



RIETMANN LAW, P.C.

March 21, 2018

U.S. Bureau of Reclamation
Attn: Jeffrey Nettleton, Area Manager
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, Oregon 97603

RE: Demand for BOR to comply with order in Klamath Basin Adjudication

Mr. Nettleton:

Our firm represents the Klamath Irrigation District (“KID”). The purpose of this letter is to demand that U.S. Bureau of Reclamation cease and desist from using water from Upper Klamath Lake to provide enhanced instream flows below Iron Gate Dam unless or until such time as it obtains a stay of the order of determination in the Klamath Adjudication.

The Amended and Corrected Final Order of Determination (“ACFOD”) was entered in the Klamath Adjudication on February 28, 2014. The ACFOD provides that the U.S. Bureau of Reclamation (“BOR”) owns the “right to store water in Upper Klamath Lake to benefit the separate irrigation rights recognized for the Klamath Reclamation Project.” KA1000, Pg. 68. Under the ACFOD, KID and its landowners have the right to use the water that BOR stores in Upper Klamath Lake for the purpose of irrigation. KA1000, Pg. 45.

The ACFOD is presently in full force and effect. ORS 539.130(4). Therefore, water must be distributed in accordance with the ACFOD unless or until the Klamath County Circuit Court stays the ACFOD, either fully or in part. ORS 539.170; ORS 539.180. In this regard, the relevant statutes provide as follows:

ORS 539.130(4):

The determination of the department shall be in full force and effect from the date of its entry in the records of the department, unless and until its operation shall be stayed by a stay bond as provided by ORS 539.180.

ORS 539.170:

While the hearing of the order of the Water Resources Director is pending in the 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 the stream involved in the appeal shall be made in accordance with the order of the director.

ORS 539.180:

At any time after the determination of the Water Resources Director has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond or an irrevocable letter of credit issued by an insured institution as defined in ORS 706.008 in the circuit court wherein the determination is pending, in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced. Upon the filing and approval of the bond or letter of credit, the clerk of the circuit court shall transmit to the Water Resources Department a certified copy of the bond or letter of credit, which shall be recorded in the department records, and the department shall give notice thereof to the watermaster of the proper district.

Contrary to the ACFOD, BOR currently plans to use at least 320,000 a/f of water from Upper Klamath Lake to enhance instream flows below Iron Gate Dam in California. To the best of our knowledge, BOR is also intending to use water from Upper Klamath Lake to satisfy the injunction flows ordered by Judge William H. Orrick in the litigation brought by the Hoopa Valley Tribe and other parties last year.

Unless or until BOR obtains a stay of the ACFOD from Judge Wogan in the Klamath Basin Adjudication, it is unlawful for BOR to use water from Upper Klamath Lake for the foregoing purposes. ORS 539.170 plainly requires water to be distributed in accordance with the ACFOD. The ACFOD does not grant BOR *any* legal right to use water stored in Upper Klamath Lake to enhance instream flows below Iron Gate Dam. Although BOR could potentially obtain a stay of the ACFOD upon the condition that it pays all damages that may accrue by reason of the ACFOD not being enforced, BOR has neither sought nor obtained a stay of the ACFOD in the Klamath Adjudication. ORS 539.180. To the extent BOR contends it has some right to use water of Upper Klamath Lake for instream purposes, which exists outside of the ACFOD, that water right must be evidenced by a permit or certificate issued by OWRD. ORS 539.130(2). It is a matter of public record that OWRD has not issued BOR a permit or certificate entitling it to use a minimum of 320,000

a/f of water from Upper Klamath Lake to provide instream flows below Iron Gate Dam in California.

BOR's violation of the ACFOD is not excused by the 2013 Biological Opinion issued under the Endangered Species Act (16 U.S.C. § 1531 et seq.) or Judge Orrick's recent order directing BOR to provide enhanced flows below Iron Gate Dam. Neither the 2013 BiOp nor Judge Orrick's order grants BOR a water right authorizing it to use water stored in Upper Klamath Lake for instream purposes or excuses BOR from its mandatory legal obligation to comply with the ACFOD. In the absence of a recognized water right, or stay of the ACFOD, BOR has no power or discretion to implement the agency action described in the 2013 BiOp and cannot use water from Upper Klamath Lake to comply with Judge Orrick's order without directly violating the ACFOD. *See, Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 US 644, 669, 127 S Ct 2518, 2536, 168 L Ed 2d 467 (2007); *Natural Resources Defense Council v. Norton*, 236 F.Supp.3d 1198 (2017).

While BOR apparently believes it has authority to use the water of Upper Klamath Lake however it sees fit, that is not the circumstance. The United States Supreme Court has held that in enacting the Reclamation Act, Congress intended that "the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *California v. U. S.*, 438 US 645, 665, 98 S Ct 2985, 2996, 57 L Ed 2d 1018 (1978). The Court has also explained that Congress intended that, "once the waters were released from the Dam [or project], their distribution to individual landowners would again be controlled by state law." *Id.* at 667, 98 S.Ct. 2985. In a recent decision specifically considering the nature of water rights in Upper Klamath Lake, the Oregon Supreme Court explicitly held:

"In authorizing the United States to appropriate water for the construction of irrigation works, the Oregon Legislature did not intend to give the United States carte blanche to use the water rights it appropriated in whatever way it chose. *Klamath Irrigation Dist v. United States*, 348 Or 15, 39, 227 P3d 1145, 1159 (2010)

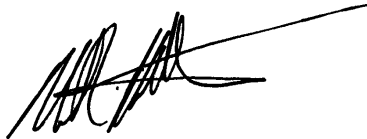
BOR's failure to comply with the order entered in the Klamath Adjudication is causing severe financial harm to KID and its water users. "Use of legally stored water is governed by the water rights, if any, which call on that source of water." OAR 690-250-0150. KID and its water users own a water right to use stored water in Upper Klamath Lake for the purposes of irrigation. Under the ACFOD, KID's right to use water of Upper Klamath Lake has priority over every other water user that has a right to call upon the water stored in Upper Klamath Lake. The ACFOD does not give BOR *any* right to use stored water in Upper Klamath Lake to provide enhanced instream flows below Iron Gate Dam in California. If BOR wants to implement the agency action described in the 2013 BiOP or use water from Upper Klamath Lake to comply with Judge Orrick's order (instead of using

water from other sources), BOR must, just like any other party to the Klamath Adjudication, seek a stay and post a bond that is conditioned upon BOR paying all damages that may accrue by reason of the ACFOD not being enforced. ORS 539.180. BOR has not done this and instead proceeded to use water from Upper Klamath Lake in the manner it sees fit in complete and total disregard of the ACFOD. By willfully disregarding the ACFOD without obtaining a stay in the adjudication to ensure that KID and its water users are compensated for any damages resulting from the ACFOD not being enforced, BOR is trampling the due process rights of KID's water users, as well as the rights of other districts and landowners throughout the Klamath Project.

KID is committed to ensuring that BOR adheres to the ACFOD entered in the Klamath Basin General Adjudication unless or until such time as BOR obtains a lawful stay from Judge Wogan that is properly conditioned upon BOR paying "all damages that may accrue by reason of the determination not being enforced." ORS 539.180. Therefore, please advise by no later than Wednesday, March 28, 2018 whether BOR intends to comply with the ACFOD or seek a stay in the Klamath Basin Adjudication. If BOR does not agree to promptly comply with the ACFOD or seek a stay of the ACFOD on or before such date, KID will seek appropriate relief from Judge Wogan in the context of the Klamath Basin Adjudication.

If you or another appropriate representative of BOR would like to discuss this matter, please do not hesitate to give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nathan R. Rietmann', with a long horizontal line extending to the right.

Nathan R. Rietmann

Cc: KID Board of Directors