

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ 8

In the Matter of

CROOKED RIVER RANCH WATER
COMPANY

An Investigation Pursuant to ORS 756.515 to
Determine Jurisdiction

RULING

DISPOSITION: MOTION TO DISMISS DENIED

I. INTRODUCTION

By motion filed February 1, 2010, Crooked River Ranch Water Company (Crooked River or the Company) requests that this matter be dismissed. On February 10, 2010, the Staff of the Public Utility Commission of Oregon (Staff) filed its response in opposition to the Company's motion. On February 12, 2010, Crooked River filed a reply to Staff's response.

II. CROOKED RIVER'S MOTION

As grounds for its motion, Crooked River argues that this matter should be dismissed "because there is another matter pending before the same parties for the same cause," citing ORCP 21 A(3). The "other action" cited by Crooked River is *Charles Nichols, et al., v. Crooked River Ranch Water Co., et al.*, pending in Jefferson County Circuit Court (Case No. 09CV-0049)

Crooked River argues that "the Oregon Rules of Civil Procedure apply to cases before [the] PUC," citing OAR 860-011-0000(3).¹ Where the circumstances are extant – "there is another action pending for the same cause * * * then the PUC is required to grant a motion to dismiss." The Company cites several cases to support its claim that dismissal is required – "it is not a matter of discretion."

According to Crooked River, a case should be dismissed when the other action would have "preclusive effect" in the present case. That "preclusive effect" may arise either from issue preclusion or claim preclusion. In this instance, Crooked River argues that a decision in *Nichols* would have preclusive effect under the standards of both issue and claim preclusion.

¹ OAR 860-011-0000(3) provides "the Oregon Rules of Civil Procedure shall govern in all cases except as modified by these rules, by order of the Commission, or by ruling of the ALJ."

With respect to issue preclusion, Crooked River recites five crucial elements that must be present: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to the final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type that will be given preclusive effect. The Company argues that each of the elements has been met in this instance.

Crooked River cites the complaint filed by the Oregon Attorney General (AG) in *Nichols* to the effect that the AG seeks a judgment “setting aside the dissolution of the Company” and “dissolving the Cooperative.” In this case the ALJ has identified as a key issue “whether Crooked River is a cooperative exempt from jurisdiction under ORS 757,063(2).” Crooked River argues that “resolution of whether the Company validly transferred the water system assets to the Cooperative is a key issue in both *Nichols* and this proceeding.”

Because the PUC is a party to *Nichols*, Crooked River argues that the PUC will have a full and fair opportunity to address whether the transfer was fair in that proceeding. Further, because *Nichols* will be a civil trial, it is the type of proceeding that will be given preclusive effect.

With respect to claim preclusion, Crooked River cites several cases that support its view that “[c]laim preclusion prevents a party from relitigating the same cause of action,” where cause of action “does not mean the particular form or proceeding by which a certain kind of relief is sought, but, rather, a group of facts which entitled plaintiff to relief.” (emphasis added by the Company). Crooked River argues that claim preclusion is applicable in this instance. In *Nichols*, the AG claims that the Company did not validly transfer the water system assets to the Cooperative. In this case, “[t]o assert regulatory authority, [the] PUC must establish that the Company did not validly transfer the water system assets to the Cooperative.”

Crooked River also argues that policy considerations support its motion. Absent a stay or dismissal by the Commission, Crooked River will be required to defend against the same cause of action in more than one proceeding.

III. STAFF'S RESPONSE

Staff notes that on January 14, 2010, Crooked River filed a motion to dismiss and to cancel the hearing in this proceeding. The Company's motion was denied by ALJ ruling on February 3, 2010. On February 1, 2010, Crooked River filed this motion. Staff argues that this motion should be denied because the Company's claim under ORCP 21 A(3) was waived, where it was not joined in the first motion to dismiss, citing ORCP 21 A(F)-G).

ORCP 21 A(G)(1) provides that:

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

ORCP 21 A(F) provides:

If a party makes a motion under this rule * * * but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted * * * .

Because Crooked River did not raise its ORCP 21 A(3) defense in its first motion to dismiss, Staff argues that the Company's second motion should be denied as waived.

Staff further argues that the Commission proceeding is not "another action pending between the same parties for the same cause." The Commission has exclusive authority to determine its own jurisdiction. To determine whether it has jurisdiction the Commission will decide whether Crooked River is an "association of individuals that furnishes water to members of the association" or a "cooperative" exempt from jurisdiction.

According to Staff, "these are different questions than any the circuit court will decide." The circuit court action "is a shareholders derivative action. The circuit court has jurisdiction to provide relief to the shareholders, but lacks jurisdiction to determine the Commission's jurisdiction."

The AG intervened in the *Nichols* proceeding, which was filed in 2009. As noted by Staff, the Commission was not originally a party in that proceeding. The Commission was joined as a party in the *Nichols* case, but not in the AG's case. According to Staff, Crooked River cites only to allegations in the AG's complaint. However, the Commission is not a party to that action.

Further, as noted by Staff, the Commission proceeding has been pending since 2006. If a decision on the motion were to be based on which action has been "pending," it is the Commission proceeding, not the circuit court case.

IV. CROOKED RIVER'S REPLY

Crooked River argues that it did not waive its right to assert its defense that another action is pending because its earlier motion "was a motion to dismiss the rehearing only and not the entire proceeding."

Crooked River further argues that the two cases involve the same parties and the same cause, regardless whether the same relief has been sought. The central issue in both cases is whether the transfer of the water system's assets from the Company to the Cooperative was valid.

With respect to whether the two proceedings involve the same parties, Crooked River argues that both the Commission and the AG are the "same party" – the State of Oregon. The State of Oregon controls both the Commission and the AG.

With respect to the timing of the two matters, Crooked River argues that the Court in the case cited by Staff did not decide that only the action filed second can be dismissed pursuant to ORCP 21 A(3). Crooked River argues that the Commission appears to be treating this case as a "new proceeding" – the Commission is not reconsidering the case based on the original record. Thus, the *Nichols* case was pending when the PUC decided to start this "new proceeding."

V. DISCUSSION

As noted in page 1 herein, the Oregon Rules of Civil Procedure apply in Commission matters, "except as modified by these rules, by order of the Commission, or by ruling of the ALJ." In this ruling, the ORCP rules are applied without modification.

Crooked River's motion is not well grounded. Accepting its preclusion claims at face value, the motion fails.

In *Bonneville Automobile Ins. Co. v. Ins. Div.*, 53 Or App 440 (1981) (cited by Crooked River) the Oregon Court of Appeals considered whether an administrative proceeding before the Insurance Division should have been stayed, pending resolution of two consolidated lawsuits. The Court of Appeals sustained the Insurance Division's denial of a stay:

We conclude, however, that the stay of proceedings was properly denied. The Division has primary responsibility for enforcing the Insurance Code, a duty which prompted the present proceeding. Any type of violation which involves two or more entities is likely to result in associated litigation between them, which in turn is likely to encompass issues which are before the Division in an administrative proceeding. In some instances, the party seeking recovery may rely on the very statute upon which the administrative disciplinary action is predicated. To hold that the Division had to delay its consideration of the disciplinary matter pending the outcome of related litigation would frustrate its enforcement efforts. The existence of a prior court determination that a statute was or was not violated could complicate the agency's task significantly. Logically, it makes more sense to stay the litigation pending interpretation of a statute by the agency with expertise in the area, which is charged by law with

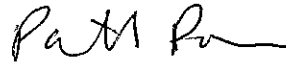
construing, expressing and enforcing legislative policy. We conclude that there was no abuse of discretion in denying the stay in this case. *Bonneville*, at 448.

In this matter this Commission has been “charged by law” with construing, expressing and enforcing legislative policy. “Charged by law” in this context means delegated by the legislature (ORS 757.063) and ordered by the Court of Appeals: “ on remand it (the Commission) must complete the process contemplated by its notice in light of a correct interpretation of ORS 757.063. It is not in the Commission’s discretion to disregard an order of the Appellate Court.

Crooked River’s authorities establish that issue or claims preclusion can be grounds for a motion to dismiss. However, the case law does not support the Company’s inference that it may choose which of two cases should be dismissed. Clearly this proceeding was “pending” before this Commission long before the circuit court proceedings were filed.

The motion to dismiss filed by Crooked River Ranch Water Company on February 1, 2010, is DENIED.

Dated at Salem, Oregon this 18th day of February, 2010.



Patrick Power
Administrative Law Judge