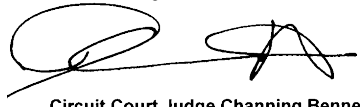


DENIED. Respondents' Motion restates their misapprehension of this courts Orders in 20CV17922 and 20CV15606. Respondents' accepted exclusive jurisdiction over the UKL pursuant to ORS 540.210. Respondents are required by that statute to divide and distribute the water therefrom in accordance with the respective and relative rights of the various users. Despite this statutory obligation, Respondents have continued to allow the Bureau of Reclamation to take Stored Water without determining the Bureau's right to do so. The Respondents continue to violate the Oregon Water Rights Act by allowing the Bureau to take and use Stored Water in the UKL without determining it is entitled to do so as required by ORS 540.210. Respondents must stop the release until a determination is made pursuant to ORS 540.740. Nothing in the Court's Order dictates how the Respondents make the determination or what criteria is used. *TPC, LLC v. OWRD*, 308 Or.App. 177 is not analogous or factually similar to this case. **MAKE A DETERMINATION**

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

Signed: 1/8/2021 11:52 AM



Circuit Court Judge Channing Bennett

6 **KLAMATH IRRIGATION DISTRICT,**
7
8 Petitioner,
9
10 v.
11 **OREGON WATER RESOURCES**
12 **DEPARTMENT**, *an agency of the state of*
13 *Oregon*, **THOMAS BYLER**, *in his official*
14 *capacity as Director of Oregon Water*
15 *Resources Department*, and **DANETTE**
16 **WATSON**, *in her official capacity as*
17 *Watermaster for the Oregon Water Resources*
18 *Department*,
19 Respondents.

Case No. 20CV17922

RESPONDENTS' MOTION FOR RECONSIDERATION

ORS 20.140 - State fees deferred at filing

MOTION

Respondents move for reconsideration of their Motion to Dismiss based on lack of subject matter jurisdiction. The Court of Appeals ruled on December 30, 2020, that the Marion County Circuit Court lacks subject matter jurisdiction over determined claims “currently subject to pending exceptions before the Klamath County Circuit Court.” *TPC, LLC v. Water Resources Dept.*, slip opinion, 308 Or App 177, 198 (December 30, 2020). Petitioner’s attempt to use ORS 540.740 to circumvent the exclusive adjudication process must be rejected and the claim dismissed because this Court lacks subject matter jurisdiction.

The Klamath County Circuit Court, in Case No. WA1300001, has exclusive jurisdiction over the ACFFOD. Petitioner’s second claim under ORS 540.740 seeks an injunction to compel the watermaster to “carry into effect” the ACFFOD but on terms that are contrary to the ACFFOD. Specifically, the ACFFOD does not confer a right on petitioner to control operation

1 of the United States Bureau of Reclamation’s Klamath Project diversion and distribution works
2 or to prohibit the release of stored water by the Bureau when there is sufficient water present to
3 satisfy petitioner’s determined claim under the ACFFOD. Those issues are presently pending
4 before the adjudication court. Therefore, this Court lacks subject matter jurisdiction.
5 Respondents request that the Court reconsider the motion to dismiss for lack of subject matter
6 jurisdiction and dismiss petitioner’s claim for an injunction under ORS 540.740.

7 **POINTS AND AUTHORITIES**

8 Respondents moved to dismiss petitioner’s injunction claim pursuant to ORCP 21A(1)
9 for lack of subject matter jurisdiction based on KBA exclusivity.¹ The question presented was
10 the same question before the Court of Appeals in *TPC*, namely “whether the *subject matter* of
11 the petitions herein was nonetheless within the scope of the exclusive jurisdiction of Klamath
12 County Circuit Court, as provided in ORS chapter 539, because petitioners’ claims were bound
13 up with the KBA, a proceeding under ORS chapter 539.” *TPC*, 308 Or App at 191 (emphasis in
14 original). The record shows that here, as in *TPC*, the answer is yes. The Court lacks jurisdiction
15 and the claim under ORS 540.740 must be dismissed.

16 As relevant here, the ACFFOD establishes that (1) the Bureau of Reclamation is the sole
17 owner of a storage right in Upper Klamath Lake (Ex 507) and (2) petitioner is a co-owner with
18 the Bureau and others of a right to use water from Upper Klamath Lake and the Klamath River
19 (Ex 508). There is no dispute that the ACFFOD *does not* determine (a) the amount of stored
20 water petitioner or its co-owners are entitled to use or (b) “the relative rights of the KPWU
21 entities and the United States to control or operate diversion and distribution works, including
22 headgates, pumps, canals and other structures * * * and does not alter in any way the relative
23 rights of the United States and the irrigation entities to control or operate the irrigation works.”
24 Ex 506. The validity of the ACFFOD’s conclusions is pending review in, and subject to, the

25 _____
26 ¹ Respondents also moved to dismiss because ORS 540.740 does not apply to the ACFFOD,
petitioner lacked standing and the KBA is another action pending, among other grounds.

1 exclusive jurisdiction of the KBA court. Specifically, the question of whether the ACFFOD
2 *should have determined* control of the works, including the A-Canal and the Link River Dam, is
3 pending before the adjudication court. Ex 513, p 9 (U.S. Exception 22: the ACFFOD “should
4 provide that the control and operation of Project works extends to the right to administer
5 contracts between the United States and Project water users for the diversion and use of Project
6 water.”); *see also* Ex 514, p 9 (Agri-Water Exception 9 to the “conclusion that the claimants are
7 not required to show the capacity of the storage system or the need for the entire amount of water
8 claimed for storage”).

9 As in *TPC*, the parties here agree that “Klamath County Circuit Court has exclusive
10 subject matter jurisdiction to review the KBA order.” 308 Or App at 192. To determine whether
11 the subject matter of the *TPC* petitioners’ injunction claim was within that exclusive jurisdiction,
12 the Court of Appeals considered authorities from the land use context concerning LUBA’s
13 exclusive jurisdiction. *Id.* Among other parallels, the Court of Appeals explained that the
14 requested relief – an injunction – made the *TPC* issue analogous to the circumstances in *The*
15 *Flight Shop, Inc. v. Leading Edge Aviation, Inc.*, 277 Or App 638 (2016). In *Flight Shop*, the
16 Court of Appeals had “noted that the plaintiff’s requested remedies of an injunction to prevent
17 defendant from operating its fueling station and an order to remove the fuel tanks ‘underscore the
18 impropriety of circuit court intervention,’ because whether or not such remedies would be proper
19 would have *required predicting the outcome of the land use decisional process.* *Id.* at 646-47.”
20 308 Or App at 193 (emphasis added). The same is true here.

21 As written, the ACFFOD expressly concludes that, “[a] determination of the relative
22 rights of the KPWU entities and the United States to control or operate diversion and distribution
23 works, including headgates, pumps, canals and other structures, *is not within the scope of the*
24 *Adjudication * * *.*” Ex 506 (emphasis added). Petitioner’s claim is based on the contention that
25 the watermaster has failed to carry the ACFFOD into effect and, therefore, this Court can and
26 must “enjoin the unlawful uses of water by Reclamation” by controlling the Bureau’s diversion

1 and distribution works. Complaint, ¶¶ 57-60. This is exactly what the *TPC* court held the circuit
2 court cannot do.

3 In *TPC*, the petitioners’

4 * * * claim, and its requested relief, however, is irreconcilably bound up
5 with the KBA, because it required Marion County Circuit Court to decide whether
6 the Hyde Agreement placed a limitation on the Klamath Tribes’ KBA-determined
7 water right claims. The KBA adjudicator had already rejected that notion,
8 concluding that the no-call provision in the Hyde Agreement was “not pertinent to
9 the determination of a water right claim.” That decision is currently on review
10 before Klamath County Circuit Court in its review of the KBA order.

11 308 Or App at 197. Similarly, petitioner’s claim here depends on an interpretation of the
12 ACFFOD already rejected by the adjudicator in the conclusion that control of the works is not
13 “within the scope” of the ACFFOD. The circuit courts lack subject matter jurisdiction to issue
14 an injunction that predicts that the KBA court will ultimately modify the ACFFOD.

15 CONCLUSION

16 Petitioner seeks a remedy based on the erroneous assumption that the ACFFOD will
17 ultimately determine the relative rights of the Bureau and petitioner “to control or operate
18 diversion and distribution works” and require the Bureau to retain an entire season of stored
19 water petitioner to use, or not use. This Court lacks subject matter jurisdiction over that
20 decision. While exceptions to the ACFFOD are pending, the watermaster regulates in
21 accordance with the prior appropriation doctrine and the relative rights in the determined claims
22
23
24
25
26

1 as stated in the ACFFOD. ORS 540.740 applies (if at all) only to make sure that the watermaster
2 carries the ACFFOD into effect as written. The injunction claim should be dismissed.

3 DATED January 7, 2021.

4 Respectfully submitted,
5 ELLEN F. ROSENBLUM
6 Attorney General

7
8 s/ Darsee Staley
9 DARSEE STALEY #873511
10 Senior Assistant Attorney General
11 Trial Attorney
12 Tel (971) 673-1880/Fax (971) 673-5000
13 Darsee.Staley@doj.state.or.us
14 Of Attorneys for Oregon Water Resources
15 Department, Thomas Byler and
16 Danette Watson

1 **CERTIFICATE OF SERVICE**

2 I certify that on January 7, 2021, I served the foregoing **RESPONDENTS' MOTION**
3 **FOR RECONSIDERATION** upon the parties hereto by the method indicated below, and
4 addressed to the following:

5
6 Nathan R. Rietmann
7 Rietmann & Rietmann, LLP
8 1270 Chemeketa St. NE
9 Salem, OR 97301
10 *Attorneys for Klamath Irrigation District*

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 SERVED BY EFILING

11 s/ Darsee Staley
12 DARSEE STALEY #873511
13 Senior Assistant Attorney General
14 Trial Attorney
15 Tel (971) 673-1880/Fax (971) 673-5000
16 Darsee.Staley@doj.state.or.us
17 Of Attorneys for Respondents