

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**

3 WJ 8

4 In the Matter of

5 CROOKED RIVER RANCH WATER  
6 COMPANY

7 An Investigation Pursuant to ORS 756.515 to  
8 Determine Jurisdiction.

STAFF'S RESPONSE TO CROOKED RIVER  
RANCH WATER COMPANY'S SECOND  
MOTION TO DISMISS

9 INTRODUCTION

10 On January 14, 2010, Crooked River Ranch Water Company ("Crooked River") filed a  
11 motion to dismiss and to cancel the hearing. On January 21, 2010 Commission Staff ("Staff")  
12 filed a response in opposition to Crooked River's motion to dismiss. Crooked River filed a reply  
13 on January 22, 2010. On February 3, 2010, Administrative Law Judge, Patrick Power, issued a  
14 ruling denying Crooked River's Motion to Dismiss.

15 On February 1, 2010, Crooked River filed a second motion to dismiss. In its second  
16 motion to dismiss, Crooked River incorrectly asserts that this Commission proceeding should be  
17 dismissed under ORCP 21 A(3) because there is another action pending between the same parties  
18 for the same cause.

19 Crooked River's second motion to dismiss should be denied because an ORCP 21 A(3)  
20 defense is waived if not joined with a first motion to dismiss. Additionally, even if the motion  
21 was decided on its merits, it should be denied because there is not another action pending  
22 between the same parties for the same cause.

23 DISCUSSION

- 24 1. Crooked River waived its 21 A(3) defense by failing to join it with its first motion to  
25 dismiss.

1 Crooked River's second motion to dismiss moves to dismiss the Commission  
2 proceedings pursuant to ORCP 21 A(3). Crooked River's motion, however, conveniently  
3 ignores that under ORCP 21 A(F)-(G) that it waived its defense by not joining it with its first  
4 motion to dismiss. ORCP 21 A(G)(1) provides in pertinent part:

5 A defense . . . that there is another action pending between the same parties for  
6 the same cause . . . is waived . . . if the defense is omitted from a motion in the  
circumstances described in section F of this rule. . . .

7 ORCP 21 A(F) provides in pertinent part:

8 If a party makes a motion under this rule . . . but omits therefrom any defense or  
9 objection then available to the party which this rule permits to be raised by  
10 motion, the party shall not thereafter make a motion based on the defense or  
objection so omitted, except as provided in subsection G(3). . . .

11 Crooked River did not raise an ORCP 21 A(3) defense in its first motion to dismiss and  
12 have waived it under ORCP 21 A(F)-(G). Crooked River's second motion to dismiss should be  
13 denied as waived.

14 2. The Commission proceeding is not another action pending between the same parties  
15 for the same cause.

16 Crooked River asserts that the *Charles Nichols, et al. v. Crooked River Ranch Water Co.,*  
17 *et al.*, Jefferson Co. Circuit Co. Case No. 09CV-0049 is another pending action between the  
18 same parties for the same cause. The Commission proceeding and the Circuit Court case,  
19 however, do not involve the same cause.

20 The Commission has exclusive authority to determine its own jurisdiction. This  
21 proceeding is established only to determine whether or not the Commission has jurisdiction over  
22 Crooked River. In order to determine jurisdiction, the Commission will decide whether Crooked  
23 River is "Any association of individuals that furnishes water to members of the association,"  
24 because the Commission has jurisdiction over such entities. ORS 757.063(1). Crooked River  
25 may argue that it is "any cooperative formed under ORS chapter 62..." because the provisions of  
26 ORS 757.063(1) do not apply to any cooperative formed under the provisions of ORS chapter

1 62. The Commission will decide those questions. Those are different questions than any the  
2 circuit court will decide.

3 The circuit court case is a shareholders derivative action. The circuit court has  
4 jurisdiction to provide relief to the shareholders, but lacks jurisdiction to determine the  
5 Commission's jurisdiction.

6 The Oregon Attorney General has intervened in the *Nichols, et al.* shareholders derivative  
7 case, which was filed in 2009. The Commission was not originally a party to the circuit court  
8 case. In fact, the only reason the Commission was recently joined as a party in the circuit court  
9 case was based on action by Crooked River. Crooked River moved to dismiss the Nichols  
10 plaintiffs' circuit court case if the PUC were not joined. The court ordered the Nichols plaintiffs  
11 case, but not the Attorney General's case, dismissed with leave to join the PUC. The Nichols  
12 plaintiffs then filed an amended complaint joining the PUC as an additional defendant. A copy  
13 of the circuit court's opinion letter and order are attached.<sup>1</sup>

14 As the circuit court notes, the PUC has jurisdiction to determine its jurisdiction.

15 In its second motion to dismiss, Crooked River only cites to allegations of the Attorney  
16 General's complaint as the basis to support that the another pending action is between the same  
17 parties for the same cause. However, the Commission is not a party to the Attorney General's  
18 action. The State of Oregon cannot sue the State of Oregon and has not done so.

19 The circuit court's order only affected the suit by Nichols. [See, opinion letter and Order,  
20 attached] Crooked River points to no allegations in the Nichols complaint, the only action  
21 joining the Commission, as being the same cause as this Commission proceeding.

22 Finally, the Commission proceeding, in which the Commission will determine its own  
23 jurisdiction, has been pending at the Commission or on appeal since 2006. This is years before  
24 the circuit court case was filed in 2009. If the decision in the matter is based upon which action  
25

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26 <sup>1</sup> As the Commission is only involved in the circuit court proceeding because Crooked River moved to have the  
Commission joined, the Commission offers to stipulate to a dismissal of the Commission from the circuit court case.

1 has been pending, it is the Commission proceeding, not the circuit court case. *Webb v.*  
2 *Underhill*, 174 Or App 592, 27 P3d 148 (2001) (The first case filed is the case that is “pending.”)

3 Basically, Crooked River is trying to avoid the administrative process.

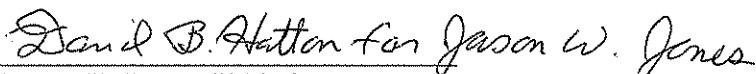
4 CONCLUSION

5 For the foregoing reasons, Crooked River’s second motion to dismiss should be denied  
6 because Crooked River waived its defense, because the Commission proceeding and circuit court  
7 action do not involve the same cause and because a party to a Commission regulatory action may  
8 not cause the Commission to be joined in a later circuit court action and obtain dismissal of the  
9 Commission’s action, essentially of the Commission’s jurisdiction.

10 DATED this 10<sup>th</sup> day of February 2010.

11 Respectfully submitted,

12 JOHN R. KROGER  
13 Attorney General

14   
15 Jason W. Jones, #00059  
16 Assistant Attorney General  
17 Of Attorneys for the Public Utility Commission  
18 of Oregon  
19  
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26

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Daniel J. Ahern  
Circuit Court Judge

George W. Neilson  
Presiding Judge

Gary Lee Williams  
Circuit Court Judge

## Twenty-Second Judicial District

October 1, 2009

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Timothy Gassner  
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Re: Charles Nichols v Crooked River Ranch Water Company, et al  
State of Oregon v Crooked River Ranch Water Company  
Jefferson County Circuit Court Case No. 09CV0049

Gentlemen:

This matter came before the court earlier today on Defendants' Motion to Dismiss Amended Complaint filed on August 7, 2009. Prior to the hearing, I reviewed the file, including Defendants' Motion to Dismiss Amended Complaint, Plaintiffs' Opposition Memo to the Motion, State's Response to the Motion to Dismiss, and Defendants' Reply to those Memoranda. I informed the parties that I would take the matter under advisement, to allow additional time to review my notes, file material, and relevant statutory provisions and case law.

By its terms, Defendants' Motion to Dismiss Amended Complaint deals only with Plaintiffs' First Amended Complaint, and does not address the Complaint of the Attorney

Attachment 1  
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General Intervener. My opinion, therefore, only addresses the motion as it related to the Plaintiffs' Amended Complaint.

Defendants asked this court to dismiss the Amended Complaint because Plaintiffs failed to join the Public Utility Commission as a necessary party under ORCP 29 and 21A(7). As an alternative basis, Defendants asked this court to dismiss the Amended Complaint on the grounds that the court lacks subject matter jurisdiction, based on ORCP 21A(2) and ORS 28.110.

The State's Memorandum and oral argument focused on ORCP 29B. That rule was not specifically cited by Defendants in their motion or oral argument. I conclude that ORCP 29B does not apply, and I will not consider that subsection, because there is no indication that the Public Utility Commission (PUC) can not be served with process, or that the court otherwise can not obtain jurisdiction over the PUC. ORCP 29B is not applicable to this case.

There are three bases for the court to order a party to be joined in an action:

- 1) If that party's absence would result in incomplete relief to the current parties;
- 2) If the non-party claims an interest relating to the subject to the action, and is so situated that the disposition in the non-party's absence may impair or impede the non-party's ability to protect that interest; or
- 3) If any of the parties would be subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations.

I will address each one of the bases separately.

The first factor is not met. Complete relief can be accorded among the parties without the PUC being involved. It does not matter which proceeding concludes first. The relief sought in the PUC proceeding (the determination of jurisdiction and the setting of rates) is different than the relief sought in the First Amended Complaint.

The second factor weighs against joinder as well. The PUC's ability to protect its interest will not be impaired or impeded by the suit now filed in Jefferson County Circuit Court. The PUC would probably have an interest in the outcome of this suit, but not necessarily in the details of the controversy.

The third factor, however, favors joinder. For example, if the case is successfully defended without the PUC being made a party, Defendants would likely be required to re-litigate the same or similar issues litigated in this suit, creating a substantial risk of double, multiple or inconsistent obligations for Defendants. I am persuaded by Defendants' argument that the anticipated PUC action and this law suit would involve similar, and in some instances, identical evidence. Plaintiffs candidly admitted, in oral argument, that at least some evidence

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would be common to both proceedings, and admitted that Defendants may have to relitigate similar issues with the PUC.

Plaintiffs argued that the PUC proceeding and this law suit may involve different standards of proof. That may be true, but there was insufficient information presented to the court to justify a decision on that basis.

It simply makes sense to join the PUC. Although the ultimate decision for the PUC is whether it has jurisdiction over the Water Company, there are more common issues and allegations than there are unique ones.

As a separate basis for my decision, ORS 28.110 instructs that, "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration..." Plaintiffs admit that the PUC may use evidence of the Company's mismanagement as a reason to exercise jurisdiction over the Company, and admits that the Company's corporate status may influence the process by which the PUC can assert jurisdiction, but argue that declaratory relief in this suit would not result in the ultimate determination of whether the PUC will exercise jurisdiction over the Company. However, that is not the test. The PUC certainly has an interest which would be affected by the declaration in the lawsuit.

Pike vs. Allen International Ltd. 287 Or 55 (1979) is helpful to our analysis. Plaintiffs, a group of retail package sellers of wine, filed a suit in equity for a declaratory judgment, naming as defendants a group of wholesale dealers of wine. Plaintiffs alleged that Defendants were not entitled to certain sales to members of the public under their licenses from the Oregon Liquor Control Commission (OLCC) as wholesale wine licensees. The OLCC was not named as a party Defendant. The trial court concluded that the OLCC was a necessary party under ORS 28.110. The Oregon Supreme Court agreed with the trial court and concluded that the OLCC was a necessary party, based on its conclusion that, under relevant statutes, the OLCC had the power and the duty to interpret, administer and enforce the provisions of statutes relating to the sales of wine. If Plaintiffs were to prevail, the result would be a declaration that such sales are prohibited by statute which the Commission had the duty to administer and enforce. Therefore, the interests of the OLCC would be affected by such a declaration and was a necessary party.

Therefore, under ORS 28.110 and ORCP 29A (2) (b), the PUC should be joined as a party in this action,

Defendants ask the court for an order dismissing the First Amended Complaint pursuant to ORCP 21A (7), for failure to join a party under rule 29. ORCP 25A allows the court to grant leave to Plaintiffs to amend its pleading. Plaintiffs cite ORCP 23A as additional authority for their request to amend the pleading. That request is granted, just as the Oregon Supreme Court granted in Pike vs. Allen International Ltd. When, as in this case, a necessary party is absent, the court may dismiss the proceeding, but where it appears that such a party may be brought in, and

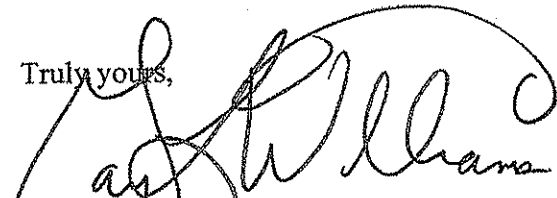
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thus enable the court to do full justice and grant complete relief, the court should allow that.  
Pike, 287 Or App 62.

Defendants' motion to dismiss this case is granted, with leave granted to Derivative Plaintiffs to amend their First Amended Complaint to join the PUC as a party within 21 days of date of receipt of this letter.

Mr. Gassner shall prepare the appropriate order.

Truly yours,



Gary Lee Williams  
Circuit Court Judge

GLW/ff



1  
2  
3 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
4 FOR THE COUNTY OF JEFFERSON

<p>5 CHARLES NICHOLS, 6 7 Plaintiff 8 vs. 9 CROOKED RIVER RANCH WATER COMPANY, an 10 Oregon non-profit corporation; CROOKED RIVER 11 RANCH WATER COOPERATIVE, an Oregon 12 cooperative, RICHARD A. KEEN JR., RANDOLPH M. 13 SCOTT, BRIAN A. ELLIOTT, and RICHARD J. 14 MILLER, in their capacity as board members of the 15 Crooked River Ranch Water Company and the Crooked 16 River Ranch Water Cooperative; JOHN COMBS, in his 17 capacity as a board member of the Crooked River Ranch 18 Water Company; and JAMES H. ROOKS, in his 19 capacity as general manager of the Crooked River Ranch 20 Water Company and as a board member of the 21 CROOKED RIVER RANCH WATER 22 COOPERATIVE, 23 Defendants</p>	<p>CASE NO. 09 CV 0049</p>
<p>17 STATE OF OREGON, by and through John R. Kroger, 18 Attorney General, 19 20 Intervenor-Plaintiff 21 vs 22 CROOKED RIVER RANCH WATER COMPANY, an 23 Oregon non-profit corporation; CROOKED RIVER 24 RANCH WATER COOPERATIVE, an Oregon 25 cooperative; RICHARD A. KEEN JR., RANDOLPH M. 26 SCOTT, BRIAN A. ELLIOTT, RICHARD J. MILLER, JOHN COMBS, and JAMES H. ROOKS</p>	<p>Case No.: 09 CV 0049 ORDER RE: DEFENDANT'S MOTION TO DISMISS</p>

24 This matter having come before the Court on Defendants' Motion to Dismiss Amended  
25 Complaint For Failure to Join a Necessary Party. Defendants appeared and were represented by

26 1-ORDER RE: DEFENDANTS' MOTION TO DISMISS  
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1 Timothy R. Gassner. Plaintiffs appeared and were represented by Tommy A. Brooks. Plaintiff-  
2 Intervenor, Oregon Attorney General appeared and was represented by Albert C. Depenbrock.

3 The Court having reviewed the files including Defendants' Motion to Dismiss Amended  
4 Complaint; Plaintiff's Opposition Memo to the Motion; State's Response to the Motion to Dismiss,  
5 and Defendants' Reply to those memoranda and oral arguments of the parties' counsel the Court  
6 hereby Orders that under ORS 28.110 and ORCP 29A(2)(b), the PUC should be joined as a party  
7 in this action.

8 Defendants' Motion to Dismiss this case granted, with leave granted to derivative Plaintiffs  
9 to amend their First Amended Complaint to join the PUC as a party within 21 days of October 13,  
10 2009.

11 DATED this \_\_\_\_\_ day of October 2009.

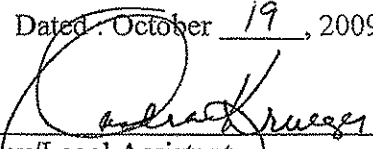
12  
13 \_\_\_\_\_  
14 GARY LEE WILLIAMS  
CIRCUIT COURT JUDGE

15 Prepared and submitted by:  
16 TIMOTHY R. GASSNER, OSB 02309  
17 GLENN, SITES & REEDER, LLP  
205 NE 5<sup>th</sup> Street  
18 Madras, OR 97741  
19 (541) 475-2272  
20 Attorney for Defendants  
21  
22  
23  
24  
25

1 TRUE COPY CERTIFICATE

2 The undersigned certifies that the documents to which this certificate is attached are true and  
3 complete copies of the originals, excepting only that signatures reflected hereon may have been  
"conformed" to match the signatures made on the original.

4 Dated: October 19, 2009

5  
6   
Attorney/Legal Assistant

7  
8 CERTIFICATE OF SERVICE

9  
10 The undersigned hereby certifies that a full and complete copy of the documents to which this  
11 Certificate is attached were served on Tommy Brooks and Albert C. Depenbrock by mailing, at the  
following address:

12 Tommy Brooks  
13 Cable Houston Benedict, et al  
1001 SW 5<sup>th</sup> Ave.  
14 Ste. 2000  
Portland, OR 97204

Albert C. Depenbrock  
Department of Justice  
1162 Court St. NE  
Salem, OR 97301

15 and that said documents were either mailed to said address, first class, postage prepaid, or personally  
16 left at that address, which is the named recipient's office, with a person apparently authorized to  
accept such documents.

17  
18 \_\_\_\_\_ Date: October \_\_\_\_\_, 2009.

Attorney/Legal Assistant

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23  
24  
25  
26 3- CERTIFICATE

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1 **CERTIFICATE OF SERVICE**

2 I certify that on February 10, 2010, I served the foregoing Staff Response upon all WJ 8  
3 and UW 120 parties of record in this proceeding by delivering a copy by electronic mail to those  
4 parties with email addresses, and upon all WJ 8 parties only, by mailing a copy by first class  
5 postage prepaid mail or by hand delivery/shuttle mail to the parties accepting paper service.

6 WJ 8:

UW 120:

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23 \_\_\_\_\_  
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24 Legal Secretary  
25 Department of Justice  
26 Regulated Utility & Business Section