conditions change. When the Department determines that Legally Stored Water is passing through the Link River Dam, it will issue an order directed to the Bureau with respect to Legally Stored Water being released by passing through the Link River Dam.

DATED this 22nd day of January, 2021.



DANETTE WATSON,
Watermaster District #17
Oregon Water Resources Department