

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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PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

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NATHAN R. RIETMANN #053630  
Rietmann Law PC  
1270 Chemeketa St NE  
Salem, OR 97301  
Email: nathan@rietmannlaw.com

Attorney for Plaintiff-Adverse Party

ELLEN F. ROSENBLUM #753239  
Attorney General  
BENJAMIN GUTMAN #160599  
Solicitor General  
1162 Court St. NE  
Salem, Oregon 97301-4096  
Telephone: (503) 378-4402  
Email:

benjamin.gutman@doj.state.or.us

Attorneys for Defendants-Relators

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EXCERPT OF RECORD

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## INTRODUCTION

The Marion County Circuit Court ordered relator Danette Watson, the Oregon Water Resources Department's watermaster for the district that encompasses the Upper Klamath Lake, to stop the federal Bureau of Reclamation from releasing stored water from the lake into the Lower Klamath River to protect threatened salmon and honor tribal treaty rights. For the reasons explained below and in the accompanying memorandum, the court had no authority to issue that order. The defendants in the circuit court—the Department, its director, and watermaster Watson—have appealed the order to the Court of Appeals, but there is a question whether the order is appealable as a limited judgment or a ruling in a special statutory proceeding. In an abundance of caution, defendants also seek a writ of mandamus directing the Marion County Circuit Court to vacate the order, and they ask this court to hold the mandamus petition in abeyance pending a determination of the Court of Appeals' jurisdiction. If the Court of Appeals lacks jurisdiction, the circumstances of this case warrant mandamus relief.

### **A. Background**

This petition involves a dispute over water rights in the Klamath Basin. Those rights are currently being adjudicated in the Klamath County Circuit Court, which is hearing exceptions to the Department's Amended and Corrected

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#### **A. Background**

This petition involves a dispute over water rights in the Klamath Basin. Those rights are currently being adjudicated in the Klamath County Circuit Court, which is hearing exceptions to the Department's Amended and Corrected

Findings of Fact and Order of Determination (ACFFOD)—an administrative determination of the relative rights of claimants to the waters of the Klamath River and its tributaries. *See* ORS 539.130; (ER 382–383, 388). In the underlying case, plaintiff Klamath Irrigation District purports to be trying to enforce part of the ACFFOD in Marion County Circuit Court.

The dispute involves the Link River Dam, which is owned by the federal government's Bureau of Reclamation and operated by PacifiCorp to store water in Upper Klamath Lake. (ER 386). The ACFFOD determined that the Bureau has a right to store up to a maximum of 486,828 acre-feet of water in the lake during a calendar year (January 1st to December 31st). (ER 479). But plaintiff alleged that the Bureau was letting some of that stored water run through the Link River Dam into the Lower Klamath River. (ER 8–10). The Bureau was doing so in part to protect the health of a Coho salmon population in California that is listed as threatened under the Endangered Species Act and to ensure that the federal government honors its treaty obligations to tribes that are in California. (ER 203–205). Plaintiff sought to stop that flow of water, arguing that the Bureau cannot release stored water through the dam unless it is for the use of someone with an adjudicated right to use stored water in Oregon under the ACFFOD. (ER 14–15). Although plaintiff's diversion point is above the dam, meaning that the release of water through the dam does not directly affect how much water flows past its diversion point, plaintiff asserted that the

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Bureau's release of stored water meant that there would not be as much water available to it late in the irrigation season. (ER 220, 563–564).

Plaintiff filed suit against the Oregon Water Resources Department, its director, and its watermaster for the district (but not the federal Bureau of Reclamation, PacifiCorp, or the downstream tribes). (ER 1). Plaintiff asserted two claims, one under the state Administrative Procedures Act and one under ORS 540.740, which allows the circuit court to issue an injunction to the watermaster if the watermaster is failing to carry into effect certain kinds of orders determining existing water rights. (ER 12–15). With respect to the latter claim, plaintiff alleged that the ACFFOD required the watermaster to use “all powers of enforcement at her disposal” to stop the release of stored water through the Link River Dam except to the extent needed to satisfy enforceable water rights under Oregon law. (ER 14–15).

The parties cross-moved for partial summary judgment on the ORS 540.740 claim. (ER 16–26, 216–231). Defendants explained that (among other problems with the claim) the statute does not apply because the ACFFOD did not do what plaintiff alleged. (ER 225). Under Oregon water law, although the ACFFOD gave the Bureau the *right* to store up to a certain amount of water, it did not *require* the Bureau to do so. (ER 225, 479). The Bureau might have *contractual* obligations to store water for the use of plaintiff or others. But the Bureau's operation of its water diversion and control works, including the Link



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River dam, are beyond the scope of the ACFFOD. (ER 475–476). The ACFFOD does not prohibit the Bureau from allowing stored water to flow through the dam and become part of the natural flow of the Lower Klamath River available to downstream users. (ER 479).

The circuit court issued opinion letters indicating that it intended to grant plaintiff's motion for partial summary judgment. (ER 667–672 (amended opinion letter)). The court concluded that the watermaster had “allowed” the Bureau to “release” stored water from the lake without determining that the Bureau had a right to do so, and it indicated that it would issue an order to stop the release. (ER 671). The court ultimately issued an order granting partial summary judgment on the statutory claim. (ER 665–666). It ordered the watermaster to “immediately stop the distribution, use and/or release of Stored Water from the [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 the [lake].” (ER 666). Although the opinion letter had stated that the court would not issue a limited judgment, the footer on the document stated that it was a “limited judgment.” (ER 665–666, 672).

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Defendants appealed to the Court of Appeals and moved for a determination of appealability. That motion remains pending.

**B. This petition is timely.**

The circuit court entered its order granting plaintiff's motion for partial summary judgment on October 13, 2020. The petition is timely because defendants filed it within 30 days of entry of that order. *See State v. Peekema*, 328 Or 342, 346, 976 P2d 1128 (1999) (the timeliness of a mandamus petition is governed by laches, but a petition ordinarily is timely if filed "within the statutory time limitation required for filing an appeal"); ORS 19.255(1) (notice of appeal must be filed within 30 days of entry of judgment).

**C. No further application to the circuit court is required.**

The circuit court in this case has already considered and rejected the legal position advanced by defendants in this petition and its accompanying memorandum. Presenting those arguments to the circuit court again would serve no purpose.

**D. If the order is not appealable, defendants lack an adequate remedy in the ordinary course of the law to address the circuit court's error.**

Defendants have appealed the order to the Court of Appeals and moved for a determination of appealability, arguing that (as the footer on the order states) it is in fact a limited judgment and therefore appealable under ORS 19.205(1) or in the alternative that it is appealable under ORS 19.205(5) as a ruling in a special statutory proceeding.

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But if the Court of Appeals determines that it lacks jurisdiction, then mandamus jurisdiction will be appropriate because it will be the only way to

obtain timely appellate review of the order directing the watermaster to stop the release of water from the lake. This court has recognized that mandamus is the proper vehicle to review interlocutory injunctions. *State ex rel. Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993). Although the order in this case was not labeled a preliminary injunction, it has the same effect because it requires the watermaster to take affirmative action while the case is pending before entry of a final judgment on all claims.

**E. 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 for the reasons explained in defendants' accompanying memorandum 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.

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Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

/s/ Benjamin Gutman

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BENJAMIN GUTMAN #160599

Solicitor General

benjamin.gutman@doj.state.or.us

Attorneys for Defendants-Relators



Respectfully submitted,

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Solicitor General

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Attorneys for Defendants-Relators