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2
3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4 FOR THE COUNTY OF MARION

5 **WATER FOR LIFE, INC.**, *a domestic mutual*
6 *benefit organization with members, JOHN*
7 *FLYNN, an individual; ERIC DUARTE, an*
8 *individual; CHAD RABE, an individual; BILL*
9 *NICHOLSON, an individual;*
10 *AMBROSE MCAULIFFE, an individual; and*
11 *GERALD HAWKINS, an individual,*

12 Plaintiffs,

13 v.

14 **OREGON WATER RESOURCES**
15 **DEPARTMENT**, *an Oregon administrative*
16 *agency, and PHIL WARD, in his capacity as*
17 *Director of the Oregon Water Resources*
18 *Department.*

19 Defendants.

20 Plaintiffs allege as follows:

21 **PLAINTIFFS**

22 1.

23 Water for Life, Inc. is a domestic mutual benefit organization with members
24 founded in 1990 by farmers and ranchers from Oregon's Klamath Basin. The
25 organization has since expanded to include hundreds of members from across the State
26 of Oregon. The mission of Water for Life, Inc. is to protect and promote agricultural
27 water rights while advocating responsible stewardship of the land. Water for Life, Inc. is
28 very active in public policy matters, regularly advocating support for the rights of
29 agricultural water users in legislative, legal, and administrative proceedings.

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31 //

Case No.

**COMPLAINT FOR DECLARATORY
JUDGMENT/INJUNCTIVE RELIEF**

(28.010 *et seq*)

**NOT SUBJECT TO MANDATORY
ARBITRATION**

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2.

Plaintiff John Flynn is an individual Oregon resident whose address is 438 Mountain View, Lakeview Oregon 97630. Plaintiff Flynn is a third-generation cattleman and irrigates from rivers and wells located in the Sprague River Valley.

3.

Eric Duarte is an individual Oregon resident whose address is P.O. Box 6 Beatty, Oregon 97621. Plaintiff Duarte is an irrigator, a cattleman, and engaged in the business of cattle auctioneering and cattle buying services in the Upper Klamath Basin area.

4.

Plaintiff Chad Rabe is an individual Oregon resident whose address is 22539 Highway 140 E, Dairy, Oregon 97625. Plaintiff Rabe irrigates from the Sprague River and a well located in the Sprague River Valley.

5.

Plaintiff Bill Nicholson is an individual Oregon resident whose address is P.O. Box 515 Fort Klamath, Oregon 97626. Plaintiff Nicholson is a third generation rancher in the Fort Klamath area and his family has been in Fort Klamath since the 1890's. Plaintiff Nicholson currently irrigates from stream diversions in the Wood River Valley.

6.

Plaintiff Ambrose McAuliffe is an individual Oregon resident whose address is P.O. Box 456 Fort Klamath, Oregon 97626. Plaintiff McAuliffe is a third generation Fort Klamath cattleman who ranches and trades cattle within the Fort Klamath area. Plaintiff McAuliffe irrigates from a stream diversion on Fort Creek and Crooked Creek.

7.

Plaintiff Gerald Hawkins is an individual Oregon and California resident whose address is P.O. Box 426 Fort Klamath, Oregon 97636 Plaintiff Hawkins is a second-

1 generation Fort Klamath rancher and irrigates from the Wood River, Fort Creek, and
2 Crooked Creek.

3 **DEFENDANTS**

4 8.

5 Defendant Phillip C. Ward is the duly appointed director of the Oregon Water
6 Resources Department. In that capacity, Defendant Ward serves as the administrative
7 head of the Oregon Water Resources Department, administers and enforces the laws of
8 the state concerning the water resources of the state, and is empowered to engage in other
9 related functions consistent with ORS 536.037. These responsibilities include
10 implementation and enforcement of ORS Chapter 539 pertaining to general stream water
11 rights adjudications and related tribal water right negotiations.

12 9.

13 Defendant Oregon Water Resources Department (“OWRD”) exists as an
14 executive-administrative branch of government under the Oregon Water Commission
15 pursuant to ORS 536.039. Defendant OWRD is responsible for carrying out the policies
16 of the Oregon Water Resources Commission and administering and enforcing the laws of
17 the state concerning the water resources of the state at the direction of defendant Director.
18 Among the laws defendant OWRD is responsible for enforcing are the laws pertaining to
19 the conduct of general stream water rights adjudications and related tribal water right
20 negotiations set forth in ORS Chapter 539.

21 **ALLEGATIONS COMMON TO ALL CLAIMS**

22 10.

23 On or about 1975, defendant OWRD initiated a general stream water rights
24 adjudication in Oregon’s Klamath Basin pursuant to ORS Chapter 539. The adjudication
25 is still ongoing.

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11.

The Klamath Tribes are a federally recognized Indian Tribe. The Klamath Basin adjudication involves claims of federal reserved water rights held by the Klamath Tribes.

12.

Plaintiff Water for Life is neither a claimant nor a contestant in the Klamath Basin adjudication but has advocated for laws that ensure holders of agricultural water rights are treated fairly in the adjudication and is equally committed to ensuring that holders of agricultural water rights are treated fairly in any negotiated settlement concerning the scope and attributes of the federal reserved water rights claimed by the Klamath Tribes.

13.

Plaintiff Nicholson is a contestant in the Klamath Basin adjudication and challenging certain of the federal reserved water right claims of the Klamath Tribe.

14.

Plaintiff Hawkins, and McAuliffe are claimants and contestants in the Klamath Basin adjudication and challenging certain of the federal reserved water right claims of the Klamath Tribes in the adjudication.

15.

Plaintiff Flynn is a claimant in the adjudication but not a contestant.

16.

Plaintiffs Rabe and Duarte are not claimants or contestants in the Klamath Basin adjudication but are irrigators who will be economically impacted by the outcome of the Klamath Basin adjudication or by any settlement defining the scope and attributes of federal reserved water rights claimed by the Klamath Tribes.

17.

On or about 2006, defendant OWRD, the Klamath Tribes, and certain other governmental and non-governmental persons or entities began participating in

1 confidential negotiations concerning the scope and attributes of federal reserved water
2 rights claimed by the Klamath Tribes. Participants in these negotiations have publicly
3 referred to themselves as the Klamath Settlement Group. The confidentiality of Klamath
4 Settlement Group’s negotiations is assured by a confidentiality agreement signed by all
5 parties thereto, including defendants or their designees.

6 18.

7 Defendants have engaged in confidential negotiations with the Klamath Tribes and
8 other parties concerning the scope and attributes of federal reserved water rights claimed
9 by the Klamath Tribes on an ongoing basis since the inception of the so-called Klamath
10 Settlement Group and signing of the associated confidentiality agreement. Defendants or
11 their designees, which include representatives of the Oregon Department of Justice, have
12 been, and continue to be, active participants in these negotiations. The ongoing
13 negotiations have produced a document known as the *Klamath Basin Restoration*
14 *Agreement* (“KBRA”). The *KBRA* was first made publicly available on or about January
15 of 2008 and includes provisions that define the scope and attributes of federal reserved
16 water rights claimed by the Klamath Tribes.

17 19.

18 Since the release of the *KBRA* in January of 2008, members of the Klamath Basin
19 Settlement Group, including defendants and/or their authorized designees, have
20 continued to participate in confidential negotiations concerning the scope and attributes
21 of federal reserved water rights claimed by the Klamath Tribes. These confidential
22 negotiations remain ongoing as of the time of this complaint.

23 20.

24 ORS 539.310 provides:

25 (1) *The Water Resources Director may negotiate with*
26 *representatives of any federally recognized Indian Tribe that may have a*

1 *federal reserved water right claim in Oregon and representatives of the*
2 *federal government as trustee for the federally recognized Indian Tribe to*
3 *define the scope and attributes of rights to water claimed by the federally*
4 *recognized Indian tribe to satisfy tribal rights under treaty and the tribes of*
5 *Oregon. All negotiations in which the director participates under this*
6 *section shall be open to the public.*

7 *(2) During negotiations conducted under subsection (1) of this*
8 *section, the director shall:*

9 *(a) Provide public notice of the negotiations;*

10 *(b) Allow for public input through the director; and*

11 *(c) Provide regular reports on the progress of the*
12 *negotiations to interested members of the public.*

13 21.

14 Defendants' authority to participate in the Klamath Settlement Group negotiations
15 that produced the *KBRA* arises from ORS 539.310. Any final agreement that results from
16 the negotiations which defines the scope and attributes of federal reserved water rights
17 claimed by the Klamath Tribes is subject to the requirements of ORS 539.310 *et seq.*
18 These requirements include submitting a final agreement to an appropriate court (ORS
19 539.320), providing public notice of a final agreement (ORS 539.330), as well as the
20 requirement that a final agreement shall not take effect until after such time as owners of
21 water right certificates, permits, or claimants in the adjudication have been afforded
22 opportunity to file exceptions to the agreement in court and the court has ruled upon the
23 exceptions and entered a final decree (ORS 539.340). The requirements of ORS 539.310
24 *et seq.* are for the benefit of the public generally, including persons or entities same or
25 similarly situated to plaintiffs herein.

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22.

Defendants failed to comply with the requirements of ORS 539.010 while participating in the confidential negotiations that produced the *KBRA*. Defendants' violation of ORS 539.310 is ongoing as defendants are, as of the time of this complaint, continuing to regularly participate in confidential negotiations concerning the scope and attributes of federal reserved rights held by the Klamath Tribes in contravention of the statutes. The aim of the confidential negotiations is to develop a final version of the *KBRA* that, *inter alia*, defines the scope and attributes of the federal reserved water rights claimed by the Klamath Tribes. Defendants have publicly announced their intention to sign the final version of the *KBRA* along with all other members of the Klamath Settlement Group.

23.

Pursuant to ORS 539.310, plaintiffs are entitled to public notice and the opportunity participate in any and all ongoing negotiations defendants are involved in concerning the scope and attributes of the federal reserved water rights claimed by the Klamath Tribes. To the extent those negotiations result in a final agreement involving the scope and attributes of rights claimed by the Klamath Tribes, defendants are required to act in accordance with ORS 539.320-ORS 539.340 by submitting the agreement to an appropriate court and providing public notice of the agreement so that plaintiffs and others similarly situated may exercise their right to file exceptions to the agreement with the court before the agreement takes effect.

24.

Defendants maintain that ORS 539.310 *et seq.* is inapplicable to the confidential negotiations that produced the *KBRA* and the ongoing negotiations related thereto.

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25.

If not restrained, defendants will continue to engage in confidential negotiations in violation of ORS 539.310 *et seq.* and will cause irreparable harm to plaintiffs and others similarly situated.

26.

Defendants are threatening and imminently prepared to become party to a final agreement defining the scope and attributes of federal reserved water rights claimed by the Klamath Tribes without filing such agreement in an appropriate court in accordance with ORS 539.320 where plaintiffs, and others similarly situated, would be afforded the opportunity to file exceptions to the agreement before it takes legal effect in accordance with ORS 539.340, thereby causing injury to plaintiffs and the public.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment ORS 28.010 *et seq.*)

27.

Plaintiffs re-allege paragraphs 1-26 above.

28.

ORS 539.310 *et seq.* grants defendants authority to negotiate with federally recognized Indian Tribes toward an agreement that defines the scope and attributes of federal reserved water rights claimed by such Tribes.

29.

Defendants violated ORS 539.310 *et seq* by participating in the confidential negotiations that produced the Klamath Basin Restoration Agreement because the agreement defines the scope and attributes of federal reserved water rights claimed by the federally recognized Klamath Tribes.

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30.

Defendants are continuing to violate ORS 539.310 *et seq* by continuing to negotiate confidentially with the Klamath Tribes and other parties toward a final version of the Klamath Basin Restoration Agreement that will, *inter alia*, define the scope and attributes of the federal reserved water rights claimed by the Klamath Tribes. Defendants continued violation of ORS 539.310 is causing plaintiffs irreparable harm.

31.

Defendants are imminently prepared and threatening to enter into a final binding agreement, whether known as the Klamath Basin Restoration Agreement or another name, that defines the scope and attributes of federal reserved water rights claimed by the Klamath Tribes, without first filing the agreement in an appropriate court as required by ORS 539.320 and allowing plaintiffs and others similarly situated to file exceptions to the agreement in an appropriate court and have those exceptions ruled upon prior to the agreement taking effect in accordance with ORS 539.310 *et seq.*, causing injury to plaintiffs thereby.

32.

Plaintiffs have sustained and will continue to sustain injury as a result of defendants' past and ongoing violations of ORS 539.310 *et seq.*

33.

Plaintiffs are entitled to a declaration from this court that defendants' participation in the confidential negotiations that produced the Klamath Basin Restoration Agreement violated ORS 539.310 and that defendants are required to comply with ORS 539.310 *et seq.* in all future negotiations concerning the Klamath Basin Restoration Agreement or any other agreement that would define the scope and attributes of federal reserved water rights claimed by the federally recognized Klamath Tribes.

34.

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2 Plaintiffs have brought this action to protect the rights of others as much as their
3 own. This court, sitting in equity, should award plaintiffs costs and reasonable attorney
4 fees incurred herein.

5 WHEREFORE plaintiffs pray for judgment as follows:

6 (1) A declaration that defendants have acted in violation of ORS 539.310 by participating
7 in confidential negotiations to define the scope and attributes of federal reserved water
8 rights claimed by the Klamath Tribes without complying with the public notice and
9 public participation requirements of the statute, and further, that defendants are required
10 to comply with ORS 539.310 *et seq.* in all future negotiations concerning the Klamath
11 Basin Restoration Agreement or any other agreement that would define the scope and
12 attributes of federal reserved water rights claimed by the federally recognized Klamath
13 Tribes.

14 (2) An injunction to restrain defendants from engaging in further confidential
15 negotiations to define the scope and attributes of federal reserved rights claimed by the
16 Klamath Tribes, and further; restraining defendants from entering into a legally binding
17 Klamath Basin Restoration Agreement, or other similar agreement by other name,
18 defining the scope and attributes of the federal reserved rights claimed by the Klamath
19 Tribes without having first publicly disclosed all records of the confidential negotiations
20 that have previously taken place, affording the public meaningful participation in the
21 negotiations consistent with ORS 539.010, and thereafter; submitting the agreement to an
22 appropriate court, providing public notice of the right to file exceptions, and allowing
23 those exceptions to be determined by the court before the agreement takes effect in
24 accordance with ORS 539.310 *et seq.*

25 (3) Awarding plaintiffs their costs, disbursements, and attorney fees incurred herein.
26

DATED this ___ day of December, 2009

Respectfully submitted,

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