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

4 **KLAMATH IRRIGATION DISTRICT,**

5 Petitioner,

6 v.

7 **OREGON WATER RESOURCES**  
8 **DEPARTMENT**, *an agency of the state of*  
9 *Oregon*, **THOMAS BYLER**, *in his*  
10 *official capacity as Director of Oregon*  
*Water Resources Department*, and  
**DANETTE WATSON**, *in her official*  
*capacity as Watermaster for the Oregon*  
*Water Resources Department*

11 Respondent.

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**WATER RIGHTS CASE**

**ORIGINAL FILING FEE: \$281, ORS  
21.135(1), (2)(g)**

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12 **INTRODUCTION**

13  
14 1.

15 Plaintiff KLAMATH IRRIGATION DISTRICT (“KID”) is bringing this action pursuant  
16 to ORS 183.490 and ORS 540.740 seeking an injunction compelling Defendants OREGON  
17 WATER RESOURCES DEPARTMENT (“OWRD”), THOMAS BYLER (“Byler”), and  
18 DANETTE WATSON (“Watson”) to carry into effect the Amended and Corrected Order of  
19 Determination (“ACFFOD”) in the Klamath Adjudication by ordering the United States Bureau  
20 of Reclamation not to divert stored water through the Link River Dam for instream purposes  
21 unless or until: (1) it obtains a water right or instream lease authorizing the use of water for such  
22 purpose, (2) obtains a stay of the ACFFOD pursuant to ORS 539.180, or (3) Reclamation obtains  
23 a final judgment providing that federal law authorizes the United States Bureau of Reclamation  
24 to use stored water in UKL reservoir for instream purposes *without securing a water right in*  
25 *accordance with state law and the Reclamation Act*. Pursuant to ORS 540.750, this matter is to  
26 be heard within 15-days of the issues being joined and a temporary restraining order may issue  
upon 3-days’ notice thereof. KID is hereby providing notice that it is seeking a temporary

1 restraining order compelling OWRD to use all of its authorities at its disposal to stop stored  
2 water in UKL reservoir from being unlawfully diverted through Link River Dam without a water  
3 right.

4 **PARTIES**

5 2.

6 Plaintiff KLAMATH IRRIGATION DISTRICT (“Plaintiff” or “KID”) is an irrigation  
7 district and quasi-municipal corporation organized under ORS Chapter 545 and located within  
8 the boundaries of the Klamath Reclamation Project in Klamath County, Oregon. KID holds  
9 water rights in UKL reservoir and is obligated to divert and deliver water from UKL to  
10 approximately one-thousand Oregonians and Oregon small businesses which own farms  
11 encompassing approximately 122,000 acres of irrigable land in the Klamath Basin.

12 3.

13 Defendant OREGON WATER RESOURCES DEPARTMENT (“OWRD”) is an  
14 executive-administrative branch of government under the Oregon Water Resources Commission  
15 pursuant to ORS 536.039. Defendant OWRD is responsible for carrying out the policies of the  
16 Oregon Water Resources Commission and administering and enforcing ORS 540.210 and other  
17 Oregon laws concerning the water resources of the state at the direction of Defendant Thomas  
18 Byler. The authority of Defendant OWRD is circumscribed by statute.

19 4.

20 Defendant THOMAS BYLER (“Byler”) is the duly appointed director of OWRD. In  
21 such capacity, Defendant Byler serves as the administrative head of OWRD, administers and  
22 enforces the laws of the state concerning the water resources of the state, and is empowered to  
23 engage in other related functions consistent with ORS 536.037. These related functions include  
24 executing the laws relative to the distribution of water, which includes enforcement of water  
25 rights under ORS 540.210 and other laws and exercising general control over OWRD’s  
26 watermasters.

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5.

Defendant DANETTE WATSON (“Watson”) is the watermaster for the OWRD in District 17, which encompasses Upper Klamath Lake. In such capacity, Defendant Watson is responsible for enforcing the water laws of the state, including enforcement of water rights in accordance with ORS 540.210.

**FACTUAL ALLEGATIONS**

6.

The Klamath Project is a project of the U.S. Bureau of Reclamation (“Reclamation”) designed to help irrigate and expand the number of farmable acres in southern Oregon and northern California. It is one of the oldest Reclamation projects in the nation, and is unique from most other Reclamation projects in that it was solely authorized as a single-purpose irrigation project to meet the nation’s objective of developing the West.

7.

The United States Congress enacted the Reclamation Act in 1902 to provide funding for irrigation projects in arid regions of the western United States.

8.

Pursuant to Sections 7 and 8 of the Reclamation Act, Reclamation is required to obtain water rights for Reclamation projects in accordance with state law, through appropriation, purchase, or “condemnation under judicial process.”

9.

Sections 7 and 8 of the Reclamation Act also require Reclamation and its agents to comply with state laws relating to the control, use, or distribution of water.

10.

In 1905, the Oregon Legislative Assembly sought to advance the purposes of the Reclamation Act and the development of a Reclamation project in the Klamath Basin, by enacting Chapter 5, Oregon Laws of 1905 and Chapter 228, Oregon Laws 1905.

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11.

Following authorization of the Klamath Project, facilities were constructed, previously existing facilities were improved and incorporated into the Klamath Project, and individual landowners began applying water to beneficial use on their lands after entering into contracts with the United States to repay the costs of the irrigation works developed by the United States.

12.

KID was formed in 1917 and thereafter entered into a contract with Reclamation in 1918 to repay the costs of construction, operation, and maintenance of the Klamath Project. The contract has since been amended several times, most notably in 1954. By virtue of its contract with Reclamation, KID has a perpetual obligation to operate and maintain certain irrigation works owned by the United States and an affirmative non-discretionary legal and contractual obligation to deliver water to fulfill the appurtenant water rights of its own landowners. KID also has a non-discretionary legal and contractual obligation to deliver water needed to fulfill water rights held by certain districts and landowners located outside KID’s own boundaries. KID’s contract specifically contemplates that ownership of the transferred works it currently operates and maintains, as well as any water rights held by Reclamation that are associated with KID, will be eventually be transferred to KID.

13.

On February 24, 1909, the Oregon Legislative Assembly enacted the Water Rights Act, including the provisions found at ORS 536.050, 537.120, 537.130, 537.140 to 537.252, 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310 to 540.430, 540.505 to 540.585 and 540.710 to 540.750.

14.

Pursuant to ORS 537.110, all water within the state from all sources of water supply belongs to the public. However, subject to existing rights, individuals may obtain the right to use the public’s water by applying for and obtaining a water right. Under Oregon law, the use of the public’s water is a property right. *See e.g.*, ORS 307.010(1)(b)(D)). The property right is said to

1 be usufructuary because, although a water right grants the right to use the public’s water,  
2 ownership of the water itself remains vested in the public. Oregon courts have recognized that  
3 the right to the use of water constitutes a vested property interest which cannot be divested  
4 without due process of law.

5 15.

6 ORS 539.007(11) defines water rights established prior to the adoption of the Water  
7 Rights Act on February 24, 1909 as undetermined vested rights. The Water Rights Act provides  
8 at ORS 539.010(4) that undetermined vested rights are not to be impaired or affected by any of  
9 its provisions. However, ORS 539.010(4) of the Water Rights Act also provides that the scope  
10 and attributes of all undetermined vested rights are to be determined through an adjudication  
11 conducted in accordance with ORS Chapter 539.

12 16.

13 In 1975, the State of Oregon initiated a general stream adjudication pursuant to ORS  
14 Chapter 539 of the waters of the Klamath Basin (hereafter “Klamath Adjudication”). The  
15 Klamath Adjudication satisfies the requirements of the McCarran Amendment, 43 U.S.C. § 666,  
16 and encompasses, *inter alia*, all pre-1909 state, federal, and tribal claims to the use of water  
17 stored in UKL reservoir and the portions of the Klamath River encompassed within the  
18 adjudication.

19 17.

20 On March 7, 2013, thirty-eight (38) years after commencing the Klamath Adjudication,  
21 Defendant OWRD issued its Findings of Fact and Final Order of Determination (“FFOD”) and  
22 filed it with the Klamath County Circuit Court, thus completing the administrative phase of the  
23 adjudication.

24 18.

25 In February 2014, OWRD filed an Amended and Corrected Findings of Fact and Final  
26 Order of Determination (“ACFFOD”) with the Klamath County Circuit Court.

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19.

The ACCFOD provides that Reclamation is the owner of a right to store water— specifically, a maximum annual volume of 486,828 acre-feet of water in UKL reservoir to benefit the separate water rights held by KID and other water right holders.

20.

The ACFFOD does not recognize Reclamation as having any right to use water stored in UKL reservoir for instream purposes.

21.

The ACFFOD recognizes that KID, its landowners, and other districts and landowners within the Klamath Project own water rights entitling them to use live flow and water the United States stores in UKL reservoir for the purposes of irrigation and other beneficial uses. Each acre of land with an appurtenant water right is entitled to use up to 3.5 acre-feet per acre. Since there are approximately 40,000 acres of land within KID that have appurtenant water rights, KID has a nondiscretionary obligation to divert up to 140,000 acre-feet each irrigation season to fulfill the water rights of its own patrons. KID also has a nondiscretionary obligation to deliver water from UKL reservoir to other irrigation districts and landowners who hold many tens of thousands of acres of land with appurtenant water rights as set forth in the ACFFOD.

22.

The ACFFOD is presently enforceable under Oregon law, and must be followed by all owners of determined claims pending the judicial review phase of the Klamath Adjudication before the Klamath County Circuit Court. ORS 539.130; ORS 539.170. To date, the Klamath County Circuit Court has not issued a stay to any party pursuant to ORS 539.180.

23.

Despite the issuance of the FFOD, and the subsequent issuance of the ACFFOD, Reclamation has persisted in using stored water in UKL for instream purposes for which it has no right under Oregon law or the federal Reclamation Act.

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24.

Accordingly, it is clear that KID and Reclamation have significant conflicts over the right to use stored water in UKL.

25.

ORS 540.210(1) provides that:

Whenever any water users from any ditch or reservoir, either among themselves or with the owner thereof, are unable to agree relative to the distribution or division of water through or from the ditch or reservoir, either the owner or any such water user ***may apply to the watermaster of the district in which the ditch or reservoir is located, by written notice, setting forth such facts, and asking the watermaster to take charge of the ditch or reservoir for the purpose of making a just division or distribution of water from it*** to the parties entitled to the use thereof.

26.

In April of 2018, KID was experiencing a water shortage and repeatedly demanded in writing that OWRD take exclusive charge of Upper Klamath Lake pursuant to ORS 540.210 and divide and distribute the water therefrom in accordance with the respective and relative rights of the various users of water from the reservoir. Defendant failed to act on these requests and failed to grant or deny the requests in writing.

27.

Thereafter, KID filed suit against the OWRD in Marion County Circuit Court, Case No. 18CV18112. Following a hearing on the merits, the Court granted judgment in KID’s favor and issued an order compelling OWRD to take charge of UKL pursuant to ORS 540.210. However, OWRD asserted it could not make a decision without extensive and unnecessary factual investigation. By delaying acting until it could gather this information it claimed to need, OWRD avoided making any decision before KID’s practical need for relief terminated with the end of the irrigation season. The issue was thereafter rendered moot, and OWRD ceased pursuing any action.

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28.

This year (2020) is proving to be another year of water shortage and, again, Reclamation is using stored water from UKL reservoir without a water right in violation of Oregon law and the Reclamation Act. For example, in a draft Environmental Assessment Document (“EA”), provided to Plaintiff on or about April 13, 2020, Reclamation indicated that it would use stored water in UKL reservoir for instream purposes without any water right, beginning with a 50,000 acre-foot “flushing flow” to be sent down the Klamath River within a period of a few short days. KID subsequently learned that Reclamation intended to conduct the flushing flow on or about April 16, 2020.

29.

Therefore, on April 3, 2020, KID again asked Defendants, including specifically Defendant Watson, the watermaster of the district in which UKL reservoir is located, to take charge of UKL reservoir pursuant to ORS 540.210 “according to the relative and respective rights of the various users from the... reservoir.”

30.

As of April 13, 2020, KID had not received any response from OWRD in regard to its request that OWRD take charge of UKL for purposes of controlling the distribution of water. Accordingly, KID sent correspondence, through its attorney, noting that it would bring legal action if necessary to compel OWRD to perform its non-discretionary duty to take charge of UKL and control the distribution of water in advance of the flushing flow.

31.

Thereafter, Reclamation changed the timing of its flushing flow from April 15, 2020 to an unknown time prior to May 1, 2020.

32.

On Thursday, April 16, 2020 at 3:01 p.m., OWRD issued an intermediate order entitled “NOTIFICATION OF DISTRIBUTION AND INVESTIGATION IN AID OF DISTRIBUTION” (“Intermediate Order”).



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33.

OWRD’s Intermediate Order did not take charge of UKL reservoir pursuant to ORS 540.210 to resolve KID’s very specific complaint that Reclamation was imminently prepared to unlawfully divert stored water without a water right in violation of the ACFFOD, ORS 540.720, ORS 540.410, and other Oregon laws.

34.

Instead, OWRD’s Intermediate Order set forth a process of investigating KID’s request that OWRD take charge of UKL reservoir, by issuing subpoenas before May 1, 2020, conducting hearings, and otherwise investigating whether there is a surface water shortage caused by the purported management of stored water. OWRD is well aware of the fact that the unlawful diversion of water that KID was immediately concerned with was scheduled to happen prior to this May 1, 2020 date, and the failure to act before Reclamation’s releases would deprive KID and the farmers it serves of their property interests in their water rights.

35.

On April 17, 2020, KID petitioned this Court for an emergency alternative writ of mandamus in Marion County Circuit Court Case No. 20CV15606 that would compel Defendants to take exclusive charge of UKL reservoir and ensure water is distributed from UKL reservoir in accordance with the relative rights thereon (i.e. the ACFFOD).

36.

On April 21, 2020, this Court issued an alternative writ of mandamus compelling OWRD to take charge of UKL reservoir and distribute the water thereof in accordance with the relative water rights thereon (i.e., ACFFOD).

37.

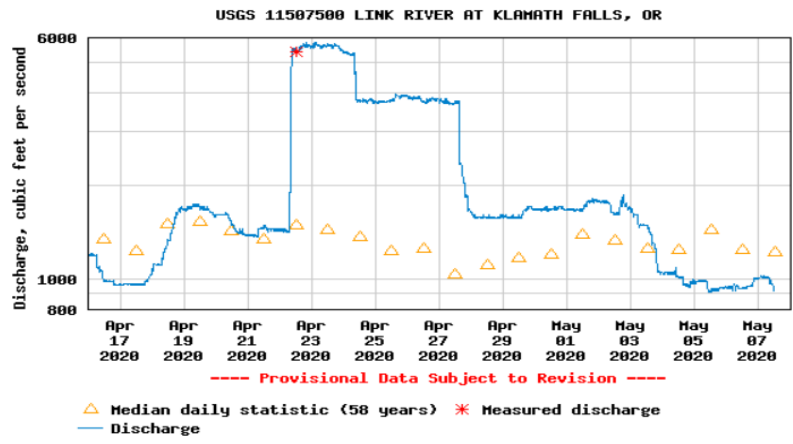
In an order date April 23, 2020, OWRD asserted it had taken charge of UKL as of April 16, 2020. It also ordered Reclamation to “cease releasing stored water from UKL reservoir *except in accordance with the relative and respective state law rights calling upon the stored*

1 *water*” until Reclamation shared with OWRD certain information identifying the authority it  
2 *claimed* authorized it to use stored water in UKL reservoir.

3 38.

4 Despite the issuance of the writ of mandamus by this Court, OWRD’s April 23, 2020  
5 order did nothing to control the distribution of water through the Link River Dam, as OWRD  
6 was obligated to do under ORS 540.210, ORS 540.720, and the writ issued by this Court.  
7 Instead, the order allowed Reclamation to conduct the flow exactly as planned without OWRD  
8 making any decision as to whether the flow was in accordance with the ACFFOD and Oregon  
9 law or not. This is made obvious by the fact that Reclamation has continued to use water from  
10 UKL to satisfy its ESA obligations—specifically, the release of a large quantity of stored water  
11 as a so-called “flushing flow”—even after OWRD purportedly “took charge” of UKL. The  
12 graph below, available publicly on the U.S. Geological Survey’s website, shows that after  
13 OWRD purportedly “took exclusive charge” of UKL on April 16, 2020 and ordered Reclamation  
14 to cease releasing stored water, Reclamation nevertheless released its flushing flow, beginning  
15 on April 23, 2020 and continuing until May 3, 2020. As this graph clearly shows, the discharge  
16 over Link River Dam during this period increased sharply. This increased quantity of water  
17 released reflects the release of stored water from UKL without a water right and such increased  
18 flows cannot be attributed to live or natural flow of the Klamath River.

19 **Discharge, cubic feet per second**  
20 Most recent instantaneous value: 921 05-07-2020 11:15 PDT



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39.

Defendants have “taken charge” of UKL in name only. Defendants have done nothing to prevent the actual release of water in an unlawful manner, despite clear evidence that Reclamation is flouting Defendants’ order.

40.

Defendants have the legal authority under Oregon law to do more than merely issue orders which are worded so as to be toothless to being with, and can and are being ignored to the extent they may be interpreted as having any teeth. Defendants and their agents may take control of headgates and other devices for water distribution, may pursue legal actions to prevent unlawful releases of stored water, and may seek punitive measures against individuals who flout their authority. (*See, e.g.*, ORS 540.045 [setting out watermaster duties]; ORS 540.060 [granting watermaster power to arrest and file complaints]; ORS 540.210(4); ORS 540.310 [noting that each ditch or canal must have a headgate that can be locked and kept closed by the watermaster]; ORS 540.320 [authority of watermaster to close ditches]; ORS 540.330 [same].) However, they have not taken *any* of these steps or otherwise sought to ensure that Reclamation complies with OWRD’s “order.”

41.

Defendants cannot assert that they have taken “exclusive charge” of UKL reservoir by issuing an order that is simply being ignored and taking no steps to enforce their order. It is clear that Defendants have neither physical nor actual control of UKL reservoir.

42.

Further, Defendants have insisted they must conduct an investigation prior to taking charge of UKL reservoir and determining the distribution of water therefrom. Plaintiff maintains no such investigation is necessary. In fact, such an investigation of the relative rights of the parties to this dispute has already *been* conducted over the past four decades: it culminated in the ACFFOD, which establishes and sets out the respective, enforceable rights of the parties. No further investigation is necessary.

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43.

Even if some factual investigation must take place prior to the determination of how water should be distributed—for instance, to distinguish between live flow and stored water in UKL—this information is readily available to OWRD, which requires that all owners of structures that obstruct the natural flow of the river maintain measuring devices such that the natural flow of the river can be easily determined. *See* ORS 540.330.

44.

Lastly, regardless of the level of factual investigation required, Defendants must “take exclusive charge” of UKL upon the filing of the complaint, not upon the completion of an investigation. Defendants have clearly failed to do so here, since Reclamation continues to release water without a secondary water right notwithstanding Defendants’ “order” to cease doing so. Defendants have taken no action to enforce their “order,” despite the availability of avenues to do so, and thus cannot claim to have taken “exclusive charge” of the reservoir.

45.

As such, Plaintiff seeks this court to grant injunctive and declaratory relief requiring Defendants to discharge their statutory duty and take “exclusive charge” of UKL reservoir, which necessarily entails preventing Reclamation from distributing water without a water right in a manner that is contrary to the ACFFOD.

46.

Defendant’s failure to carry into effect the ACFFOD is causing KID and the landowners it serves irreparable harm as Defendants are the regulatory agency with exclusive authority to carry into effect the ACFFOD and enforce the water rights set forth therein, which are private property under Oregon law.

**FIRST CAUSE OF ACTION – VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT (Against All Defendants)**

47.

Plaintiff reasserts and realleges ¶¶ 1 to 46 as though fully set forth herein.

1 48.

2 Under ORS 540.210(2), Defendants, particularly including Defendant Watson, have a  
3 duty to “take exclusive charge” of UKL for the purposes of making a just distribution of the  
4 water contained therein pursuant to the Oregon water rights determined in the ACFFOD.

5 49.

6 While Defendants have issued orders purportedly directing Reclamation to cease  
7 releasing stored water without a corresponding water right, the orders are written so as to ensure  
8 Reclamation may comply without bringing its water use into compliance with law, and to the  
9 extent they may be interpreted otherwise, Reclamation has ignored these orders and Defendants  
10 have taken no steps to enforce or enact these orders.

11 50.

12 As such, Defendants have not taken charge of UKL, as they have neither physical nor  
13 actual control of the outflow of stored water from UKL.

14 51.

15 Under ORS 183.490, a court may “compel an agency to act where it has unlawfully  
16 refused to act or make a decision or unreasonably delayed taking action or making a decision.”

17 52.

18 Under ORS 540.210(2), Defendants have no discretion or authority not to take exclusive  
19 charge of UKL reservoir. *See* ORS 540.210(2) (“The watermaster **shall** then take exclusive  
20 charge of the ditch or reservoir . . . .”) (emphasis added).

21 53.

22 Defendants have unlawfully refused to take exclusive charge of UKL reservoir, or are  
23 unreasonably delaying taking exclusive charge of UKL reservoir by actually taking control of the  
24 distribution of water and distributing it in accordance with the ACFFOD.

25 54.

26 KID is entitled to order and judgment compelling Defendants to immediately take  
exclusive charge of UKL and distribute water in accordance with the ACFFOD.

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55.

KID is entitled to an award of its attorney fees pursuant to ORS 183.497 and other law because OWRD has acted without reasonable basis in law or fact.

**SECOND CAUSE OF ACTION – INJUNCTION PURSUANT TO ORS 540.740 (Against Defendant Watson)**

56.

Plaintiff reasserts and realleges ¶¶ 1 to 46, as though fully set forth herein.

57.

ORS 540.740 permits any person to seek an injunction against a watermaster if they can show “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.”

58.

Defendant Watson has refused to take adequate steps to stop or enjoin the unlawful uses of water by Reclamation to which Plaintiff possesses a water right. Specifically, Plaintiff’s entitlement to use up to 3.5 acre-feet of water per year per irrigable acre, either for irrigation purposes or leasing purposes for in-stream rights, has been unilaterally seized by Reclamation, who is using it for instream purposes without a lease and without any monetary payment or lawful condemnation of this right. Despite complaints to Defendant Watson, no steps have been taken to actually stop this unlawful seizure of water rights.

59.

Because these water rights were determined in the ACFFOD, Defendant Watson’s failure to intervene is a failure “to carry into effect the order of the Water Resources Commission” under ORS 540.740.

60.

Therefore, Plaintiff is entitled to an injunction against Defendant Watson directing her to carry into effect the ACFFOD by using all powers of enforcement at her disposal to stop the United States from unlawfully diverting stored water from UKL reservoir through Link River

1 Dam without having obtained a water right or instream lease authorizing the use, or a stay of the  
2 ACFFOD pursuant to ORS 539.180, or a final judgment providing that federal law authorizes the  
3 United States Bureau of Reclamation to use stored water in UKL reservoir for instream purposes  
4 *without securing a water right in accordance with state law and the Reclamation Act.*

5 **PRAYER FOR RELIEF**

6 **WHEREFORE**, Plaintiff prays for judgment and an order against each Defendant as  
7 follows:

- 8 1. On each of the causes of action, for injunctive and declaratory relief as may be  
9 shown to be proper, including but not limited to issuance of a temporary restraining order; and  
10 2. Any other relief that this Court deems just and proper.

11  
12 Dated: May 14, 2020

RIETMANN LAW P.C.

13  
14 *s/ Nathan R. Rietmann*  
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