

**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

**MOTION TO STAY ORAL  
ARGUMENT HEARING  
SCHEDULED BEFORE PUBLIC  
UTILITY COMMISSION**

**By Crooked River Ranch Water  
Cooperative**

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**I. MOTION.**

Crooked River Ranch Water Company (“Company”), nka Crooked River Ranch Water Cooperative (“Cooperative”) (collectively “CRRWC”) moves to stay the oral argument and hearing currently scheduled for July 20, 2010, before the Public Utility Commission, because there is another action pending in Jefferson County Circuit Court, *Charles Nichols, et al. v. Crooked River Ranch Water Co., et al.*, Jefferson Co. Circuit Co. Case No. 09CV-0049 (“*Nichols*”), involving the same parties and issue as this proceeding.

CRRWC seeks a stay pursuant to the ALJ’s authority under OAR 860-012-0035(1) and pursuant to ORCP 21 A(3). CRRWC previously moved to dismiss this proceeding pursuant to ORCP 21 A(3) because there was another action pending and the ALJ denied the motion. CRRWC moves to stay the oral argument hearing at this time because the circuit court issued a decision addressing the central question to this

proceeding – whether CRRWC validly converted to a cooperative and transferred its assets.

## **II. ARGUMENT.**

### **A. The ALJ should exercise his authority pursuant to OAR 860-012-0035(1) to stay the proceedings pending final resolution of the *Nichols* case.**

The PUC has delegated to the ALJ in a contested case, the authority to regulate proceedings, including “recessing” and “reconvening” and deciding procedural matters. OAR 860-012-0035(1)(a) & (g). The ALJ should exercise his authority to stay this matter because the fundamental issue to be decided at the July 20, 2010, hearing – whether CRRWC validly became a cooperative and transferred its assets – was recently decided by the circuit court judge in *Nichols*. In *Nichols*, a case in which both the PUC and CRRWC are parties, the State had filed a motion for summary judgment seeking a declaration that CRRWC had not validly become a cooperative. The judge issued a letter opinion dated July 13, 2010, ruling on the State’s motion.<sup>1</sup> Steringer Decl. ¶ 2. The judge has not entered an order at this time; the parties will be submitting additional briefing to the court over the next three weeks relating to the future of CRRWC before a final order is entered. *Id.* at ¶ 2. Trial of any remaining issues is scheduled for August

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<sup>1</sup> Because the judge’s decision has not been reduced to an order and because the decision should not be considered as evidence in this proceeding, CRRWC is not submitting the decision or revealing its contents in this filing. Nevertheless, the decision is dispositive (subject to entry of final judgment and any subsequent appeal) of the question of whether CRRWC made a valid transformation into a cooperative. Steringer Decl. ¶ 3. Counsel for the PUC, which is a party to *Nichols*, is of course aware of the decision.

30, 2010. *Id.* at ¶ 4. In the meantime, all the parties have begun settlement discussions.  
*Id.* at ¶ 4.

It would be most efficient to allow the parties in the *Nichols* case, including the PUC, to complete settlement discussions in the next two weeks and, if those discussions do not produce a global settlement, to proceed to a final judgment rather than expending the time and resources to argue and decide the same issue in this proceeding – potentially with inconsistent outcomes.

**B. The ALJ should stay the proceedings in this action pursuant to ORCP 21 A(3) because there is another action pending between the same parties for the same cause in circuit court.**

The ALJ should also stay this action pursuant to ORCP 21 A(3) because there is another action pending between PUC and CRRWC for the same cause in the *Nichols* case.

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 ALJ is required to grant the motion. *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, however, the ALJ has discretion in determining whether to enter judgment, stay the administrative proceeding, or defer entry of judgment. ORCP 21 A. CRRWC is requesting that the ALJ stay the proceeding.

A case should be dismissed or stayed 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).

The ALJ should stay this proceeding because a final decision in *Nichols* will have preclusive effect under the standards for both issue and claim preclusion.

**1. A final decision in the *Nichols* case would result in issue preclusion in this proceeding.**

A final judgment in *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 *Nichols* and this proceeding is identical: Did Crooked River Ranch Water Company validly convert to

and transfer its assets to the Cooperative? In *Nichols*, the trial court has decided a summary judgment motion on that precise issue.

In this case, the ALJ identified the key issue as: “whether Crooked River is a cooperative exempt from jurisdiction under ORS 757.063(2).” Prehearing Conference Memorandum (Jun 21, 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, then PUC can have no regulatory authority.

The issue of whether the cooperative is valid has been litigated, by summary judgment, in *Nichols*, but has not been reduced to a judgment. PUC and CRRWC are parties to *Nichols* and a civil trial is clearly a proceeding that will be given preclusive effect. Because a final judgment in *Nichols*, when issued, will have a preclusive effect on the parties to this proceeding with respect to whether the Company validly converted to a cooperative, the ALJ should stay the current proceeding until a final decision in *Nichols*.

**2. A final decision in the *Nichols* case would result in claim preclusion in this proceeding.**

A final judgment 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. *Lee*, 152 Or App at 166. There is a direct claim by the State in *Nichols* that the Company did not validly convert to a cooperative and transfer the water system assets to the Cooperative. Here, in order to assert regulatory authority, PUC must establish that CRRWC is not a 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 of this proceeding, CRRWC will be required to defend against the same cause of action – that its conversion and transfer of assets to the Cooperative was invalid – in more than one proceeding.

ALJ Power denied CRRWC’s previous motion to dismiss stating in his ruling that the administrative proceeding before PUC was pending before the circuit court proceeding was initiated. Ruling (Feb 18, 2010) at 5. While it is true that this proceeding was initiated before *Nichols*, the hearing on July 20, 2010, is the first time the ALJ will specifically be addressing whether CRRWC validly became a cooperative. The circuit court has ruled on that issue and so now is “ahead” of the PUC.

In denying CRRWC’s previous motion to dismiss based on ORCP 21 A(3), ALJ Power stated that he could not dismiss the proceeding because PUC has been “‘charged by law’ with construing, expressing and enforcing legislative policy” in ORS 757.063 and the Court of Appeals specifically remanded for further action by PUC. Ruling (Feb 18, 2010) at 5. PUC is not charged with determining whether corporate formalities have been followed or the effect of a failure to follow corporate formalities. There is nothing preventing the ALJ from staying this proceeding.

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**III. CONCLUSION.**

The PUC should stay this proceeding pending final resolution of the *Nichols* case.

Dated: July 15, 2010.

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

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s/ Jona J. Maukonen

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## CERTIFICATE OF FILING AND SERVICE

I certify that on July 15, 2010, I filed the foregoing **MOTION TO STAY ORAL ARGUMENT HEARING**, 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 July 15, 2010, I served copies of the foregoing **MOTION TO STAY ORAL ARGUMENT HEARING** addressed to the following email addresses:

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I further certify that on July 15, 2010, I served copies of the foregoing **MOTION TO STAY ORAL ARGUMENT HEARING** addressed to the following, via first class mail, postage prepaid, as follows:

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Of Attorneys Crooked River Ranch Water  
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**DECLARATION OF C. ROBERT  
STERINGER IN SUPPORT OF  
MOTION TO STAY ORAL  
ARGUMENT HEARING  
SCHEDULED BEFORE PUBLIC  
UTILITY COMMISSION**

**By Crooked River Ranch Water  
Cooperative**

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I, C. Robert Steringer, declare and state as follows:

1. I am an attorney with Harrang Long Gary Rudnick PC, counsel for Crooked River Ranch Company, nka Crooked River Ranch Cooperative (“CRRWC”), and make this declaration in support of CRRWC’s Motion to Stay Oral Argument Hearing Scheduled Before Public Utility Commission.

2. In the case of *Charles Nichols, et al. v. Crooked River Ranch Water Co., et al.*, Jefferson County Circuit Court Case No. 09CV-0049, the trial court judge issued a letter opinion dated July 13, 2010, ruling on the State’s motion for summary judgment. The judge has not entered an order at this time; the parties will be submitting additional briefing to the court over the next three weeks relating to the future of CRRWC before a final order is entered.

3. The decision of the trial court judge on the State's motion for summary judgment is dispositive (subject to entry of final judgment and any subsequent appeal) of the question of whether CRRWC made a valid transformation into a cooperative.

4. Trial of any remaining issues is scheduled for August 30, 2010. In the meantime, all the parties have begun settlement negotiations.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty of perjury.

Dated: July 15, 2010.

s/ C. Robert Steringer  
C. Robert Steringer OSB #98351

## CERTIFICATE OF FILING AND SERVICE

I certify that on July 15, I filed the foregoing **DECLARATION OF C. ROBERT STERINGER IN SUPPORT OF MOTION TO STAY ORAL ARGUMENT HEARING**, on the Public Utility Commission by email and first class mail, postage prepaid, addressed as follows:

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