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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF KLAMATH

*In Re*

*WATERS OF THE KLAMATH RIVER BASIN.*

Case No. \_\_\_\_\_

STATE'S MOTION FOR SETTING AN INITIAL  
HEARING DATE UNDER ORS 539.130

ORS 539.130  
ORS 539.150

**ORS 20.140 - State fees deferred at filing**

Under Oregon's General Stream Adjudication Statutes, Dwight French (Adjudicator),  
under the authority delegated to him by the Director of the Oregon Water Resources Department  
(OWRD or Department) respectfully MOVES as follows:

First, pursuant to ORS 539.130(2), the Adjudicator respectfully requests that the Court  
set a date for the initial hearing on the Adjudicator's findings of fact and an order of  
determination determining and establishing the several rights to the waters of the Klamath River  
and its tributaries, which findings and order are filed with this Court along with the record of the  
decision. The Adjudicator further requests that the date and time for this ORS 539.130(2)  
hearing ("initial hearing") be no less than six months from the date the order setting the initial  
hearing is signed.

Second, pursuant to ORS 539.130(2), the Adjudicator respectfully requests that the Clerk  
of the Court forward a certified copy of the order setting the initial hearing date to the  
Adjudicator through the undersigned counsel, pursuant to ORS 539.130(2).

1 Third, pursuant to ORS 539.150, the Adjudicator respectfully requests that the Court  
2 order that all exceptions to the findings of fact and an order of determination be filed by the date  
3 of the initial hearing.

4 Fourth, the Adjudicator respectfully requests that the Court order that all exceptions filed  
5 with the Court be served on all persons or entities who, during the administrative phase, were  
6 claimants or contestants to the particular water rights claim excepted to, as well as upon counsel  
7 for the Adjudicator.

8 This motion is supported by the points and authorities that follow, and by the declaration  
9 of Adjudicator Dwight French. A proposed form of order is also attached.

10 **POINTS AND AUTHORITIES**

11 **I. Introduction**

12 This matter comes before the Court for circuit court review of a general stream  
13 adjudication (“Adjudication”) of the Klamath River and its tributaries (“Klamath Basin”).  
14 Oregon’s general stream adjudication statutes (“Adjudication Statutes”) are set out at ORS  
15 539.005 – 539.220. The Adjudication Statutes establish the substantive and procedural  
16 requirements for general stream adjudications in Oregon. *See* ORS 539.005 – 539.220; *See also*  
17 ORCP 1 (the ORCP “govern...*except where a different procedure is specified* by statute or rule”)  
18 (emphasis added).

19 **II. General Stream Adjudications in Oregon**

20 Under the Adjudication Statutes, a general stream adjudication involves first, an  
21 administrative determination phase and, second a judicial review phase. The order being sought  
22 with this motion is designed to help initiate the judicial review phase for the Klamath Basin  
23 Adjudication.

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1                   **A.     The administrative determination phase for the Klamath Basin**  
2                   **Adjudication has come to a close.**

3                   The administrative phase involves the filing of water rights claims, an investigation  
4                   pertaining to those claims by the OWRD, the taking of evidence, an opportunity for parties to file  
5                   contests to claims, and contested case hearings on those contests. At the conclusion of this  
6                   administrative process, the Director (or, as in this case, his delegate, the Adjudicator<sup>1</sup>) issues  
7                   what the Adjudication Statutes call “findings of fact and an order of determination determining  
8                   and establishing the several rights to the waters of the stream” (FOD). ORS 539.130(1).

9                   On March 7, 2013, after a many-years-long administrative process, the Adjudicator will  
10                  enter the FOD into the records of the Department. This action concludes the administrative  
11                  phase (French Decl, ¶ 3).

12                  Under the Adjudication Statutes, “[t]he determination of the department shall be in full  
13                  force and effect from the date of its entry in the records of the department, unless and until its  
14                  operation shall be stayed by a stay bond.” ORS 539.130(4).

15                                 At any time after the determination of the Water Resources Director has  
16                                 been entered . . . by filing a bond or an irrevocable letter of credit. . . in the circuit  
17                                 court wherein the determination is pending, in such amount as the judge may  
18                                 prescribe, conditioned that the party will pay all damages that may accrue by  
19                                 reason of the determination not being enforced.

20                  ORS 539.180. That is, the Adjudicator’s FOD is in effect and enforceable unless and until it is  
21                  stayed through the stay bond procedure set out in ORS 539.180, or until this Court’s decree is  
22                  issued pursuant to ORS 539.150.

23                   **B.     The judicial review phase is beginning.**

24                  When the FOD is filed with the Court, the Klamath Basin Adjudication enters the judicial  
25                  phase. In order to initiate the judicial phase the Adjudicator must take certain actions.  
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<sup>1</sup> As allowed by ORS 536.037(3), the Director delegated the authority to adjudicate the water rights of the Klamath Basin to an OWRD employee, Dwight French (“the Adjudicator”). Declaration of Dwight French, (French Decl.), ¶ 2. A copy of the delegation order is attached as Exhibit 1 to the French Decl.

1           1.       Filing the order of determination with the Court and county clerks. To  
2 initiate the judicial phase, the Adjudicator must file with the clerk of the circuit court a certified  
3 copy of “[t]he original evidence gathered by the director, and certified copies of the observations  
4 and measurements and maps of record, in connection with the determination [“the record”]. . .  
5 together with a copy of the order of determination and findings of fact of the director” ORS  
6 539.130(1). The Director also files “[a] certified copy of the order of determination and findings  
7 . . . with the county clerk of every other county in which the stream or any portion of a tributary  
8 is situated.” *Id.*

9           Under the Adjudication Statutes, no further service of the final order of determination is  
10 required. However, in this case, in order to facilitate review of the FOD by the numerous parties,  
11 the Adjudicator will be mailing a copy of the FOD to the parties to the Adjudication. On or  
12 before March 11, 2013 the Adjudicator will cause to be mailed a DVD copy of the FOD, along  
13 with a copy of this motion and proposed order setting a hearing date, to all persons, entities and  
14 attorneys on the service list maintained during the administrative phase of the Adjudication  
15 (French Decl, ¶¶ 6-7; Ex. 2). The FOD will also be made available on the Department’s website  
16 (*id.* ¶ 8).

17           2.       Setting a date for an initial hearing on the determination. After filing the  
18 FOD with the Court, the next step is for the Adjudicator to “procure an order from the court . . .  
19 fixing the time at which the determination shall be heard in the court.” ORS 539.130(2). The  
20 present motion seeks to “procure” the order setting the date and time for the ORS 539.130  
21 hearing (“initial hearing”).

22           The Adjudicator requests that the initial hearing be set at least six months from the date  
23 of the order. The Adjudication Statutes require that the hearing be at least “40 days subsequent  
24 to the date of the order [setting the hearing].” ORS 539.130(2). The period between the filing of  
25 the FOD and the initial hearing is designed to give the parties a chance to review the

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1 determination and decide whether to file “exceptions.” ORS 539.150(1). Given the length of the  
2 Klamath Basin FOD, and the number of parties and claims in this matter, allowing six months is  
3 reasonable. This period of time is consistent with the amount of time that OWRD allowed for  
4 potential Adjudication contestants to file contests to claims after OWRD provided the statutorily  
5 required notice of an opportunity to inspect the claims (French Decl, ¶ 10).

6           3.       Service of the order setting ORS 539.130 hearing date. After the order  
7 setting a hearing date is signed by the Court, the statute directs the Clerk of the Court to “forward  
8 a certified copy” of the order to the Director (in this case, the Adjudicator). ORS 539.130(2).  
9 The Adjudicator is required to notify “each claimant or owner who has appeared in the  
10 proceeding of the time and place for hearing.” ORS 539.130(3). Following this notification, the  
11 Adjudicator will file proof of service with the circuit court. *Id.*

12           Thus, in order to satisfy the requirements of ORS 539.130(3), the Adjudicator requests an  
13 order directing the clerk to “forward a certified copy” of the order setting a hearing date to his  
14 counsel at the Attorney General’s office.

15           4.       Filing exceptions to the final order. ORS 539.150(1) provides that “at *any*  
16 *time prior to*” the date set for the initial hearing, “any party or parties jointly interested may file  
17 [with the Court] exceptions in writing to the findings and order of determination, or any part  
18 thereof[.]” ORS 539.150(1) (emphasis added). These exceptions must “state with reasonable  
19 certainty the grounds” for the exception, and must “specify the particular paragraphs or parts of  
20 the findings and order excepted to.” ORS 539.150(1). Thus, under the statutes, the date set for  
21 the initial hearing under ORS 539.130(1) is also the deadline for parties to file exceptions to the  
22 final order of determination. In the interests of clarity, the Adjudicator seeks an order stating that  
23 the initial hearing date and time is also the deadline for filing exceptions.

24           Moreover, the Adjudicator seeks an order that each party’s exceptions be served on  
25 counsel for the Adjudicator, as well as upon all persons or entities who, during the administrative

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1 phase, were claimants or contestants to the particular water rights claim excepted to. *See* ORS  
2 539.150(2) (requiring service on claimants to a particular water right). Such an order balances  
3 the need for appropriate notice to interested parties against the burden of serving each and every  
4 party to this Adjudication.

5           5.       Hearing on the determination (ORS 539.150(2) hearing). If no exceptions  
6 have been filed by the date of the ORS 539.130 hearing, the Court is directed to “enter a  
7 judgment affirming the [FOD]” at that hearing. ORS 539.150(3). However, if exceptions are  
8 filed, then the ORS 539.130 hearing is effectively a scheduling hearing. Under the statute, where  
9 exceptions have been filed, the Court’s function at initial hearing is to “fix a time, not less than  
10 30 days thereafter . . . when a hearing will be had upon the exceptions.” ORS 539.150(3).

11           Thus, the initial hearing is not a substantive hearing on the merits of any timely filed  
12 exceptions. The Adjudicator anticipates that this hearing will provide the Court and the parties  
13 with an opportunity to discuss a number of issues, including but not limited to:

- 14           (1) Procedural issues such as service of filings and efficient substitution of parties; and  
15           (2) A schedule for briefing and resolving (if necessary) preliminary legal questions  
16 regarding proper parties, the scope of the Court’s review, and issues regarding the admission of  
17 additional evidence, or other scheduling or organizational issues.

18           Given the number of parties and issues that may need to be involved, OWRD requests  
19 three hours for this initial ORS 539.130(2) hearing.

20           **III. Conclusion**

21           In sum, pursuant to the Adjudication Statutes, and in order to initiate and facilitate the  
22 judicial review phase of the Klamath Basin Adjudication, the Adjudicator requests an order that  
23 accomplishes the following four things:

- 24           (1) Sets an initial hearing on the FOD at least six months after the date of the order;

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1 (2) Directs the clerk of the Court to forward a certified copy of the signed order setting  
2 this hearing to counsel for the Adjudicator;

3 (3) Directs that all exceptions to the FOD be filed by the date and time of the initial  
4 hearing; and

5 (4) Directs that all such exceptions be served on counsel for the Adjudicator as well as on  
6 all persons or entities who, during the administrative phase, were claimants or contestants to the  
7 particular water rights claim excepted to.

8 DATED February 28, 2013.

9 Respectfully submitted,

10 ELLEN F. ROSENBLUM  
11 Attorney General

12 *June Staley for OSB# 043944*

13 DARSEE STALEY #873511  
14 Senior Assistant Attorney General  
15 SARAH WESTON #085083  
16 Assistant Attorneys General  
17 Trial Attorneys  
18 Tel (971) 673-1880  
19 Fax (971) 673-5000  
20 Darsee.Staley@doj.state.or.us  
21 Sarah.Weston@doj.state.or.us  
22 Of Attorneys for the Oregon Water Resources  
23 Department.

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