

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
a Tributary of the Pacific Ocean

Pacificorp; ~~WaterWatch of Oregon, Inc.; Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; Rogue River Valley Irrigation District;~~ Roger Nicholson; Richard Nicholson; Agri Water, LLC; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch; ~~Dave Wood; Kenneth Zamzow;~~ Nicholson Investments, LLC; William S. Nicholson; John B. Owens; Kenneth Owens; William L. Brewer; Mary Jane Danforth; ~~Jane M. Barnes; Franklin Lockwood Barnes, Jr.;~~ Jacob D. Wood; Elmore E. Nicholson; Mary Ann Nicholson; Gerald H. Hawkins; Hawkins Cattle Co.; Owens & Hawkins; Harlow Ranch; Terry M. Bengard; Tom Bengard; Dwight T. Mebane;

**UPPER BASIN CONTESTANTS'
MOTION FOR
RECONSIDERATION**

Case No. 282

Claims: 671, 672, 673, and that Portion of Claim 612 pertaining to the Klamath River

Contests: 2062, 2064, 2065, 2066, ~~3016, 3070, 3071, 3072¹, 3249, 3257, 3258, 3259², 3314³, 3373, 3374, 3375, 3644, 3657, 3658,~~

¹ WaterWatch of Oregon, Inc.'s contests 3016, 3070, 3071, and 3072 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

² Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3249, 3257, 3258 and 3259 on October 16, 2003. Medford and Rogue River Valley Irrigation Districts voluntarily withdrew from Contests 3249, 3257, 3258 and 3259 on June 14, 2006.

³ On October 31, 2003, William Bryant voluntarily withdrew from Contest 3314. On October 26, 2004, Dave Wood voluntarily withdrew from Contests 3314 and 3373-3375. Change of Title Interest for Contests 3314, and 3373-3375 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3314 and 3373-3375 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contest 3314 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contest 3314 and 3373-3375 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contest 3314 and 3373-3375 from Walter Seput to Wayne James, Jr. (5/2/05). Change of Title Interest for Contests 3314 and 3373-3375 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3314 and 3373-3375 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3314 and 3373-3375 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3314, 3373-3375 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3314, 3373-3375 on September 13, 2005. Change of Ownership filed for Contests 3314 and 3373-3375 reflecting that William V. Hill is deceased and his ownership rights transferred to Lillian M. Hill (6/15/06). Sevenmile Creek Ranch, LLC voluntarily withdrew from Contests 3314, 3373-3375 on March 1, 2007. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily withdrew from Contests 3314 and 3373-3375 on April 6, 2007. Mary Jane Danforth voluntarily withdrew from Contests 3314 and 3373-3375 on June 19, 2008. Modoc Point Irrigation District voluntarily withdrew from Contests 3373-3375 on November 13, 2008. Change of Title Interest for Contest 3314 and 3373-3375 from Robert Bartell to Michael LaGrande (1/9/09).

Helen Mebane; ~~Sevenmile Creek Ranch, LLC~~; James G. Wayne, Jr.; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams; River Springs Ranch; Pierre A. Kern Trust; ~~William V. Hill~~; Lillian M. Hill; Carolyn Obenchain; Lon Brooks; Newman Enterprise; ~~William C. Knudtson~~; Wayne Jacobs; Margaret Jacobs; Michael LaGrande; Rodney Z. James; Hilda Francis for Francis Loving Trust; David M. Cowan; James R. Goold for Tillie Goold Trust; Duane F. Martin; Modoc Point Irrigation District; Peter M. Bourdet; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; ~~William Bryant~~; Peggy Marengo; Jerry L. Neff & Linda R. Neff; ~~Klamath Irrigation District~~; ~~Klamath Drainage District~~; ~~Tulelake Irrigation District~~; ~~Klamath Basin Improvement District~~; ~~Ady District Improvement Company~~; ~~Enterprise Irrigation District~~; ~~Malin Irrigation District~~; ~~Midland District Improvement Company~~; ~~Poe Valley Improvement District~~; ~~Shasta View Irrigation District~~; ~~Sunnyside Irrigation District~~; ~~Don Johnston & Son~~; ~~Modoc Lumber Co.~~; ~~Bradley S. Luscombe~~; ~~Berlva Pritchard~~; ~~Don Vincent~~; ~~Randy Walthall~~; ~~InterCounty Title Co.~~; ~~Winema Hunting Lodge, Inc.~~; ~~Van Brimmer Ditch Co.~~; ~~Plevna District Improvement Company~~; ~~Collins Products, LLC~~;

Contestants

vs.

United States, Bureau of Indian Affairs, as Trustee on behalf of the Klamath Tribes;

Claimant/Contestant, and

The Klamath Tribes;

Claimant/Contestant.

3659⁴, 3932, 3933, 3934, 4002, 4061, 4062, 4063

⁴ Don Vincent voluntarily withdrew from Contest 3644, 3657, 3658, and 3659 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3644, 3657, 3658, and 3659 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3644, 3657, 3658, and 3659 on January 15, 2004. The remaining entities comprising Klamath Project Water Users, conditionally withdrew from Contests 3644, 3657, 3658, and 3659 on May 18, 2009. See STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU'S CONTESTS TO CLAIMS 671, 672, 673, AND THAT PORTION OF CLAIM 612 PERTAINING TO THE KLAMATH RIVER AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES (MAY 18, 2009).

INTRODUCTION

Pursuant to OAR 137-003-0630, the Upper Basin Contestants (“UBC”) hereby move this administrative court to reconsider and vacate the Order on Klamath Tribes, United States, and Klamath Project Water Users’ Stipulation of Conditional Withdrawal of KPWU Contests to Claims 671, 672, 673, and That Portion of Claim 612 Pertaining to the Klamath River and Conditional and Interim No-Call Provisions By the United States and Klamath Tribes entered in this case on June 19, 2009 (the “Order”). In the alternative, and to the extent that the Order is determined to be a proposed final order, UBC files this motion as exceptions to a proposed order pursuant to OAR 137-003-0645 and OAR 137-003-0650. UBC reserves all rights to file further exceptions to the Order at the time the Administrative Law Judge (“ALJ”) files a proposed final order for the entirety of Case No. 282.

UBC seeks reconsideration of the Order because it violates federal and state law and due process requirements. The Order deprives UBC of a fair and meaningful opportunity to contest Claimants’ claims. It also placed UBC in a position of having to re-defend its contests in other cases and of trying to protect its interests without discovery and while other forums are issuing decisions that affect the outcome of its contests. For these and other reasons outlined below, UBC requests that the Order be reconsidered and vacated in its entirety.

Pursuant to OAR 137-003-0630(2), UBC’s counsel sought to confer with counsel for the parties who signed the Stipulation. UBC was able to reach opposing counsel for all but the United States Bureau of Indian Affairs, and generally discussed or left a voicemail concerning the issues raised by the Motion with each of the opposing counsel. UBC’s counsel conveyed to all opposing counsel that UBC is willing to discuss the issues raised by this motion following its filing. Thus, while UBC was unable to resolve its concerns about the Order prior to the filing of

this Motion, it has offered to confer further about its concerns notwithstanding the filing of this Motion.

UBC requests oral argument on this Motion.

FACTS

1. Overview.

The facts relevant to this Motion are well known to the Oregon Water Resources Department (“OWRD”), to the Contestants, and to the Claimants in Case No. 282 of the Klamath Basin Adjudication (“the Adjudication”), and their counsel. Case No. 282 concerns the claims of the Klamath Tribes and United States Bureau of Indian Affairs to the Klamath River, Claims 671, 672, 673, and that portion of Claim 612 pertaining to the Klamath River, and the contests to these claims. The OWRD, Klamath Tribes and the United States Bureau of Indian Affairs (hereafter “Claimants”), and Contestants Klamath Project Water Users (hereafter “KPWU”) recently reached a private agreement, which concluded that the ALJ and the Adjudicator should conditionally resolve KPWU’s contests to Claims 671, 672, 673, and that portion of Claim 612 pertaining to the Klamath River. KPWU was the only contestant from Case No. 282 that was a party to the agreement. The OWRD, Claimants, and KPWU filed a stipulation memorializing their agreement. *See* Stipulation of Conditional Withdrawal of KPWU’s Contests to Claims 671, 672, 673, and that portion of Claim 612 pertaining to the Klamath River and Conditional and Interim No-Call Provisions by the United States and Klamath Tribes (“Stipulation”) at 2. In the Stipulation, OWRD staff expressly recommended to the ALJ and the Adjudicator that KPWU’s contests be disposed of as described in the Stipulation. Stipulation at 6-7. OWRD was a signatory to the Stipulation. Stipulation at 15. The ALJ accepted and approved the Stipulation through the Order issued on June 19, 2009.

2. The Stipulation.

According to the Stipulation, the OWRD, Claimants, and KPWU, “negotiated terms to resolve KPWU’s contest” through the Klamath River Basin Restoration Agreement (“KBRA”). Stipulation at 4. These parties agreed that KPWU’s contests could be “conditionally resolved without the need for hearing.” Stipulation at 4. The proposed resolution and KPWU’s withdrawal from this case were made “conditional.” To the extent the KBRA does not become effective, and to the extent the Secretary of the Interior does not publish required notices, “the conditional withdrawal by KPWU of their Contests in Case 282 shall no longer be in effect. Thereafter, the Parties shall be entitled to fully litigate...before the State of Oregon Circuit Court.” Stipulation at 5.

As to Claims 671, 672, 673, and 612, the parties to the Stipulation agreed that “the exercise of any water rights hereafter determined under Claims 671, 672, 673, and 612 by any decision-maker in the Adjudication, shall be limited....” Stipulation at 6. The limitations include:

- (1) from the time the Stipulation is filed until the date selected by the Klamath Water and Power Agency (“KPWA”)⁵, the exercise of any water rights determined for Claims 671, 672, 673, and 612 “shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908”; and
- (2) after the date selected by KPWA, any exercise of the water rights determined for Claims 671, 672, 673, and 612 “shall not result in regulations curtailing

⁵ KPWA is not a party to Case No. 282. Regardless of this fact, the ALJ was asked to, and by issuance of the Order has attempted to, assume jurisdiction over the actions of a non-party. Such action is troubling, as it appears to be beyond the scope of authority of both the ALJ and the agency.

use of water under water rights having a priority date before August 9, 1908, except that to the extent that diversion under any such rights is precluded by the limitations on diversion water in Appendix E-1 of the Restoration Agreement....”

Stipulation at 6-7 (emphasis added).

Specific limitations on diversion are set forth in the Stipulation, Attachment 1, which incorporates “selected provisions of the Klamath Basin Restoration Agreement as agreed to among these parties.”⁶ Stipulation, Attachment 1 at 1. Among other provisions, Attachment 1 includes the draft KBRA Section 15.3 concerning certain “water assurances” related to the Adjudication. *Id.* at 3. Under this section, KPWU and the United States Bureau of Reclamation and United States Fish and Wildlife Service⁷ agree to file a document, “Appendix E-1,” with the OWRD or Circuit Court (as applicable) “as part of the ongoing Klamath Basin Adjudication.” *Id.* at 3. Appendix E-1 was filed with the Stipulation. *Id.*, Attachment at 11-36.

Appendix E-1 (which is also an appendix to the draft KBRA) applies to three Adjudication cases for which proposed final orders have been issued – Cases 003, 274, and 275 – and sets out diversions by date and amount for water claimed in those three cases. *Id.* at 11-24, 34-35. More specifically, Appendix E-1 outlines various diversion locations by reference to canals operated for the benefit of KPWU. *Id.* at 19-20, 34-35. It provides for water to be diverted for the benefit of KPWU and outlines a “Refuge Allocation” of water for the Lower

⁶ The KBRA is not yet final. *See e.g.* Stipulation at 3 (paragraph A.3). However, the provisions of the draft KBRA included in the Stipulation, as well as others incorporated by reference and directly related to those provisions, are now binding on the parties as a result of the Stipulation. The Stipulation requires the parties to adhere to its terms.

⁷ The Bureau of Reclamation and Fish and Wildlife Service are not parties to Case No. 282. The Bureau of Reclamation is, however, a claimant in Case 003, and the Fish and Wildlife Service is a claimant in Cases 274 and 275.

Klamath Lake Refuge and Tule Lake Refuge (collectively “Refuges”). *Id.* at 19, 21, and 23.⁸ Attachment A to Appendix E-1 explains the extent of the anticipated diversions. *Id.* at 34-35.

In portions of the draft KBRA not attached to the Stipulation (but which are important for understanding the broader context of the effect of the Stipulation and Order), the parties to the KBRA agree that Appendix E-1 will be put into effect by requiring the Bureau of Reclamation to deliver water to the Refuges and to KPWU. *See e.g.* May 6, 2009 draft KBRA, Section 15.1.2 (attached as Exhibit 1 to Howard Dec.) They also agree that the purpose of these limitations is to place water that is the subject of Case 003 (Klamath Reclamation Project water) instream for the benefit of fish.⁹ *Id.*, Section 15.1.1.A.

In simple terms, Appendix E-1 and the terms of the KBRA at issue here require allocation of water to KPWU and the Refuges, and require that water be left instream for the benefit of fish. Although framed as “limitations”, these terms would allocate water to uses and amounts that were contested by UBC. For example, UBC strongly contested allocation of water for use by Klamath Project Water Users if the water had not been put to beneficial use within a particular timeframe. The terms of Appendix E-1 and the KBRA also incorporate legal determinations made in proposed orders in the Adjudication, against which both the OWRD and UBC filed exceptions. *See* Section 4 *infra*. Thus, the terms included in the Stipulation are directly contrary to filed exceptions, which have not yet been reviewed by the Adjudicator.

⁸ Stipulation, Attachment 1 at 21 specifically references Attachment B. Attachment B in the Stipulation has no text. Portions of the draft May 6, 2009 KBRA, including the text for Attachment B, are included as Ex. ____ to the E. Howard Declaration for the decision-maker’s reference. This draft was apparently inadvertently released to the public, as the participants in the KBRA negotiations are bound to confidentiality. Nicholson Dec., ¶ 4.

⁹ All parties involved in this matter are well aware that they have no legal authority to transfer water claimed in the Adjudication to an instream use. There was an effort to amend the law to allow claims to be transferred instream during the 2009 legislative session, but it was rebuffed. Thus, at least at present, any provision that would transfer waters at issue in the Adjudication instream is a violation of law.

Finally, in terms of the binding effect of the Stipulation, the Stipulation states: “This Stipulation shall be binding upon and shall inure to the benefit of the Parties and the OWRD...” Stipulation at 9.

3. June 19, 2009 Order.

A Proposed Order was attached to the Stipulation as Attachment 3. ALJ Joe Allen converted the Proposed Order to the Order on June 19, 2009. The Order adopted the terms of the Stipulation, and mandated that certain terms “shall” be included in the Proposed Order issued under ORS 183.464(1) and OAR 137-003-0645, as well as in “any other Order or Judgment determining these contests.” Order at 3-4. The referenced terms include the fact that the conditional withdrawal will become permanent unless the KBRA does not become effective, or the Secretary does not publish the notices; in which case the Parties are entitled to litigate in Oregon Circuit Court. *Id.* The Order also expressly adopted the limitations agreed to in the Stipulation (at pp. 6-7 of the Stipulation, as described above). Order at 5.

The Order states: “The [Stipulation]...is hereby approved and the Parties to the Stipulation...and Oregon Water Resources Department (“OWRD”) shall comply with its terms.” Order at 2. The final paragraph of the Order states, “[n]othing in the Stipulation or this Order shall diminish or affect in any way: a) the rights of Contestants other than KPWU to contest or oppose claims 671, 672, 673, or 612 or any other claims, or b) any contests other than contests 3657, 3558, 3659, and 3644.” Order at 6.

4. Cases 003, 274, 275.

As noted previously, by requiring implementation of certain terms, including those outlined in Appendix E-1, the Order directly impacts the claims, contests, proposed order, and

exceptions filed in Cases 003, 274, and 275. The UBC filed exceptions to the proposed orders in Cases 003, 274 and 275. The OWRD also filed exceptions in Case 003.

a. Case 003.

The Bureau of Reclamation filed claims in Case 003 to divert water for both the KPWU and the Refuges. As contestants, UBC filed a number of exceptions to the Proposed Order for Case 003. Upper Basin Contestants' Exceptions to the Proposed Order (attached as Exhibit 2 to Howard Dec.) UBC filed exceptions as to the extent, rate, duty, and season of use for water claimed by the Bureau of Reclamation, and strongly objected to the fact that the Bureau of Reclamation was determined to have the right to claim water that it had not put to a beneficial use within a particular time frame. UBC also filed exceptions to the portion of the ALJ's order that allowed the Bureau of Reclamation to claim water for the Refuges under its 1905 reservation of water for the Klamath Project (the ultimate resolution of this issue will affect the priority date of water diverted by the Refuges).

The OWRD filed exceptions to the Proposed Order in Case 003, requesting, among other things, that the Adjudicator deny the claims for water applied to the Refuges for any purpose other than irrigation of agricultural crops and domestic use. Oregon Water Resources Department's Exceptions to the Proposed Order, at 11-14 (attached as Exhibit 3 to Howard Dec.) The OWRD also filed exceptions to the amount and priority date of water claimed by the Bureau of Reclamation. *See, e.g., id.* at 15-32.

b. Case 274 and Case 275.

The United States Department of Interior, Fish and Wildlife Service ("FWS") filed claims for each of the Refuges, which were later consolidated with relevant contests into Case 274 and Case 275. Case 274 addressed claims filed by the FWS for federal reserved rights for

the Lower Klamath Lake Wildlife Refuge. Case 275 addressed claims filed by the FWS for federal reserved rights for the Tule Lake Refuge.

Members of the UBC filed exceptions in both cases concerning, among other things, the validity of the claims and the appropriate extent of the claimed amounts. Contestants Sprague River's and Fort Klamath's Exceptions to Corrected Proposed Order, Case No. 274; Contestants' Exceptions to Proposed Order (attached as Ex.4 and Ex. 5 to Howard Dec.)

These exceptions, along with those filed in Case 003, remain unresolved at this time. The Adjudicator will address these and exceptions filed in other cases following completion of all contested cases pending in the Adjudication.

ARGUMENT

The June 19, 2009 Order violates federal and state due process requirements by depriving the UBC of a fair and meaningful opportunity to contest Claimants' claims, and to protect and not have to retry contests and exceptions filed in Cases 003, 274, and 275. The decision to enter the Order should be reconsidered and vacated to restore UBC's right to due process in this case and in Cases 003, 274, and 275.

A. Federal And State Due Process Requirements Mandate A Fair Trial In A Fair Tribunal.

There are two sources of due process protection; namely, the Fourteenth Amendment to the United States Constitution and Article 1 § 10 of the Oregon Constitution. These constitutional guarantees form the framework for this Motion, and are considered below.

1. Due Process Under the 14th Amendment of the U.S. Constitution.

The Fourteenth Amendment of the U.S. Constitution provides, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

The “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Woodroffe v. Board of Parole and Post-Prison Supervision*, 219 Or.App. 87, 182 P.3d 202 (2008), quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Although due process is difficult to precisely define, at its core, due process means assuring fundamental fairness:

For all its consequence, “due process” has never been, and perhaps can never be, precisely defined. “[U]nlike some legal rules,” this Court has said, due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 24 (1981).

There is no question that due process applies in administrative proceedings. In *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975), for example, the Supreme Court noted that “a fair trial in a fair tribunal is a basic requirement of due process,” and that this requirement “applies to administrative agencies which adjudicate as well as to courts.” (Internal citations omitted.)

2. Due Course of Law Under the Oregon Constitution.

The Oregon Constitution also includes a provision addressing the right to fair process:

No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

Or. Const., Art. I, § 10. This provision is known as the remedies clause. It has no counterpart in the federal constitution, and the scope of its constitutional guarantees “is less than clear from the words of the text, leaving room for interpretations...[Oregon case law] has failed definitively to establish and consistently to apply any one theory regarding the protections afforded by the remedies guarantee.” *Neher v. Chartier*, 319 Or. 417, 422-23 (1994). Nevertheless, “the procedural effect of state ‘due course of law’ constitutional provisions is essentially the same as the procedural effect of the due process clause to the federal constitution.” *Tupper v. Fairview Hosp. & Training Center*, 276 Or. 657, n.2 (1976). In other words, the remedies clause and the federal due process clause “are the same insofar as each would prohibit the deprivation of the interests specified in the respective provisions of the federal and Oregon constitutions without fair procedures generally associated with the term ‘due process.’” *Id.* at 668.

B. Due Process Protections Apply To This Case.

There is no question that due process protections afforded under the state and federal constitutions apply to this case. It is well established that, “[t]he right to the use of water is a valuable property right guaranteed to every citizen. It cannot be arbitrarily nor unreasonably interfered with by the legislative department of the state.” *In Re Willow Creek*, 74 Or. 592, 617 (1914). The courts have recognized due process challenges in many other cases involving water rights. *See e.g., Gass v. Water Resources Department*, 43 Or. App. 825, 829 (1979) (recognizing due process challenge while finding no violation because petitioner had received actual notice despite his contention to the contrary); *see also, Oregon Lumber Co. v. East Fork Irrigation Dist.*, 80 Or. 568, 573 (1916) (finding that due process of law is preserved for every party in interest, “for all have the constitutional ‘day in court’ before a judicial tribunal endowed with jurisdiction to hear and determine issues). In fact, in the context of the water right proceedings

involved in the Adjudication, the Klamath Tribes asserted a due process challenge, contending that requiring the Tribes to participate in the Adjudication would deprive them of due process. *U.S. v. Oregon*, 44 F.3d 758, 771 (1994). UBC’s rights as a party must be protected by due process throughout the Adjudication and in this Case and all of its proceedings.

C. The Order Violates Due Process Requirements And Should Be Vacated.

While the Order is purportedly narrow, stating, “[n]othing in the Stipulation or this Order shall diminish or affect...the rights of Contestants...to contest or oppose claims”, and stating that it shall not affect “any contests other than Contests 3657, 3658, 3659, and 3644” (Order at 6), the Order is in fact broad and far-reaching. As discussed below, the Order deprives UBC of due process in many different, and specific, ways.

1. The Order binds the ALJ to a particular outcome in Case No. 282.

The Order binds the decision-maker in this Case No. 282 by requiring that the terms of the Order “shall be included in the Proposed Order issued...” under ORS 183.464(1) and OAR 137-003-0645, and in “any other Order or Judgment determining these water rights claims.” Order at 4 (emphasis added).

The phrase “these water rights claims” refers to Claims 671, 672, 673, and 612. *Id.* UBC is contesting both claims. Therefore, this Order makes determinations as to Claims 671, 672, 673, and 612 – and validates those claims – without first allowing UBC the opportunity to challenge them. This is true both under the terms of the Order and under principles of the law of the case. *See e.g., Bloomfield v. Weakland*, 224 Or.App. 433, 440 (2008) (“The doctrine of the law of the case precludes relitigation or reconsideration of a point of law decided at an earlier stage of the same case”); 1B Moore’s Federal Practice, ¶ 0.404(1) at 402-03 (noting that when a court enunciates a rule of law in the course of a given case, the law of the case doctrine generally

requires the court to adhere to the rule throughout the proceedings); *Roberts v. Cooper*, 61 U.S. 467, 481 (1858) (the rule is one of expedition, designed to bring about a quick resolution of disputes by preventing continued reargument of issues already decided).

Parts of the Order purportedly only apply to KPWU's Contests, Nos. 3657, 3558, 3659, and 3644. For example, the Order states, "Regarding contests 3657, 3558, 3659, and 3644...the following terms are a part of this Order and shall be included in the Proposed Order...and any other Order or Judgment determining these contests." Order at 3. While Claimants will likely argue that because of this language, the terms do not affect UBC's contest, this contention is flawed. Ultimately, all of the Claims and all of the Contests concern the same available water from the same body of water – in the case of Case 282, the Klamath River. Determining water claims and water rights as to one contest (and requiring that the determination be incorporated into the Proposed Order and any other Order or Judgment) has direct bearing on water rights determinations in all other contests. This is true because, among other reasons, the decision-maker in the case is bound by the Order, and because the ALJ's ruling is now the law of the case. (The effect of this fact is particularly troubling in this case, where the ALJ has ruled that there is an issue as to the very existence and validity of these claims that cannot be resolved without an evidentiary hearing. *See* Section C(6) *infra*.)

In short, fundamentally the Order decides water allocation issues that will impact UBC's contests, without giving UBC the opportunity to litigate its contest. This consequence deprives UBC of a fair and meaningful opportunity to be heard and deprives UBC of due process.

2. The Order impermissibly allows one contestant to litigate in state court and fails to comply with the regulatory requirements for disposing of a contest by stipulation.

The Order provides that should the conditional withdrawal not become permanent (due to the KBRA not materializing and/or the Secretary's failure to file notices), KPWU is entitled to pursue its contests in Oregon Circuit Court without further administrative process. The problem here is palpable. Allowing KPWU to proceed directly to state court means that the contestants to the same case will be filing evidence and making arguments at the fact-finding stage, in different venues – an administrative proceeding before the Office of Administrative Hearings and the Circuit Court. Different tribunals will be deciding contests of the same claim. The wisdom of this idea is highly questionable because of the probability of inconsistent decisions, and it raises a likely equal protection violation.¹⁰

Allowing separate tribunals to decide contests on the same claim also sets in motion a process that is beyond the agency and ALJ's authority. Neither the adjudication statutes nor the Administrative Procedures Act authorize the dual-tribunal process created in the Stipulation and adopted by the Order. *See* ORS 539.005 et seq; ORS Chapter 183.

Applicable regulations require that, when resolving a contest through stipulation, a party waives its rights to a contested case hearing and to judicial review. OAR 137-003-0510(5). Because the KBRA is not yet final and the parties do not want to give up their rights as contestants until it is final, the parties to the Stipulation apparently agreed to draft protections and make reservations in their Stipulations that are outside the scope of the law. It would have been more appropriate for the parties to wait to file a stipulation until the KBRA is final (this is

¹⁰ The Equal Protection Clause is part of the Fourteenth Amendment to the United States Constitution, and provides, "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." The Privileges and Immunities provision in Art. I, § 20 of the Oregon Constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." The two provisions are not identical, but in general, "substantially the same analysis is applicable in determining whether there has been a denial of equal protection of the laws or a grant of a privilege or immunity on terms not equally applicable to all citizens." *City of Klamath Falls v. Winters*, 289 Or. 757, 775 (1980).

the approach actually contemplated by the draft KBRA), or for the parties to request a stay of Case No. 282 pending the completion of the KBRA and the contingencies in the KBRA that are necessary to make the stipulation unconditional. Instead, the Order has adopted a process that is contrary to law and likely creates an Equal Protection violation.

3. The Order sanctions a process where OWRD has to share conflicting roles, which calls into question the fairness of the proceeding.

The Order attempts to bind the ultimate decision-maker in the Adjudication – the Adjudicator, who is an OWRD staff member – by requiring that the OWRD shall comply with the terms of the Stipulation, and by requiring that the terms of the Order shall be included, not only in the Proposed Order issued under ORS 183.464(1) and OAR 137-003-0645, but also in “any other Order or Judgment determining these water rights claims.” Order at 4 (emphasis added). In issuing such an order, the ALJ has sanctioned a process that does not provide due process to UBC.

The OWRD has worn and continues to wear many hats throughout the Adjudication: OWRD conducted an initial investigation of Claimants’ claims (resulting in the Preliminary Evaluation); OWRD became a party to this case; OWRD is participating in confidential settlement negotiations with certain parties; OWRD recommended to the ALJ that the private Stipulation be accepted; and an OWRD staff member is the final decision-maker (the “Adjudicator”) at the administrative level in the Adjudication.

While it is not necessarily unconstitutional for an agency to serve both investigative and adjudicative functions, *Withrow, supra*, 421 U.S. at 47, in this case OWRD has gone beyond what is allowed. As evidenced by the Stipulation, the OWRD is participating in the negotiation process that will culminate in the KBRA, which, at least as presently drafted, provides for

particular outcomes within the Adjudication regardless of what evidence is presented on certain claims and contests. *See e.g.* Stipulation, Attachment 1, at 4 (requiring the filing of Appendix E-1), 5 (explaining how Cases No.s 282 and 286 will be resolved), and 11-24 (Appendix E-1). As presently drafted, the KBRA provides an “escape clause” for OWRD if the Adjudicator chooses not to adopt the resolution of these cases as outlined in the KBRA. Stipulation, Attachment 1, at 4 (Section 15.3.1.D.). However, the OWRD effectively undercut this clause by agreeing to adhere to the provisions of the Stipulation requiring administration of the water claimed in Cases 282, 003, 274, and 275 in the manner provided by the KBRA, Appendix E-1, regardless of the evidence, contests, and claims presented in this case.

The OWRD’s recommendations to the ALJ and Adjudicator to accept the Stipulation, as well as the resulting Order, both have the effect of prejudging the merits of the claims and contests before the evidentiary hearing even starts. As the Supreme Court instructs, where there is a risk of actual bias or prejudgment, that practice “must be forbidden if the guarantee of due process is to be adequately implemented.” *Withrow, supra*, 421 U.S. at 1465. A similar issue was at play in *Texaco, Inc. v. F.T.C.*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965), where the court held that a speech made by a commissioner clearly indicated he had already reached a decision as to matters pending before the commission, and, therefore, the commissioner’s participation in the hearing “amounted in the circumstances to a denial of due process which invalidated the order under review.” The OWRD’s significant involvement in the KBRA and the Stipulation calls into question “the very appearance of complete fairness,” which in turn erodes the basic requirement of due process afforded to the litigants. *Texaco, supra*, 336 F.2d at 760, *quoting Amos Treat & Co. v. Securities and Exchange Comm’n*, 306 F.2d 260, 267 (D.C. Cir. 1962).

The Order effectively sanctions the OWRD's actions, and, combined with the other facts described in this Motion, suggest that UBC will not receive a fair trial in a fair forum as required by the state and federal constitutions. The Order should be vacated in order to remedy this harm.

4. UBC was excluded from the settlement negotiations, even though the outcome affects its interests in multiple cases.

The UBC has been intentionally excluded from negotiations between the OWRD, Claimants, and KPWU. Those negotiations have occurred outside the Adjudication as part of the KBRA, but led to the Stipulations being filed in the Adjudication. Some time ago, UBC requested to be part of the KBRA negotiations, but was denied that request. *See* Nicholson Dec. ¶ 2. Section 16.2 now confirms the intent of the parties to exclude UBC from the KBRA negotiations. It states that parties to the KBRA will not negotiate with contestants to the tribal claims (i.e. UBC members) until after the KBRA is signed. *See* Howard Dec., Ex. 1. Further, it is UBC's understanding that all parties to the KBRA have been required to sign confidentially agreements, barring them from providing information about the KBRA and its attendant settlements with parties that are not part of the KBRA. Nicholson Dec. ¶ 4. In some circumstances, private parties are free to negotiate and settle without including all parties to a case, however, under the facts of this case, the private settlement and resulting Order deprive UBC of due process of law.

There is no doubt that the parties are actively negotiating and participating in the settlement discussions to the exclusion of UBC. *See e.g.*, Stipulation at n. 7 (indicating that any change to the KBRA would be "mutually agreed to by the Parties and OWRD"). The private and secretive nature of these negotiations has deprived UBC of necessary information which would

permit it to adequately respond to the proposed resolution of KPWU's contest.¹¹ *See e.g., Long v. Board of Parole*, 189 Or.App. 56, 60 (2003) (holding that where the Board of Parole notified an inmate of its determination, but did not describe the underlying factual bases of the determination before it required him to file his objections, the board's notice was constitutionally inadequate); *see also U.S. v. Oregon*, 913 F.2d 576, 580-581 (9th Cir. 1990) (requiring that parties not party to an agreement be given the opportunity to air their objections at a reasonableness or fairness hearing). *Cf. U.S. v. Oregon*, 666 F.Supp. 1461 (D.Or. 1987) (approving a private settlement that adversely impacted an excluded party because there had been "open and diligent negotiations between the proponents and [the excluded party]").

It is well-established law that a decision-maker cannot adopt an agreement between some, but not all of the parties to the agreement when doing so will harm the protectable interests of the excluded party. *See U.S. v. Oregon*, 666 F.Supp. at 1463; *U.S. v. Oregon*, 699 F. Supp. 1456, 1461 (D. Or. 1988); *U.S. v. Oregon*, 913 F.2d at 580-581; *Local 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986). Here, the UBC has protectable interests in its water claims and rights, which will be tangibly affected by the outcome in Cases 282, 003, 274 and 275. All of the waters claimed in Cases 282, 003, 274 and 275 are downstream of the UBC members, meaning that the claimants in these cases could "call" on UBC water to fill their claims once determined. The Order impacts UBC members' protectable interests in their water by validating these "downstream" claims. UBC should have been given a right to object to the Stipulation before it was approved. The failure to do so deprived UBC of its rights to due process.

¹¹ The Order and the underlying Stipulation barely define the extent of the water claims being determined by the Order. Other than its date, there is little to no information concerning the tribal claim that is being addressed by the Stipulation. Further, if the terms of the Stipulation (and resulting Order) were meant to be binding through every stage of the Adjudication, at a minimum, they should have included sufficient detail to alert the parties as to what was being resolved. UBC is deprived of information necessary to protect its interests.

To the extent the Order is withdrawn to allow UBC to file such objections, this harm can only be fully rectified if the ALJ orders full disclosure of all facts leading to the Stipulation so that UBC has the opportunity to fully understand the Stipulation. *Accord Long v. Board of Parole*, 189 Or.App. at 60. Only then can UBC have a reasonable opportunity to air its objections to the Stipulation, as required by law.

(Note, in requesting this relief, UBC does not concede that providing it with the opportunity to fully review the basis for the Stipulation and to air objections will remedy the harms caused by leaving the Order in place. UBC anticipates that because of the issues raised in this Motion and further concerns that would come to light as a result of full disclosure of the basis for the Stipulation, complete vacatur of the Order will be the only remedy appropriate to protect its interests.)

The Stipulation harms UBC's protectable interests, and failure to allow UBC to address these and other problems following full disclosure of the basis for the Stipulation violates UBC's constitutional right to fair process. The Order should be vacated.

5. The Order approves a Stipulation that violated public notice requirements.

Another troubling aspect of the Order is that it approves a stipulation that was reached through a process that violated Oregon law. While OWRD is authorized to negotiate with any federally recognized Indian tribe under ORS 539.310, all negotiations in which OWRD director participates "shall be open to the public." *Id.* ORS 539.310 further requires that during such negotiations, the OWRD shall: (a) provide public notice of the negotiations; (b) allow for public input through the director; and (c) provide regular reports on the progress of the negotiations to interested members of the public. In this case, and with respect to negotiations that led to the Stipulation, there were no public meetings or opportunities to comment, and, more egregiously,

interested members of the public – the UBC – were flatly denied information and involvement. Nicholson Dec. ¶ 3. Further, the OWRD, along with other parties to the KBRA, signed confidentiality agreements, barring them from sharing information about the process with the public. *Id.* ¶ 4. The negotiations were far from transparent. Consequently, the ALJ has now approved an agreement that was arrived at through a process that violates Oregon law.¹² This is further evidence that this proceeding is not meeting the requirements of the federal and state constitutions. The constitutional violations can only be remedied by vacating the Order.

6. The Order makes determinations without an evidentiary hearing, contrary to the ALJ’s prior Legal Rulings.

A prior ALJ (Maurice L. Russell) for Case No. 282 previously ruled that the ALJ could not make a determination as to the validity of the Claimants’ claims without an evidentiary proceeding. In the Amended Order On Motions For Ruling On Legal Issues, the ALJ ruled:

In the Klamath, it may well be that the healthy fishery present in the Washington cases does not yet exist. That remains to be determined at hearing.

Amended Order On Motions For Ruling On Legal Issues, Case 282 (“Amended Order”) at 11 (emphasis added). In discussing the applicability of *Adair* decisions, the ALJ noted:

In Case 282, this standard would only apply if Claimants are able to overcome their legal and factual burdens to establish a right to waters in these areas.

Amended Order at 14 (emphasis added).

And, perhaps most significantly, the ALJ ruled:

¹² The OWRD cannot sign an agreement that violates the law. This is relevant both to this issue and to others, such as the apparent agreement to transfer water claims instream prior to the conclusion of the Adjudication. In addition, OWRD cannot remedy violations or arguments to do something contrary to law by changing the law after the agreement is signed. UBC is deprived of due process by being subjected to an order in which the ALJ approves of OWRD’s violations of Oregon law and agreement to take actions that violate the law.

The claims in this case involve water levels on the Klamath River, which is not on the former reservation lands. I have earlier noted that Claimants must prove their case—that is, they must establish a right, both legally and factually, to affect the water off the former reservation lands. They must be given the chance to do so. The matter will not be summarily dismissed..

Amended Order at 25 (emphasis added).

Based on the foregoing, it is clear that ALJ Maurice Russell believed that Claimants were required to meet their burden of proof by presenting evidence at the hearing before the Office of Administrative Hearings could determine the validity of their claims. Now, the ALJ has made a judgment that the Claimants' claims are valid by approving a Stipulation that protects the claims. The ALJ has done so without a hearing or otherwise requiring Claimants to present evidence to overcome the initial ruling that the claims may not be valid under any scenario. This issue would perhaps be irrelevant if the UBC had been made party to the Stipulation or if the ALJ had treated the Stipulation as a motion to reconsider its legal ruling, giving the parties an opportunity to provide input on the legal issue. Instead, the Order proceeds to recognize and validates claims which the UBC contests and which the ALJ ruled could not be determined to be valid without an evidentiary hearing. This apparent disregard for a prior legal ruling is further evidence that this process has not met minimum constitutional standards.

Due process is lacking. The Order should be vacated.

7. The Order impacts other Adjudication cases in which UBC and OWRD have filed exceptions.

In approving the Stipulation, the Order approves provisions from the Stipulation that require OWRD, Claimants, and KPWU to manage water claimed in three other Adjudication cases in a manner that conflicts with pending exceptions filed in those cases.

While an exception does not control the outcome of a case, the problem here is that these exceptions are still pending and the Order effectively overlooks that fact in approving the Stipulation. As noted above, Appendix E-1 sets diversion limitations by time and amount for areas involved in Cases 003, 274, and 275 in order to put water instream for the benefit of the fish, and presumably to satisfy Claimants' instream claims. Appendix E-1 also requires that water be delivered to the Refuges and KPNV in amounts that UBC found objectionable (and filed exceptions on) in other, pending Adjudication cases.

UBC contested and then filed exceptions objecting to a proposed order to allow the Bureau of Reclamation to deliver project water (water developed through the Klamath Project) to the Refuges. They did so in Case 003, where they filed a contested case, went through a hearing, received a proposed order, and filed exceptions.

UBC also filed contests, participated in a hearing, and filed exceptions to the proposed orders in Cases 274 and 275.

The Order seemingly ignores these other proceedings and pending exceptions, and requires the parties to the Stipulation to follow the terms of Appendix E-1. This raises a number of due process issues. First, if UBC is not given the right to file objections to the Order, it will be deprived of the ability to defend its legally filed contests on the claims filed in Cases 003, 274, and 275. As it currently stands, it is entirely unclear whether UBC will be given such a right because the issue is not addressed in the Order. Next, even if UBC is given the right to file exceptions to the Order (perhaps as part of a proposed order in Case 282), UBC will be forced to defend its contests twice. And, it will be forced to do so without the benefit of any discovery concerning the basis for the "revised" claim amounts outlined in Appendix E-1. This is an undue and unfair burden, and a fundamental violation of due process. UBC should not be forced to try

its contests twice and should not be forced to try any case absent discovery of the basis of the opposing party's claims.

To summarize, the Order does not clearly protect UBC's rights to protect its contests to the claims made and exceptions filed on the proposed orders – all of which are put at issue by the Stipulation and Order – in Cases 003, 274, and 275. Although the Order could be revised to afford UBC an opportunity to protect its contests and exceptions, doing so would force UBC to defend its contests without any opportunity for discovery or trial and would force UBC to try its contests a second time. There is no question that putting UBC in this position is a fundamental violation of its due process rights under the U.S. Constitution and the Oregon Constitution. The only way to remedy this violation is to vacate the Order.

CONCLUSION

In summary, the effect of the Order is to make binding determinations as to the Adjudication without providing the UBC the opportunity to be heard at a meaningful time and in a meaningful manner. The Order is also contrary to law in a number of respects and approves a Stipulation that was arrived at in violation of law. Furthermore, the Order gives UBC no opportunity to object to the Stipulations and jeopardizes UBC's rights as a party to other proceedings. Quite clearly, UBC has been deprived due process of law as a result of the issuance of the Order and under the circumstances at hand. UBC should be afforded the opportunity to litigate its contests consistent with federal and state constitutional guarantees.

///

///

///

For all of these reasons, and those detailed above, UBC respectfully requests that the Order be vacated in its entirety.

DATED: August 18, 2009.

DUNN CARNEY ALLEN HIGGINS AND TONGUE, LLP

/s/ Elizabeth C. Knight

Elizabeth E. Howard, OSB No. 01295

EEH@dunn-carney.com

Elizabeth C. Knight, OSB No. 99245

ECK@dunn-carney.com

Dunn Carney Allen Higgins & Tongue LLP

851 SW Sixth Ave., Suite 1500

Portland, OR 97204

Phone: 503-224-6440

Fax: 503-224-7324