

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ8

In the Matters of

CROOKED RIVER RANCH WATER
COMPANY

**REPLY IN SUPPORT OF MOTION
TO DISMISS**

An Investigation Pursuant to ORS 756.515 to
Determine Jurisdiction (WJ 8)

**By Crooked River Ranch Water
Company, nka Crooked River Ranch
Water Cooperative**

Crooked River Ranch Water Company (“Company”), nka Crooked River Ranch Water Cooperative (“Cooperative”) (collectively “CRRWC”) submits this reply in support of its motion to dismiss this action pursuant to ORCP 21 A(3) because there is another action pending between the same parties for the same cause.

PUC should grant CRRWC’s motion to dismiss because there is another action pending in *Charles Nichols, et al. v. Crooked River Ranch Water Co., et al.*, Jefferson Co. Circuit Co. Case No. 09CV-0049 for the same cause. CRRWC did not waive its right to assert the defense that another action is pending because CRRWC’s previous motion was a motion to dismiss the rehearing only and not the entire proceeding. The same cause is at issue in both *Nichols* and this administrative proceeding because both involve the same issues and operative facts about whether the Company validly transferred the water system’s assets to the Cooperative. The same parties are involved because, not only is PUC a party to the *Nichols* action, but also because PUC

and the Attorney General are both the State of Oregon. Finally, the timing of the two proceedings does not preclude dismissal for another action pending.

A. Crooked River Ranch Water Cooperative did not waive its right to assert the defense that another action is pending.

CRRWC previously filed a “Motion to Dismiss Rehearing Proceeding and Cancel Hearing.” CRRWC did not seek dismissal of the entire proceeding but rather argued that PUC should issue an order based on the original record in the proceeding consistent with the Court of Appeals’ remand for reconsideration rather than rehearing. Thus, the motion was not a motion to dismiss for purposes of ORCP 21 G and CRRWC did not waive its right to assert that another action is pending.

B. The *Nichols* case involves the same parties and the same cause as this administrative proceeding.

1. The two actions involve the same underlying facts and issues.

PUC argues that this administrative proceeding and the *Nichols* case do not involve the same cause because different relief is sought. Staff’s Resp. at 2-4. It is not necessary that the same relief be sought in both proceedings. Rather, a case must be dismissed because there is another action pending between the parties for the same cause when the other action would have preclusive effect in the present case. *Eli v. Lambert*, 194 Or App 280, 285, 94 P3d 170 (2004). The “preclusive effect” can arise either from issue preclusion or claim preclusion. *See Bonneville Automobile Ins. Co. v. Ins. Div.*, 53 Or App 440, 447, 632 P2d 796 (1981) (recognizing that “the possibility of collateral estoppel [issue preclusion] is a proper basis for staying one proceeding pending determination in the other”); *Lee v. Mitchell*, 152 Or App 159,

165-67, 953 P2d 414 (1998) (rules concerning claim preclusion apply to motion to dismiss for another action pending).

That the same relief has been sought is not a requirement for either issue preclusion or claim preclusion. For issue preclusion, the issue must be the same and must actually be litigated. Here, PUC did not contest, nor can there be any doubt that the issue in both proceedings is whether the transfer of the water system's assets from the Company to the Cooperative was valid.

For claim preclusion, "cause" is defined as a "group of facts" that give rise to a claim; it "does not mean the particular form or proceeding by which a certain kind of relief is sought." *See Troutman v. Erlandson*, 287 Or 187, 598 P2d 1211 (1979) (defining cause of action for claim preclusion); *Lee*, 152 Or App at 165-67 (1998) (rules concerning claim preclusion apply to motion to dismiss for another action pending).

CRRWC established in its motion to dismiss that this proceeding and *Nichols* involve the same group of facts and the same critical determinations. CRRWC's Motion to Dismiss at 5-6. In a nut shell, because the central issue in both the *Nichols* case and this proceeding is whether the transfer of the water system's assets from the Company to the Cooperative was valid, the proceedings necessarily involve the same group of facts.

C. The two actions involve the same parties.

PUC and CRRWC are parties to both proceedings. The Attorney General is also a party in *Nichols*. PUC distinguishes itself from the Attorney General with respect to their roles in the *Nichols* case. Staff's Response at 3. PUC's purpose in

making that distinction is unclear. If PUC is asserting that the two proceedings do not involve the same parties, then PUC is ignoring the fact that both PUC and the Attorney General are ultimately the same party – the State of Oregon. PUC itself acknowledged that both PUC and the Attorney General are ultimately the State of Oregon when PUC stated, with respect to the Attorney General and PUC, that “[t]he State of Oregon cannot sue the State of Oregon and has not done so.” Staff’s Resp. at 3.

Further, both issue and claim preclusion, and by extension dismissal for another action pending, apply when proceedings involve the same parties or parties “in privity.” *See D’Amico ex rel. Tracey v. Ellinwood*, 209 Or App 713, 717-18, 149 P3d 277 (2006) (“For either claim preclusion or issue preclusion to apply, the person against whom preclusion is asserted must have been a party or in privity with a party to the earlier proceeding.” (emphasis added)). The purpose of the “party or in privity with a party” is to ensure that the party being precluded was adequately protected in the first proceeding and received due process. *Stevens v. Horton*, 161 Or App 454, 461–462, 984 P2d 868 (1999). There are three general categories of parties in privity: “(1) those who control an action though not a party to it; (2) those whose interests are represented by a party to the action; and (3) successors in interest to those having derivative claims.” *Id.* at 462.

Here, the State of Oregon is controlling the PUC and the Attorney General even though the State is not named as a party. Ultimately, PUC is a party to both proceedings and to the extent there is any question about PUC’s role in the *Nichols*

case, it is irrelevant because the State of Oregon is controlling PUC and the Attorney General is both proceedings.

///

D. The timing of the two actions does not require PUC to deny the motion.

PUC asserts that because this administrative proceeding began in 2006 and the Nichols case began in 2009, the Nichols case is not another action pending.¹ Staff's Resp. at 3-4. PUC relies on *Webb v. Underhill*, 174 Or App 592, 27 P3d 148 (2001). In *Webb*, the court decided that an action is "pending" once a complaint is filed rather than only after the complaint is served. The court did not decide that only the action filed second can be dismissed pursuant to ORCP 21 A(3).

In any event, the sequence of events is not as straight forward as PUC asserts. While the administrative proceeding originally started in 2006, it was remanded from the Court of Appeals on December 24, 2008. PUC appears to be treating this case on remand as a new proceeding. PUC is not reconsidering the case based on the original record as CRRWC has suggested it must. Instead, PUC is starting a new proceeding to determine whether the transfer of the water system's assets from Crooked River

///

///

///

///

///

¹ The *Nichols* case was actually filed in 2008, not 2009.

///

///

Ranch Water Company to Crooked River Ranch Water Cooperative was valid. The *Nichols* case was initiated on November 24, 2008, before the Court of Appeals remand. Thus, the *Nichols* case was pending when PUC decided to start this new proceeding.

PUC is required by law to dismiss this action because another action is pending in *Nichols*.

Dated: February 12, 2010.

GLENN SITES REEDER & GASSNER LLP
Timothy R. Gassner, OSB #023090

HARRANG LONG GARY RUDNICK P.C.

s/ Jona J. Maukonen

Jona J. Maukonen, OSB #043540

jona.maukonen@harrang.com

C. Robert Steringer OSB #98351

bob.steringer@harrang.com

Of Attorneys for Crooked River Ranch
Water Cooperative

CERTIFICATE OF FILING AND SERVICE

I certify that on February 12, 2010, I filed the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS**, on the Public Utility Commission by email and first class mail, postage prepaid, addressed as follows:

Public Utility Commission of Oregon
Attn: Filing Center
P.O. Box 2148
Salem, OR 97308-2148
PUC.FilingCenter@state.or.us

I further certify that on February 12, 2010, I served copies of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** addressed to the following email addresses:

Michael.dougherty@state.or.us
sewfab4u@hotmail.com
jason.w.jones@state.or.us
charlien@blazerind.com
cby_64@yahoo.com

gsr.dcg@gmail.com
frank@imfd.com
marc.hellman@state.or.us

I further certify that on February 12, 2010, I served copies of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** addressed to the following, via first class mail, postpaid, as follows:

G.T. & T.T.
13454 Golden Mantel
Terrebonne, OR 97760

Timothy R. Gassner
GLENN SITES REEDER & GASSNER LLP
205 SE 5th St.
Madras, OR 97741
Of Attorneys for Crooked River
Ranch Water Cooperative

HARRANG LONG GARY RUDNICK P.C.

s/ Jona J. Maukonen
Jona J. Maukonen, OSB #043540

Of Attorneys Crooked River Ranch Water
Cooperative