

IN THE SUPREME COURT OF THE STATE OF OREGON

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KLAMATH IRRIGATION  
DISTRICT,

Plaintiff-Adverse Party,

v.

OREGON WATER RESOURCES  
DEPARTMENT, an agency of the  
State of Oregon; THOMAS BYLER,  
in his official capacity as Director of  
the Oregon Water Resources  
Department; and DANETTE  
WATSON, in her official capacity as  
Watermaster for the Oregon Water  
Resources Department,

Defendants-Relators.

Marion County Circuit Court  
No. 20CV17922

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MEMORANDUM IN SUPPORT OF  
PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

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**MEMORANDUM IN SUPPORT OF  
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**INTRODUCTION**

The circuit court ordered the watermaster to stop the flow of stored water through the Link River Dam. If that order is not immediately appealable, this court should issue a writ of mandamus vacating that order, which is based on a flawed understanding of ORS 540.740 and Oregon water law.

- A. The circuit court erred as a matter of law in issuing the order, because the release of stored water through the dam does not violate an order or decree determining existing rights to the use of water.**

The circuit court granted partial summary judgment only on claim 2 in the complaint, which was a statutory claim under ORS 540.740. (ER 665). That statute allows a circuit court to issue an injunction to a watermaster in the narrow circumstances when the watermaster has failed to carry out an order or decree determining existing rights to the use of water:

Any person who may be injured by the action of any watermaster may appeal to the circuit court for an injunction. The injunction shall only be issued in case it can be shown at the hearing that the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights to the use of water.

Thus, an ORS 540.740 proceeding is not the forum to adjudicate in the first instance various parties' rights to use of water. It is appropriate only when the rights are fully and finally settled by a Commission order or court decree and the watermaster is defying that order or decree.

Here, no such order or decree has determined that the Bureau of Reclamation may *not* release stored water through the Link River Dam for use in-stream in California, for the protection of threatened salmon or to satisfy federal treaty obligations to tribes. The circuit court and plaintiff relied solely on the ACFFOD, an administrative order of an adjudicator within the Water Resources Department that currently is under review in Klamath County Circuit Court. (ER 670). But the ACFFOD is not an order of the Water Resources *Commission* or a court decree, which is what would be needed to give rise to a claim under ORS 540.740: The order adopting the ACFFOD was signed by the adjudicator “acting on authority delegated by the Water Resources *Director*,” not the Commission. (ER 31 (emphasis added)). And even if it were an order of the Commission, the ACFFOD did not make any determination about the Bureau’s right to release stored water through the dam, much less the right to do so for in-stream use in California. On the contrary, the ACFFOD expressly stated that it “does not alter in any way the relative rights of the United States and the irrigation entities to control or operate the irrigation works.” (ER 476).

The ACFFOD did not determine the Bureau of Reclamation’s right to release stored water through the dam for in-stream use in *California* because such a release is not a beneficial use of water regulated under *Oregon* water law. The circuit court erred as a matter of law in concluding that Oregon water law always requires a permit to release stored water. A permit is required if the

person is putting the released water to beneficial use in Oregon. *See* ORS 537.130. But no provision of Oregon water law regulates the release of stored water for *nonbeneficial* purposes, such as flood control. And when the intended in-stream use is outside of Oregon, Oregon law simply does not control. A release of stored water for in-stream use outside of Oregon is equivalent to a release for a nonbeneficial use.

Thus, nothing in Oregon law restricts a person who has stored water behind a dam from opening the dam and allowing the stored water to flow downstream as it naturally does, as long as release is not for a beneficial use in Oregon. Any stored water that is released in excess of the needs of downstream Oregon users is considered part of the natural flow of the river. ORS 540.045(3) (“For purposes of regulating the distribution or use of water, any stored water released in excess of the needs of water rights calling on that stored water shall be considered natural flow, unless the release is part of a water exchange under the control of, and approved by, the watermaster.”).

Plaintiff may have *contractual* rights to force the Bureau to store water for its use based on its agreements with the Bureau. But those contracts are not enforceable through ORS 540.740. All the ACFFOD does is set a maximum, but not a minimum, amount of water that the Bureau may store behind the Link River Dam. It does not require the Bureau to store any particular amount or

regulate the release of stored water for anything other than beneficial uses regulated under Oregon law.

The circuit court apparently recognized that the conditions for an ORS 540.740 order were not satisfied, because it said that the Water Resources Department had “failed to determine *whether* the Bureau had any right to the use of the Stored Water.” (ER 669 (emphasis added)). But ORS 540.740 applies only when the Commission or a court has already “determine[ed] the existing rights to the use of water,” not when those rights have not yet been determined. If a court or the Commission has not finally determined whether the Bureau has a use right, ORS 540.740 cannot apply.

For those reasons, the circuit court’s order is legally erroneous, and this court should issue a peremptory writ of mandamus directing the circuit court to vacate the order.

**B. This court should exercise its discretion to issue a writ of mandamus because of the importance of the issue.**

Mandamus lies within this court’s discretion. But this case presents the sort of extraordinary circumstances that warrant exercising that discretion. If the order is not immediately appealable, mandamus is the only means for defendants to obtain timely appellate review of what amounts to a preliminary injunction. *See State ex rel. Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993).

The order is impossible to comply with as a practical matter. Although it directs the watermaster to stop the release of stored water through the Link River Dam, the watermaster has no realistic way to do so. The Link River Dam is federal property, and the watermaster cannot physically seize control of the dam or override its operation. And while the watermaster could in theory issue additional orders to the Bureau of Reclamation or PacifiCorp, which operates the dam, the federal government may assert sovereign immunity and prevent the state from enforcing those orders. Any such efforts would provoke unnecessary conflict between sovereigns and make it harder for the state and federal governments to work cooperatively on issues related to the Klamath River basin.

And if the watermaster somehow did succeed in stopping the release of stored water through the Link River Dam, the consequences could be even worse. Cutting off the release of stored water from the dam may jeopardize downstream salmon populations that are protected by the federal Endangered Species Act, and it risks violating the federal treaty rights of downstream tribes. *See Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F Supp 3d 450, 483–84 (2017) (inadequate flows in the lower Klamath River cause irreparable harm to endangered salmon, warranting injunctive relief against the Bureau).

Although the irrigation season is now over, which means that the circuit court's order should have no practical effect until next year, the dispute is not

likely to resolve on its own. Plaintiff already has asked the circuit court to hold the watermaster in contempt of court for allegedly failing to stop the release of stored water through the dam. *See Klamath Irrigation District v. Oregon Water Resources Department*, No. 20CN04464 (Cir. Ct. Marion County). And is it not clear whether the circuit court will issue a final judgment in the case before the 2021 irrigation season. If the order remains in effect and is not stayed, it likely will lead to more protracted litigation in the months ahead.

This court should not allow those consequences to unfold when, at a minimum, there is a serious question whether the circuit court had the authority to issue the order in the first place. If the order is not appealable to the Court of Appeals, this court should grant mandamus relief and direct the circuit court to vacate the order.

### CONCLUSION

This court should hold this petition in abeyance until the Court of Appeals determines whether it has jurisdiction over defendants' direct appeal. If the Court of Appeals does not have jurisdiction, then this court should exercise its original mandamus jurisdiction in this matter under Article VII (amended), section 2, of the Oregon Constitution and ORS 34.250. This court should issue a peremptory writ of mandamus directing the circuit court to vacate its order. Alternatively, this court should issue an alternative writ of



mandamus directing the circuit court to vacate the order or to show cause for not doing so.

Respectfully submitted,

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## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 10, 2020, I directed the original Memorandum in Support of Petition for Alternative Writ of Mandamus to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system.

I further certify that on November 10, 2020 I directed the Memorandum in Support of Petition for Alternative Writ of Mandamus to be served upon Nathan R. Rietmann, attorney for plaintiff-adverse party, and Honorable J. Channing Bennett, circuit court judge, by mailing a copy, with postage prepaid, in an envelope addressed to:

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