



October 11, 2016

Ronald A. Bersin,
Executive Director
The Oregon Government Ethics Commission
3218 Pringle Rd. SE, Suite 220
Salem, OR 97302-1544

Re: ITSSD Ethics Violations Complaint Against
Ed Bair, David Cacka, Greg Carleton,
Jason Chapman and Ross Fleming

Dear Mr. Bersin,

Please find attached an ethics complaint filed against current and former members of the Board of Directors of the Klamath Irrigation District (“KID” or “District”) located in Klamath Falls, Oregon for violations of Oregon government ethics laws (ORS Chapter 244) within the jurisdiction of OGEC: 1) Use of public office for financial gain; and 2) Conflict of interest.

I file this ethics complaint both in my individual capacity as a citizen from outside the State of Oregon who has reviewed publicly available documents revealing some of the violations discussed below, and as the authorized representative of the Institute for Trade, Standards and Sustainable Development (“ITSSD”), a globally recognized New Jersey-based nonprofit public interest organization dedicated, in part, to promoting regulatory transparency, good governance and public accountability from federal, state and local governments. The ITSSD finds intentional ethical lapses by public officials reprehensible and unacceptable, and it is filing this complaint to ensure that the State of Oregon holds the above-referenced KID Board members publicly accountable, especially in light of the fraudulent KID Recall Campaign these same individuals launched this past July 2016 against current KID majority Board members Brent Cheyne, Kenneth Smith and Grant Knolls.

On October 6, 2016, the ITSSD filed the first part of a multi-part complaint with the Oregon Secretary of State Elections Division and the Oregon Department of Justice/Attorney General to highlight how these same KID Board members have likely violated Oregon civil elections and criminal laws in prosecuting their KID Recall Campaign. The Ethics Commission, therefore, should consider the ITSSD Oregon Secretary of State Elections Division Complaint as part of the administrative record for purposes of this Complaint. Information about the ITSSD Elections Division filing has been provided for your review.

I also have standing to file the enclosed complaint because I formerly served as specialty counsel to the District addressing specific federal law and policy matters. During the four and one-half months of my engagement as specialty counsel, I observed firsthand and personally experienced some of this offensive behavior which violates not only Oregon laws but also the public trust that KID patrons have placed in these individuals.

Given the impending illegitimate October 12th recall vote against current KID majority Board members Cheyne, Smith and Knolls, the likely violation of Oregon Elections and Ethics Laws and the possible commission of criminal acts in connection with these and other related matters, the ITSSD strenuously requests that the OGEC undertake an immediate investigation of these Ethics Law violations. If you have any questions following your review of this complaint, please don't hesitate to contact me.

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Thank you, in advance, for your prompt and considered response.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
President/CEO

Cc: Michael Thornicroft, Ethics Commission Investigator
Diane Gould, Ethics Commission Investigator
Brenda Bayes, Interim Director, Elections Division, SOS
Aleea Sharp, Investigations and Legal Specialist, Elections Division, SOS
Ellen F. Rosenblum, Attorney General, Oregon DOJ
Steve Wolf, Chief Counsel, General Counsel Division, Oregon DOJ
Judy Giers, Deputy Chief, General Counsel Division, Oregon DOJ
Michael Slauson, Chief Counsel, Criminal Justice Division, Oregon DOJ
Stephanie Tuttle, Deputy Chief Counsel, Criminal Justice Division, Oregon DOJ
David Kirby, Special Agent in Charge, Criminal Justice Division, Oregon DOJ

ITSSD Ethics Violations Complaint Against Ed Bair, David Cacka, Greg Carleton, Jason Chapman and Ross Fleming

The ITSSD and I hereby file this complaint voluntarily out of an abundance of concern that these individuals, in their capacities as public officials, have engaged in a pattern of inappropriate, unethical, and illegal behaviors far too long at the expense of the KID patrons to whom they have a public trust obligation/duty. The ITSSD fears that, barring the OGEC's immediate intervention and investigation of such behaviors, these same individuals will be permitted to successfully prosecute a fraudulent, and perhaps, criminally illegal public Recall Campaign resulting in the misplaced recall of current KID majority Board Members Cheyne, Smith and Knolls. The ITSSD hopes that the immediate intervention of OGEC, the Secretary of State Elections Division and the Department of Justice can prevent such a miscarriage of justice from occurring at the expense of KID patrons.

Neither the ITSSD nor I currently represent or otherwise work for or on behalf of KID or any of its Board members or patrons, with or without compensation. The contents of this Complaint, the accompanying correspondence, and the legal references and documentary hyperlinks contained herein, are not intended to be construed, and should not be construed, by a member of the public as constituting or providing a legal opinion, legal advice or legal consultation.

I. Discussion

1. KID Board Members are Public Officials Who Must Be Held Personally Responsible for Complying With Oregon Ethics Laws:

KID is governed by a five-person elected Board of Directors that meets monthly to discuss and take action on all District business. KID is a "local service district" that falls within the definition of "local government" under [ORS § 174.116\(1\)\(a\)](#) and [ORS § 174.116\(2\)\(w\)](#). More specifically, KID is an Oregon Special District [ORS § 198.010\(15\)](#) the organization of which was authorized by Oregon statute – [ORS Chapter 545](#) – "Irrigation Districts." As such, KID is a "public body" ([ORS § 174.109](#)). Each person serving on the KID Board of Directors (an administrative subdivision of such local service district/public body) is considered a "public official" [ORS § 244.020\(15\)](#) serving in "public office" ([ORS § 260.005\(19\)](#)) during their entire term as a KID Board member.

[ORS § 244.010\(1\)-\(3\)](#) provide that "service as a public official [e.g., as a KID Board member] is a public trust" that must be safeguarded by both elected and appointed public officials, whether they work for compensation or voluntarily. These provisions also provide that public officials [e.g., KID Board members] must safeguard the public trust, *at a minimum*, by complying with the applicable provisions of ORS Chapter 244. [ORS § 244.010\(5\)](#) and (8), furthermore, provide that "public officials [e.g., KID Board members] should put loyalty to the *highest ethical standards* above loyalty to government, persons, political party or private enterprise [...] *ever conscious of the public trust*" (emphasis added). As the Ethics Commission clearly states on page 3 of the [Oregon Public Officials Guide](#) it has developed, "[p]ublic officials [e.g., including KID Board members,] must know that they

are held *personally responsible* for complying with the provisions in Oregon Government Ethics law” (emphasis added).

2. KID Board Members are Subject to the Following Oregon Conflict-of-Interest Ethics Laws:

ITSSD appreciates the Ethics Commission’s emphasis on the importance of public officials not engaging in “conflicts-of-interest” without public disclosure and the consent of public bodies charged with honoring the public trust.

“The cornerstone of Oregon Government Ethics law[] *prohibits public officials from using or attempting to use their official positions or offices to obtain a financial benefit for themselves, relatives or businesses they are associated with through opportunities that would not otherwise be available but for the position or office held*” (emphasis added) (*Oregon Public Officials Guide* pp. 3, 12).

An “actual” conflict-of-interest arises when a public official participates in “*any action or any decision or recommendation* by a person acting in a capacity as a public official, the effect of which *would* be to the private pecuniary benefit or detriment of the person or the persons relative or any business with which the person or a relative of the person is associated” (emphasis added). ([ORS § 244.020\(1\)](#)) A “potential” conflict-of-interest arises when a public official participates in “*any action or any decision or recommendation* by a person acting in a capacity as a public official, the effect of which *could* be to the private pecuniary benefit or detriment of the person or the persons relative, or a business with which the person or the persons relative is associated” (emphasis added). ([ORS § 244.020\(13\)](#); *Oregon Public Officials Guide* (p. 21))

[ORS § 244.120\(1\)\(c\)](#) provides that, “[w]hen an actual or potential conflict-of-interest arises, the public official must “*notify in writing* the person who appointed the public official to office [e.g., KID patrons] of the nature of the conflict, and request that the appointing authority [e.g., the KID Board] dispose of the matter giving rise to the conflict” (emphasis added). This statutory provision also states that, “[u]pon receipt of the [notification and] request, the appointing authority [e.g., the KID Board] shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority [e.g., the KID Board].”

[ORS § 244.130\(1\)](#) provides that, “[w]hen a public official gives notice of an actual or potential conflict of interest, the public body [e.g., the KID Board...] that the public official serves shall *record the actual or potential conflict in the official records [minutes, audio/video recording]* of the public body” (emphasis added). (See also *Oregon Public Officials Guide*, p. 22)

[ORS § 244.120\(2\)\(a\)](#) provides that, “an appointed public official serving on a board [...] shall [...]w]hen met with a *potential* conflict of interest, *announce publicly* the nature of the potential conflict *prior to* taking any action thereon in the capacity of a public official” (emphasis added). [ORS § 244.120\(2\)\(b\)\(A\)](#) provides that, “an appointed public official serving on a board [...] shall [...]w]hen met with an *actual* conflict of interest, *announce publicly* the nature of the actual conflict *and* [...]”

refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises *or from voting* on the issue” (emphasis added).

The existence of an actual or a potential conflict-of-interest will not be deemed actionable and trigger the notification and announcement obligations under the statute, however, “[i]f the conflict of interest arises from an unpaid position as officer [on board of directors of] or membership in a nonprofit corporation that is tax-exempt under 501(c) of the Internal Revenue Code” (emphasis added). (See ORS § 244.020(13)(c); ORS § 244.020(1); ORS § 244.020(13)(c)(B)). There is, nevertheless, an exception to this exception, and it is found in [ORS § 244.040](#). ORS § 244.040(7) states that, “[t]he provisions of this section apply *regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed under ORS 244.120*” (emphasis added).

ORS § 244.040(1) provides that,

“a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public officials holding of the official position or office.”

This would arguably cover situations where a public official serves simultaneously on the board of a tax-exempt nonprofit corporation to indirectly derive personal benefits by utilizing BOTH his official government position in tandem with his nonprofit board position to influence and advance the lobbying agenda of the nonprofit organization to secure personal benefits through law and policy making.

3. Conflict-of-Interest Ethics Law Violations Committed by Ed Bair, Ross Fleming, Jason Chapman, David Cacka and Greg Carleton:
 - a. *Serving Simultaneously on KID, KBID, KWUA and KWAPA Boards Without Publicly Notifying, Disclosing Recording Conflicts or Securing Consent from KID Board*

The record shows that five (5) former and current KID Board members served on multiple organizations’ boards of directors during the period spanning 2010 through 2015. The record also shows that these multiple simultaneous board positions evidenced a likely concerted effort to use a public position to influence public policy in the Klamath Basin for the specific purpose of securing private benefits for the board members themselves, as well as, for their family members and friends.

As Table 1 below indicates, former KID Board members Ed Bair, Ross Fleming, Jason Chapman, David Cacka and Greg Carleton, ruled the entire or the majority of the KID Board, at the very least, from January 1, 2010 through December 31, 2015. It shows that: 1) Ed Bair served as a majority KID Board member from 2010-2015; 2) Ross Fleming served as a majority KID Board member from 2010-2012; 3) Jason Chapman served as a majority KID Board member from 2010-2011; 4) David Cacka served as a majority KID majority Board member from 2010-2015 and for 2016 serves as a minority

KID Board member; and 5) Greg Carleton served as a majority KID Board member from 2010 through 2015 and for 2016 serves as a minority KID Board member.

The period spanning 2010 through 2015 is critically important because it was during this period that the highly controversial Klamath Basin Restoration Agreement (“[KBRA](#)”) and the Klamath Hydroelectric Settlement Agreement (“[KHSA](#)”) had been negotiated and signed by the U.S. Department of Interior’s Bureau of Reclamation (“BOR”), the States of Oregon and California, several tribal governments, KID and certain other organizations in which these former and current Board members simultaneously played an influential role. It also was during this period that the text of the proposed Wyden-Merkley Amendment (“SA 3288”) to another U.S. Senate amendment to the Murkowski energy bill (SA 2953 proposed to S. 2012) had been drafted by the majority board members of KID and these same other organizations.

As of the close of December 31, 2015, since Congress had not ratified the KBRA and KHSA, the KBRA expired and the KHSA became eligible for renegotiation by KHSA parties pursuant to that agreement’s nontransparent and non-inclusive meet and confer process. A new Klamath Power and Facilities Agreement (“[KPFA](#)”) and an Amended KHSA also was subsequently signed by these same parties in [April 2016](#), pursuant to a [nontransparent and non-inclusive negotiating process](#) that prevented the new KID majority Board from having any input and which provided Indian tribes with additional water rights [at the expense of Project and off-Project irrigators](#).

The former KBRA and KHSA had provided for [federal funding of certain land idling programs as the result of diminished water supply to the Project](#) to conserve Upper Klamath Lake waters for fish entrainment, wildlife and water quality/environmental protection programs consistent with the federal Endangered Species Act and Clean Water Act. The KHSA also provided federal and state funding mechanisms to ensure the liability-free removal of four perfectly operational dams located on the Klamath River in southern Oregon and northern California owned by Warren Buffet’s PacifiCorp. The Wyden-Merkley Amendment, which currently remains under consideration by a U.S. House-Senate conference committee working to reconcile the different House-Senate provisions within S.2012, is intended, in part, to make up the federal funding shortfall resulting from the expiration of the KBRA and original KHSA, and to fulfill the funding obligations for fish entrainment and water quality programs to be developed pursuant to the KPFA. Unfortunately, for the majority of Klamath Basin residents who operate smaller farms and ranches, most of the funding proposed for such programs in the Wyden Merkley Amendment has been [earmarked for the larger farms and ranches in the Project](#).

Clearly, the former and current KID Board members who are the subject of this Ethics Commission Complaint had long [worked, in their official public capacities, to secure personal financial and nonfinancial benefits](#) from such federal funding. However, they did not limit the use of their public official status to KID; they also worked in an official public capacity in other public and private organizations where they wielded much influence to promote the development, signing and implementation of these Klamath Basin Agreements from which they intended to derive personal financial benefits. These other organizations included the nonprofit Klamath Water Users Protective Association (otherwise known as Klamath Water Users Association or “KWUA”), the intergovernmental Klamath Water and Power Agency (“KWAPA”) and the Klamath Basin

Improvement District (“KBID”), a small irrigation district local government entity operating alongside KID within the federal Klamath Irrigation Project (“the Project”).

Table 1 – Multiple Board Assignments of KID Directors				
Year	Klamath Irrigation District (“KID”) Board Member	Klamath Basin Improvement District (“KBID”) Board Member	Klamath Basin Water Users Protective Association (“KWUA”) Board Member	Klamath Power and Water Agency (“KWAPA”) Board Member & Executive Position
2010	Ed Bair; David Cacka (Exhibit 1)			Ed Bair; David Cacka (Exhibit 2)
2011	Ed Bair; David Cacka; Greg Carleton; Jason Chapman; Ross Fleming (Exhibit 3)	Ed Bair (Exhibit 4)	David Cacka; Jason Chapman (Exhibit 5)	Ed Bair; David Cacka (<i>See Exhibit 2</i>)
2012	Ed Bair; David Cacka; Greg Carleton; Ross Fleming (Exhibit 6)	Ed Bair (Exhibits 7, 8)	Ross Fleming (Exhibit 9)	Ed Bair; David Cacka (<i>See Exhibit 2</i>)
2013	Ed Bair; David Cacka; Greg Carleton (Exhibit 10)	Ed Bair (Exhibit 11)	David Cacka (Exhibit 12)	Ed Bair; David Cacka (<i>See Exhibit 2</i>)
2014	Ed Bair; David Cacka; Greg Carleton (Exhibit 13)	Ed Bair (Exhibits 14, 15)	David Cacka (Exhibit 16)	Ed Bair; David Cacka (<i>See Exhibit 2</i>)
2015	Ed Bair; David Cacka; Greg Carleton (Exhibit 17)		David Cacka; Jason Chapman (Exhibit 18)	Ed Bair; David Cacka (<i>See Exhibit 2</i>)

The Klamath Water and Power Agency (“KWAPA”) functioned from September 26, 2008 through December 31, 2015. KWAPA was a Joint Powers/Intergovernmental Agency whose members were water agencies within the Klamath Reclamation Project.

“A Joint Powers Agreement allows signatories to the agreement, who have statutory authorities that are common to each participant, to exercise those common ‘powers’

jointly for the benefit of all parties. Each of the Parties to the Agreement has the power to purchase, generate, transmit, distribute, sell and interchange electrical energy, and to manage water resources, in addition to other powers. Each of the Parties (Klamath Project Districts) either by statutory authority or by a vote of their patrons enjoys the same powers as a Public Utility District (PUD) or Municipal Utility District does.”

The first part of the [KWAPA Final Performance – Water User Mitigation Plan \(WUMP\) Report](#) was released this past March 2016, based on the official KWAPA meeting minutes available at the BOR and the law offices of KID/KWAPA counsel Bill Ganong. (p. 71) It reveals that KWAPA was intended to execute the Klamath Basin Restoration Agreement (“KBRA”) which assigned KWAPA the duty to develop a water plan that financially compensated farmers for idling their land and/or reducing their surface water use in years of diminished water supply.

“[O]ne of the purposes of the Intergovernmental Cooperation and Joint Exercise of Power Agreement [R10AC20669] was to *authorize KWAPA to execute the Settlement Agreement [Klamath Basin Restoration Agreement (KBRA)]* and to undertake and complete all authorities and duties that would have been assigned to it by the Settlement Agreement” (emphasis added). (p. 3)

[...] The Klamath Basin Restoration Agreement (KBRA) assigns various duties and responsibilities to KWAPA. Among those duties is the drafting and implementing of a water plan. The guiding principal in the development of this water plan will be ‘the most water for the most acres’. KWAPA will emphasize the importance of increased water supply, then conservation and further improvements in efficiency, and finally, when full crop demand cannot be met, *establish a compensated program for reduction of water use*. It is the goal of KWAPA to develop a water plan that renders the ABC issue moot” (emphasis added). (p. 4)

[...T]he WUMP included programs that *mitigated water users for using ground water instead of surface water along with enrolling water users in a land idling program* for not using or expecting to receive surface water during that irrigation season” (emphasis added). (p. 7)

The WUMP was “a cooperative agreement between KWAPA and the BOR awarded on September 26, 2008. The agreement served as a test-run for the implementation of the KBRA which was anticipated to result in future diminished water deliveries to the Klamath Project as the result of Endangered Species Act requirements to protect fish and wildlife on Upper Klamath Lake and in the Klamath River. Its purpose was to use federal *funds* for the examination of future sustainable water management programs capable of providing extra available water when water delivery to the Project from Upper Klamath Lake and/or the Klamath River would no longer be permitted by the Klamath Basin Agreements. (p. 17)

As Table 1 above clearly shows, Ed Bair served as the President and the Chairman of the Board of KWAPA from at least the beginning of the organization’s 2010 fiscal year, during which year he

signed the [KBRA](#) and the [KHSA](#) on KWAPA members' behalf, until on or around July 31, 2015. It also shows that Ed Bair simultaneously served as a KID Board member from 2010 through 2015. Table 1 also shows that, upon Bair's resignation in July 2015, David Cacka assumed the role of President and Chairman of the Board until the issuance of the KWAPA Report in March 25, 2016. From, at least, 2010 to on or around July 31, 2015, David Cacka had served as a KWAPA Board *member-at-large* (See Exhibit 2, at p. 14), presumably, to cover up his simultaneous board roles and activities at KID and the KWUA. Ed Bair was more brazen

The KWUA is [a non-profit private corporation](#) that has represented Klamath Reclamation Project farmers and ranchers in its current form since 1953. KWUA is governed by an 11-member board of directors who are representatives from Klamath Project districts. The KWUA's [2008](#), [2011](#) and [2015](#) Annual Reports clearly reveal that the KWUA was and is indisputably [a political and policy advocacy organization](#). The KWUA's 2008 Annual Report stated that, "[o]ver the past year we have devoted a tremendous amount of time and resources to the completion and implementation of the proposed Klamath Basin Restoration Agreement (KBRA)". (p. 2) The KWUA's 2011 Annual Report stated that "KWUA's long-term strategic plan continues to include a variety of avenues to achieve stability including the continued support and implementation of the KBRA" (Klamath Basin Restoration Agreement) and the Klamath Hydroelectric Settlement Agreement ("KHSA"). (pp. 5-6, 9-10)

KID remained a dues paying member of the KWUA and KWAPA through December 31, 2015. As Table 1 above shows, from January 1, 2010 through December 31, 2015, several uncompensated KID Board members also served simultaneously and on a voluntary basis on the KWAPA and/or KWUA Boards, as follows:

- [Ed Bair](#) – Served simultaneously on the KID, KBID and KWAPA Boards from 2010 through 2014, and on the KID and KWAPA Boards from 2010 through July 31, 2015;
- [Jason Chapman](#) – Served on the KID Board from 2010 to 2011, and simultaneously on the KID and KWUA Boards in 2011;
- [Ross Fleming](#) – Served on the KID Board from 2010 to 2012, and simultaneously on the KID and KWUA Boards in 2012;
- [David Cacka](#) – Served simultaneously on the KID and KWAPA Boards in 2010 and 2012, and simultaneously on the KID, KWUA and KWAPA Boards in 2011, 2013, 2014 and 2015. He presently serves as a minority member on the KID Board;
- [Greg Carleton](#) – Served on the KID Board from 2010 thru 2015, and presently serves as the other minority member on the KID Board.

These KID Board members did not operate the KID in a transparent and inclusive manner. For example, Board meetings were not well attended and the majority KID Board did not make publicly available or maintain publicly accessible hardcopy files or internet websites containing the minutes of KID public Board meetings they convened from January 1, 2010 through December 31, 2015. In addition, what few public meeting minutes KID patrons were able to obtain do not reveal in-depth discussions of most subject matter areas. As the result, KID patrons were not being kept well informed about District business or the activities of the KID Board.

More importantly, the KID board meeting minutes District patrons were able to obtain do NOT indicate whether any of these District Board members had, at any time, notified the KID Board in writing about, or otherwise publicly announced to the Board and patrons, the existence of potential and/or actual conflicts-of-interest arising as the result of any one or more of said KID Board members serving simultaneously from 2010 through 2015 on multiple boards of directors. In addition, the board meeting minutes obtained do NOT indicate whether the Board had publicly waived (granted consent to) the actual or potential conflicts-of-interest arising from serving simultaneously on multiple organizations' boards pursuant to a formal KID Board vote.

The year-to-year failures to publicly notify, announce and record actual or potential conflicts-of-interest and the KID Board's official vote to waive such conflicts, and to indicate whether such conflicts resulted in any of these KID Board members choosing to refrain from participation in Board actions, decisions or recommendations, constitute clear violations of ORS § 244.120(1)(c), ORS § 244.130(1), ORS § 244.120(2)(a) and ORS § 244.120(2)(b)(A). It may be true that an individual KID Board member's simultaneous service during these years on both the KID and KWUA Boards would not generally trigger an actual or potential conflict-of-interest that is actionable and subject to public notification, announcement, reporting and waiver under ORS Chapter 244 since KWUA is a nonprofit organization. However, reasonable persons can conclude from the evidence accompanying this Complaint that these KID Board members used their public positions to creatively influence KWUA political and policy advocacy in favor of the Klamath Basin Agreements consistent with the aims and objectives of the BOR.

- b. *Using Their Official Public Positions to Engage in Simultaneous Directorships for the Purpose of Deriving Personal Financial Benefits Not Otherwise Available to the Public*

Indeed, KID Board members Ed Bair, David Cacka, Jason Chapman and Ross Fleming used their public positions in KID to influence both KWUA's and KWAPA's promotion of the Klamath Basin Agreements which, if they had been approved by Congress would have resulted in significant federal funding for various activities from which these individuals and their families and friends would have significantly benefited. For example, during the three years spanning 2012 to 2014, Ed Bair's board roles in two Project irrigation districts (KID and KBID) together with his KWAPA chairmanship had been specifically intended to wield maximum political influence to secure federal (BOR) funding for the leasing and/or idling of farmlands of which he, and his family and friends owned and leased many thousands of acres. However, Bair did not work alone; David Cacka simultaneously served during the same three-year period on the KID, KWUA and KWAPA Boards to achieve the identical result.

Furthermore, Bair, Cacka, Carleton, Fleming and Chapman all were members of the Malin Potato Cooperative, [where Cacka also was then employed as General Manager](#) during that period. They clearly appear to have derived significant private economic benefits from being able to secure more water to exploit [the acreage they had pooled together amongst themselves](#) to cultivate and harvest the potato crops that would ultimately be processed [at their greatly expanded Malin facilities](#), which has since formed an affiliation with [Basin Gold](#) in order to serve a larger more regionally oriented customer base.

These facts strongly suggest that KID Board members Bair, Cacka, Carleton, Fleming and Chapman had all along intended to use, and did use, their public offices to derive personal benefits from opportunities that otherwise would not have been available to them. Although most KID patrons did not fare nearly as well, [certain large farmers from the Tulelake Irrigation District](#) (“TID”) also benefited handsomely from their friendships with TID Board members [Bill Heiney and Gary Wright](#). Heiney simultaneously served on the TID and KWAPA Boards in 2015, while Wright served simultaneously on the TID, KWAPA and KWUA Boards in 2015. Thus, reasonable persons can conclude that ORS § 244.040(7) applies to their activities, and consequently, that former and current KID Board members Bair, Cacka, Fleming, Carleton and Chapman violated ORS § 244.040(1), ORS § 244.040(4) and/or ORS § 244.040(5).

If the Ethics Commission needs further evidence of the actual conflicts of interest created by these multiple directorships, it need only refer to the 2016 KWAPA Report. The KWAPA report states that, “the KWAPA board of directors struggled with the need to fulfill obligations under the Cooperative Agreement and the influence expressed by stakeholders and entities such as KWUA.” (p. 8) It also stated that, “[s]ome representative[s] of the KWAPA board of directors expressed that their role as a board member was to use their influence on the KWAPA board to see that their district benefited from the WUMP programs” (emphasis added). (p. 9). In addition, the KWAPA report states that KWAPA board members’ simultaneous service on KWUA board adversely impacted KWAPA’s ability to fulfill its mission.

“The KWUA is a political organization whose members consist of various Klamath Project irrigation districts. Some of the KWAPA board members were also KWUA board members. KWUA open claims (see KWUA annual reports at www.kwua.org) the successes of the WUMP at providing supplemental water to the Project as KWUA accomplishments, even though KWAPA was a separate entity from KWUA. There was definitely large influence on KWAPA policies from board members also on the KWUA board. KWAPA’s staff perspective is that KWAPA policies were influenced by KWUA...” (p. 9).

Furthermore, the KWAPA Report indicates that the conflicts of interest had certainly influenced KWAPA’s development of WUMP policies and resulted in the “highjacking” of WUMP programs to suit the personal interests and political beliefs of KWAPA board members.

“Conflict of Interest within the KWAPA board of directors seemed evident. While the legal level of conflict of interest may not have been breached, *the conflicting actions taken by some [members of] the KWAPA Board was ever present and influenced how WUMP policies were developed.* [] The role of KWAPA board members was unclear. *Some members would not represent the interests of KWAPA but continued to represent the interests of their home district and personal political beliefs to the detriment of KWAPA. [...] Due to the conflicts of interest in board members, WUMP programs were ‘highjacked’* to involve other issues that were not part of the purpose of WUMP. For example: the wet/dry land idling bid process in 2014 was used by those involved in the 2001 Federal Takings Case lawsuit against

the federal government and asked the irrigators to submit bids based on the value of the water. To some, this bid data could then be used as justification in the ongoing litigation” (emphasis added) (p. 10)

The KWAPA Report goes on to state that, during 2010 and 2011, several board members had pursued their own personal and district interests rather than KWAPA interests, and failed to abide by their duty of loyalty to the organization. Page | 12

“Professional conduct (conflict of interest) - Several of the KWAPA board of directors could not put aside their personal, home district and KWAPA interests to represent the interests of the KWAPA organization. They signed an oath of office to uphold the Board Policy Manual that they adopted, yet did not always abide by it. [...] Duty of loyalty: Several of the board members did not stand up for the KWAPA board approved policies” (emphasis added). (p. 34)

This practice was reportedly continued from 2012 to 2014 resulting in destructive personal rivalries between districts over the classification of water delivery contracts.

“The internal politics and rivalries between districts and class of water delivery contracts are very destructive. Many times, KWAPA has been used as a forum to advance individual interests rather than the goals of the organization” (emphasis added) (p. 63)

Indeed, in 2014, the conflicts of interest had risen to such a level that KWAPA Board decisions had been effectively controlled by the Tulelake Irrigation District.

“TID asked that KWAPA create a ‘special’ program for District pumping as the current policies did not work for their district. California KWAPA board director stated that KWAPA should not allocate any funds to individual irrigators until it was known the amount of funds it would take for the districts to pump. This is another example of conflict of interest of a ‘stakeholder’ managed program” (emphasis added). (p. 62)

“Professional conduct (conflict of interest) [] KWAPA Board in 2014 was primarily controlled by the California irrigation district. This has the potential to compromise decisions based on the agenda that district [has] over the Project as a whole. Decisions of the Board for enforcement of contract terms and conditions sometimes not upheld in a consistent manner” (emphasis added). (p. 63)

Apparently, the personal conflicts of interest the KWAPA organization had struggled with since its inception did not subside in 2015. According to the KWAPA Report, the majority of the KWAPA board refused to accept policy committee recommendations, and Chairman Ed Bair refused to accept the land idling policy because it did not provide sufficient personal benefits to irrigators. He also admitted that, due to the primacy of personal over community interests, it could not be expected that the millions of dollars the KBRA would provide to the Klamath Basin would be properly managed.

“The Board Chair stated the following about WUMP during the July 14th board meeting: a. *Land Idling does not produce measurable water* but does significantly reduce demand. b. Groundwater can be mined quickly. c. It does not take long to create an entitlement mentality. *When one feels they are ‘owed’ they cease to make decisions for the greater good of the community.* d. The current district boards and other water related organizations will have difficulty managing *the millions of dollars of the KBRA*” (emphasis added). ([p. 68](#))

Presumably, Chairman Bair preferred the possibility of the KBRA providing a “Farmer Leaseback Program” rather than a Land Idling Program. According to the December 2013 KWAPA newsletter, the Farmer Leaseback Program would essentially provide for the federal buyout of Klamath Project farmlands that would be leased for production or idled depending on the hydrological conditions.

“At the last OPPAC meeting considerable discussion centered on one potential demand management option still under consideration—the “Farmer Leaseback Program” or “Beginning Farmer Program”. If this option were implemented, KWAPA would use up front money to purchase land outright, and use these lands over the long-term to help provide a means of generating water savings through demand management activities. *For those years where hydrology and the Limitation on DIVERSION would require demand management options to be activated, these are the lands that would be idled. For years where demand management is not required, these lands would be leased to local producers, possibly with pricing incentives that would favor young or beginning farmers as a means of drawing new farmers in the Klamath Project. Emphasizing certain benefits will certainly cause people to view this program one way or another. While this option would likely be much easier to implement and administer than some of the other temporary idling programs, this concept is very controversial and could be met with local resistance, since there is a very strong local reaction towards government ownership of land, even though local oversight would be provided via the KWAPA board or some other locally appointed board consisting of landowners. [...] This option would also provide annual lease revenue to KWAPA and/or the Klamath Project districts*” (emphasis added) (p. 6)

Based on the above, reasonable persons can conclude that KWAPA activities motivated by conflicts of interest arising, in part, from the multiple directorships held simultaneously by KID board members Bair, Cacka, Fleming, Chapman and Careleton from 2010-2015 had not only violated ORS Chapter 244 ethical requirements, but also had likely resulted in the unauthorized use of federal restoration program funds the BOR had disbursed to KWAPA during those years. In July 2015, the local media reported that [whistleblower information had prompted a federal investigation of the Klamath Water and Power Agency \(“KWAPA”\)](#) in late June 2015 by the [U.S. Office of Special Counsel \(“OSC”\)](#) to determine how more than \$38 million of federal payments had been improperly funneled through KWAPA from 2008-2015. It is more than possible that [the OSC investigation resulted in Congress’ reticence](#) to pass the Klamath Basin Water Recovery and Economic Restoration Act of 2015 which would have lavished KWAPA with yet more federal funds to implement the KBRA and KHSA!

The [OSC](#), an independent federal investigative and prosecutorial agency, ultimately concluded that, “*there is [a substantial likelihood](#) that information provided [by the Public Employees for Environmental Responsibility (“PEER”)] to OSC discloses a violation of law, rule, or regulation; gross mismanagement; and a gross waste of funds*” (emphasis added). Following the completion of its KWAPA investigation, OSC turned the case over to the [Interior Department’s Office of the Inspector General](#) where it remains, for political reasons, “[parked](#).” (p. 52)

In sum, the record reveals that former and current KID Board members Ed Bair, David Cacka, Ross Fleming, Jason Chapman and Greg Carleton violated various ORS Chapter 244 ethical requirements as the result of their serving simultaneously on the KID, KBID, KWUA and/or KWAPA boards from 2010 through 2015. These conflicts of interest, which were not publicly notified, announced, recorded or cleared by the KID Board. Messieurs Bair, Cacka, Fleming, Chapman and Carleton served on these multiple boards individually, and at times, collectively for the purpose of using their public offices to engage in activities from which they derived personal benefits for themselves, their families and their friends. These KID Board members were well aware that they would not have access to such benefits if they had not been public officials.

Given the abundance of evidence of ethical conflict of interest violations, it is incumbent upon the Oregon Ethics Commission to promptly and thoroughly investigate these persons with the objective of finally holding them publicly accountable.

4. KID Board Members are Subject to the Following Oregon Confidential Information Ethics Laws:

ORS § 244.040(4) provides that,

“[a] public official [e.g., a current KID Board member] may not attempt to further or further the personal gain of the public official through the use of *confidential information* gained in the course of or by reason of holding position as a public official or activities of the public official” (emphasis added).

The [Oregon Public Officials Guide](#) explains that, “ORS 244.040(4) specifically prohibits public officials from attempting to use confidential information gained because of the position held or by carrying out assigned duties to further the public official’s personal gain.” (p. 9)

ORS § 244.040(5) provides that,

“[a] person *who has ceased to be a public official* [e.g., a former KID Board members] may not attempt to further or further the personal gain of any person through the use of confidential information gained in the course of or by reason of holding position as a public official or the activities of the person as a public official” (emphasis added)

The *Oregon Public Officials Guide* explains that “ORS 244.040(5) also prohibits a former public official from attempting to use confidential information for personal gain if that confidential information was obtained while holding the position as a public official, from which access to the confidential information was obtained.” (p. 9)

5. Confidentiality-based Ethics Law Violations Committed by Ed Bair, David Cacka and Greg Carleton: Page | 15
- a. *Using Board-Confidential Information to Further KID Board Members' Personal Gain*

As previously discussed, Ed Bair, David Cacka, Ross Fleming, Jason Chapman and/or Greg Carleton predominated the KID Board of Directors from 2010 until the end of 2015. During this period, these KID Board members used their public offices to secure seats on the boards of other organizations. These included another irrigation district/local public body (KBID), an intergovernmental organization (KWAPA) and a nonprofit private corporation (KWUA). These other organizations individually and together heavily influenced the activities of KWAPA which had been charged, in part, with the responsibility of implementing some facets of the KBRA. These KID Board members engaged in such conflicts of interest to ensure that the negotiation of the KBRA and KHSA yielded sufficient personal benefits for themselves, their families and their friends. Indeed, Ed Bair executed these Klamath Basin Agreements on behalf of KWAPA and David Cacka executed these agreements on behalf of KID.

Since January 1, 2016, David Cacka and Greg Carleton remain the only members of the former KID Board majority. The new KID Board majority elected in November 2015 was given a mandate by KID patrons to move the District in a new direction away from federal government control over irrigators' land and water rights. Such control has been the hallmark of the BOR's intrusive stewardship and oversight of KID operations and maintenance work on District-managed infrastructure located within the Klamath Project (“transferred works”), including work KID performed to ensure the safe and secure operation of the aged 100-year-old C-Canal Flume which had long been scheduled for replacement but delayed by the former KID Board majority for financial reasons. Such control also has been the hallmark of the U.S. Department of Interior's stewardship of the Klamath Basin Agreements negotiation and implementation processes discussed above.

In furtherance of the current KID Board majority's new direction, on February 29, 2016, the KID Board voted to hire The Kogan Law Group, P.C. to address both of these federal law and policy issues. In particular, KLG was tasked with negotiating as favorable a C-Canal Flume Replacement financing agreement as was possible, and with ensuring that KID patrons' best interests were not diminished by ongoing Klamath Basin Agreement negotiations. Unfortunately, upon endeavoring to negotiate the C-Canal Flume Replacement financing contract with the BOR during the course of March and April 2016, KLG encountered stiff resistance to any of the changes to the agreement's terms and conditions that it had requested. Similarly, upon attending along with a current KID Board majority member a March 16, 2016 Sacramento, California-based public stakeholder meeting to discuss the terms and conditions of the then-proposed [Amended KHSA](#) text, KLG encountered stiff resistance from BOR, Oregon and California officials and other Klamath stakeholders, including KWUA members, in response to the technical questions KLG had posed. Thereafter, KLG learned of the announcement issued by these

same federal and state governments that the subsequently revised and undisclosed Amended KHSA text and a previously unknown new KPFA would be executed on April 6, 2016.

KLG contested the [one-sided, take-it-or-leave-it contract](#) that no individual irrigator would sign if they had the choice, and proceeded to prepare and issue [a public notice of protest](#) invoking the original [KHSA's meet and confer provisions](#) calling for the BOR to suspend the signing ceremony until KID could review and discuss these new agreements with the original KHSA signatories. David Cacka, Greg Carleton, Ed Bair, Ross Fleming and Jason Chapman were incensed by KLG's responses considering they had previously promoted the KBRA and KHSA and had received and solicited additional generous funding from the BOR to implement the Klamath Basin Agreements, on behalf of KID, KBID, KWUA and/or KWAPA. Opposed to the current KID Board's changed direction and concerned that KLG would extinguish their prior efforts, Messieurs Bair, Cacka, Fleming, Chapman and Carleton developed and launched a public relations campaign to [disparage, discredit and to disrupt the efforts of KLG](#) and the current KID Board majority members to satisfy KID patrons' new mandate.

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The Bair-Cacka-Fleming-Chapman-Carleton objective was to regain financial and political control over the District anyway possible, to ensure the implementation of the Klamath Basin Agreements (Amended, KHSA, KPFA, Wyden-Merkley Amendment, any new agreements not yet publicly revealed) which, individually or collectively, would provide considerable federal funding to these KID Board members, their families and/or friends under one or more various programs. One way to achieve this objective was for these KID Board members to ensure the dissemination to third parties of an unredacted version of the KLG-KID Engagement Agreement *containing privileged and confidential attorney work product* against the advice and instruction of KID Oregon Legal Counsel Nathan Reitmann. On April 5, 2016, David Cacka, Greg Carleton and/or Ed Bair directed former KID Office Secretary and Bookkeeper, Rachelle Gates to fax an unredacted version of the engagement agreement from the KID office to the [Malin Potato Cooperative](#) of Merrill, OR, where Carleton and Bair (who were and remain Malin Potato [coop members](#)), and [Cacka](#) (who was formerly employed by Malin Potato as [General Manager](#)), awaited its receipt. Bair, Carleton and/or Cacka then walked the faxed unredacted engagement agreement over to the Klamath Falls Herald and News publisher which then proceeded to improperly disseminate the agreement to the public by posting it to the newspaper's website. This document has remained on the [Herald and News website since May 4, 2016](#) and [can still be downloaded](#) to this day.

The fax transmission record ("Personal Journal") of April 5, 2016 provides irrefutable proof that Bair, Cacka and/or Carleton were involved in this enterprise. ([Exhibit 19](#)) The fax transmission record provides *inter alia* the date of transmission ("April 5, 2016"), the time of transmission ("12:39 P.M." thru "12:43 P.M."), the destination of transmission ("541-798-5530"), the fax duration ("4'30"), the number of pages faxed ("P.13") and the file/transmission number ("No. 4052"). The header of the first and last pages of the faxed unredacted engagement agreement reveal the same date ("April 5, 2016"), the time ("12:39" and "12:43"), the KID Office fax signature ("Klamath Irrigation District"), and the page number ("P.1" and "P.11"). The only difference between the fax transmission record and the faxed document header concerns the number of pages faxed: the fax transmission record shows that 13 pages were faxed from the KID Office to the destination number ("541-798-5530"), rather than only the 11 pages of the engagement agreement. This strongly suggests that the faxed document was accompanied by a fax cover sheet and an instruction or other sheet. The linchpin of the fax

transmission record is the destination fax number (“541-798-5530”) which matches that of the Malin Potato Cooperative (**Exhibits 20, 21, 22**), and it establishes the absolute culpability of Messieurs Cacka, Carleton and/or E. Bair in prosecuting this series of transactions.

The intentional public dissemination by these KID Board members of the unredacted KLG-KID Engagement Agreement, *which contained privileged and confidential attorney work product (e.g., legal strategies regarding how to approach the BOR to negotiate a more favorable financing agreement to fund the C Canal flume replacement, and how to address the KHSa threat of dam removal)* was carefully choreographed and timed to dovetail with the [May 5, 2016 publication by the Klamath Falls Herald and News of an inaccurate and incendiary article](#). Its purpose was to disrupt and interfere with KLG’s legal representation of the District on both of the federal matters for which it was retained.

Once the BOR became apprised of the legal strategies it contained its officials were unwilling to negotiate an economically favorable District infrastructure financing agreement with KLG. The Director of the BOR’s Mid-Pacific Regional Office, for example, informed KLG during an April 21, 2016 meeting that the Bureau’s Denver office was concerned about the District’s position on dam removal. For this reason, the Bureau’s Mid-Pacific Regional Office could not offer the District the possible 35% write-down (otherwise available under the Reclamation law) of the \$7.45 million to \$10 million loan the Bureau represented it was willing to provide. As the result of such public disclosure, the Bureau also was unwilling to meet most, if not all, of the District’s other requests KLG submitted for more favorable contract terms and conditions.

Thereafter, officials at the BOR’s Mid-Pacific Regional Office and local Klamath Falls Office proceeded to work behind the scenes alongside Messieurs Bair, Cacka, Carleton, Fleming and Chapman to create political turmoil in Klamath Falls so that the current KID Board majority members could be deceived and intimidated into: 1) signing the BOR C-Canal Flume [financing contract](#) in KLG’s absence on May 31, 2016; 2) [signing the construction contract](#) with R&G Excavating, Inc. despite BOR funding shortages and unauthorized changes to the financing contract on July 7, 2016; and 3) [terminating KLG](#) in its absence at KID’s July 14, 2016 public board meeting. In other words, the intentional unauthorized public dissemination of the unredacted KLG-KID Engagement Agreement containing privileged and confidential information served to protect the personal financial gains that KID Board members Bair, Cacka, Carleton, Fleming and Chapman had apparently “locked-in” when they previously controlled the KID Board and later ensured that KLG could no longer jeopardize BOR funding and implementation of the Klamath Basin Agreements.

In sum, KID Board members Ed Bair, David Cacka and Greg Carleton used and publicly released without a formal Board vote (authorization) privileged and confidential information gained because of the public positions they currently and/or formerly held as KID Board members to further their personal gain, in violation of Oregon Ethics Laws – ORS § 244.040(4) and ORS § 244.040(5).

The Ethics Laws violations committed by Ed Bair, David Cacka, Greg Carleton, Jason Chapman and Ross Fleming appear to be indicative of a broader pattern of behavior in which these KID Board members have engaged that has likely resulted in the violation of other Oregon Laws. For this reason, the ITSSD hereby provides the OGEC with information about the Complaint and supporting exhibits it recently filed with the Oregon Secretary of State Elections Division in connection with Case # 16-098

([Exhibit 23](#)) currently under investigation, which the Elections Division has since acknowledged ([Exhibit 24](#)), and about which the [local press has since reported](#).

6. Penalties for Violating Oregon Ethics Laws:

[ORS § 244.350](#)(1)(a) provides that the “Oregon Government Ethics Commission may impose civil penalties not to exceed [...] \$5,000 for violation of any provision of this chapter...” Page | 18

ORS § 244.350(1)(c) provides that the “The Oregon Government Ethics Commission may impose civil penalties not to exceed [...] \$10,000 for willfully violating ORS 244.040 (Prohibited use of official position or office)” (emphasis added).

In addition to the penalties described above, ORS § 244.350(3) provides that the “commission may impose civil penalties not to exceed \$250 for violation of ORS 293.708 (Conflicts of interest for council members) [...] in addition to and not in lieu of a civil penalty that may be imposed under subsection (1) of this section.”

Furthermore, ORS § 244.350(5) provides that, “[i]n lieu of or in conjunction with finding a violation of law [...] or imposing a civil penalty under this section, the commission may issue a written letter of reprimand” (emphasis added).

Moreover, [ORS § 244.360](#) provides that, “[i]n addition to civil penalties imposed under ORS 244.350 (Civil penalties), if a public official has financially benefited the public official or any other person by violating any provision of this chapter, the Oregon Government Ethics Commission may impose upon the public official a civil penalty in an amount equal to twice the amount the public official or other person realized as a result of the violation” (emphasis added).

II. Conclusion

- **The year-to-year failures to publicly notify, announce and record actual or potential conflicts-of-interest and the KID Board’s official vote to waive such conflicts, and to indicate whether such conflicts resulted in KID Board members Ed Bair, David Cacka, Greg Carleton, Jason Chapman and/or Ross Fleming choosing to refrain from participation in Board actions, decisions or recommendations, constitute clear violations of ORS § 244.120(1)(c), ORS § 244.130(1), ORS § 244.120(2)(a) and ORS § 244.120(2)(b)(A).**
- **KID Board members Ed Bair, David Cacka, Greg Carleton, Jason Chapman and Ross Fleming used their public positions to influence both KWUA’s and KWAPA’s promotion of the Klamath Basin Agreements which, had they been approved by Congress would have resulted in significant federal funding for various activities from which these individuals and their families and friends would have personally benefited. They also used their public positions to influence these outcomes knowing that such opportunities would not otherwise have been available to them, but for their public service. Thus, reasonable**

persons can conclude that ORS § 244.040(7) applies to their activities, and consequently, that these former and current KID Board members violated ORS § 244.040(1), ORS § 244.040(4) and/or ORS § 244.040(5).

- KID Board members Ed Bair, David Cacka and Greg Carleton used and publicly released without Board authorization privileged and confidential information gained because of the public positions they currently and/or formerly held as KID Board members to further their personal gain, in violation of Oregon Ethics Laws – ORS § 244.040(4) and ORS § 244.040(5).
- Given the willful and repetitive nature of the Ethics Law violations committed by KID Board members, Ed Bair, David Cacka, Greg Carleton, Ross Fleming and Jason Chapman, the Oregon Ethics Committee, for purposes of creating a deterrent effect that ensures against such violations in the future, should seriously consider not only issuing a letter of reprimand and imposing the maximum penalty of \$10,000 for each such willful violation, but also imposing a penalty equal to TWICE the amount of personal gain these public officials, their families and/or their friends realized as the result of the violation(s), consistent with ORS § 244.350(1)(c), ORS § 244.350(3), ORS § 244.350(5) and ORS § 244.360.