

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ8

In the Matters of

CROOKED RIVER RANCH WATER
COMPANY

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

MOTION TO DISMISS

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

I. MOTION

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

II. ARGUMENT

PUC should dismiss this action pursuant to ORCP 21 A(3) because there is another action pending between PUC and CRRWC for the same cause in *Charles Nichols, et al. v. Crooked River Ranch Water Co., et al.*, Jefferson Co. Circuit Co. Case No. 09CV-0049.

The Oregon Rules of Civil Procedure apply to cases before PUC. OAR 860-011-0000(3). If the circumstances specified in ORCP 21 A(3) are present – that is, that there is another action pending for the same cause – then the PUC is required to grant a motion to dismiss. *See Web v. Underhill*, 174 Or App 592, 597, 27 P3d 148

(2001) (ORCP 21 A(3) requires dismissal under the circumstances it specifies; it is not a matter of discretion). After granting the motion to dismiss, however, PUC does have the discretion in determining whether to enter judgment in favor of CRRWC, stay the administrative proceeding, or defer entry of judgment. ORCP 21 A.

A case should 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). Dismissal of one action pursuant to ORCP 21 A(3) is available before judgment is entered in the second case, if that judgment would have a preclusive effect on the first case. *Webb*, 174 Or App at 597. 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).

The administrative proceeding before PUC should be dismissed because a decision in the pending *Nichols* case would have preclusive effect in this proceeding under the standards for both issue and claim preclusion.

A. PUC should grant CRRWC’s motion to dismiss for another action pending because a decision in the *Nichols* case would result in issue preclusion in this proceeding.

The final outcome of *Nichols* would have preclusive effect in this proceeding under the principle of issue preclusion. Issue preclusion applies when: (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. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104, 862 P2d 1293 (1993).

Here, each of those elements would be met. The central issue in the *Nichols* case and this proceeding is identical: Was the transfer of the water system's assets from Crooked River Ranch Water Company to Crooked River Ranch Water Cooperative valid? In *Nichols*, the Attorney General's complaint seeks a judgment, among other things, "setting aside the dissolution of the Company" and "dissolving the Cooperative." Declaration of Jona Maukonen ("Maukonen Decl.") Ex. A (complaint of the Attorney General, Intervenor ("AG Complaint")) ¶ 3 & pg. 12. The State alleges:

"The purported dissolution and transfer of assets [to the Cooperative] violated the Company's Articles of Incorporation, the Bylaws of the Company, and State law, ORS 65.621 *et seq.*, because it was without a quorum of valid directors, without a plan of dissolution, without required notice to the membership that the Board would be considering dissolution of the Company, without a vote of the Company's membership and did not distribute the Company's assets as required by the Company's Articles of Incorporation and Bylaws."

Maukonen Decl. Ex. A (AG Complaint ¶ 17). Thus, the State is alleging that the Company did not validly transfer the water system assets to the Cooperative.

In this case, ALJ Powers has identified the key issue as: “whether Crooked River is a cooperative exempt from jurisdiction under ORS 757.063(2).” Prehearing Conference Memorandum (dated January 8, 2010) at 1. PUC asserts that it has regulatory authority over CRRWC pursuant to ORS 757.063(1), which allows PUC to regulate a water provider when 20% of the provider’s members petition for regulation. ORS 757.063(2) exempts cooperatives from regulation under ORS 757.063(1). PUC has asserted that the hearing will address CRRWC’s “status” to determine whether it is exempt from regulation. Resp. PUC’s Response to Petitioner’s Motion for Reconsideration, Appellate Court No. A141283 at 6-7. If the Company validly reorganized as a cooperative and transferred the water system assets to the Cooperative, then PUC can have no regulatory authority. 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 issue of whether the Company validly transferred its assets to the Cooperative is central to the *Nichols* case, it will actually be litigated in that case and will be essential to the final decision. Also, PUC is a party to *Nichols*, as is the State of Oregon, so PUC will have a full and fair opportunity to address whether the transfer was valid. Finally, *Nichols* is a civil trial and thus is the type of proceeding that will be given preclusive effect.

The decision in *Nichols* would have a preclusive effect on the parties to this proceeding with respect to whether the Company validly transferred its assets to the Cooperative. Thus, PUC should dismiss or stay the current proceeding.

B. PUC should grant CRRWC’s motion to dismiss for another action pending because a decision in the *Nichols* case would result in claim preclusion in this proceeding.

A decision in *Nichols* would also have preclusive effect in this proceeding under the principle of claim preclusion. Claim preclusion prevents a party from re-litigating the same cause of action. *Pham v. Thompson*, 156 Or App 440, 446, 965 P2d 482 (1998). It also prevents a party from litigating a claim that arises out of the same transaction where the claim could have been joined in the first action. *Rennie v. Freeway Transport*, 294 Or 319, 323, 656 P2d 919 (1982).

Here, the two proceedings involve the same cause of action. For claim preclusion, a claim or 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.” *Troutman v. Erlandson*, 287 Or 187, 598 P2d 1211 (1979) (emphasis added); *see also RAM Tech. Servs. v. Koresko*, 346 Or 215, 236 (2009) (a claim is broadly defined for claim preclusion as the “aggregate of operative facts giving rise to a right enforceable by a court”). In other words, in determining whether two proceedings involve the same cause of action, “the focus is on the transaction at issue.” *Lee*, 152 Or App at 166. Claim preclusion applies both to plaintiffs and defendants. *Id.* at 165.

That same “transactional” approach applies to determining whether the same “cause” is at issue for an ORCP 21 A(3) motion to dismiss for another action pending. *Lee*, 152 Or App at 166. Here, there is a direct claim in *Nichols* that the Company did not validly transfer the water system assets to the Cooperative. Further, the PUC’s

assertion of regulatory authority in this proceeding involves the same operative facts surrounding the transfer of assets to the Cooperative. To assert regulatory authority, PUC must establish that the Company did not validly transfer the water system assets to the Cooperative. Thus, the same cause has been asserted in both *Nichols* and this proceeding.

The policy underlying the doctrines of claim preclusion and dismissal for another action pending supports CRRWC's position. The purpose of both claim preclusion and dismissal for another action pending are to provide finality to the conclusion of a dispute, to prevent splitting a single dispute into separate controversies and to prevent a party from having to litigate the same claim twice. *Lee*, 152 Or App at 165. Absent a stay or dismissal of this proceeding before PUC, CRRWC will be required to defend against the same cause of action – that its transfer of assets to the Cooperative was invalid – in more than one proceeding.

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III. CONCLUSION.

PUC should dismiss or stay this proceeding because another case is pending between the same parties for the same cause in Jefferson County Circuit Court.

Dated: February 1, 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 1, 2010, I filed the foregoing **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 1, 2010, I served copies of the foregoing **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 1, 2010, I served copies of the foregoing **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