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10
11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF OREGON, EUGENE DIVISION**

13 **In re: WATERS OF THE KLAMATH**
14 **RIVER BASIN**

15 KLAMATH IRRIGATION DISTRICT,

16 Movant,

17 v.

18 UNITED STATES BUREAU OF
19 RECLAMATION,

20 Respondent.

Case Nos. 1:21-cv-00504-AA

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF MOTION TO REMAND
MOTION FOR PRELIMINARY
INJUNCTION TO STATE COURT**

21
22 Pursuant to Rule 201 of the Federal Rules of Evidence, Movant Klamath Irrigation
23 District (“KID”) respectfully requests this Court take judicial notice of the following document in
24 support of its Motion for Remand.

25 **LAW AND ARGUMENT**

26 A court may take judicial notice of a fact that is “capable of accurate and ready determination
27 by resort to sources whose accuracy cannot reasonably be questioned.” Federal Rules of
28 Evidence 201(b)(2). “[U]nder Fed.R.Evid. 201, a court may take judicial notice of “matters of public

1 record.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citing *Mack v. South Bay Beer*
2 *Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). Documents filed in other court cases are typically
3 appropriate for judicial notice. See *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6
4 (9th Cir. 2006) (“We may take judicial notice of court filings and other matters of public record.”); *In re*
5 *Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1025 (N.D. Cal. 2014) (“Courts have taken judicial notice of
6 amicus briefs that relate to the matters at issue.”); *Dauven v. U.S. Bancorp*, 390 F. Supp. 3d 1262, 1269
7 (D. Or. 2019) (“A court may take judicial notice of complaints and briefs filed in another case to
8 determine what issues were before the court.”). Reclamation filed the accompanying amicus brief in
9 the Oregon Court of Appeals, specifically arguing the Klamath County Circuit Court had exclusive
10 jurisdiction over all matters related to the Klamath Adjudication. The fact of this brief’s filing and the
11 arguments set forth therein are not reasonably subject to dispute and are proper subjects of judicial
12 notice:

- 13 1. United States’ Brief on the Merits as *Amicus Curiae* in Support of Appellants Oregon
14 Water Resources Department and Klamath Tribes, Case No. CA A167380, Oregon Court
15 of Appeals, filed December 7, 2018. A true and correct copy of this document is attached
16 as **Exhibit A** to this Request for Judicial Notice.

17 Dated: April 20, 2021.

WANGER JONES HELSLEY PC

18
19 By: /s/ Christopher A. Lisieski
20 John P. Kinsey
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22 Attorneys for Movant KLAMATH
23 IRRIGATION DISTRICT
24
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26
27
28

REQUEST FOR JUDICIAL
NOTICE
Exhibit A

IN THE COURT OF APPEALS OF THE STATE OF OREGON

TPC, LLC, an Oregon limited liability company, and TAYLOR A. HYDE and JOHN L. HYDE, as general partners of the Hyde Family Limited Partnership,

Petitioners-Respondents,

v.

OREGON WATER RESOURCES DEPARTMENT and DANETTE WATSON, in her official capacity as District #17 Watermaster,

Defendants-Respondents,

and

KLAMATH TRIBES,

Intervenor-Appellant.

Marion County Circuit Court
Nos. 16CV27427, 17CV26962

CA A167380

**United States' Brief on
the Merits as *Amicus
Curiae* in Support of
Appellants Oregon Water
Resources Department
and Klamath Tribes**

TPC, LLC, an Oregon limited liability company, and TAYLOR A. HYDE and JOHN L. HYDE, as general partners of the Hyde Family Limited Partnership,

Respondents-Respondents,

v.

OREGON WATER RESOURCES DEPARTMENT and DANETTE WATSON, in her official capacity as District #17 Watermaster,

Respondents-Appellants,

and

KLAMATH TRIBES,

Intervenor.

December 2018

On Appeal from the Judgment of the Circuit Court for Marion
County, Honorable THOMAS M. HART, Judge

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December 2018

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GLOSSARY

ACFFOD	Klamath Basin Adjudication Amended & Corrected Findings of Fact & Order of Determination
APA	Administrative Procedure Act
OWRD	Oregon Water Resources Department

The United States submits this brief to accompany its motion for leave to appear as *amicus curiae*, also filed today but submitted separately as required by Oregon Rule of Appellate Procedure 16.15(5)(c)(i).

INTRODUCTION

The United States holds water rights in trust for Intervenor the Klamath Tribes. Those rights entitle the Tribes to the water necessary to support their treaty-reserved rights to hunt, fish, trap, and gather in the Klamath Marsh. The rights have been assigned a priority of “time immemorial,” and they are the most senior water rights in the Klamath Basin.

Respondents the Hydes and TPC, LLC (collectively, “the Hydes”) also hold water rights in the Klamath Basin: they have a right to draw irrigation water from the Williamson River, upstream of the Klamath Marsh. The Hydes’ water rights are junior to those of the Tribes.

The Hydes, the Klamath Tribes, and the United States (as trustee for the Tribes) dispute the extent and scope of each other’s water rights. Those disputes—and all such disputes in the basin—are being heard and resolved in the Klamath Basin Adjudication, a

general stream adjudication authorized under chapter 539 of Oregon's codified laws. Or. Rev. Stat. ("ORS") Ch. 539. The parties have filed their claims and presented their evidence in that adjudication, and the adjudicator has made its findings and determinations, which are set out in the Klamath Basin Adjudication Amended & Corrected Findings of Fact & Order of Determination ("ACFFOD"). Under express statutory provision, the determinations in the ACFFOD are subject to judicial review in the Klamath County Circuit Court. ORS 539.150. While that review is pending, such determinations are in "full force and effect," and diversions of water within the basin must be "made in accordance with" the ACFFOD. ORS 539.130(4), 539.170.

The ACFFOD defines these Tribal water rights as a specific elevation of water at a specific gage in the Klamath Marsh. In 2015 and 2016, water levels in the Klamath Marsh dropped below the level set by the ACFFOD. The Oregon Water Resources Department ("OWRD"), finding that the Tribes' senior water right was not being satisfied, enforced the ACFFOD by ordering the Hydes (and all other junior water users) to stop drawing water from the Williamson River.

The Hydes objected. But instead of presenting their objections to the Klamath County Circuit Court or seeking a stay of the ACFFOD under ORS 539.180, they asked a different court, the Marion County Circuit Court, to overturn OWRD's order. That was an impermissible collateral attack on the ACFFOD, which is barred both by ORS chapters 536 and 539 and by the common law doctrine of prior exclusive jurisdiction. Moreover, even if the Marion County Circuit Court had concurrent jurisdiction over the Hydes' claims, it should have abstained from exercising that jurisdiction.

Finally, to the extent that this Court reaches the merits of the Hydes' claims, those claims should be rejected because they are based on the "Hyde Agreement." That Agreement, however, was merely a stipulation between the Hydes, the United States, the Klamath Tribes, and OWRD to make a particular recommendation to the adjudicator in the Klamath Basin Adjudication with regard to the adjudicator's determination of a claimed tribal water right; the agreement was not itself an enforceable water rotation agreement or a final OWRD order.

For these reasons and all the reasons set out below, the Marion County Circuit Court's judgment should be reversed.

INTERESTS OF AMICUS CURIAE

The United States submits this *amicus curiae* brief both as the trustee for these tribal water rights and as a signatory to the Hyde Agreement.

ARGUMENT

- I. **The Marion County Circuit Court should not have adjudicated the Hydes' claims.**
 - A. **The Marion County Circuit Court lacked subject matter jurisdiction over the Hydes' claims.**
 1. **The Hydes' claims are an impermissible collateral attack on determinations made in the Klamath Basin Adjudication.**

For two reasons, the Hydes' suit in Marion County Circuit Court is an impermissible collateral attack on the ACFFOD and not a legitimate challenge to an OWRD order.

First, the Hydes' claims in this suit arise directly out of the Klamath Basin Adjudication. The claims are based entirely on a stipulation known as the "Hyde Agreement." That Agreement was, pursuant to its terms, submitted as a recommendation to the adjudicator in the Klamath Basin Adjudication for resolving certain disputes between the Hydes, the Klamath Tribes, and the United States.

Second, the Hydes' claims raise the same substantive issues that have been and continue to be the subject of the Klamath Basin Adjudication. Under the laws governing the conduct of the Klamath Basin Adjudication, those claims were presented initially to the adjudicator, who made the findings and determinations set out in the ACFFOD, and now those claims are pending before the Klamath County Circuit Court for judicial review. The Hydes' core argument is that the tribal water right claimed by the United States on behalf of the Klamath Tribes should be subject to conditions described in the Hyde Agreement. But as we explain below, the adjudicator rejected that recommendation in the ACFFOD. In the Klamath County Circuit Court, the Hydes filed "exceptions" to the ACFFOD, arguing that it should have included those conditions, and the Hydes' "exceptions" are now pending for resolution by that court.

The Hydes have offered no other objection to OWRD's order except that it follows the ACFFOD and not the Hyde Agreement. Because that argument has so far been rejected in the Klamath Basin Adjudication, they have gone outside of the Adjudication to ask a different court to force OWRD to implement their interpretation of the Agreement. But that effort is plainly a collateral attack on the

ACFFOD and, as we demonstrate below, is impermissible for several reasons.

2. Under Oregon law, the Klamath County Circuit Court has exclusive jurisdiction over challenges to determinations made in the Klamath Basin Adjudication.

The Marion County Circuit Court lacked jurisdiction here because Oregon law gives exclusive jurisdiction over challenges to the ACFFOD to the Klamath County Circuit Court. Specifically, ORS chapter 539 creates a single, unified process for carrying out a general stream adjudication in this State. ORS 539.005(1). The Klamath Basin Adjudication is a general stream adjudication. Trial Court File (“TCF”) # 672 (stating that the “adjudication is a proceeding . . . pursuant to [ORS] Chapter 539.”).

Chapter 539 also defines the process for judicial review of the ACFFOD, and it gives exclusive jurisdiction over that review to the Klamath County Circuit Court. Chapter 539 required OWRD to submit all of the “original evidence gathered by the director . . . in connection” with the ACFFOD to that court, which OWRD has done. *See* ORS 539.130(1). It allowed any party to file “exceptions” to the ACFFOD with the Klamath County Circuit Court, which the Hydes

(and many others) have done. *See id.* 539.150(1). And it now requires that court to hold a hearing and either affirm or modify the ACFFOD “as the court considers proper.” *Id.* 539.150(4). This process, once complete (and after any appeals to this Court are resolved), will be “conclusive as to all prior rights and the rights of all existing claimants” in the Klamath River Basin in Oregon. *Id.* 539.200.

Thus, under chapter 539, the Klamath County Circuit Court has exclusive jurisdiction to hear the Hydes’ challenges to the ACFFOD, including the collateral attacks at issue here. Indeed, the Hydes’ “exceptions” involving the Hyde Agreement are already pending before that court.

The Hydes challenged an order issued by OWRD. But while ORS chapter 536.075 allows any party affected by such an order to “appeal the order to the Circuit Court of Marion County,” ORS 536.075(1), chapter 536.075(7) expressly limits that appeal right by stating that it does not apply “to any proceeding under . . . ORS chapter 539.” Thus, chapter 536.075 does not give the Marion County Circuit Court jurisdiction to hear a collateral attack on the ACFFOD; to the contrary, it expressly prohibits such a challenge. Oregon law ensures that the Hydes’ challenges to the ACFFOD will be heard, but

it also ensures that such challenges must be heard in Klamath County Circuit Court under the process created by chapter 539.¹

Besides this jurisdictional defect, the fact that this collateral attack on the ACFFOD is governed by chapter 539—and not by chapter 536—is also significant because the two chapters impose different requirements for obtaining a stay. Under chapter 536, the mere filing of the Hydes’ petitions for judicial review automatically stayed OWRD’s order: the Hydes were not required to post any bond or to make any particular showing of harm. ORS 536.075(5) (stating that OWRD’s orders are automatically stayed unless the agency determines, in writing, that “substantial public harm will result if the order is stayed”). In contrast, chapter 539 expressly states that the ACFFOD “shall be in full force and effect,” and that diversions of

¹ Indeed, the statute’s prohibition against interference with OWRD’s ORS chapter 539 proceedings is broad. OWRD takes action to enforce a general stream adjudication’s final agency orders pursuant to ORS 539.130(4) and ORS 539.170, making such actions “proceeding[s] under . . . ORS chapter 539” and not reviewable under ORS 536.075. *See also* ORS 536.690 (providing that for groundwater adjudications, enforcement actions of OWRD shall be in “*proceedings . . . as nearly as possible in the same manner as provided in ORS [539.130(4)], . . . 539.170, [and] 539.180*” and similarly not reviewable under ORS 536.075 (emphasis added)). Nevertheless, here the Hydes collaterally attack the ACFFOD itself, and there is no need to further define the extent of ORS 536.075(7)’s prohibition.

water “shall be made in accordance with” the ACFFOD “unless and until its operation shall be stayed by a stay bond.” ORS 539.130(4), 539.170.

Thus, in order to obtain a stay under chapter 539, the Hydes would have had to file a stay bond “in such amount as the judge may prescribe,” and that stay would have issued only on the condition that the Hydes “pay all damages that may accrue by reason of the determination not being enforced.” *Id.* 539.180. Then, and only then, would the clerk of the Klamath County Circuit Court “transmit to [OWRD] a certified copy of the bond . . . , which shall be recorded in the department records,” and OWRD would “give notice thereof to the watermaster of the proper district,” suspending enforcement of the ACFFOD. *Id.*

None of these things happened here. The Hydes posted no bond, the stay was not conditioned on the Hydes’ paying damages, and no notice was given to OWRD or to the watermaster. (In fact, no notice was given to the United States or the Tribes that enforcement of the water right had been stayed.) The Hydes were able to effectively stay the operation of the ACFFOD without meeting any of the requirements of chapter 539. In so doing, they circumvented the

express requirements of Oregon law and thereby deprived the Klamath Tribes of both the water—and the legal process—to which they are entitled.

The Supreme Court of Nevada disallowed a similar collateral attack under a nearly identical statutory scheme. *In re Water Rights in Humboldt River Stream System*, 246 P. 692 (Nev. 1926). In that case, the Humboldt River was subject to a general stream adjudication, and a party brought a new suit in a new court in an effort to obtain a stay of the water rights that had already been determined in an ongoing adjudication. *Id.* at 694. The Nevada Supreme Court rejected that collateral attack and held instead that no court had jurisdiction to adjudicate a stay of those water rights except the original adjudication court. *Id.* at 693. The supreme court concluded that because “the determination of the very question presented” in the new case was “already before the court” in the general stream adjudication, “it would be a singular thing if a party could ignore such method of review and resort to a method of procedure recognized in general equity practice.” *Id.* at 695. That, however, is exactly what happened here: the Hydes were allowed to “ignore” the detailed and carefully constructed requirements of

chapter 539 and obtain judicial review of the ACFFOD under other, inapplicable provisions of law instead.

Moreover, the Hydes cannot avoid the requirements of chapter 539 simply by citing the broad judicial review provisions of the Oregon Administrative Procedures Act (“Oregon APA”). *See* ORS 183.484. While this Court has not yet addressed the interaction of chapter 539 and the Oregon APA, it has repeatedly held that judicial review of OWRD’s orders is controlled by the more specific and more restrictive provisions set out in chapter 536, notwithstanding the expansive language set out in the Oregon APA.

In *Waterwatch of Oregon, Inc. v. OWRD*, 316 P.3d 330 (Or. Ct. App. 2013), for example, this Court recognized that the Oregon APA only governed judicial review of an OWRD order (in a contested case) “*except as otherwise specified in ORS 536.075(4), (5), and (6) of the Water Rights Act.*” *Id.* at 337 (emphasis added). And this Court held that judicial review of OWRD orders is governed by the stay provisions of chapter 536.075(5)—staying enforcement of an OWRD order once a petition for review is filed unless OWRD determines that “substantial public harm will result,” ORS 536.075(5)—not by the stay provisions of the Oregon APA, which require a petitioner to

show at least “irreparable injury” to obtain a stay, *id.* 183.482(3)(a). *Waterwatch*, 316 P.3d at 337 n.15. The Court reached the same conclusion in *Pete’s Mountain Homeowners Association v. OWRD*, 238 P.3d 395, 399, 400 n.2 (Or. Ct. App. 2010), where it again held that chapter 536 governs judicial review of OWRD orders in contested cases on water rights applications and not the Oregon APA (by expressly refusing to apply the Oregon APA’s definition of “party”).

Thus, the Oregon APA is not an independent source of jurisdiction that allows the Hydes to skirt the requirements of chapters 536 and 539. Instead, the law must be read so that the more-specific provisions of chapters 536 and 539 are given full effect and control judicial review of OWRD orders and the ACFFOD, respectively.² Here, the Legislative Assembly’s intent is clear: no order issued by OWRD would be reviewable except subject to the restrictions set out in chapter 536.075, and no determination like the

² See ORS 174.010 (instructing the Oregon courts that, “where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all”), 174.020(2) (“When a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.”).

ACFFOD made in a general stream adjudication would be subject to judicial review except under the proceedings defined in chapter 539.

The Hydes' contrary interpretation of the law would reduce important provisions of chapters 536 and 539 to mere nullities. The Oregon APA, for example, allows judicial review of "any agency action expressed orally or in writing directed to a named person or named persons." ORS 183.310 (definition of "order"). Chapter 536, in contrast, only allows judicial review of a "final" OWRD order that is in writing and that states on its first page that it is "a final order other than contested case, that the order is subject to judicial review under ORS 183.484, and that any petition for judicial review of the order must be filed within the time specified by ORS 183.484(2)." *Id.* 536.075(1). If a party could circumvent that limitation and obtain judicial review of "non-final" OWRD orders simply by citing the Oregon APA, it would read these requirements out of the law and, as this Court found, "thwart" the intent of the legislature. *See Waterwatch*, 316 P.3d at 337.

In short, if the Hydes believe that OWRD has improperly regulated them off the Williamson River, they may seek judicial review of the ACFFOD in the Klamath County Circuit Court, and

they may even suspend the operation of the ACFFOD by submitting an appropriate stay bond to that court. But the Hydes may not bring a collateral attack on the ACFFOD under chapter 536 simply so that they can have their claims heard by a different court and avoid the rigorous bond requirements imposed by chapter 539.

For all these reasons, the Marion County Circuit Court lacked jurisdiction over the Hydes' claims.

3. The Klamath County Circuit Court also had exclusive jurisdiction over the Hydes' claims under the doctrine of prior exclusive jurisdiction.

In addition, even if the relevant statutes had granted concurrent jurisdiction over the Hydes' claims to the Marion County Circuit Court (and it did not), that court lost its jurisdiction under the common law doctrine of prior exclusive jurisdiction.

Prior exclusive jurisdiction is a longstanding common law doctrine that has been recognized by both the Oregon courts and the United States Supreme Court. *See, e.g., Palm v. Smith*, 195 P.2d 708, 710–11 (Or. 1948); *Matlock v. Matlock*, 170 P. 528, 529–30 (Or. 1918); *Ex parte Bowers*, 153 P. 412, 414 (Or. 1915); *see also Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *Farmers'*

Loan & Trust Co. v. Lake Street Elevated Railroad Co., 177 U.S. 51, 61 (1900). The doctrine holds that “[b]etween courts of concurrent jurisdiction, the court first acquiring jurisdiction will retain it, and will not be interfered with by another court.” *Ex parte Bowers*, 153 P. at 414; *see also Palm*, 195 P.2d at 710–11 (“It is well settled that as between courts of concurrent jurisdiction, the court first acquiring jurisdiction will retain it until final disposition of the issue under consideration has been made.”). This principle “is essential to the proper and orderly administration of the law and in order to avoid conflict in rendition of final decrees.” *Matlock*, 170 P. at 530. It is enforced “to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process.” *Id.* The doctrine, however, is not merely a matter of comity and judicial efficiency, but has also been held to be a “mandatory jurisdictional limitation.” *State Engineer v. South Fork Band*, 339 F.3d 804, 810 (9th Cir. 2003).

Although the doctrine originated in actions *in rem*, courts look “behind the form of the action to the gravamen of a complaint and the nature of the right sued on” and, as a result, have repeatedly applied the doctrine in the context of litigation concerning water rights. *State Engineer*, 339 F.3d at 810 (cleaned up); *see also United*

States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1014 (9th Cir. 1999) (applying prior exclusive jurisdiction to hold that “water adjudications are more in the nature of *in rem* proceedings.”); *cf.* *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817–20 (1976) (discussing prior exclusive jurisdiction and ultimately dismissing concurrent federal proceedings in water rights dispute under related abstention doctrine).

Here, the Klamath County Circuit Court has properly assumed jurisdiction over the water rights claims in the Klamath Basin Adjudication, which includes the dispute between the Hydes and the Klamath Tribes over the Hyde Agreement, and it assumed that jurisdiction first. By doing so, it withdrew those issues from any possible jurisdiction of other courts of concurrent jurisdiction “as effectually as if the property had been entirely removed to the territory of another sovereignty.” *State Engineer*, 339 F.3d at 809. Two courts cannot have jurisdiction to decide these issues at the same time. Thus, even if the Marion County Circuit Court would otherwise have had concurrent jurisdiction here under Oregon law (which it did not), the doctrine of prior exclusive jurisdiction would

have deprived it of that jurisdiction, which is now held exclusively by the Klamath County Circuit Court.

B. Even if the Marion County Circuit Court had concurrent jurisdiction, it should have abstained from exercising that jurisdiction.

If the Marion County Circuit Court did have jurisdiction, it should have abstained from exercising that jurisdiction because it necessarily interferes with the Klamath Basin Adjudication and creates the kind of duplicative, piecemeal litigation that a general stream adjudication is intended to eliminate. That conclusion is supported by the United States Supreme Court’s decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), which first articulated what is now known as “*Colorado River*” abstention.

In that case, the Supreme Court affirmed the dismissal of a second federal lawsuit involving Colorado River water rights even though it was undisputed that both courts properly had concurrent jurisdiction. The Court did so in order to “avoid duplicative litigation” and ensure “wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.” *Id.* (cleaned up). To assess whether abstention is

appropriate, a court should consider “the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which the jurisdiction was obtained by the concurrent forums.” *Id.* at 818 (citation omitted). And the Court found that such abstention was especially important in cases involving water rights because it is federal policy to avoid “piecemeal adjudication of water rights in a river system.” *Id.* at 819.

Here, the same factors show that even if the Marion County Circuit Court had jurisdiction, it should have abstained from exercising that jurisdiction. It is the policy of the State of Oregon, like the United States, to avoid “piecemeal adjudication of water rights in a river system,” which is why the Oregon legislature created the process for a general stream adjudication set out in chapter 539. The Klamath County Circuit Court took jurisdiction over the issues raised by the Hydres first because the Klamath Basin Adjudication has been pending before that court since 2013. Allowing these claims to simultaneously proceed in the Marion County Circuit Court creates duplicative, piecemeal litigation that wastes the resources of both the parties and the courts. Thus, for the reasons explained by the Supreme Court in *Colorado River*, the Marion County Circuit

Court should have abstained from exercising jurisdiction here and dismissed this case.

Oregon Rule of Civil Procedure 21A(3) also supports the conclusion that the Marion County Circuit Court should have abstained from exercising jurisdiction here. That rule allows a court to dismiss a case if “there is another action pending between the same parties for the same cause” (or, alternatively, to stay the proceeding). The United States, the Klamath Tribes, and the Hydes are already before the Klamath County Circuit Court to resolve the same issues raised by the Hydes here. When the process of judicial review under chapter 539 is completed in the Klamath Basin Adjudication, the court’s final decision will be conclusive and will preclude the Hydes from making these same claims again. *See Federal National Mortgage Ass’n v. United States*, 380 P.3d 1186, 1189 (Or. Ct. App. 2016) (explaining that, under Rule 21A(3), “if entry of a judgment in the other pending actions would preclude plaintiffs from asserting any claims in this case, the court should dismiss those claims” (cleaned up)).

Thus, even if the Marion County Circuit Court had concurrent jurisdiction here, it should have abstained from exercising that jurisdiction and dismissed the case under Rule 21A(3).

C. Oregon law on “necessary” and “indispensable” parties supports these conclusions.

Rule 29 of the Oregon Rules of Civil Procedure also supports the conclusion that the Marion County Circuit Court should not have adjudicated these claims. Rule 29 defines “necessary” and “indispensable” parties under Oregon law and is “virtually identical” to Rule 19 of the Federal Rules of Civil Procedure. *Steers v. Rescue 3, Inc.*, 934 P.2d 532, 534 (Or. Ct. App. 1997). A party is necessary if, among other requirements, it claims an interest in the subject of the action and the disposition of the case in its absence may, as a practical matter, impair its ability to protect that interest. Or. R. Civ. P. 29A(2).

Where the necessary party is also a sovereign (like the United States or the Klamath Tribes) and no relevant waiver of sovereign immunity can be identified, then in most cases the party is “indispensable” and the case must be dismissed. *See, e.g., Republic of the Philippines v. Pimentel*, 553 US 851, 867 (2008) (holding that,

“where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered [under Federal Rule of Civil Procedure 19] where there is a potential for injury to the interests of the absent sovereign.”).

The Klamath Tribes were granted limited intervention here and moved to dismiss this case on the grounds that they were a necessary and indispensable party because the case may affect their interests—both in their Klamath Marsh water rights and their interest in the interpretation of the Hyde Agreement—and they had not waived their sovereign immunity. The Marion County Circuit Court denied that motion without explanation. Order Granting Klamath Tribes’ Limited Motion to Intervene and Denying Klamath Tribes’ Motion to Dismiss, *TPC, LLC v. OWRD*, No. 17-CV-26962 (Mar. 2, 2018).

The United States takes no position at this time on whether the Klamath Tribes or the United States are indispensable parties to this action. But in any event, the considerations that underlie Rule 29 further support the conclusion that the Marion County Circuit Court should not have exercised jurisdiction here. Rule 29 counsels that a case should not go forward if its disposition will affect

the interests of parties that cannot be joined. The United States and the Klamath Tribes indisputably have an important interest in both the interpretation of the Hyde Agreement (to which they are parties) and in the Tribes' Klamath Marsh water rights (which the United States holds in trust for the Tribes). Neither was joined as a party to this case. In contrast, the United States, the Klamath Tribes, and the Hydes are all parties in the Klamath Basin Adjudication, where these issues are already being heard.

Thus, just as the statutory provisions of chapters 536 and 539, the common law doctrine of prior exclusive jurisdiction, the Supreme Court's decision in *Colorado River*, and Oregon Rule of Civil Procedure 21A(3) all show that the Marion County Circuit Court should not have adjudicated these claims, Rule 29 similarly underscores the conclusion that these claims are best heard by the Klamath County Circuit Court, where all of the parties interested in their resolution are present to protect their own interests.

II. If the Marion County Circuit Court had jurisdiction, it should have rejected the Hydes' claims on the merits.

If the Court rejects the foregoing arguments and reaches the merits of the Hydes' claims, it should deny those claims because the

Hyde Agreement was merely a stipulation to make recommendations to the adjudicator and not an enforceable rotation agreement or a final order by OWRD.³

A. The Hyde Agreement was an agreement to make a recommendation to the adjudicator in the Klamath Basin Adjudication, not an agreement on a division of water.

The Hyde Agreement was not an agreement on how to divide the water of the Williamson River between the Hydes and the Klamath Tribes. The Agreement was a stipulation between the parties to make a *recommendation* to the adjudicator that it adopt a particular division of water in the Klamath Basin Adjudication. The parties complied with the terms of the Agreement by making that recommendation to the adjudicator. The adjudicator determined, in its discretion, not to adopt some of the Agreement's terms, including the terms that the Hydes are attempting to enforce in this improper suit outside of the adjudication. But Oregon law obligates OWRD to

³ The United States addresses the merits of the case here briefly for the convenience of the Court. But in so doing, the United States does not concede that the terms of the Hyde Agreement can be enforced against it in any Oregon court.

enforce the terms of the ACFFOD as actually issued, not as the Hydes preferred it to be issued. *See* ORS 539.130(4), 539.170.

In its core terms, the Hyde Agreement proposes a definition of the Hydes' water right, OWRD's Excerpts of Record ("OWRD ER") 22–24 ¶ B(1)(a); that their water right will be "subject to maintaining a flow of at least one-half of the total flow in the Williamson River," OWRD ER 24 ¶ B(1)(b); and that the United States and the Klamath Tribes "will not place any call on the Williamson River that will result in the curtailment of [the Hydes'] use of water in excess of [these] principles," OWRD ER 25 ¶ B(1)(c). These terms, however, are framed as *recommendations* that the parties will make to the adjudicator in the Klamath Basin Adjudication, not as the terms of a water-sharing agreement having independent force outside the adjudication.

The Agreement begins, for example, by stating that the Hydes' water rights claim in the Klamath Basin Adjudication (Claim 33) "*should* be approved by the Adjudicator as described below." OWRD ER 22–24 ¶ B(1)(a) (emphasis added). Similarly, the Agreement states that, to "ensure implementation" of the agreement's selective "no-call" provision, the United States and the Klamath Tribes will

“*request* that the Adjudicator’s Findings of Fact and Order of Determination place a condition implementing” that term of the agreement, “thereby preventing exercise . . . of any rights adjudicated in favor of the United States on behalf of the Klamath Tribes.” OWRD ER 24 ¶ B(1)(c) (emphasis added). This request would have been unnecessary if the Agreement’s terms were already legally binding without further action by the adjudicator.

The Agreement also states that OWRD “*recommends* to the Adjudicator” that the Hydes’ water rights claim be “withdrawn” and “approved in the Findings of Fact and Order of Determination issued by the Adjudicator in accordance with the terms of Section B.1 above.” OWRD ER 27 ¶ B(3) (emphasis added). Finally, the parties expressly recognized that the adjudicator might not adopt their recommendations, and the Hydes reserved their right to file an “exception” to the adjudicator’s determination if it did not conform with the agreement. OWRD ER 27 ¶ B(4) (“If the Finding of Fact and Order of Determination issued by the Adjudicator . . . does not conform to the terms set forth in paragraph B.1., above, the Parties reserve any rights they may have to file exception to the Findings of Fact and Order of Determination . . . in the Circuit Court for

Klamath County, and reserve any rights that they may have to participate in any future proceedings authorized by law.”).

The substantive terms of the Hyde Agreement were thus not self-executing. Rather, the parties agreed to recommend these terms to the adjudicator in the Klamath Basin Adjudication, so that the adjudicator could, if it so chose, include them in the determinations made in the ACFOD, while also recognizing that the parties could file exceptions to the ACFOD if the adjudicator chose not to include those terms. The United States and the Klamath Tribes discharged their obligations under the Hyde Agreement when they made those precise recommendations.

Significantly, the adjudicator did not adopt two terms that are central to the Hydres’ claims here: the “selective no-call” provision, which would have barred the United States and the Klamath Tribes from placing a call on the Hydres; and the term that provided that the Hydres’ water use would not be curtailed as long as they maintained at least one-half the total flow of the Williamson River. OWRD ER 68–71. The adjudicator rejected those terms on the grounds that they were “not pertinent to the determination of a water right claim.” OWRD ER 69 (declining to adopt paragraph B.1.(c)).

Because the adjudicator did not adopt these terms, they do not bind the United States or the Klamath Tribes. The Hydes have filed “exceptions” in the Klamath Basin Adjudication and can argue there that these restrictions should have been incorporated into the ACFFOD. But unless and until the Klamath County Circuit Court rules for the Hydes, the water rights actually adopted in the ACFFOD are in “full force and effect” and determine divisions of water on the Williamson River. *See* ORS 539.130(4), 539.170. OWRD and the watermaster are required, by law, to enforce those water rights, and the Marion County Circuit Court erred when it ordered OWRD to implement the Hyde Agreement instead.

B. The Hyde Agreement is not an enforceable “rotation agreement.”

The Marion County Circuit Court erred in concluding that the Hyde Agreement is an enforceable “rotation agreement.” *See* General Judgment at 4, *TPC, LLC v. OWRD*, No. 16-CV-27427 (Mar. 2, 2018), OWRD ER 134. Oregon law allows parties to enter into binding rotation agreements, but it also imposes strict requirements on the

terms of such agreements. The Hyde Agreement does not satisfy those requirements.⁴

First, the Hyde Agreement does not “rotate” water between the Hydes and the Klamath Tribes. In a rotation agreement, different water users, each of whom draws their supply from the same source, agree to “take a turn at using the full quantity of water available in the source to irrigate his or her lands.” Lawrence J. MacDonnell, *Out-of-Priority Water Use: Adding Flexibility to the Water Appropriation System*, 83 Neb. L. Rev. 485, 494–95 (2004); *see also*, e.g., A. Dan Tarlock, *Law of Water Rights and Resources* § 5.36 (2018) (“Under rotation one user may take all the available water, regardless of senior priorities for a limited period of time, and the next user may do the same.”). Oregon law confirms the obvious proposition that a rotation agreement is an agreement to “rotate” the

⁴ ORS 540.150 (“Whenever two or more water users notify the watermaster that they desire to use the water by rotation, and present a written agreement as to the manner of rotation, the watermaster shall distribute the water in accordance with the written agreement.”); Or. Admin. R. 690-250-0010 (defining “enforceable rotation agreement” as a “[w]ritten agreement between two or more appropriators to rotate the use of water, to bring about more economical use of the available supply to which they are collectively entitled.”); *id.* 690-250-0080 (defining required terms of enforceable rotation agreements).

use of water. Or. Admin. R. 690-250-0010 (definition of “enforceable rotation agreement”); *see also* ORS 540.150 (referring to the use of water “by rotation”).

Even under the Hydies’ erroneous interpretation of the Hyde Agreement, the parties did not agree to each take a turn using their full shares of the river’s water. Instead, the Hydies argue that the parties agreed to split the water of the Upper Williamson River between the Hydies’ appropriative use and the Tribes’ non-consumptive, in-stream water rights in the Klamath Marsh. But that is not “rotation” because the parties are not taking turns or “rotating” their use of the water.

Second, the Hyde Agreement does not “identify the duration of the agreement” as required by Oregon law. Or. Admin. R. 690-250-0080(2)-(3). The governing regulations specifically state that the watermaster will only distribute water under a rotation agreement if it identifies a duration. *Id.* 690-250-0080(3). The Hyde Agreement, however, does not specify a term or duration.

Although the Hyde Agreement does not include any provisions for its termination, it does state that it is binding on “heirs” and “successors,” OWRD ER 28 ¶ 6, which perhaps suggests that the

agreement was intended to be perpetual. But that provision is inadequate to satisfy the regulations, which require the agreement to expressly “identify the duration of the agreement.” The only Oregon court to address this issue concluded that a rotation agreement is defective when it is perpetual and does not identify a duration.

Hawes v. Devos, No. 08-328, 2009 WL 646216, at *10 (Or. Cir. Ct. Jan. 26, 2009) (noting that “the defect in the agreement goes . . . to duration” but ultimately holding that the agreement was enforceable because it, unlike the Hyde Agreement, was signed before these regulations went into effect).

Third, the regulations provide that a rotation agreement is only enforceable if a “copy of the agreement” is “filed with the watermaster for the area.” Or. Admin. R. 690-250-0080(2). The Hyde Agreement, however, was never filed with the watermaster.

Fourth, the regulations expressly state that the “watermaster shall not implement a rotation agreement that violates” either “instream water rights” or “minimum flows.” Or. Admin. R. 690-250-0080. Here, the Klamath Basin Adjudication has determined that the Klamath Tribes have non-consumptive water rights that entitle the Tribes to certain minimum water levels in the Klamath Marsh. That

determination is in “full force and effect,” and OWRD and the watermaster are required to administer the upper Williamson River to maintain those minimum elevations. The Marion County Circuit Court’s order impermissibly prevents OWRD and the watermaster from performing that duty. Instead, by allowing the Hydes to continue to draw up to half of the water of the upper Williamson River, that order forces OWRD and the watermaster to “implement a rotation agreement that violates” both “instream water rights” and “minimum flows.” That result is directly contrary to Oregon law.

Finally, even if the Hyde Agreement were an enforceable rotation agreement, it has now been terminated by both the Klamath Tribes and the United States. The regulations state: “Unless the rotation agreement provides otherwise, any member of the agreement may notify the watermaster after the end of the irrigation season . . . that they are terminating the agreement.” Or. Admin. R. 690-250-0080(2). Nothing in the Hyde Agreement “provides otherwise,” and the Klamath Tribes and the United States notified the watermaster that they were terminating the agreement on February 28, 2017 and March 13, 2017, respectively. TCF # 560–62.

In sum, the Hyde Agreement was never an enforceable rotation agreement under Oregon law. But even if it had been, it has now been lawfully terminated, and the Marion County Circuit Court had no authority to order OWRD to enforce its terms.

C. The Hyde Agreement is not a “final order” issued by OWRD.

The Marion County Circuit Court also erred when it held that OWRD, by signing the Hyde Agreement, transformed that agreement into an enforceable final agency order under chapter 183.310(6)(b) of the Oregon APA. General Judgment at 4 (holding that the Hyde Agreement is a “final order” because it is “a contract signed by the agency”), OWRD ER 134.

First, as discussed above, judicial review of OWRD’s orders is governed by chapter 536.075. That chapter plainly states that an order is not a *final* order unless it states “on the first page” that it is (1) “a final order,” (2) that “the order is subject to judicial review under ORS 183.484,” and (3) that “any petition for judicial review of the order must be filed within the time specified by ORS 183.484(2).” ORS 536.075. The Hyde Agreement satisfies none of these requirements.

Second, the Hyde Agreement is not a final agency order even under the broader definition of “final order” set out in the Oregon APA, which defines an order as “any agency action expressed orally or in writing directed to a named person or named persons” and a “final order” as a “final agency action expressed in writing.” ORS 183.310(6)(b). As this Court has held, a final order is “the complete statement of the agency’s decision on the matter before it.”

Grobovsky v. Board of Medical Examiners, 159 P.3d 1245, 1248 (Or. Ct. App. 2007). But the Hyde Agreement is not a “complete statement” of an OWRD “decision” on a “matter before it.” It is not an order directed by OWRD to the Hydes, the United States, or the Klamath Tribes as named parties. Rather, it is a stipulation with respect to a dispute about claimed water rights. It was not an OWRD “decision”; it was a settlement agreement among the parties.

If the Hyde Agreement were a final OWRD order, that would lead directly to the nonsensical result that the parties could seek judicial review of a stipulation, and the Oregon courts would have to decide whether the terms of that stipulation are “supported by substantial evidence in the record.” ORS 183.484(5)(c). This Court has already rejected that result and held that a settlement

agreement does not become a “final order” under the Oregon APA when a state agency signs it. *Hawes v. State*, 125 P.3d 778, 782 (Or. Ct. App. 2005) (rejecting claim that a settlement between the Oregon Department of Environmental Quality and the United States Environmental Protection Agency was a “final order”).

Accordingly, the Marion County Circuit Court’s conclusion that the Hyde Agreement is an enforceable final agency order is legally unsound.

CONCLUSION

The Marion County Circuit Court’s decision should be reversed, and this case dismissed for lack of jurisdiction.

Respectfully Submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed this brief electronically with the Appellate Court Administrator on December 7, 2018. I certify that service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate court's eFiling system, by the appellate courts' eFiling system on December 7, 2018: Carson L. Whitehead, attorney for appellant Oregon Water Resources Department; Edmund Clay Goodman, attorney for appellant Klamath Tribes; Dominic M. Carollo, attorney for respondent TPC, LLC; and Nathan J. Ratliff, attorney for respondents John L. Hyde and Taylor A. Hyde.

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