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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

KLAMATH WATER USERS
ASSOCIATION, TULELAKE IRRIGATION
DISTRICT, VAN BRIMMER DITCH
COMPANY, KLAMATH DRAINAGE
DISTRICT, and ADY DISTRICT
IMPROVEMENT COMPANY,

Petitioners,

vs.

OREGON DEPARTMENT OF
ENVIRONMENTAL QUALITY, an agency of
the State of Oregon; OREGON
ENVIRONMENTAL QUALITY
COMMISSION, an agency of the State of
Oregon.

Respondents.

Case No. 20CV12749

PETITION FOR JUDICIAL REVIEW

(JUDICIAL REVIEW OF FINAL ORDER ON
PETITION FOR RECONSIDERATION
PURSUANT TO ORS 183.484)

NOT SUBJECT TO MANDATORY
ARBITRATION

1.

Petitioners Klamath Water Users Association, Tulelake Irrigation District, Van Brimmer Ditch Company, Klamath Drainage District, and Ady District Improvement Company (collectively, "Petitioners"), by and through its counsel of record, hereby file this Petition for Judicial Review, seeking judicial review of the Order on Petition for Reconsideration issued on January 17, 2020, by Respondent Oregon Department of Environmental Quality ("ODEQ"), which denied Petitioners' request for reconsideration of the *Upper Klamath and Lost Subbasins Temperature Total Maximum Daily Load and Water Quality Management Plan* ("Temperature TMDL") dated September 19, 2019 (the Temperature TMDL, and Order on Petition for Reconsideration are referred to herein as the "Final Order"). The Order on Petition for Reconsideration notified Petitioners of their right to petition for judicial review under Oregon Revised Statutes ("ORS") 183.484.

1 **PARTIES**

2 2.

3 Petitioner Klamath Basin Water Users Protective is a non-profit corporation with its
4 principal place of business in Klamath Falls, Oregon, that does business as the Klamath Water
5 Users Association (“KWUA”). KWUA represents private rural and suburban irrigation districts,
6 other districts, and ditch companies within the United States Bureau of Reclamation’s Klamath
7 Reclamation Project (“Klamath Project”), along with private irrigation interests outside the
8 Project in Oregon and California in the Upper Klamath Basin. KWUA has represented Klamath
9 Project interests since 1953, and its members comprise over 5,000 water users on 1,400 family
10 farms and ranches encompassing nearly 200,000 acres. The nature of KWUA’s interest in this
11 Petition is because the Final Order threatens to adversely affect operations of its constituent water
12 districts, and submits this Petition as a representative thereof. In addition, as identified below,
13 individual Petitioners who are members of the KWUA submit this Petition in their own right.

14 3.

15 Petitioner Tulelake Irrigation District (“TID”) is a California irrigation district formed and
16 existing under the California Irrigation District Law, California Water Code sections 20510-
17 29978. TID is located in Modoc County and Siskiyou County, California. TID operates and
18 maintains irrigation and drainage facilities which convey irrigation water from the Klamath River
19 system for beneficial use to water users on more than 60,000 acres of high-value agricultural land
20 within the TID boundaries. Under California law, TID was established by and represents all
21 landowners and water users within its boundaries. TID (on its own behalf and as a representative
22 of its landowners) has an interest in this Petition as the Final Order threatens to adversely affect
23 TID operations.

24 4.

25 Petitioner Van Brimmer Ditch Company (“VBDC”) was incorporated in 1903, and
26 provides irrigation and drainage service to lands in Klamath County, Oregon. VBDC operates
27 under chapter 554 of the ORS. VBDC (on its own behalf and as a representative of its
28

1 landowners) has an interest in this Petition as the Final Order threatens to adversely affect VBDC
2 operations.

3 5.

4 Petitioner Klamath Drainage District (“KDD”) is an Oregon Drainage District organized
5 and operating pursuant to ORS chapter 547, with a service area located within Klamath County,
6 Oregon, and was formed under the laws of the state of Oregon on March 6, 1915. KDD is
7 situated in southern Oregon on the lakebed of the historic Lower Klamath Lake and was created
8 for the purpose of providing adequate drainage at all times as well as for providing a cost-
9 effective water supply to its landowners. KDD is comprised of approximately 27,000 acres of
10 agricultural lands and is part of the Klamath Project. KDD (on its own behalf and as a
11 representative of its landowners) has an interest in this Petition as the Final Order threatens to
12 adversely affect KDD operations.

13 6.

14 Petitioner Ady District Improvement Company (“ADIC”) is a corporation that operates
15 under chapter 554 of the ORS. ADIC is located in Klamath Falls, Oregon. ADIC was formed by
16 landowners in 1954, when articles of incorporation were filed with the state of Oregon. ADIC is
17 responsible for the continual improvement of the canals, drains, pumps, control gates, and other
18 structures used to provide irrigation water for beneficial use to the lands served by ADIC. ADIC
19 diverts water into its system from the Klamath Project each year, and the water that irrigates land
20 within ADIC is used to raise a variety of crops. ADIC (on its own behalf and as a representative
21 of its landowners) has an interest in this Petition as the Final Order’s Temperature TMDL
22 threatens to adversely affect ADIC operations.

23 7.

24 Respondent Oregon Department of Environmental Quality (“ODEQ”) is an agency of the
25 state of Oregon as that term is defined in ORS 183.310(1). ODEQ has jurisdiction under
26 ORS 468B.110 to, by rule or order, issue and enforce a total maximum daily load (“TMDL”) to
27 attain state water quality standards adopted pursuant to the Federal Water Pollution Control Act
28 (33 U.S.C. § 1321), known as the Clean Water Act (“CWA”).

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8.

Respondent Oregon Environmental Quality Commission (“EQC”) is an agency of the state of Oregon as that term is defined in ORS 183.310(1). Under ORS 468B.110(1), EQC may adopt rules pursuant to Oregon Revised Statutes chapter 183 for the administration and implementation of “any acts necessary to be performed by the state to implement within the jurisdiction of the state the provisions of the Federal Water Pollution Control Act, P.L. 92-500, as amended, and federal regulations or guidelines issued pursuant to the Act.”

JURISDICTION AND VENUE

9.

This Court has jurisdiction pursuant to ORS 183.480 and 183.484. Petitioners timely file this Petition within 60 days from the date of the Order on Petition for Reconsideration, which was served on January 17, 2020, as required by ORS 183.484(2). The “Final Order” for judicial review, encompassing the Temperature TMDL, and Order denying Petition for Reconsideration, constitute a final order in other than a contested case because it constitutes “final agency action expressed in writing.” ORS 183.310(6)(b).

10.

Venue is proper in the Marion County Circuit Court pursuant to ORS 183.484(1).

GENERAL ALLEGATIONS

TMDL REQUIREMENTS

11.

The CWA is the primary law regulating pollution of the nation’s waterways. Section 303(d) of the CWA requires states to identify waters where current pollution control technologies alone cannot meet the water quality standards set for the waterbody. Every two years, states are required to submit a list of impaired waters, plus any that may soon become impaired to United States Environmental Protection Agency (“EPA”) for approval. The impaired waters are prioritized based on the severity of the pollution and the designated use of the waterbody (e.g., fish propagation or human recreation). States must establish the TMDLs of the

1 pollutant(s) in the waterbody for impaired waters on their list. Notably, the CWA does not
2 require an implementation plan. *See, e.g.*, 33 U.S.C. § 1313(d); 40 C.F.R. § 130.2

3
4 12.

5 ODEQ is the state agency with jurisdiction under ORS 468B.110 to issue TMDLs.
6 Pursuant to the requirements of chapter 340, division 42 of the Oregon Administrative Rules
7 (“OAR”), ODEQ must include defined elements in every TMDL it promulgates. A TMDL is
8 defined in OAR 340-042-0030(15) as a written quantitative plan and analysis for attaining and
9 maintaining water quality standards. The TMDL must include the elements described in
10 OAR 340-042-0040, including a calculation of the maximum amount of a pollutant that a
11 waterbody can receive and still meet state water quality standards, allocations of portions of that
12 amount to the pollutant sources or sectors, and a Water Quality Management Plan (“WQMP”) to
13 achieve water quality standards. Allocations of pollutant load are divided between existing point
14 sources and nonpoint sources including runoff, deposition, and background sources. OAR 340-
15 042-0040(4)(h).

16 13.

17 A WQMP is a required element of a TMDL that provides the framework of management
18 strategies to achieve allocations and attain water quality standards. OAR 340-042-0030(17). The
19 WQMP must itself include the elements described in OAR 340-042-0040(1)(1), including
20 proposed management strategies for each source category to meet the load allocations in the
21 TMDL.

22 14.

23 Applicable management strategies are incorporated into, and implemented by way of,
24 sector-specific or source specific TMDL implementation plans for nonpoint sources, and
25 discharge permits for point sources. TMDL implementation plans must set forth the timeline for
26 implementing management strategies, measurable milestones for completing them, and
27 performance monitoring. OAR 340-042-0080.
28

1 15.

2 Pursuant to OAR 340-042-0040(4)(I)(G) and (I), the WQMP must identify all persons
3 responsible for developing and revising TMDL implementation plans, and the schedule for
4 preparing, submitting, and revising them. TMDL implementation plans are typically developed
5 and implemented by a Designated Management Agency (“DMA”), which is defined as “a federal,
6 state or local governmental agency that has legal authority over a sector or source contributing
7 pollutants and is identified as such by the Department of Environmental Quality in a TMDL.”
8 OAR 340-042-0030(2).

9 16.

10 TMDLs are issued as an order. Within 20 days thereafter, ODEQ must provide notice that
11 the order has been issued and that the summary of responses to comments is available, to three
12 categories of persons: “all affected NPDES [point source] permittees, nonpoint source DMAs
13 identified in the TMDL and persons who provided formal public comment on the draft TMDL.”
14 OAR 340-042-0060.

15 **PETITIONERS SUBMIT COMMENTS TO DRAFT TEMPERATURE TMDL**

16 17.

17 On May 14, 2019, ODEQ issued a draft temperature TMDL (“Draft TMDL”). Petitioners
18 duly submitted comments on the Draft TMDL by the July 15, 2019 public comment deadline.

19 **ODEQ ISSUES THE TEMPERATURE TMDL**

20 18.

21 On September 19, 2019, ODEQ issued a final order, and thereby the Temperature TMDL,
22 establishing TMDLs and surrogates and implementation measures for waterbodies impaired for
23 temperature in the Upper Klamath and Lost River Subbasins in Oregon. The Temperature TMDL
24 failed to address important issues raised by Petitioners during its development.

25 **ODEQ DENIES PETITIONERS’ REQUEST FOR RECONSIDERATION**

26 19.

27 On November 18, 2019, as a precursor to judicial review permitted by and pursuant to
28 OAR 137-004-0080 and 340-042-0070, Petitioners submitted a Petition for Reconsideration of

1 the [Temperature TMDL], which set forth specific grounds upon which Petitioners sought
2 reconsideration of the Temperature TMDL. Petitioners explained that reconsideration was
3 justified because, as set forth in detail in their accompanying written argument, the underlying
4 assumptions, load allocations, source designations, responsible parties, data and modeling
5 sufficiency, waste load surrogates, and implementation measures within the Temperature TMDL
6 are unreasonable, unnecessary, arbitrary and capricious, not supported by substantial evidence,
7 outside the range of discretion granted to ODEQ by law, and otherwise inconsistent with
8 applicable law.

9 20.

10 On January 17, 2020, ODEQ issued its Order on Petition for Reconsideration, which
11 denied Petitioners' request for reconsideration in its entirety, and notified Petitioners of their right
12 to petition for judicial review of the Order within the 60-day time period specified by
13 ORS 183.484. Accordingly, Petitioners timely submit this Petition for judicial review of the
14 Temperature TMDL and Order denying reconsideration (the "Final Order") on March 17, 2020.

15 **PETITION FOR JUDICIAL REVIEW PURSUANT TO ORS 183.484**

16 21.

17 Pursuant to ORS 183.484(3), Petitioners set forth herein the nature of their interest in the
18 Final Order, facts showing how they are adversely affected and aggrieved by the Final Order, and
19 the grounds upon which the Final Order should be remanded or reversed.

20 22.

21 As background, the Temperature TMDL applies to sections of the Klamath River from the
22 outlet of Upper Klamath Lake to the Oregon state border with California. The Klamath River
23 originates at the outflow from Upper Klamath Lake approximately 50 miles upstream of the
24 California-Oregon border, and flows through northern California, entering the Pacific Ocean in
25 Del Norte County, California. Upper Klamath Lake has the largest surface area of any lake in
26 Oregon and is relatively shallow, creating conditions that cause waters in the lake to be naturally
27 warm, particularly in late spring through early fall.

1 23.

2 The Klamath Project includes dams, reservoirs, canals, drains, pumping plants, tunnels,
3 and other facilities that provide water to approximately 20,000 acres of cropland. The United
4 States Bureau of Reclamation (“Reclamation”), districts, and water users developed the Klamath
5 Project to supply irrigation water to lands in the Klamath Basin. Facilities within the Klamath
6 Project include Clear Lake Dam and Reservoir, Gerber Dam and Reservoir, Link River Dam,
7 Lost River Diversion Dam, Anderson-Rose Dam, and many others as well as numerous canals
8 and laterals. Klamath Project facilities additionally include drainage facilities essential to viable
9 agriculture operations and flood control. The Klamath Project encompasses large areas of
10 Oregon and California, covering territory in Klamath County, Oregon, and Siskiyou and Modoc
11 Counties in northern California. The two main sources of water supply for the Klamath Project
12 are the Upper Klamath Lake and the Klamath River, as well as Clear Lake Reservoir, Gerber
13 Reservoir, and Lost River. The total drainage area, including the Lost River and the Klamath
14 River watersheds above Keno, Oregon, is approximately 5,700 square miles.

15 24.

16 Pursuant to the federal CWA as noted, and in addition to the “TMDL requirements” set
17 forth above, a TMDL specifies the maximum pollutant loading capacity of an impaired
18 waterbody, which equates to the total amount of pollutant loads that a waterbody can receive
19 from point sources and nonpoint sources and still achieve water quality standards. 40 C.F.R.
20 § 130.2(i). A TMDL must distinguish between point source discharges, which receive wasteload
21 allocations, and other sources, which receive load allocations. *Id.* A TMDL must also distinguish
22 between naturally occurring sources of water quality impairment, or “natural background,” and
23 manmade nonpoint sources of pollution. *Id.* § 130.2(c), (e), (g). A load allocation must identify
24 the permissible amount of constituents that a respective nonpoint source can contribute to the
25 impaired waterbody while still attaining water quality standards. *Id.* § 122.3(e). A load
26 allocation must be attributable to nonpoint sources or to natural background, and based on a
27 reasonable estimate of the source’s pollutant loading considering any applicable pollutant
28 controls. 33 U.S.C. § 1313(d); 40 C.F.R. § 130.2(g), (h), (i).

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25.

The Temperature TMDL at issue attempts to assign “load allocations” and other “surrogate measures” for certain features alleged to be sources of temperature pollution within the Klamath Project and related area.

26.

The WQMP associated with the Temperature TMDL not only delegates actual implementation of the TMDLs, but also inappropriately delegates any meaningful source identification or cost analysis, to “responsible parties,” a term that is not defined, and does not exist, in applicable statutes or regulations.

27.

The Temperature TMDL assigns roles and duties to “responsible parties” for preparing implementation plans to implement the Temperature TMDL.

28.

Under Oregon law, the Oregon Department of Agriculture (“ODA”) is responsible for developing implementation plans applicable to agricultural discharges. OAR 340-042-0080. Certain private lands within the Klamath Project are already covered by the *Lost River Subbasin Agricultural Water Quality Management Area Plan*, revised April 28, 2006 (“Ag WQMP”) as a comprehensive WQMP for agricultural activities within the Lost River Subbasin. *See* OAR 603-090-0000. The Ag WQMP covers the waterbodies at issue in the Temperature TMDL, including those in the Klamath Project area. Ag WQMP at 7, 8, 12. The Ag WQMP applies to agricultural, rural, and certain forest lands supporting agriculture (e.g., private roads). *Id.* at 6.

FIRST CLAIM FOR RELIEF

29.

Petitioners adopt by reference paragraphs 1-28 above.

30.

The Final Order is unlawful under ORS 183.484(5)(a)-(b) because it designates Petitioners as “responsible persons.”

1 31.

2 The Temperature TMDL inappropriately assigns certain expectations and responsibilities
3 to water management agencies as “responsible persons” to implement the TMDL. The
4 designation requires water management agencies to prepare TMDL implementation plans,
5 identical to the responsibilities of a DMA. Under Oregon law, a DMA is “a federal, state, or local
6 governmental agency that has legal authority over a sector or source contributing pollutants, and
7 is identified as such by the [DEQ] in a TMDL.” OAR 340-042-0030(2). Nowhere in the ORS or
8 OAR is the term “responsible persons” identified or defined, nor is the difference between a
9 “responsible person” and a DMA explained. Irrigation districts and other water delivery agencies
10 in the Klamath Project lack authority (and in some cases the expertise) to enforce water quality
11 standards or regulate activities of constituent irrigators. The Final Order fails to describe or refer
12 to any legal authority or other basis for which Petitioners can be compelled to develop source-
13 specific implementation plans such that “reasonable assurance” is provided pursuant to OAR 340-
14 042-0040(4)(1)(J) that such plans would or could be implemented. Consequently, the
15 inappropriately assigned actions are unlikely to be carried out effectively, if at all.

16 32.

17 Further, ODEQ is the entity with authority over the actual dischargers responsible for
18 discharges to the state’s surface waters. *See, e.g.*, OAR 340-045-0005. ODEQ cannot expect or
19 require districts to assume the role of a water quality regulator. Moreover, ODEQ cannot assign
20 responsibility for certain discharges unless the assignee is actually responsible for the subject
21 discharges. The TMDL Implementation Guidance issued by ODEQ recognizes this limitation:
22 “DMAs required to submit a plan are not responsible for pollution arising from land management
23 activities that occur outside of their jurisdictional authority.” TMDL Implementation Plan
24 Guidance, ODEQ (May 2007) at 7.

25 33.

26 It is uncertain what specific “water management districts” are called upon by the
27 Temperature TMDL to develop TMDL Implementation Plans for temperature. Petitioners lack
28

1 the legal authority to ensure that the targets set forth in a temperature TMDL are met as required
2 by OAR 340-042-0030(2).

3 34.

4 ODEQ simply swapped the term “responsible person” in place of the term “DMA,” and
5 imposed the same implementation plan preparation obligation on Petitioners. ODEQ’s Order
6 denying reconsideration concluded that the regulatory framework is not limited to DMAs and
7 therefore “includes” Petitioners pursuant to OAR 340-042-0040(4)(1)(G). This is an unlawful
8 action taken without first engaging in a rulemaking that further defines “responsible persons.”

9 35.

10 Petitioners are entitled to an order from this Court reversing, setting aside, or remanding
11 the Final Order to eliminate the ambiguous and unlawful “responsible person” designation for
12 “water management agencies,” including KWUA’s member districts.

13 **SECOND CLAIM FOR RELIEF**

14 36.

15 Petitioners adopt by reference paragraphs 1 through 35 above.

16 37.

17 The Final Order is unlawful under ORS 183.484(5)(a)-(b) because the load allocations are
18 improperly assigned to waters that are not meaningfully distinct from the Klamath River and thus
19 do not add pollutants to the Klamath River.

20 38.

21 The Temperature TMDL assigns load allocations to features that, under the CWA
22 applicable precedent, are not sources of pollutants to the Klamath or Lost Rivers.

23 39.

24 Applicable federal law¹ holds that the feature known as Klamath Straits Drain (“Straits
25 Drain”) is not meaningfully distinct from the Klamath River. A load allocation is a specification
26 of the limit on the addition of pollutants to a waterbody. 40 C.F.R. § 130.7(c); OAR 340-042-

27 _____
28 ¹ See *ONRC Action v. U. S. Bureau of Reclamation*, 798 F.3d 933 (9th Cir. 2015); *Los Angeles Cty. Flood Control Dist. v. Nat. Res. Defense Council*, 568 U.S. 78 (2013) (*L.A. County*).

1 0030(15), 340-042-0040(4)(h). However, as a matter of law, “no pollutants are ‘added’ to a water
2 body when water is merely transferred between different portions of that water body.”
3 *L.A. County*, 568 U.S. at 82. Thus, load allocations for the Straits Drain are not required,
4 authorized, or appropriate.

5 40.

6 The historical circumstances and development of the Plevna District Improvement
7 Company and Keno Irrigation District are for all relevant purposes identical to those of the Straits
8 Drain. There is no legally relevant difference for the Lost River Diversion Channel (“LRDC”)
9 which is physically connected, at all times, to the mainstem Klamath River. As the Temperature
10 TMDL recognizes, water sometimes flows westward in the LRDC into the mainstem, and
11 sometimes flows eastward in the LRDC away from the mainstem. The historic and continuing
12 connections and intermingling of these waters leads to the conclusion that for the purposes of the
13 CWA there is no meaningful distinction between the two. *See, e.g.*, KWUA’s July 15, 2019
14 Comments, Attachment C (excerpt from Reclamation’s 2005 natural flow study describing the
15 physical interconnectedness of the LRDC and mainstream Klamath River).

16 41.

17 ODEQ’s response and modifications to the Temperature TMDL did not remedy this
18 defect, and additionally created new issues and uncertainties, including but not limited to:

19 (a) The Temperature TMDL identifies “sources to” the Straits Drain and LRDC, and
20 apparently has changed the previous load allocations from those two features to sources that
21 contribute to those features. Those sources are not identified and a “collective” load allocation is
22 not authorized or appropriate, or understandable. Further, it is impossible to determine whether a
23 source meets the load allocation or not. Further, the new approach does not consider at all the
24 fate of waters in the two features and there has been no modeling of temperature changes
25 associated with any of the sources. Such effects will vary based on multiple factors.

26 (b) It is arbitrary to assume a background temperature in the Straits Drain and LRDC
27 that is the same as the Klamath River.
28

1 (c) Contrary to the implication of Table 2-20 of the Temperature TMDL, no land in
2 KDD contributes flow to the LRDC. Further, during a considerable amount of the time, Lost
3 River is the dominant source of flow into LRDC.

4 (d) Contrary to the implication of Table 2-20, water enters the Straits Drain from
5 sources other than land in KDD.

6 (e) The allocations calculated previously for Straits Drain and LRDC (for example)
7 were based on temperatures at the point where water from those features enter the Lost River.
8 That water temperature is affected by multiple factors other than inflow to those features that
9 have not been accounted for. Further, for the same reason that Straits Drain, LRDC, and other
10 features are not meaningfully distinct from the Klamath River, water flowing into Straits Drain
11 and LRDC is not meaningfully distinct for CWA purposes.

12 42.

13 Petitioners are entitled to an order from this Court reversing, setting aside, or remanding
14 the Final Order to eliminate the unlawful load allocations assigned to waters that are not
15 meaningfully distinct from the Klamath River.

16 **THIRD CLAIM FOR RELIEF**

17 43.

18 Petitioners adopt by reference paragraphs 1 through 42 above.

19 44.

20 The Final Order is unlawful under ORS 183.484(5)(a)-(b) because the load allocations are
21 unreasonable, and to achieve them would misallocate public resources, have adverse
22 environmental effects, and could create inconsistencies with other regulatory programs.

23 45.

24 ODEQ unlawfully failed to consider the costs of implementing measures, the ease of their
25 implementation, and the environmental impacts and unintended consequences of meeting a load
26 allocation. OAR 340-0042-0040(6). There is no realistic likelihood that the load allocations
27 proposed will afford meaningful benefit to beneficial uses generally, let alone in California or in
28 all months of all years. The costs of actual attainment would be breathtaking, and there would be

1 considerable adverse consequences in doing so. In addition, while the specific load allocations
2 may be calculable, their precision far exceeds the accuracy or practical realities that can be
3 achieved in real-world conditions.

4 46.

5 Specifically, the document titled “Comparison of Draft 2019 Klamath Temperature
6 Allocations to 2013-2018 Source Discharge Data” provides, in Table 4, the maximum reduction
7 in temperatures of Straits Drain and LRDC water that would be needed to achieve the
8 Temperature TMDL’s load allocations assigned to these waters. For Straits Drain, this value is
9 6.6°C and for LRDC it is 4.9°C. The volume of discharge from these facilities can be up to
10 600 cubic feet per second (cfs) and 3,000 cfs, respectively. To lower the temperature of such a
11 volume of water would require extraordinary capital facilities.² Moreover, ODEQ’s record
12 includes an engineering analysis and findings of a California regional water quality control board
13 concerning the cost of facilities to cool 317 million gallons per day (491 cfs) of treated
14 wastewater effluent by 9°F (~12.8°C). That total project cost is over \$700,000,000. In addition,
15 the necessary facilities would have estimated annual operating costs of over \$22,000,000. Power
16 demand would be up to 70 megawatts, and the environmental impacts of the facility would be
17 significant. Given that the volume of water requiring cooling in the Temperature TMDL is even
18 greater than that evaluated in the engineering analysis, the cost would likely be even greater, but
19 undoubtedly would be extreme. Further, the environmental impacts of cooling facilities – visual
20 and construction and other impacts – would be very significant. The constraints on Straits Drain
21 or LRDC operations may conflict with assumptions and analyses in Klamath Project ESA
22 consultations.

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27 ² Petitioners do not, by this Petition, assume or admit that a load allocation will necessarily become immediately
28 effective as a legally binding limit. But, the WQMP states that ODEQ has authority to compel a DMA or
Responsible Person to develop and implement a TMDL implementation plan. Temperature TMDL at § 5.2.4.

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47.

ODEQ’s Order denying reconsideration admits that attainment of the Temperature TMDL criteria would be “costly,” yet fails to address the foregoing issues and simply directs DMAs and “responsible persons” to submit implementation plans and choose strategies based on cost.

48.

Petitioners are entitled to an order from this Court reversing, setting aside, or remanding the Final Order to eliminate the unreasonable load allocations.

FOURTH CLAIM FOR RELIEF

49.

Petitioners adopt by reference paragraphs 1 through 48 above.

50.

The Final Order is unlawful under ORS 183.484(5)(a)-(c) because its application of California water quality standards is not required or appropriate.

51.

A major driver of the wasteload and load allocations for the Klamath River is the “TMDL target” or “targets” established by the North Coast Regional Water Quality Control Board (“Regional Water Board”) “at the Oregon/California border.” The Temperature TMDL’s adoption of these standards is not appropriate on several grounds, including but not limited to:

(a) “Targets” and “water quality standards” are not the same thing. And, there is no evidence of any “target” that applies specifically or uniquely at the state border, which would appear discriminatory.

(b) The Temperature TMDL appears to rely on a memorandum from three members of the Regional Water Board staff that states the “findings of the [Regional Water Board] regarding requested temperature standards”³ This staff memorandum is not the findings of the Regional Water Board itself, which is a California public agency governed by an appointed

³ Memorandum to Alan Henning and Ryan Michie from Clayton Creager, Bryan McFadin, and Alydda Mangelsdorf, *Interpretation of CA Water Quality Standards (Temperature) for the OR Upper Klamath and Lost River Water Temperature TMDL* (April 10, 2019).

1 board and which can only take actions or make findings in a public process and at a public
2 meeting. Cal. Wat. Code, § 13201; Cal. Gov. Code, § 11123. The memorandum does not bind
3 ODEQ or control ODEQ's actions.

4 (c) The Regional Water Board staff memorandum refers to a Regional Water Board
5 basin plan water quality objective ("WQO") that is applicable to "intrastate" waters. There is no
6 basis for the assumption that this WQO is relevant here. "Intrastate" means wholly within one
7 state. Webster's Collegiate Dictionary, 11th ed. ("existing or occurring within a state"). The only
8 WQO cited in the Regional Water Board staff memorandum is one that disallows increases of
9 more than 5°F in temperatures having a coldwater fishery beneficial use. Based on the Regional
10 Water Board staff memorandum, this is the only WQO properly applied to discharges in Oregon.

11 (d) The intrastate WQO that is cited in the memorandum states that the "natural
12 receiving water temperature of such waters shall not be altered unless it can be demonstrated to
13 the satisfaction of the [Regional Water Board] that such alteration in temperature does not
14 adversely affect beneficial uses." By its own terms, the WQO affords parties who are subject to
15 Regional Water Board authority to make a showing that a change in temperature would not
16 adversely affect beneficial uses at whatever location this inquiry may be relevant. No opportunity
17 has been presented to parties in Oregon to make the showing contemplated by the WQO, which is
18 procedurally unfair. Nor is there any known process for persons outside California to make such
19 a showing. To the extent that parties in Oregon must seek a modification of the Regional Water
20 Board's TMDL or Basin Plan in order to be eligible for this opportunity, such process would be
21 extremely burdensome at best, and place unfair disadvantages on Oregonians.

22 (e) The Temperature TMDL is premised on the notion that, 365 days per year, water
23 temperature at the state line must not perceptibly increase as a result of discharges in Oregon.
24 The greatest compliance challenges are in the cool-weather months, when increases in water
25 temperature, especially those that may result from any incremental change from discharges
26 occurring many miles away (and upstream of Keno and J.C. Boyle Reservoirs) should not even be
27 of potential concern.
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52.

Petitioners are entitled to an order from this Court reversing, setting aside, or remanding the Final Order to eliminate the unlawful application of California water quality standards.

FIFTH CLAIM FOR RELIEF

53.

Petitioners adopt by reference paragraphs 1 through 52 above.

54.

The Final Order is unlawful under ORS 183.484(5)(a)-(c) because it is based on insufficient scientific data to comply with the requirements of a TMDL under OAR 340-042-0040(4).

55.

The Final Order is based on data only from the year 2000, which necessarily leads to bias. All available data should have been used to develop the model and the Temperature TMDL and implementation measures. The United States Geological Survey Oregon Water Science Center has available temperature data from the Keno Impoundment beginning in 2003 until present. These data should have been incorporated into the modeling and compared to the outputs from the 2000 data. Running the model with additional data would have allowed assessment of the output and allowed a determination of whether the data relied upon are appropriate to represent the temperatures at relevant locations.

56.

There is no technically supported basis for having a daily maximum temperature threshold for the Keno Impoundment be more restrictive than below Keno Dam or Lost River. Both have the 7-day average daily maximum threshold in which the maximum temperature recorded is averaged with the maximum temperature recordings for a 7-day period (referred to as the “7DADM”). There should not be any reason why the Keno Impoundment is managed different than the other two locations. In 2017, the ODEQ outlined the 7DADM as a reasonable threshold for this location. Based on the LC50 (i.e., the lethal concentration that causes 50 percent mortality to the population) concentrations calculated by Saiki et al. (1999) for Lost River and

1 shortnose suckers, the 28-degree daily threshold is well below the approximately 31-degree
2 Celsius for 24-hour threshold that would be detrimental to these species. These species are
3 adequately protected under the 7DADM. Until an impact on the fish is observed in this location,
4 it should be subject to the same guidelines as the other locations.

5 57.

6 The “effective shade” surrogate is similarly inappropriate. The surrogate does not relate to
7 reduction in load from a source.

8 58.

9 Petitioners are entitled to an order from this Court reversing, setting aside, or remanding
10 the Final Order based on the insufficient data and evidence to support it.

11 **SIXTH CLAIM FOR RELIEF**

12 59.

13 Petitioners adopt by reference paragraphs 1 through 58 above.

14 60.

15 The Final Order is unlawful under ORS 183.484(5)(a)-(c) because the flow targets for
16 Lost River reaches are not lawful load allocations or surrogates.

17 61.

18 The Lost River Subbasin portion of the Temperature TMDL includes instream flow
19 targets in Lost River below Malone and Anderson-Rose Dams as “Surrogate Measures.” The
20 targets exceed ODEQ’s authority. They are not proper load allocations or surrogates. Relevant
21 dam operators do not have water rights necessary for such purposes, and flow targets as
22 surrogates would create chaos in Oregon’s system of administration of water rights. In addition,
23 there is no support for specific targets selected.

24 62.

25 The Temperature TMDL incorrectly states that the instream flow targets “translate load
26 allocations” for Malone and Anderson-Rose Dams. The purpose of the flow objectives is to
27 decrease the consequence of atmospheric warming downstream of the dams. In other words, the
28 reason the dam operator would release water up to the flow targets is to mitigate a condition that

1 will occur under some lesser flow, or to “dilute” atmospheric heat effects. This is not a load
2 allocation. Further, each of the dams is a diversion dam, whose function is to raise water
3 elevations for gravity diversion. Under optimal operation, there would be zero flow released
4 below the dam. In those circumstances, there would not be water downstream of the dams at all.
5 Yet, the Temperature TMDL’s flow surrogates will likely and illogically lead to release of some
6 water just so that an additional increment of water would be released to ensure that the total
7 volume does not exceed a desired temperature due to atmospheric warming.

8 63.

9 The flow targets implicate issues of water supply and water rights, matters that are outside
10 the scope of TMDLs or ODEQ’s authority. Section 101(g) of the CWA expresses the policy that
11 state authority to allocate water will not be superseded by the CWA and the CWA will not be
12 construed to abrogate rights to water which have been established by states. 33 U.S.C. § 1251(g).
13 ODEQ is not the state authority for water allocation, and the flow targets impair and conflict with
14 state water rights. If water is bypassed in order to meet flow targets, the right to use of that water
15 for irrigation is foregone. In addition, in the case of Anderson-Rose Dam (for example), if TID
16 (the operator) must ensure realization of the target flow, it may be required to divert water at
17 Station 48 (on LRDC) and into Lost River, specifically so that flow can be bypassed below
18 Anderson-Rose Dam. But, the only water rights that exist for diversion via Station 48 are for the
19 use of water for irrigation. Thus, the target flows call for action inconsistent with state water
20 rights.

21 64.

22 The Temperature TMDL is contrary to law because the CWA and Oregon law do not
23 support the flow targets because they are not limitations on loading from a source.
24 Section 303(d)(1)(D) of the CWA refers to allocations of thermal “load” and “heat input.”
25 33 U.S.C. § 1313(d)(1)(D). ODEQ’s regulations are clear that a load allocation represents a
26 quantity pollutant loading from a source. *See* OAR 340-042-0040(4)(d), (e), (f), (h). The flow
27 targets are not limitations on the loading of heat from a source of heat.

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65.

Flow targets are not a “surrogate” contemplated by the regulations. OAR 340-042-0040(5) states: “To determine load allocations for sources identified in the TMDL, the Department: . . . (b) may use surrogate measures to estimate allocations for pollutants addressed in the TMDL.” The ODEQ may use one or more surrogate measures for a pollutant that is difficult to measure or highly variable. A surrogate measure will be closely related to the pollutant, and may be easier to monitor and track. The regulation’s characterization of surrogates is unrelated to the flow targets. The flow targets are not an estimation of allocation of heat loading. Temperatures of water can vary but not randomly or in a manner that is difficult to track, and heat is easily measured. The flow targets, which are amounts of flow that will not warm up too much due to atmospheric heating, are not closely related to heat pollution from a source.

66.

Petitioners are entitled to an order from this Court reversing, setting aside, or remanding the Final Order to eliminate the flow target “surrogates.”

SEVENTH CLAIM FOR RELIEF

67.

Petitioners adopt by reference paragraphs 1 through 66.

68.

The Final Order is unlawful under ORS 183.484(5)(a)-(c) because the Lost River flow targets are not supported technically.

69.

The proposed discharges of 25 cfs at Malone Dam and 11 cfs at Anderson-Rose Dam are based on one year of climatic and hydrologic data occurring in 1999. Multiple years of data are needed to capture the annual variability in hydrological and climatic conditions.

70.

Increased bypass at Anderson-Rose Dam would cause undue financial hardship on TID patrons. This water would flow to Tule Lake Sumps. TID would incur the entire cost of

1 pumping D Plant to maintain the Tule Lake Sump elevations for flood control and other purposes,
2 and this additional cost would ultimately fall on the patrons.

3 71.

4 Petitioners are entitled to an order from this Court reversing, setting aside, or remanding
5 the Final Order based on the insufficient data or evidence to support it.

6 **EIGHTH CLAIM FOR RELIEF**

7 72.

8 Petitioners adopt by reference paragraphs 1 through 71.

9 73.

10 The Final Order is unlawful under ORS 183.484(5)(a)-(c) because the effective shade
11 targets are not lawful load allocations or surrogates.

12 74.

13 For reasons similar to those applicable to instream flow targets, the effective shade
14 measures are not proper. The purpose of the shade is to reduce the effects of atmospheric
15 warming, not to function as a reduction in load from a source of pollutants. The Temperature
16 TMDL does not sufficiently address what parties' discharge or discharges in the Klamath Project
17 area have a proposed load allocation surrogate of effective shade, who has the responsibility for
18 any sort of implementation plan, and who is expected to implement those measures.

19 75.

20 Petitioners are entitled to an order from this Court reversing, setting aside, or remanding
21 the Final Order based on the insufficient data or evidence to support it.

22 **NINTH CLAIM FOR RELIEF**

23 76.

24 Petitioners adopt by reference paragraphs 1 through 75.

25 77.

26 The Final Order is unlawful under ORS 183.484(5)(b)(C) because it does not allocate
27 money to Petitioners and other local governments to pay the usual and reasonable costs of
28 performing the services and activities of DMAs.

1 78.

2 The Final Order violates Article XI, section 15(3) of the Oregon Constitution by
3 establishing a new program that will force Petitioners, which the Temperature TMDL expects to
4 act as “responsible persons” with identical responsibility as DMAs and therefore recognized as
5 local governments under ORS 174.116, to incur costs exceeding the financial thresholds set forth
6 in Article XI, section 15(3)(a)-(b), but fails to allocate the funds to Petitioners to carry out the
7 usual and reasonable costs of the new program.

8 79.

9 Petitioners are entitled to an order from this Court reversing, setting aside, or remanding
10 the Final Order based on its violation of the Oregon Constitution.

11 **TENTH CLAIM FOR RELIEF**

12 80.

13 Petitioners adopt by reference paragraphs 1 through 79 above.

14 81.

15 The Final Order is unlawful under ORS 183.484(5)(a)-(b) because ODEQ lacks the
16 authority to compel Petitioners to assume responsibilities and engage in acts that are beyond the
17 scope of authority expressly granted to Petitioners by the Legislature under ORS 545.025 *et seq.*

18 82.

19 The Final Order exceeds the enumerated statutory authority of Petitioners because
20 compliance with the Final Order is likely to require Petitioners to, *inter alia*, exercise or engage in
21 activity that involves or is in any way related to the management of discharges of any kind to
22 waters of the state by any irrigation district water user; enter onto, acquire, lease, or condemn the
23 lands or property of a water user or any other third party for any purpose other than those
24 purposes expressly set forth by ORS 545.025; and implement management strategies and develop
25 implementation plans concerning activities of, or the use of facilities by, third parties that result in
26 discharges to state waters and over which such activities and use of facilities Petitioners have
27 been granted no control under ORS 545.025 *et seq.*

1 83.

2 Petitioners are entitled to an order from this Court reversing, setting aside, or remanding
3 the Final Order because its requirements exceed legislative authority granted to Petitioners under
4 ORS 545.025 *et seq.*

5 **PRAYER FOR RELIEF**

6 84.

7 WHEREFORE, request that this Court grant relief as follows:

8 (a) For Petitioners' First through Eighth and Tenth Claims for Relief (1) a declaration
9 that the Final Order is unlawful under ORS 183.484(5) for the reasons set forth within such
10 claims, and (2) an order and judgment reversing, setting aside, or remanding the Final Order to
11 Respondents with appropriate instructions and/or other appropriate ancillary relief to compel
12 Respondents' compliance with applicable law;

13 (b) For Petitioners' Ninth Claim for Relief (1) a declaration that the Final Order is
14 unlawful under ORS 183.484(5)(b)(C) because it creates an unfunded mandate in violation of
15 Article XI, section 15(3) of the Oregon Constitution for the reasons set forth within that claim,
16 and (2) an order and judgment reversing, setting aside, or remanding the Final Order to
17 Respondents with appropriate instructions and/or other appropriate ancillary relief to compel
18 Respondents' compliance with applicable law;

19 (c) In the case of a reversal, make special findings of fact based on evidence in the
20 record and conclusions of law indicating clearly all aspects in which the Final Order is erroneous
21 pursuant to ORS 183.484(6);

22 (d) In the alternative, in the case the Court determines the Final Order is valid,
23 Petitioners request that Respondents: (1) be precluded from compelling Petitioners from engaging
24 in any acts that are in conflict or otherwise inconsistent with the limited authorities that the
25 Legislature expressly granted to Petitioners under ORS 545.025 *et seq.*; (2) be precluded from
26 compelling Petitioners to take any action inconsistent with their existing obligations or authority
27 under state or federal law; and (3) be precluded from compelling Petitioners to expend any public
28

1 funds in compliance with the Final Order until such time as Respondents have allocated funds to
2 carry out the usual and reasonable costs of the new program;

3 (e) For an order awarding Petitioners' attorneys' fees and costs pursuant to
4 ORS 183.497(1);

5 (f) For all other such relief as the Court deems just and equitable; and

6 (g) Petitioners reserve the right to recover any damages suffered as a result of the
7 enforcement of the Final Order.

8 SOMACH SIMMONS & DUNN, P.C.

9 DATED: March 17, 2020

/s/ Richard S. Deitchman

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15 DATED: March 17, 2020

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