



# Oregon

Kate Brown, Governor

**Water Resources Department**

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## BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF AN INVESTIGATION	)	<b>FINAL ORDER</b>
IN AID OF DISTRIBUTION PURSUANT	)	
TO ORS 540.210	)	<b>MEASURING DEVICES</b>
	)	
Klamath Irrigation District	)	
<i>Petitioner,</i>	)	
	)	
Bureau of Reclamation	)	
<i>Reservoir Owner.</i>	)	

TO: The U.S. Bureau of Reclamation  
 Jeff Nettleton, Area Manager  
 6600 Washburn Way  
 Klamath Falls, OR 97603-9365

**NOTICE: This is a Final Order other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, shall be deemed denied.**

### I. BACKGROUND

On April 3, 2020, the Oregon Water Resources Department (“Department”) received a notice of dispute from the Klamath Irrigation District (“KID”) asserting a dispute between the KID and the U.S. Bureau of Reclamation (“Bureau”) and requesting the Department to take charge of the Upper Klamath Lake reservoir and ensure that stored water is not released out of the Upper Klamath Lake reservoir through the Link River Dam except to meet the needs of secondary water right holders calling upon the source until the irrigation season ends on October 31, 2020. On April 16, 2020 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 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. The same day, April 23, 2020, the Bureau provided its Initial Response to Interim Order Concerning Release of Stored Water, notifying the Department that “this federal agency is presently accomplishing the release of water from Upper Klamath Lake in compliance with applicable federal law \* \* \*.”

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 into effect the order of the Water Resources Commission. 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, based on its ruling on KID’s claim for injunctive relief under ORS 540.470, the Marion County Circuit Court ordered the Watermaster District 17 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.

Consequently, as directed by the court and pursuant to its authorities in ORS 540, ORS 536.026 and the investigatory authorities delegated to the Department by Order of the Water Resources Commission dated April 24, 2020, the Department finds as follows and orders necessary actions in aid of distribution.

## **II. INSTALLATION OF MEASURING DEVICES**

### **A. Findings of Fact**

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.

#### **KA 294**

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 4136 to 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.
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 considered 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. The most recent rating provided by the Bureau indicates the maximum storage volume 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 United States Geological Survey ("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 online at the website:  
[https://waterdata.usgs.gov/nwis/uv/?site\\_no=11507001&parm\\_cd=72275](https://waterdata.usgs.gov/nwis/uv/?site_no=11507001&parm_cd=72275)

(Refer to the site name USGS 11507001 Upper Klamath Lake Nr K.Falls (weight/mean elev) OR.)<sup>1</sup>

### **KA 1000**

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.<sup>2</sup>
7. Under KA 1000, the KPWU (which includes KID) may beneficially use up to 3.5 AF per acre for the irrigation of 154,955.9 acres during the irrigation season March 1 through October 31 with a priority date of May 19, 1905. Downstream of the Link River Dam, and under KA 1000, the Klamath Drainage District and the ADY District Improvement Company (also KPWU) may beneficially use 29,322 AF from November 1 through February 28 which they divert at points of diversion along the Klamath River downstream of the Link River Dam.

### **Diversions upstream of the Link River Dam**

8. A total of 25 water rights (13 certificated water rights and 12 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.
9. 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. 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.
10. The 13 certificated water rights and 11 remaining determined claims (not including KA 1000) may divert natural flow from Upper Klamath Lake up to a cumulative diversion rate of approximately 208.73 cfs.<sup>3</sup> None of these certificated water rights or determined claims may divert any stored water.

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<sup>1</sup> The USGS defines provisional data at this website: <https://help.waterdata.usgs.gov/policies/provisional-data-statement>. From an operational perspective, provisional data are viewed by watermasters as the best data science and technology has readily available at the time water management decisions need to be made.

<sup>2</sup> KA 1000 erroneously refers to KA 293, but this is a typographical error.

<sup>3</sup> Some of the certificated water rights authorize irrigation on the same lands that are authorized for irrigation under determined claims. Approximately 129.9 cfs of water is authorized by certificated water rights. Approximately 78.83 cfs of water is authorized by determined claims other than KA 1000.

## **Measurement of inflows**

11. Inflow data are used in conjunction with the measured changes in the total volume of water stored in Upper Klamath Lake to determine what amount of water is stored water and what amount of water is natural flow.
12. In order to know the amount of natural flow that may be diverted pursuant to KA 1000, the 13 certificated water rights and the 11 other determined claims, the watermaster needs to know the total inflows from the sources of water for KA 294.
13. In order to determine the amount of stored water and natural flow that should be passed down river at Link River Dam to meet KA 1000, the watermaster needs to know the total inflows to Upper Klamath Lake from the sources of water for KA 294.
14. Specifically, the Department must be able to measure inflow into Upper Klamath Lake from the tributaries of Upper Klamath Lake: 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.
15. To date, there is an inadequate measuring device on Sevenmile Creek and no measuring devices on Thomason Creek, Fourmile Creek, and Crystal Creek.

## **B. Conclusion of Law**

1. Measurement devices installed in the best available location for acquiring the most accurate inflow data to Upper Klamath Lake are needed on Thomason Creek, Fourmile Creek, Crystal Creek and Sevenmile Creek. These measuring devices are necessary for the purposes of regulating the storage of water under KA 294 and are necessary for distributing the use of stored water and natural flow under KA 1000. ORS 540.330; ORS 540.045(3); ORS 536.026; Delegation Order dated April 24, 2020.

## **III. DISCUSSION**

“Any owner or manager of a reservoir that is located across or upon the bed of a natural stream, shall construct and maintain when required by the Water Resources Commission, a measuring device below, and one above, the reservoir on each stream or source of supply discharging into the reservoir, to assist the watermaster in determining the amount of water to which appropriators are entitled and thereafter diverting it for their use.” ORS 540.330.

The Upper Klamath Lake reservoir is located across or upon the bed of Upper Klamath Lake, and measurement devices on each of the streams or sources of supply discharging into the reservoir will provide the information necessary for the administration of KA 294 and KA 1000 among other water rights.

To administer KA 294 and KA 1000, the Department must determine what quantity of water within Upper Klamath Lake may be characterized as water that is stored pursuant to KA 294. The Department must also determine what quantity of water constitutes “natural flow” that pursuant to KA 1000 may be either diverted directly from Upper Klamath Lake or from the Klamath River downstream of the Link River Dam. Natural flow also includes water passed through the Link River Dam if and when it is in excess of the needs of water rights calling on stored water. ORS 540.045(3).

In addition, the information gained from measurement devices installed on tributaries to Upper Klamath Lake will assist the Department in its investigation in aid of distributing the stored water from Upper Klamath Lake. ORS 540.210.

#### **IV. ORDER**

1. In consultation with the Oregon Water Resources Department, the Bureau shall determine the appropriate location for installation of measuring devices on Sevenmile Creek, Thomason Creek, Fourmile Creek, and Crystal Creek.
2. In consultation with the Oregon Water Resources Department, the Bureau shall install, operate, and maintain appropriate measuring devices based on each stream’s configuration.
3. The Bureau shall complete installation of measuring devices consistent with paragraphs 1 and 2 of this order by April 1, 2021.

IT IS SO ORDERED.

DATED THIS 5<sup>th</sup> day of November 2020.



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THOMAS M. BYLER, Director  
OREGON WATER RESOURCES DEPARTMENT