

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

3 WJ 8

4 In the Matter of )

5 CROOKED RIVER RANCH WATER )  
6 COMPANY )

STAFF'S TRIAL BRIEF

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

9 **INTRODUCTION**

10 On July 25, 2006, Administrative Law Judge, Michael Grant issued a ruling determining  
11 the scope of the issues for hearing. In that ruling, Judge Grant concludes that whether Crooked  
12 River Ranch Water Company ("Company") is a cooperative is a matter of fact relevant to this  
13 proceeding. However, it is unclear whether the ruling concludes that the appropriate issue is  
14 whether the Company was a cooperative at the time a sufficient number of petitions were  
15 received or whether the ruling contemplates that an after-the-fact attempt to change to a  
16 cooperative would exempt the Company from Public Utility Commission of Oregon  
17 ("Commission") jurisdiction.

18 Under ORS 757.063, the Company is regulated once the Commission receives petitions  
19 from 20 percent or more of the members of the association. Furthermore, ORS 757.480 requires  
20 Commission approval for a change to a cooperative. In addition, the Company's last minute  
21 efforts to change to a cooperative were outside the Board of Directors' authority and invalid. For  
22 these reasons, Staff submits that the relevant issue in this proceeding is whether the Company  
23 was an association at the time that a sufficient number of petitions were received.

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1       **1. The Company is subject to ORS 757.063 and cannot change its organizational status**  
2       **to a cooperative without approval from the Commission.**

3           In the Company's Pre-Hearing Brief, it asserts that it changed its organizational status  
4 into a cooperative on July 5, 2006. According to the Company, it is not subject to ORS 757.063  
5 because of this change. This is incorrect. ORS 757.480 requires the Company to seek  
6 Commission approval for a change to a cooperative. Without Commission approval, any alleged  
7 change is considered void for regulatory purposes.

8           For purposes of this docket, the question is whether the Company was an association at  
9 the time more than 20 percent of the members petitioned the Commission. As the evidence will  
10 demonstrate, the Company was an association when 20 percent or more petitions were received.  
11 Thus, the Company is subject to ORS 757.063 and Commission approval would be necessary to  
12 recognize an alleged change to a cooperative.

13           While the Company's Pre-Hearing Brief suggests that the Company is no longer subject  
14 to ORS 757.063 because it allegedly changed to a cooperative, such an interpretation of ORS  
15 757.063 is incorrect and not supported by the plain language of the statute. ORS 757.063  
16 provides:

- 17           (1) Any association of individuals that furnishes water to members of the  
18           association is subject to regulation in the same manner as provided by this  
19           chapter for public utilities, and must pay the fee provided for in ORS 756.310,  
20           if 20 percent or more of the members of the association file a petition with the  
21           Public Utility Commission requesting that the association be subject to such  
22           regulation.
- 23           (2) The provisions of this section apply to an association of individuals even if the  
24           association does not furnish water directly to or for the public. The provisions  
25           of this section do not apply to any cooperative formed under ORS Chapter 62  
26           or to any public body as defined by ORS 174.109.

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1           Thus, the Company is subject to regulation if 20 percent or more of the members of the  
2 association file a petition with the Commission requesting regulation.<sup>1</sup> At the hearing, Staff's  
3 evidence will establish that the Commission received petitions from more than 20 percent of the  
4 members of the Company. Upon reaching the 20 percent petition threshold, the Company  
5 becomes regulated. While the Company has been afforded the due process of challenging the  
6 sufficiency of the petitions, the statute does not allow the Company to change organizational  
7 structure after-the-fact to avoid ORS 757.063.

8           In *Portland General Electric v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d  
9 1143 (1993), the Oregon Supreme Court synthesized the appropriate method of statutory  
10 interpretation. In order to determine the legislative intent of the statute, a court must first  
11 examine the text of the statute, giving words of common usage their plain, natural, and ordinary  
12 meaning; the court will not insert what has been omitted or omit what has been inserted. *See*  
13 *also* ORS 174.010. The court will also examine the context of the statute, including other  
14 provisions of the same statute and other related statutes. If the legislature's intent remains  
15 unclear, it will consider the legislative history. If the intent is still unclear, it will resort to  
16 general maxims of statutory construction.

17           In this proceeding the statute is clear and it is unnecessary to go beyond the first level of  
18 statutory interpretation. ORS 757.063 unambiguously states that the Company is subject to  
19 regulation if the Commission receives petitions from 20 percent or more of the Company's  
20 members. Further, ORS 757.480 provides that utilities subject to regulation must file and  
21 receive Commission approval to change into a cooperative.

22           There is nothing in ORS 757.063 that implies that a Company can avoid the petition  
23 provisions of the statute by changing organizational structure after the petitions have been

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25 <sup>1</sup> Subsection (2) does provide that the petition process is not available to cooperatives organized  
26 under Chapter 62. In this case, however, the petition process was conducted when the Company  
was an association. While subsection (2) exempts cooperatives, it does not allow associations to  
change to cooperatives (without Commission approval) after the petition process applicable to  
the association has taken place.

1 received and without Commission approval for the change. The proposition that the Company  
2 can change its organizational status after a sufficient number of petitions have been received  
3 unlawfully inserts additional words into ORS 757.063. *See Stephenson v. Meyer*, 150 Or App  
4 300, 945 P2d 1114 (1997) (agency does not have authority to expand the language of a statute to  
5 circumstances not covered by it). The relevant fact for this proceeding is the organizational  
6 status of the Company when the Commission received a sufficient number of petitions. It is  
7 correct that the Company has requested a hearing to challenge the validity of the petitions but  
8 that does not mean that the Company is not subject to regulation while validation of the petitions  
9 is pending. In fact, to allow an after-the-fact organizational change would violate the rules of  
10 statutory interpretation by ignoring the plain meaning of ORS 757.063.

11 **2. The Company's alleged change to a cooperative was outside the authority of the**  
12 **Board of Directors and is not valid.**

13 The Company is a nonprofit mutual benefit corporation with members as defined by ORS  
14 65.001(28). On July 5, 2006, the Company filed articles of dissolution. Once articles of  
15 dissolution have been filed, a corporation has 120 days to file a revocation of dissolution. *See*  
16 ORS 65.634. Therefore, the Company could still file a revocation until about November 2, 2006.

17 The Company's dissolution clause in its articles of incorporation states: "Upon  
18 dissolution of the Corporation, if the Corporation has gains from the sale of an appreciated asset,  
19 it shall distribute to the extent practical, the gains as well as other funds, to all person who were  
20 members during the period and time which the asset was purchased and owned by the  
21 Corporation in proportion to the amount of business done by such members during that period."<sup>2</sup>

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23 <sup>2</sup> The original articles of incorporation state that, upon dissolution, the assets are to be distributed  
24 to Crooked River Ranch Limited Partnership and that no member or director is entitled to share  
25 in the proceeds. In 1991, articles of amendment were filed purportedly adding to, rather than  
26 replacing, existing articles. The additional articles state, in effect, that upon dissolution, the  
assets are to be distributed to members in proportion to the members' business with the  
Company. Because the original articles cannot be reconciled with the additional articles, the  
amended articles replaced paragraph 6 of the original. This is supported by the fact that a check  
of Corporation Division records demonstrates that Crooked River Ranch Limited Partnership  
became inactive in 1995.

1 However, the Company's assets were transferred directly to the cooperative. This is inconsistent  
2 with the requirements of the dissolution clause, which requires that the final assets be sold with  
3 the proceeds distributed proportionally to all of the members. In other words, the Board lacked  
4 authority to distribute the Company's assets to the new cooperative. While the Company seems  
5 to suggest that it merely restated its articles to become a cooperative, it is not possible to switch  
6 from being one type of corporation to another type of corporation by simply restating articles.

7 Even assuming the Company directors' intentions were to dissolve the Company,  
8 incorporate another entity, and transfer the assets to the other entity, those actions would appear  
9 to breach their fiduciary duties as specified in ORS 65.357, which require directors' actions to be  
10 in good faith and reasonably believed to be in the best interests of the corporation. Potentially,  
11 the directors may be personally liable for any losses to the corporation or to the members. *See*  
12 ORS 65.367. Furthermore, any dissolution would require notice be given to the directors in  
13 advance of the meeting, including that one of the purposes of the meeting will be to consider  
14 dissolution. *See* ORS 65.624(2). The notice must also include a summary of the plan of  
15 dissolution, which would disclose to whom the assets of the corporation will be distributed.

## 16 CONCLUSION

17 The Company became subject to regulation once the Commission received petitions from  
18 20 percent or more of the members. The fact that the Company requested a hearing does not  
19 change the fact that it is subject to regulation pending the validation of the petitions. The text of

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1 ORS 757.063 is unambiguous and dispositive. In addition, the Board of Directors did not have  
2 the authority to transfer the assets to a cooperative. As a result, the relevant question in this  
3 proceeding is the organizational status of the Company at the time the petitions were received.

4 DATED this 9<sup>th</sup> day of August 2006.

7 Respectfully submitted,

8 HARDY MYERS  
9 Attorney General

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11 Jason W. Jones, #00059  
12 Assistant Attorney General  
13 Of Attorneys for Public Utility Commission of  
14 Oregon Staff

1 **CERTIFICATE OF SERVICE**

2  
3 I certify that on August 9, 2006, I served the foregoing upon all parties of record in this  
4 proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid  
5 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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