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

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

In re:	)	Case No.: WA1300001
	)	
WATERS OF THE KLAMATH RIVER	)	<b>KLAMATH TRIBES' AMENDED</b>
BASIN,	)	<b>PETITION FOR DECLARATORY AND</b>
	)	<b>INJUNCTIVE RELIEF FROM A NON-</b>
THE KLAMATH TRIBES,	)	<b>FINAL AGENCY ORDER, OR, IN THE</b>
	)	<b>ALTERNATIVE, PETITION FOR WRIT</b>
Petitioner-Relator,	)	<b>OF MANDAMUS</b>
v.	)	
	)	
JEFFREY R. RHOADES, in his official	)	<b>ORS 183.480(3); ORS 28.010;</b>
capacity as Chief Administrative Law Judge	)	<b>ORS 34.120(1)</b>
for the Oregon Office of Administrative	)	
Hearings; OREGON OFFICE OF	)	
ADMINISTRATIVE HEARINGS,	)	<b>Oral Argument Requested</b>
	)	
Respondents-Defendants.	)	

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1 **PREFACE**

2 The Klamath Basin Adjudication (“KBA”) comprises the determination of pre-1909 and  
3 federal reserved water rights, which includes over 730 claims and 5,600 contests. In 1975, the  
4 Oregon Water Resources Department (“OWRD”) kicked off what has now become a decades-  
5 long adjudication proceeding under ORS chapter 539. Thirty-eight years after commencing the  
6 KBA, OWRD made initial findings of fact and published an order of determination establishing  
7 the water rights of the parties. The administrative process involved receiving the parties’ claims  
8 and contests, gathering evidence, conducting hearings, and developing a record of the  
9 proceedings by which the determinations were made. The OWRD’s final rulings are contained  
10 in the Amended and Corrected Findings of Fact and Order of Determination, commonly referred  
11 to as the ACFFOD.

12 Upon review of exceptions filed to the ACFFOD in this Court, the process for which is  
13 outlined in ORS 539.150, the Court determined that a limited remand of the Klamath Tribal  
14 Claims to OWRD was necessary to resolve certain issues. The matter was remanded to OWRD,  
15 which, in turn, referred the matter to the Office of Administrative Hearings (OAH”) to conduct  
16 the remanded proceedings. When the matters resumed at OAH, OAH informed the parties that  
17 Administrative Law Judge (“ALJ”) Joe Allen, who handled the cases at OAH from 2010 through  
18 2012, would continue as the assigned ALJ. A collective group of parties, known as the Upper  
19 Basin Irrigators (“UBI”), requested a change of ALJ. That request was properly denied by Chief  
20 ALJ Jeffrey R. Rhoades, respondent/defendant herein, along with a subsequent request for  
21 reconsideration.

22 Dissatisfied with these rulings, UBI filed an untimely Petition for Writ of Mandamus in  
23 the Circuit Court of Marion County, a court lacking jurisdiction, in an attempt to mandate Chief

1 ALJ Rhoades to remove ALJ Allen from the pending OAH cases. While the mandamus statutes  
2 direct the circuit court to issue a writ, no writ was ever issued. Instead, UBI and the attorneys for  
3 OAH and Chief ALJ Rhoades reached an agreement that ALJ Allen would be removed from the  
4 pending OAH cases and replaced in return for the dismissal of UBI's mandamus action. This  
5 secret agreement was not placed on the record in UBI's mandamus action or communicated to  
6 any of the KBA parties. Without notifying the other KBA parties or giving the parties an  
7 opportunity to respond, Chief ALJ Rhoades issued sua sponte rulings in the pending OAH cases  
8 removing ALJ Allen.

9 It gives the Klamath Tribes ("Tribes") no pleasure to bring this Petition, as the Tribes  
10 would much rather be expeditiously moving forward through the KBA process to secure a final  
11 decree. But the procedurally and substantively improper judge-shopping efforts of the UBI, and  
12 their connivance with the OAH to bring about an inexplicable and unjustified change of ALJ in  
13 matters pending before OAH, leaves the Tribes with no choice. These wholly improper and  
14 legally flawed efforts should not be rewarded.

15 The Tribes alleges as follows:

16 **I. INTRODUCTION**

17 1.

18 The Tribes requests oral argument on this Petition, estimates that two hours will be  
19 required for argument, and requests official court reporting services. The Tribes also reserves  
20 the right to conduct discovery and a hearing to provide witness testimony and conduct cross  
21 examination, if required.

22 /

23 /

2.

This is an action challenging the non-final orders<sup>1</sup> of Chief Administrative Law Judge Jeffrey R. Rhoades in pending contested cases presently on remand from this Court to the OAH, including OAH Reference Nos. 2024-OWRD-00134, 2024-OWRD-00136, 2024-OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-OWRD-00140, and 2024-OWRD-00141 (collectively “OAH Cases”).<sup>2</sup>

3.

In these non-final orders, captioned as “Rulings,” Chief ALJ Rhoades (i) vacated prior rulings in the OAH Cases that were issued November 26, 2024,<sup>3</sup> and which denied UBI’s request for change of judge, (ii) resurrected UBI’s previous request for change of judge and granted the

<sup>1</sup> Ruling on Change of Administrative Law Judge Assignment, Aug. 29, 2025 (“Sua Sponte Rulings”). Identical orders were issued for each of the seven remanded OAH Cases. The practice of issuing separate but substantially identical orders for these cases has frequently been used since the beginning of the KBA to maintain separate records for each of the cases, even while they are often being adjudicated in parallel.

<sup>2</sup> Case numbers in the KBA have had different OAH numbering systems at different phases of the Adjudication:

Claim Reach Name	Original Claim	Consolidated Case	Remanded Case
Williamson River	612, 625-640	277	2024-OWRD-00134
Upper Klamath Lake	616, 622	286	2024-OWRD-00136
Sprague River	612, 641-657	280	2024-OWRD-00137
Sycan River	612, 658-667	279	2024-OWRD-00138
Wood River	612, 668-670	281	2024-OWRD-00139
Klamath Marsh	615, 623	284	2024-OWRD-00140
Seeps & Springs	614, 624	285	2024-OWRD-00141

<sup>3</sup> Ruling on Request for Change of Administrative Law Judge, Nov. 26, 2024 (“November 2024 Rulings”). Again, these orders were issued in parallel for each of the OAH Cases. The Sua Sponte Rulings vacated the “November 25, 2024 . . . Ruling on Request for Change of Administrative Law Judge . . . in its entirety.” The Sua Sponte Rulings erred on the date of the vacated rulings. The vacated rulings were emailed to the parties on November 26, 2024. To avoid confusion, this Petition refers to the vacated rulings as the “November 2024 Rulings.”

1 same, then (iii) reassigned the OAH Cases to a different administrative law judge. These Sua  
2 Sponte Rulings were made without lawful authority, in violation of the due process rights of the  
3 Tribes, and will cause the Tribes to suffer substantial and irreparable harm in its decades-long  
4 efforts to quantify its time immemorial federal reserved water rights if a remedy is not granted.  
5 A representative copy of the Sua Sponte Rulings is attached as **Exhibit A**.<sup>4</sup>

6 4.

7 This action is brought pursuant to ORS 183.480 (judicial review of non-final OAH  
8 contested case order), ORS 28.010-.250 (declaratory judgment) and ORS 34.105-.240 (writ of  
9 mandamus).

10 5.

11 To the extent this filing may be considered an ancillary motion under Case Management  
12 Order #39, March 21, 2019, the Tribes states that the substantial nature of the matters raised  
13 warrants judicial resolution outside of the ordinary phased schedule or existing Case  
14 Management Orders. The matters raised herein involve substantial proceedings in the OAH and  
15 separate mandamus proceedings.<sup>5</sup>

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20 <sup>4</sup> Because substantially identical rulings were issued in all the OAH Cases, the Tribes attaches  
21 hereto as exhibits only the rulings from OAH Reference No. 2024-OWRD-0136 as a  
representative example.

22 <sup>5</sup> Even if this Petition is considered an “ancillary motion” under Case Management Order #39  
23 (because it is a request for a judicial resolution of an issue outside of the phased process), it is an  
original petition and not a motion within the scope of UTCR 5.010 and, for that reason, conferral  
was not sought from other parties.

1 **II. PARTIES**

2 6.

3 The Klamath Tribes is a single federally recognized Indian Tribe comprised of the  
4 Klamath, Modoc and Yahooskin-Paiute peoples.<sup>6</sup> From time immemorial, the Tribes has lived  
5 in the Klamath Basin and utilized the treaty resources of the Klamath Basin for subsistence,  
6 cultural, ceremonial, religious, and commercial purposes. The Tribes is currently a party in the  
7 KBA, a general stream adjudication conducted pursuant to ORS Chapter 539. The Tribes’ water  
8 rights in the KBA have been determined by the OWRD in the administrative phase of the KBA.  
9 Current proceedings in the KBA are ongoing in this Court and in the OAH.

10 7.

11 Respondents-Defendants are Chief ALJ Rhoades and the OAH. The OAH was created  
12 by the Oregon Legislature in 1999 to provide an independent and impartial forum for citizens  
13 and businesses to dispute state agency action against them. Thomas E. Ewing, *Independence in*  
14 *Adjudication: Understanding the Office of Administrative Hearings*, 65 Or. St. Bar Bull. 17 (Apr.  
15 2005). OAH and Chief ALJ Rhoades exercise functions which include conducting  
16 administrative hearings and proceedings in the KBA as part of the general adjudication of water  
17 rights claims in the Klamath River Basin under ORS Chapter 539. These functions also include  
18 determining the water rights of claimants in the KBA.

19 /

20 /

21  
22 \_\_\_\_\_  
23 <sup>6</sup> The Tribes is sometimes referred to as “Petitioner” in its request for declaratory and injunctive relief under Claim 1 of this Petition and is referred to as “Relator” in seeking its mandamus relief under Claim 2.

1 **III. JURISDICTION AND VENUE**

2 8.

3 This Court has jurisdiction over this action pursuant to ORS 183.480, which permits a  
4 person or party to an agency proceeding an opportunity, “by action or suit,” to challenge the  
5 validity of an agency’s order by showing that the agency is proceeding without probable cause or  
6 that the party will suffer substantial and irreparable harm if nonfinal relief is not granted. *See*  
7 *Or. Health Care Ass’n v. Health Div.*, 329 Or. 480, 492-94 (1999).

8 9.

9 This Court has jurisdiction over this action pursuant to ORS 28.010, which provides that  
10 a court of record “shall have power to declare rights, status, and other legal relations, whether or  
11 not further relief is or could be claimed.”

12 10.

13 In the event the Court determines that the Tribes is not entitled to relief under ORS  
14 183.480 or ORS 28.010, this Court has jurisdiction over the petition for writ of mandamus under  
15 ORS 34.120(1), as Respondents-Defendants exercise functions in the KBA and Klamath County.  
16 In that event, a writ of mandamus from this Court would be the only available remedy that can  
17 provide Petitioner-Relator with appropriate relief.

18 11.

19 Jurisdiction and venue are also proper in this Court because Oregon law confers  
20 exclusive jurisdiction over challenges in administrative proceedings in the KBA to the Klamath  
21 County Circuit Court. *See TPC, LLC v. Or. Water Res. Dep’t.*, 308 Or. App. 177, 191-92 (2020).  
22 That prior exclusive jurisdiction is consistent with the inherent authority that courts retain  
23



1 whenever remand orders are issued. *See, e.g., United States v. Schwarzbaum*, 127 F.4th 259,  
2 287-88 (11th Cir. 2025).

#### 3 **IV. TIMELINESS**

4 12.

5 This Petition amends the previous Klamath Tribes’ Petition for Declaratory and  
6 Injunctive Relief from a Non-Final Agency Order, or, in the Alternative, Petition for Writ of  
7 Mandamus filed on September 28, 2025, and is filed pursuant to ORCP 23 A. The Tribes’ initial  
8 Petition for Declaratory and Injunctive Relief was timely, as it was filed within 30 days of the  
9 Sua Sponte Rulings in the OAH Cases. The Tribes’ initial Petition for Writ of Mandamus was  
10 filed within 30 days of the date of entry of the Sua Sponte Rulings. *See State v. Peekema*, 328  
11 Or. 342, 346 (1999) (a mandamus petition must generally be filed within the statutory time  
12 limitation required for the filing of an appeal); *see also* ORS 19.255(1) (generally requiring the  
13 notice of appeal to be filed within 30 days of the entry of judgment or order at issue).

#### 14 **V. FACTUAL ALLEGATIONS**

##### 15 **A. The Klamath Basin Adjudication**

16 13.

17 The KBA is a general stream adjudication conducted pursuant to ORS Chapter 539. The  
18 purpose of Chapter 539 is “to set forth the procedures for carrying out a general stream  
19 adjudication in Oregon.” ORS 539.005(1). Chapter 539 specifically applies to the determination  
20 of water rights vested or initiated prior to February 14, 1909. ORS 539.010. Through  
21 application of the McCarran Amendment, 43 U.S.C. § 666, the KBA also includes the federal  
22 reserved water rights of the Tribes, which are asserted by the Tribes and the United States as  
23 trustee on behalf of the Tribes.

1 14.

2 The McCarran Amendment is a federal law that waives the sovereign immunity of the  
3 United States in comprehensive adjudications of water rights. The McCarran Amendment was  
4 extended to claims made for water rights on behalf of Indian Tribes in 1976. *Colo. River Water*  
5 *Conservation Dist. v. United States*, 424 U.S. 800, 809 (1976). The KBA is the exclusive  
6 proceeding for the determination of water rights in the Klamath River Basin, the Klamath  
7 County Circuit Court has exclusive subject matter jurisdiction over the KBA, and, as to federal  
8 reserved water rights claims – such as those asserted by the Tribes and the United States on  
9 behalf of the Tribes – the KBA is the only available proceeding.

10 15.

11 In 1975, the United States brought an action in federal court pursuant to 28 U.S.C. § 1345  
12 for a declaration of federal water rights. *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979)  
13 (“*Adair I*”). In *Adair I*, the federal district court held that the 1864 Treaty reserved the Tribes’  
14 hunting, fishing, trapping, and gathering rights and the water rights necessary to protect those  
15 Treaty rights and that termination of the Tribes’ federal recognition status did not abrogate those  
16 water rights. *Id.* at 345. *Adair I* was mostly affirmed in *United States v. Adair*, 723 F.2d 1394  
17 (9th Cir. 1984) (“*Adair II*”).

18 16.

19 When the *Adair* litigation was filed in 1975, there was not a contemporaneous state  
20 general stream adjudication of water rights in the Upper Williamson River watershed. 723 F.2d  
21 at 1404. After the filing, however, the OWRD began the proceedings which ultimately became  
22 the KBA.

1 17.

2 ORS Chapter 539 governs general adjudication of water rights in Oregon, including the  
3 KBA. An adjudication involves the determination of water rights arising either from alleged use  
4 of water initiated prior to the effective date of the Water Rights Code in 1909, or for claims for  
5 federal reserved water rights. *See generally* ORS Chapter 539. The KBA includes over 730  
6 claims and 5,600 contests of those claims.

7 18.

8 The KBA is administered by OWRD. This process involves a referral of claims for water  
9 rights to OAH, which adjudicates the contests of those claims. During the course of the KBA,  
10 the parties conducted extensive proceedings before OAH from 2003 to 2012.

11 19.

12 Senior ALJ Joe Allen presided over the OAH Cases for a significant period. The Notice  
13 of Continuation of Administrative Law Judge Assignment, entered in all seven OAH Cases on  
14 October 11, 2024, noted that “[t]he assignment of **ALJ Allen** issued April 2, 2010, remains in  
15 place.” A representative copy of the Notice of Continuation is attached as **Exhibit B**.

16 20.

17 At the time of the April 2, 2010 notice,<sup>7</sup> ALJ Allen was already presiding in all but one of  
18 the OAH Cases (Case No. 277), and ALJ Allen had conducted extensive proceedings in  
19 Consolidated Case Nos. 279, 280, 281, 284, 285 from June of 2008 and Case No. 286 from  
20 January 2009 through the issuance of the Proposed Orders in all OAH Cases on December 1,  
21

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22 <sup>7</sup> Notice of Reassignment of ALJ to Senior ALJ Joe Allen, Apr. 2, 2010, OWRD0443584 (the  
23 OWRD Bates number in this citation refers to the electronic record of the 1990-2013 OWRD  
proceedings, included here as required by Case Management Order #14, December 10, 2015).

1 2011.<sup>8</sup> During this period, ALJ Allen issued numerous rulings and orders on various issues in  
2 the OAH Cases, conducted live cross-examination hearings, reviewed thousands of pages of  
3 evidence submitted by the parties, and prepared the Proposed Orders. ALJ Allen’s decisions  
4 were incorporated, with some modification, into the Adjudicator’s Findings of Fact and Order of  
5 Determination on March 7, 2013 (“FFOD”), which became the basis of review by this Court, and  
6 the subject of the orders which led to the limited remand of the matter to OAH.

7 21.

8 Following the Court’s adoption of a process for correcting typographical or clerical errors  
9 in the FFOD, the OWRD issued the ACFOD on February 28, 2014.

10 22.

11 During this period of review by this Court, no actions were taken in the OAH to remove  
12 ALJ Allen as the ALJ presiding over the OAH Cases.

13 23.

14 Following issuance of the ACFOD, extensive proceedings were held in this Court to  
15 review the ACFOD. These proceedings led to this Court’s entry of several orders including the  
16 Order on Phase 3, Part 2, Group C Motions (Motions to Present Non-Record Evidence on Tribal  
17 Claims) on July 6, 2023. That order directed, pursuant to ORS 539.150(3), that the matter be  
18 remanded to OWRD for the limited purposes of taking further evidence on: “(1) KPWU's  
19 exceptions to claim 622, including evidence on how the ‘moderate living standard’ may affect  
20 the quantification of the tribal water rights, if at all; (2) how the ‘moderate living standard’ may  
21 affect the quantification of the tribal water rights granted in the claims challenged by UBI, if at  
22

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23 <sup>8</sup> See *supra* note 2 for explanation of KBA case numbers.

1 all; and (3) how the ‘moderate living standard’ may affect the quantification of the tribal water  
2 rights granted in the claims challenged by Mosby, if at all.” Order on Non-Record Evidence Ex.  
3 A, at 16.

4 24.

5 Following remand of the claims to OWRD, OWRD referred the claims to OAH on May  
6 3, 2024, consistent with OAH’s jurisdiction over contested proceedings before OWRD. Because  
7 of a new case numbering system at OAH, the claims were given new case numbers but continue  
8 to be captioned with the prior OAH case numbers.<sup>9</sup>

9 **B. Proceedings Remanded to the OAH in 2024**

10 25.

11 Following OWRD’s referral to OAH, on October 11, 2024, OAH issued a Notice of  
12 Continuation of Administrative Law Judge Assignment in the OAH Cases, which provides that  
13 “[t]he assignment of ALJ [Joe L.] Allen issued April 2, 2010, remains in place.” Notice of  
14 Continuation 1, **Exhibit B**.

15 26.

16 On October 23, 2024, UBI and Mosby Family Trust (collectively “UBI”) filed a Request  
17 for Change of Administrative Law Judge (“Request for Change”) in each of the OAH Cases.  
18 The Request for Change solely relied on OAR 471-060-0005, which allows a party ten business  
19 days to request an “automatic” change of an ALJ. UBI argued that remanding the cases to OAH  
20 “triggered a new contested case hearing,” giving the UBI the right to challenge the assigned ALJ.  
21 The Tribes filed a Response to UBI Request for Change of Administrative Law Judge on  
22

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23 <sup>9</sup> See *supra* note 2 for explanation of KBA case numbers.

1 October 28, 2024 in the OAH Cases, in which the Tribes raised various arguments in response to  
2 the Request for Change. UBI filed a Reply in Support of Request for Change of Administrative  
3 Law Judge in all cases on November 1, 2024.

4 27.

5 On November 26, 2024, Chief ALJ Rhoades issued the November 2024 Rulings, which  
6 were identical decisions in each of the OAH Cases. A representative copy of the November  
7 2024 Rulings is attached as **Exhibit C**. Chief ALJ Rhoades found that OAH sent written notice  
8 of ALJ Allen’s assignment in the OAH Cases on April 2, 2010. *Id.* at 1. After analyzing the  
9 statutes governing the process, Chief ALJ Rhoades determined that, under UBI’s interpretation,  
10 if the Court decided to remand this matter multiple times to supplement the record, it would be  
11 terminating and creating multiple cases, which is “in clear contradiction of the process  
12 established by the legislature for the purpose of reaching a final judgment.” *Id.* at 7.  
13 Specifically, in denying UBI’s Request for Change, Chief ALJ Rhoades held that “[t]his is not a  
14 new case, but a continuation of the existing matter, as noted on the Notice issued to the parties.”  
15 *Id.* at 8.

16 28.

17 On December 10, 2024, UBI and Mosby Family Trust (collectively “UBI”) filed Petitions  
18 for Reconsideration of Ruling on Request for Change of Administrative Law Judge (“Petitions  
19 for Reconsideration”) in the OAH Cases and lodged new arguments for the first time. UBI’s  
20 primary position advanced in the Petitions for Reconsideration was that the parties to the  
21 remanded proceedings are not identical to UBI’s predecessor, the Upper Basin Contestants  
22 (“UBC”), in the prior phase of the administrative proceedings in the KBA. UBI specifically  
23 identified C and A Vogt Community Property Trust (“C and A Vogt”), which UBI alleged was

1 not a successor to a party in the previous OAH proceedings. As to C and A Vogt, UBI reasoned  
2 that this would be that party’s first appearance before OAH, so it should be entitled to a  
3 peremptory challenge of the assigned ALJ in accordance with OAR 471-060-0005(3). Petitions  
4 for Reconsideration 1 n.1.

5 29.

6 OWRD responded to the Petitions for Reconsideration on December 17, 2024. OWRD  
7 took the erroneous position that, if UBI’s new contention regarding C and A Vogt were true, then  
8 “OWRD agrees that UBI’s Request for Change of Administrative Law Judge was timely filed as  
9 to that party and must be granted.” OWRD Resp. to Pet. for Reconsideration of Ruling on Req.  
10 for Change of ALJ 1, Dec. 17, 2024. OWRD further inappropriately requested that the Chief  
11 ALJ require that UBI provide a declaration in support of their contention. OWRD reasoned that  
12 if one of the UBI parties were appearing for the first time in this matter, then it would not have  
13 been sent written notice of the assigned ALJ until October 11, 2024, when OAH sent its Notice  
14 of Continuation of Administrative Law Judge Assignment – “[t]he request for change of  
15 administrative law judge would be timely as to that party and that party’s request must be  
16 automatically granted.” *Id.* at 2.

17 30.

18 The Tribes and United States filed a joint Reply to OWRD’s Response to UBI’s Petition  
19 for Reconsideration of its Request for Change of ALJ on December 19, 2024 (“Joint Response to  
20 Petition for Reconsideration”). The Tribes and United States argued that the provision of the  
21 OAR regarding ALJ assignments, OAR 471-060-0005(2)(a), provides that an administrative law  
22 judge is assigned to the case when written notice is sent to the party or agency. Joint Response  
23 to Petition for Reconsideration 3-4. Thus, notice of administrative law judge assignment was

1 made when the 2010 notice was sent to the agency. In other words, it is irrelevant that a “party”  
2 like C and A Vogt did not receive the 2010 notice. The Tribes and United States also argued that  
3 KBA precedent established that single members of an organizational contestant group that acts  
4 as a collective, such as UBI’s predecessor UBC, could not exercise recusal rights over and above  
5 the group. *Id.* at 4-5.

6 31.

7 Following the Joint Response to Petition for Reconsideration, Chief ALJ Rhoades sent  
8 the parties a letter which stated, “As it stands, OWRDs [sic] Response identifies a lack of  
9 evidentiary support for UBIs [sic] assertion that new parties in this matter were not provided an  
10 earlier opportunity for recusal. In the event UBI intends to file a reply, I will reserve ruling on  
11 the Reconsideration until after January 31, to allow UBI to file that reply.” Thus giving UBI an  
12 opportunity to make a factual record in a reply. Letter from CALJ Jeffrey R. Rhoades to Parties,  
13 Jan. 17, 2025. The invitation to UBI to present additional facts in a reply brief, given that the  
14 other parties could not respond, was contrary to well-established law. “It is well accepted that  
15 raising of new issues and submission of new facts in [a] reply brief is improper.”<sup>10</sup>

16 32.

17 On January 30, 2025, UBI filed replies in the OAH Cases, with the notable exception of  
18 Case 2024-OWRD-136.<sup>11</sup> In their replies, which were supported by the Affidavit of Dominic M.  
19 Carollo (attorney for UBI), UBI provided some title documents for property now owned by C  
20

21 \_\_\_\_\_  
22 <sup>10</sup> *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 682 (1999) (citing *Provenz v. Miller*, 102 F.3d  
23 1478, 1483 (9th Cir. 1996), *cert. denied*, 522 U.S. 808 (1997)).

<sup>11</sup> Reply in Supp. of Pet. for Reconsideration of Ruling on Req. for Change of ALJ, Jan. 30, 2025  
23 (“Replies in Support of Petition for Reconsideration”).



1 and A Vogt, which became a party in the Circuit Court proceedings through its inclusion in the  
2 UBI's filing of exceptions to the ACFFOD in the Circuit Court. UBI argued that C and A Vogt  
3 was not a contestant or successor-in-interest to any contestant to the Tribal claims in the prior  
4 phase of the OAH proceedings. Replies in Support of Petition for Reconsideration 1-2. On  
5 February 7, 2025, the Tribes and United States filed a motion for leave to file surreplies in the  
6 OAH cases, which was followed by a response from UBI on February 11, 2025.

7 33.

8 C and A Vogt's status as a "party" in the OAH Cases is unclear at best, as it is neither a  
9 claimant nor a contestant and has not followed the process under OAR 137-003-0535 to request  
10 participation as a party in the OAH Cases. UBI's initial request and subsequent request for  
11 reconsideration were made on behalf of UBI as a collective. The predecessors of C and A Vogt  
12 chose to not participate in the contests of the Tribal claims in 2010. Successors should not be  
13 allowed to jump in fifteen years later and disrupt the administrative proceedings that their  
14 predecessors voluntarily chose to sit out.

15 34.

16 On March 3, 2025, Chief ALJ Judge Rhoades issued Rulings on Request for  
17 Reconsideration Request for Change of ALJ ("Rulings on Request for Reconsideration") in the  
18 OAH Cases, denying UBI's Petitions for Reconsideration. A representative copy of the rulings  
19 denying reconsideration is attached as **Exhibit D**. Chief ALJ Rhoades relied on an interpretation  
20 of OAR 137-003-0675, which was cited as the basis for UBI's Petitions for Reconsideration.  
21 Rulings on Request for Reconsideration 1-3. The plain language of OAR 137-003-0675 applies  
22 to the reconsideration of a final order in a contested case and reconsideration must be lodged  
23 "with the agency." UBI, however, directed their Petitions for Reconsideration to the Chief ALJ,

1 seeking reconsideration of interlocutory rulings, not final orders of the agency. Chief ALJ  
2 Rhoades found that (i) UBI’s Petitions for Reconsideration were timely filed, but (ii) the orders  
3 for which it sought reconsideration were not final orders, and (iii) OAR 137-003-0675(1)  
4 specifically limits petitions for reconsideration to final orders. Rulings on Request for  
5 Reconsideration 3. In other words, despite giving UBI an opportunity to make a factual record in  
6 a reply, Chief ALJ Rhoades denied UBI’s Petitions for Reconsideration on strictly procedural  
7 grounds (and never addressed the merits of any of UBI’s newly raised arguments).

8 35.

9 Following the denial of reconsideration, on April 1, 2025, UBI filed a separate Petition  
10 for Writ of Mandamus in the Circuit Court of Marion County, *Upper Basin Irrigators, et al. v.*  
11 *Jeffrey R. Rhoades & Oregon Office of Administrative Hearings*, Case No. 25CV20984  
12 (“Mandamus Action”), seeking to direct Chief ALJ Rhoades to grant UBI a change of ALJ in the  
13 OAH Cases. A copy of the Petition for Writ of Mandamus is attached as **Exhibit E**. UBI’s  
14 Mandamus Action was filed over four months after Chief ALJ Rhoades’ Ruling on Request for  
15 Change of Administrative Law Judges in the OAH Cases, which was issued on November 26,  
16 2024, and after ALJ Allen had issued an order in the OAH Cases.

17 36.

18 UBI’s Mandamus Action was untimely filed, was filed despite the existence of a plain,  
19 adequate, and speedy remedy in the ordinary course of the law (*see, e.g.*, ORS 183.480) and was  
20 filed in a court lacking jurisdiction because this Court has prior exclusive jurisdiction over the  
21 KBA.

22 /

23 /

1 37.

2 No writ of mandamus was ever issued in the UBI Mandamus Action, despite the fact that  
3 ORS 34.130(3) requires the issuance of a writ.

4 38.

5 On August 25, 2025, without a hearing on the record and prior to the issuance of a writ,  
6 the Circuit Court of Marion County dismissed the Mandamus Action without prejudice “[b]ased  
7 on the stipulation of the parties.” Stipulated J. of Dismissal at 2, *UBI v. Rhoades*, No.  
8 25CV20984 (Or. Marion Cir. Ct. Aug. 25, 2025), attached as **Exhibit F**. No written stipulation  
9 or agreement was attached to the order dismissing the Mandamus Action. No record of a hearing  
10 is available to indicate when or how the parties presented the stipulation to the Circuit Court of  
11 Marion County or when the Marion County Court reviewed the stipulation.

12 39.

13 Four days later, on August 29, 2025, Chief ALJ Rhoades issued the Sua Sponte Rulings  
14 in the OAH Cases, all of which contained the following identical terse language:

15 On November 25, 2024, Chief Administrative Law Judge Jeffrey Rhoades  
16 issued a Ruling on Request for Change of Administrative Law Judge. That ruling  
17 is hereby vacated in its entirety. Upper Basin Irrigators’ request for change of  
assigned Administrative Law Judge is GRANTED. Pursuant to ORS 183.645, the  
matter is reassigned to Senior ALJ Alison Webster.

18 Sua Sponte Rulings 1, **Exhibit A** (text of the “Ruling” quoted here in its entirety).

19 40.

20 The Sua Sponte Rulings were made without lawful authority and did not contain any  
21 findings of fact or conclusions of law, and were issued without notice to the parties in the OAH  
22 Cases and without any opportunity to respond. OAH’s *Model Rules of Procedure for Contested*

1 *Cases*<sup>12</sup> do not contain any provision which allows for reconsideration of a ruling on a request  
2 for change of judge, which is an interlocutory or non-final ruling.

3 41.

4 The Sua Sponte Rulings vacated the November 2024 Rulings in the OAH Cases. In the  
5 November 2024 Rulings, Chief ALJ Rhoades found (i) that ALJ Allen was assigned on April 2,  
6 2010,<sup>13</sup> (ii) that ALJ Allen presided over the OAH Cases,<sup>14</sup> and (iii) that UBI – which  
7 collectively requested a change of judge – participated in the contested case hearings from 2010  
8 through 2012 without seeking to recuse ALJ Allen.<sup>15</sup> Chief ALJ Rhoades made his November  
9 2024 Rulings by following a thorough and detailed analysis of ORS Chapter 539, holding that  
10 the OAH Cases were a continuation of prior OAH proceedings as part of the KBA and that UBI  
11 had already enjoyed a reasonable opportunity to challenge ALJ Allen’s assignment to the OAH  
12 Cases in 2010.

13 42.

14 On September 4, 2025, subsequent to the issuance of the Sua Sponte Rulings, the Tribes  
15 learned that the dismissal of the UBI’s Mandamus Action in the Marion County Circuit Court  
16 was based upon an agreement among the parties to that case – UBI, OAH, and Chief ALJ  
17 Rhoades himself – and that a new ALJ would be assigned to the OAH Cases, if UBI’s  
18 Mandamus Action was dismissed against Chief ALJ Rhoades. This agreement was made  
19

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20  
21 <sup>12</sup> Ellen F. Rosenblum, *Oregon Attorney General’s Administrative Law Manual and Uniform  
Model Rules of Procedure under the Administrative Procedures Act* at G-24 to G-108 (2024).

22 <sup>13</sup> November 2024 Rulings 1.

23 <sup>14</sup> *Id.* at 1, 4.

<sup>15</sup> *Id.* at 2, 4.

1 without the knowledge or participation of the Tribes or, upon information and belief, any of the  
2 other parties to the OAH cases. This agreement reflects bias on the part of Chief ALJ Rhoades  
3 and calls into question the equity and fairness of the OAH proceedings, and irreparably harms  
4 other parties involved in the OAH Cases.

5 43.

6 Any communication of the settlement in UBI's Mandamus Action to OAH would  
7 necessarily constitute: (i) a communication by both parties to the settlement, including UBI; and  
8 (ii) a request to take an action that affects the rights of all parties to the OAH Cases on an issue  
9 previously litigated and decided.

10 44.

11 Because the agreement in UBI's Mandamus Action was communicated to OAH, it is an  
12 apparent violation of OAR 137-003-0625, which addresses ex parte communications with  
13 administrative law judges. When Respondents-Defendants received communication that the UBI  
14 Mandamus Action had been settled, based upon an agreement to benefit the parties to that  
15 Mandamus Action by assigning a new ALJ to the OAH Cases, OAR 137-003-0625 imposed a  
16 duty to take the following actions: (i) the Chief ALJ make a record of the ex parte  
17 communication,<sup>16</sup> (ii) the Chief ALJ "shall advise the agency and all parties in the proceeding  
18 that an ex parte communication has been made a part of the record, and (iii) the administrative  
19 law judge shall allow the agency and parties an opportunity to respond to the ex parte  
20 communication."<sup>17</sup> As a result of the Chief ALJ failing to perform this official duty regarding ex

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21  
22 <sup>16</sup> *Id.* subsection (2).

23 <sup>17</sup> *Id.* subsection (3).

1 parte communications, the Tribes was not notified of the agreement in the UBI Mandamus  
2 Action, and the unauthorized Sua Sponte Rulings were issued without providing the Tribes with  
3 an opportunity to respond or be heard in the OAH Cases.

4 45.

5 To the extent the agreement in the UBI Mandamus Action resulted in an ex parte request  
6 from a party to change an ALJ pursuant to OAR 471-060-0005 and 137-003-0501(8), it was not  
7 only contrary to the applicable rules, but also an untimely request because it was made by a party  
8 group fifteen years after the initial assignment and almost one year after the October 11, 2024  
9 Notice of Continuation of Administrative Law Judge Assignment in the OAH Cases and not  
10 within any reasonable period to object or within the ten-day time period in the current OAR 471-  
11 060-0005(4).

12 46.

13 The November 2024 Rulings in the OAH Cases were correct and remain correct. The  
14 Chief ALJ had no authority under ORS 183.645 or OAR 471-060-0005 to resurrect UBI's  
15 previous request for change of ALJ and issue its Sua Sponte Rulings. This Court should vacate  
16 the Sua Sponte Rulings, reinstate the November 2024 Rulings, and allow ALJ Allen to remain on  
17 the OAH Cases. The Court should also stay the OAH proceedings, or its Order Remanding the  
18 Matter to OWRD, pending the resolution of this Petition.

19 /

20 /

21 /

22 /

23 /

1 **VI. CLAIMS FOR RELIEF**

2 **Claim 1: Declaratory and Injunctive Relief from Non-Final Order in Contested Case**

3 47.

4 The Tribes incorporates Paragraphs 1 through 46 as if stated herein.

5 48.

6 ORS 28.010 provides:

7 Courts of record within their respective jurisdictions shall have power to  
8 declare rights, status, and other legal relations, whether or not further relief is or  
9 could be claimed. No action or proceeding shall be open to objection on the  
10 ground that a declaratory judgment is prayed for. The declaration may be either  
11 affirmative or negative in form and effect, and such declarations shall have the  
12 force and effect of a judgment.

13 49.

14 ORS 183.480(3) provides:

15 No action or suit shall be maintained as to the validity of any agency order  
16 except a final order as provided in this section and ORS 183.482, 183.484,  
17 183.490 and 183.500 or except upon showing that the agency is proceeding  
18 without probable cause, or that the party will suffer substantial and irreparable  
19 harm if interlocutory relief is not granted.

20 (emphasis added).

21 50.

22 A person or party may obtain judicial review of a non-final order in a contested case  
23 based upon a showing, under ORS 183.480(3), that the agency is proceeding without probable  
cause or that the party will suffer substantial and irreparable harm if interlocutory relief is not  
granted. *Or. Health Care Ass'n. v. Health Div.*, 329 Or. at 493-494.

51.

The purpose of the showing in ORS 183.480(3) is for a party to obtain judicial relief from

1 unauthorized or harmful agency action.

2 52.

3 The November 2024 Rulings in the OAH Cases were non-final orders in those cases and  
4 not subject to review or reconsideration under the *Model Rules of Procedure for Contested*  
5 *Cases*. This was the very basis upon which Chief ALJ Rhoades denied UBI’s Request for  
6 Reconsideration of Ruling on Request for Change of Administrative Law Judge filed in the OAH  
7 Cases.

8 53.

9 The Sua Sponte Rulings were an unauthorized administrative action, made without  
10 probable cause, violated the due process rights of the Tribes, made sua sponte in excess of  
11 statutory and regulatory authority, and made on the basis of an agreement in a separate legal  
12 action without any notice to the Tribes or opportunity for a hearing. “The fundamental  
13 requirement of due process is the opportunity to be heard ‘at a meaningful time and in a  
14 meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted).  
15 Indeed, “a fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*,  
16 349 U.S. 133, 136 (1955). This principle “applies to administrative agencies which adjudicate as  
17 well as to courts.” *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (citation omitted).

18 54.

19 Because the ORS and OAR provide a specific process for change of ALJs, the Chief ALJ  
20 was bound to follow that process. The OAR provides that a party is entitled to request a change,  
21 within ten business days of the ALJ assignment notice, for automatic reassignment.<sup>18</sup>

---

22  
23 <sup>18</sup> OAR 471-060-0005(3) to (4); *see also Pulito v. Or. State Bd. of Nursing*, 366 Or. 612, 623-24 (2020) (“the text and context establish that, where the legislature provided the opportunity to



1 Subsequent requests require a showing of good cause, which includes personal bias or prejudice  
2 of the ALJ, the ALJ’s personal knowledge of disputed facts, conflict of interest or other interest  
3 substantially affected by outcome, or any reason why impartiality might reasonably be  
4 questioned.<sup>19</sup>

5 55.

6 Nothing in the applicable administrative rules or Oregon statutes, which set forth an  
7 express process for changing ALJs, confers unilateral authority upon the Chief ALJ to overturn a  
8 duly issued assignment of an ALJ absent a motion or cause.<sup>20</sup> ALJ assignment orders, once  
9 entered, establish appointment of the designated ALJ until recusal, disqualification,  
10 unavailability, or demonstrated necessity.<sup>21</sup>

11  
12 \_\_\_\_\_  
13 make a one-time, no-cause request for a different ALJ, the chief ALJ must grant that request if it  
14 is received ‘within the time allowed,’ *i.e.*, within a specific time period. The ordinary meaning  
15 of the term ‘time limitations’ in ORS 183.645(1) means a specific time period – one that  
16 provides certainty or predictability as to when a request for a different ALJ must be submitted –  
17 and is thus the standard from which OAR 471-060-0005 may not depart.” (citing *Nay v. Dep’t.*  
18 *of Hum. Servs.*, 360 Or. 668, 695 (2016)).

19 <sup>19</sup> See OAR 471-060-0005(2)(b); *see also* OAR 438-085-0750 (an administrative law judge may  
20 recuse himself or the chief administrative law judge may excuse him on the grounds of personal  
21 bias or conflict of interest, upon such showing by a party objecting to that judge).

22 <sup>20</sup> See, *e.g.*, ORCP 71 (outlining procedure for relief from judgment or order); ORS 18.107  
23 (provision allowing corrections to civil judgments); ORS 419B.923 (juvenile court provision  
allowing court to set aside a ruling upon motion). Unilateral action without a motion is limited  
to correction of clerical errors or mistakes. *See also* ORCP 71 A; *Yarbrough v. Viewcrest Invs.,*  
*LLC*, 299 Or. App. 143, 155, 162-63 (2019). Here, the Sua Sponte Rulings go beyond the  
correction of a mere clerical mistake thus requiring any action to modify the 2024 Rulings to be  
made by motion of a party. No motion was pending before the OAH when the Sua Sponte  
Rulings were issued.

<sup>21</sup> ORS 183.645(1):

After assignment of an administrative law judge from the Office of  
Administrative Hearings to conduct a hearing on behalf of an agency [here, the  
Oregon Water Resources Department], the chief administrative law judge shall

1 56.

2 The Sua Sponte Rulings do not comply with the applicable statutes and regulations for  
3 reassignment of administrative law judges in administrative proceedings before the OAH.  
4 Pursuant to OAR 471-060-0005 and OAR 137-003-0501(8), which set forth the rules and  
5 procedures for a change of ALJ under ORS 183.645, ORS 183.341, and ORS 183.630, UBI  
6 objected to the assignment of ALJ Allen in proceedings following remand from the Circuit  
7 Court, and after briefing by the parties, the Chief ALJ determined to maintain the assignment of  
8 ALJ Allen to the remanded proceedings.

9 57.

10 UBI did not contest the Chief ALJ's determination under ORS 183.480(3),<sup>22</sup> and there is  
11 no evidence in the record or notice to the parties that UBI sought a timely second reassignment  
12

13 \_\_\_\_\_  
14 assign a different administrative law judge for the hearing upon receiving a  
written request from any party in the contested case or from the agency.

15 ORS 183.645(2):

16 Only one request for a change of assignment of administrative law judge  
17 under subsection (1) of this section may be granted by the chief administrative  
18 law judge without a showing of good cause. If a party or agency fails to make a  
19 request under subsection (1) of this section within the time allowed, or if a party  
or agency objects to an administrative law judge assigned after a request for a  
different administrative law judge has been granted under subsection (1) of this  
section, the chief administrative law judge shall assign a different administrative  
law judge only upon a showing of good cause.

20 The legislature has, thus, established an express process for removing ALJs, and that process  
21 circumscribes the Chief ALJ's inherent authority. Specifically, that express process does not  
22 recognize the OAH to act sua sponte. Chief ALJ Rhoades, therefore, exceeded his authority by  
acting sua sponte. *See, e.g., Garner v. Garner*, 182 Or. 549, 562 (1948) (explaining that judges  
are without jurisdiction if they act in excess of statutory limitations).

23 <sup>22</sup> ORS 183.480(3) provides the only avenue for judicial relief from a non-final order in a  
contested case. *Or. Health Care Ass'n v. Health Div.*, 329 Or. at 492-94. UBI filed an untimely  
petition for reconsideration in the OAH cases, but Chief ALJ Rhoades denied the petition,

1 of administrative law judge upon any showing of good cause, as expressly required by the  
2 applicable statutes and regulations.

3 58.

4 While identifying that he was acting under ORS 183.645, even though no official request  
5 or motion was pending before him, the Chief ALJ, nevertheless, reversed his own 2024 Rulings  
6 sua sponte and – without any explanation, rationale or other reasoning – reassigned these  
7 proceedings to ALJ Alison Webster. Because the Sua Sponte Rulings failed to adhere to the  
8 statutory and regulatory requirements for changes in administrative law judges, they were made  
9 in violation of ORS 183.645 and OAR 471-060-0005 and must be vacated.<sup>23</sup>

10 59.

11 The Motion to Vacate, which is incorporated herein, makes a factual showing of violation  
12 of ORS 183.685 and OAR 137-003-0625 regarding the ex parte communication to OAH and  
13 Chief ALJ Rhoades of the settlement of the UBI Mandamus Action, which was an agreement to  
14 change the assigned ALJ.

15  
16 \_\_\_\_\_  
17 because there was no basis in the OAR for reconsideration of a non-final order and the section of  
18 OAR that UBI relied upon applies only to final orders in contested cases.

19 <sup>23</sup> Chief ALJ Rhoades acted without any pending motion or request in the OAH Cases. The  
20 2024 Rulings found that UBC (now UBI) had a reasonable opportunity to object in 2010, when  
21 ALJ Allen was first assigned. UBI did not object in 2010 and continued to participate in the  
22 proceedings. The 2024 Ruling also said that since the remand proceedings are a continuation of  
23 the same proceedings prior to appeal to the Circuit Court, the time to object has long passed.  
Reassignment of the Administrative Law Judge at this stage of these multi-decade, complex  
proceedings undermines principles of judicial efficiency and wise use of scarce judicial  
resources, risks duplication of work, and threatens inconsistent handling of critical water  
adjudication issues. Vacating the Sua Sponte Rulings and restoring ALJ Allen to these matters  
would restore continuity and stability. *See Klamath Tribes’ Resps. to UBI Reqs. for Change of  
ALJ 5 n.4, Oct. 28, 2024 (noting UBI has attempted to change administrative law judges various  
times without success).*

1 60.

2 UBI and OAH settled a separate Mandamus Action that UBI filed against OAH and  
3 Chief ALJ Rhoades in Marion County Circuit Court by agreeing to a change of ALJ in the OAH  
4 Cases. Specifically, the ODOJ attorney represented the following:

5 [T]he stipulation referred to in the Stipulated Judgment of Dismissal in the  
6 mandamus action entered on August 25, 2025, was an agreement between the  
7 parties that the mandamus action would be dismissed and a new ALJ would be  
appointed in the pending OAH cases.

8 Motion to Vacate, Declaration of Thomas L. Murphy ¶ 5, attached as **Exhibit G**.

9 61.

10 The UBI Mandamus Action was dismissed on August 25, 2025; the Sua Sponte Rulings  
11 were issued on August 29, 2025.

12 62.

13 The agreement between UBI and OAH was reached in secret, was reached without the  
14 participation of *any* of the other parties to the OAH Cases, including the Tribes, and  
15 communicated to the Chief ALJ, after which he entered the Sua Sponte Rulings. This was a  
16 clear violation of ORS 183.685, OAR 137-003-0625, and the Code of Ethics for Administrative  
17 Law Judges of the Administrative Hearings.

18 63.

19 The Tribes will suffer substantial and irreparable harm if relief from the Sua Sponte  
20 Rulings is not granted, specifically:

- 21 a. Additional and possibly lengthy delays in the OAH Cases, including the  
22 additional time and resources that the parties will have to expend based upon the  
23

1 assignment of a new ALJ to legally and factually complex proceedings, which are  
2 part of a general stream adjudication that has spanned decades;

3 b. The impact of delays on the Tribes' water rights, which have now been litigated  
4 for nearly five decades;

5 c. Loss of the extensive length of time and effort ALJ Allen put into presiding over  
6 the OAH Cases, including his familiarity with the issues and parties, and ability to  
7 handle the proceedings expeditiously, which would be a substantial obstacle for  
8 any new ALJ given the length and complexity of the proceedings;

9 d. Loss of knowledge ALJ Allen gained through presiding over the OAH Cases and  
10 the amount of time required for a new ALJ to gain a similar amount of knowledge  
11 or experience;

12 e. Lack of continuity in the OAH Cases, given that the Court reviewed ALJ Allen's  
13 previous orders as incorporated into the ACFFOD;

14 f. The impact of allowing a procedurally improper substitution for the ALJ who is  
15 most intimately familiar with the claims, the factual and legal issues, and the  
16 KBA process on the ultimate resolution of the Tribes' water rights; and

17 g. Violation of the Tribes' procedural due process rights in the OAH Cases and  
18 proceedings, including (i) failure to notify the Tribes of the settlement of the UBI  
19 Mandamus Action, (ii) failure to provide the Tribes with an opportunity to  
20 respond, (iii) failure to hold a hearing, and (iv) failure to provide a statement of  
21 reasons for the decision. *See, e.g.*, Code of Ethics for Administrative Law Judges  
22 of the Office of Administrative Hearings § 2-105, <https://www.oregon.gov/oah/>  
23

1 [pages/code\\_of\\_ethics.aspx?utm\\_source=chatgpt.com](https://www.oregon.gov/OSL/Pages/code_of_ethics.aspx?utm_source=chatgpt.com) (“An Administrative Law  
2 Judge . . . shall decide matters on the basis of the facts and applicable law.”).

3 64.

4 The Court should declare that the Sua Sponte Rulings (i) were issued in violation of OAR  
5 137-003-0625, ORS 183.685, and the Tribes’ due process rights; (ii) vacate the Sua Sponte  
6 Rulings; and (iii) enjoin enforcement of the Sua Sponte Rulings, including a stay of the OAH  
7 proceedings pending resolution of this matter.<sup>24</sup>

8 **Claim 2: Mandamus Relief**

9 65.

10 The Tribes incorporates paragraphs 1 through 64 as if stated herein.

11 66.

12 In the alternative, the Tribes, Relator in this Claim 2, seeks mandamus relief from the Sua  
13 Sponte Rulings issued by Chief ALJ Rhoades in the OAH Cases. In the Sua Sponte Rulings,  
14 Chief ALJ Rhoades vacated the November 2024 Rulings in the OAH Cases, granted UBI’s  
15 request for change of administrative law judge, and reassigned the OAH Cases to a different  
16 administrative law judge.

17 67.

18 Relator Tribes petitions this Court for a peremptory writ of mandamus or, in the  
19 alternative, for an alternative writ of mandamus, directing Respondents Chief ALJ Rhoades and  
20 the OAH to vacate the Sua Sponte Rulings entered in the OAH Cases on August 29, 2025.

21  
22  
23 <sup>24</sup> On September 15, 2025, the Tribes filed a Motion to Vacate Sua Sponte Rulings of the Chief  
Administrative Law Judge in the OAH Cases, **Exhibit G**. That motion is currently pending.

1 68.

2 A request for change of ALJ should not have been granted in this matter because: (i) the  
3 OAH Cases were a continuation of prior OAH proceedings and UBI had previously exercised  
4 their right to challenge an ALJ assignment; (ii) ALJ Allen was assigned to the OAH Cases on  
5 April 2, 2010, or earlier, making UBI's October 23, 2024, Request for Change of ALJ untimely;  
6 and (iii) Chief ALJ Rhoades was without lawful authority in issuing the Sua Sponte Rulings.

7 69.

8 Vacating sua sponte the November 2024 Rulings and assigning a new ALJ in the OAH  
9 Cases, on the basis of an agreement reached in a separate lawsuit in a court which lacked  
10 jurisdiction, to which the Tribes was not a party, without notification to the Tribes, and without  
11 giving the Tribes an opportunity to respond, is a violation of OAR 137-003-0625, ORS 183.685,  
12 ORS 183.645, the Code of Ethics for Administrative Law Judges of the Administrative Hearings,  
13 and the Tribes' due process rights.

14 70.

15 Relator has no plain, speedy, and adequate remedy in the ordinary course of the law  
16 unless it is determined that the Tribes is able to seek judicial relief of a non-final order in this  
17 Court under its Claim 1, *supra*. If such relief is not granted, the Tribes may have to proceed  
18 through litigation of the OAH Cases, review by the agency adjudicator, before returning to this  
19 Court to obtain the requested relief that could reasonably require yet further remand. The  
20 extraordinary procedure of the KBA warrants the mandamus remedy.

21 71.

22 Relator requests that, pursuant to ORS 34.130(3), the Court issue the writ in accordance  
23 with this Petition.

1 72.

2 Pursuant to ORS 34.130(5), Relator seeks a stay of the proceedings in the OAH Cases  
3 while this matter is pending.

4 73.

5 Pursuant to ORS 34.150, the Court should issue a peremptory writ directing Defendants  
6 to vacate the Sua Sponte Rulings in the OAH Cases as a violation of the OAR, the ORS, the  
7 Code of Ethics for Administrative Law Judges of the Administrative Hearings, and the Tribes'  
8 due process rights in the OAH Cases, or, in the alternative, an alternative writ requiring  
9 Defendants to appear before the Court to show cause why such vacatur should not be made.

10 **VII. PRAYER FOR RELIEF**

11 For these reasons, the Court should exercise its jurisdiction under ORS 183.480(3) and  
12 vacate the August 29, 2025, Sua Sponte Rulings in the OAH Cases and enjoin OAH from  
13 changing the assigned ALJ in the OAH cases. The Court should also exercise its jurisdiction  
14 under ORS 28.010-.250 and declare that the Sua Sponte Rulings were issued without lawful  
15 authority and that they should be declared as null and void. The Tribes also seeks a stay, if not  
16 granted by OAH, of either the remand proceedings or of the Order Remanding the Matter to  
17 OWRD, pending resolution of this matter. Finally, the Tribes seeks other and further relief as  
18 the Court may deem to be just and proper, including, without limitation, the removal of Chief  
19 ALJ Rhoades from presiding over the OAH Cases.

20 In the alternative, Relator Tribes prays this Court issue a peremptory writ of mandamus  
21 or an alternative writ of mandamus directing Defendants Chief Administrative Law Judge Jeffrey  
22 R. Rhoades and the Oregon Office of Administrative Hearings to follow the Oregon  
23 Administrative Rules, vacate the Sua Sponte Rulings issued in OAH Case Nos. 2024-OWRD-



1 00134, 2024-OWRD-00136, 2024-OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139,  
2 2024-OWRD-00140 and 2024-OWRD-00141, stay the OAH cases pending resolution of this  
3 matter or stay the Order Remanding the Matter to OWRD, and for other and further relief as the  
4 Court may deem to be just and proper, including, without limitation, the removal of Chief ALJ  
5 Rhoades from presiding over the OAH Cases.

6 The Tribes also seeks recovery of attorneys' fees and costs as permitted under ORS  
7 183.497 or ORS 34.210.

8  
9 Respectfully submitted this 4th day of December, 2025.

10 s/ Joe M. Tenorio  
11 JOE M. TENORIO, OSB #210623  
12 Thomas L. Murphy, (*Pro hac vice*) Colo. Bar #61180  
13 Native American Rights Fund  
14 250 Arapahoe Avenue  
15 Boulder, Colorado 80302-5821  
16 Tel: (303) 447-8760  
17 Fax: (303) 443-7776  
18 Email: tenorio@narf.org  
19 murphy@narf.org

20 **ATTORNEYS FOR THE KLAMATH TRIBES**

# Exhibit A

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

<b>In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries</b>	)	<b>RULING ON CHANGE OF ADMINISTRATIVE LAW JUDGE ASSIGNMENT</b>
	)	OAH Reference No. 2024-OWRD-00136
<b>Claim 622 (Upper Klamath Lake)</b>	)	Former OAH Case No. 286

**RULING**

On November 25, 2024, Chief Administrative Law Judge Jeffrey Rhoades issued a Ruling on Request for Change of Administrative Law Judge. That ruling is hereby vacated in its entirety. Upper Basin Irrigators’ request for change of assigned Administrative Law Judge is GRANTED. Pursuant to ORS 183.645, the matter is reassigned to Senior ALJ Alison Webster.

\_\_\_\_\_  
Jeffrey R. Rhoades  
Chief Administrative Law Judge  
Office of Administrative Hearings

## CERTIFICATE OF MAILING

On the 29<sup>TH</sup> day of August, 2025, I emailed the foregoing RULING ON CHANGE OF ADMINISTRATIVE LAW JUDGE ASSIGNMENT in **OAH Reference No. 2024-OWRD-00136:**

BY ELECTRONIC MAIL:

<b>Name</b>	<b>Address</b>	<b>Contact</b>
United States Department Of Justice Guss Guarino	999 18th St. North Terr. #600 Denver CO 80202	guss.guarino@usdoj.gov; raymundo.ribota@usdoj.gov
United States Department Of Justice David Harder	999 18th St. North Terr. #600 Denver CO 80202	david.harder@usdoj.gov Cc: Alyssa.Martin@usdoj.gov; Matthew.Lamb2@usdoj.gov
United States Department Of Justice Emmi Blades	999 18th St. North Terr. #600 Denver CO 80202	Emmi.Blades@usdoj.gov
Native American Rights Fund: Representing The Klamath Tribes Joe M. Tenorio	250 Arapahoe Ave Boulder CO 80302-5821	tenorio@narf.org; jschmidt@narf.org
Native American Rights Fund Thomas L. Murphy	250 Arapahoe Ave Boulder CO 80302-5821	murphy@narf.org
Native American Rights Fund Alice E. Walker	250 Arapahoe Ave Boulder CO 80302-5821	walker@narf.org
Native American Rights Fund Ashley Dawn Anderson	250 Arapahoe Ave Boulder CO 80302-5821	anderson@narf.org
Carollo Law Group, LLC: Representing The Upper Basin Irrigators (UBI) Dominic M. Carollo	PO Box 2456 Roseburg OR 97470	dcarollo@carollolegal.com; nsmith@carollolegal.com; kharp@carollolegal.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Maximilian Bricker	500 Capitol Mall Suite 1000 Sacramento CA 95814	mbricker@somachlaw.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Theresa C. Barfield	500 Capitol Mall Suite 1000 Sacramento CA 95814	tbarfield@somachlaw.com

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286*  
Ruling on Change of Administrative Law Judge Assignment  
Page 2 of 3

Rietmann & Kim, LLP: Representing Klamath Project Water Users (KPWU) Nathan R. Rietmann	1270 Chemeketa St. NE Salem OR 97301	nathan@rietmannlaw.com
Parks & Ratliff, PC: Representing The Klamath Project Water Users (KPWU) Nathan Ratliff	620 Main St. Klamath Falls OR 97601	nathan@parksandratliff.com; reception@parksandratliff.com
Davis, Wright, Tremaine, LLP: Representing Klamath Project Water Users (KPWU) Olivier Jamin	560 SW 10th Ave Suite 700 Portland OR 97205	olivierjamin@dwt.com
Davis, Wright, Tremaine, LLP: Representing The Klamath Project Water Users (KPWU) Andy McStay	560 SW 10th Ave Suite 700 Portland OR 97205	andymcstay@dwt.com
Clyde Snow, Attorneys at Law: Representing The Klamath Project Water Users (KPWU) Reagan L.B. Desmond Nathaniel E. Broadhurst	377 SW Century Drive Bend OR 97702	rlbd@clydesnow.com; neb@clydesnow.com
Blain Law, LLC: Representing The Klamath Project Water Users (KPWU) Mika Blain	517 Main St. Klamath Falls OR 97601	mika@blainlawllc.com
Brandsness, Brandsness & Rudd, PC: Representing The Klamath Project Water Users (KPWU) Michael P. Rudd	411 Pine St. Klamath Falls OR 97601	mike@brandsnessrudd.com
Will Davidson	725 Summer St NE Suite A Salem OR 97301	will.d.davidson@water.oregon.gov
Jesse D Ratcliffe	1162 Court St NE Salem OR 97301	Jesse.D.Ratcliffe@doj.oregon.gov; Denise.Ruttan@doj.oregon.gov

/s/Alexandria N Whitley  
Hearing Coordinator

# Exhibit B

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

**In the Matter of the Determination of  
the Relative Rights to the Use of the  
Waters of the Klamath River and its  
Tributaries** ) **NOTICE OF CONTINUATION OF  
ADMINISTRATIVE LAW JUDGE  
ASSIGNMENT**  
)  
)  
)  
**Claim 622 (Upper Klamath Lake)** ) OAH Reference No. 2024-OWRD-00136  
) (Formerly OAH Case No. 286)

Administrative Law Judge (ALJ) Maurice L. Russell, II was previously assigned to this matter.<sup>1</sup> On April 2, 2010, the Office of Administrative Hearings (OAH) assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside over this matter. A hearing convened on April 18, 2011. On April 16, 2012, ALJ Allen issued a Proposed Order. The Oregon Water Resources Department (OWRD) referred the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD) to the Klamath County Circuit Court in 2013. On June 28, 2023, the Klamath County Circuit Court remanded the matter to OWRD to conduct a hearing to supplement the existing record. OWRD issued an Order on Scope of Hearing on Remand (Order on Remand). As part of the Order on Remand, OWRD elected to refer the matter back to the OAH. On May 3, 2024, OWRD referred this matter back to the OAH.

The assignment of **ALJ Allen** issued April 2, 2010, remains in place.

Unless otherwise notified, all correspondence, inquiries, exhibits, and other filings should be sent to the Hearing Coordinator listed below. **Please use the OAH case number above on all correspondence and filings.** If you have any questions, please call the Hearing Coordinator.

Alexandria N Whitley, Hearing Coordinator  
Office of Administrative Hearings  
PO Box 14020  
Salem OR 97309-4020  
(971) 209-5074 - FAX: (503) 947-1923  
Email: [OED\\_OAH\\_OWRD@employ.oregon.gov](mailto:OED_OAH_OWRD@employ.oregon.gov)  
TTY: 1-800-735-1232

Correspondence regarding this notice should be directed to the above address.

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<sup>1</sup> The exact date of ALJ Russell's initial assignment is unknown. ALJ Russell became unexpectedly unavailable to continue this matter. As noted in the Proposed Order, between 1999 and 2010, the matter had been presided over by four separate ALJs.

## CERTIFICATE OF MAILING

On the 11<sup>th</sup> day of October, 2024, I mailed the foregoing NOTICE OF CONTINUATION OF ADMINISTRATIVE LAW JUDGE ASSIGNMENT in OAH Reference No. 2024-OWRD-00136

BY ELECTRONIC MAIL:

<b>Name</b>	<b>Address</b>	<b>Contact</b>
United States Department Of Justice Guss Guarino	999 18th St. South Terr. # 370 Denver CO 80202	guss.guarino@usdoj.gov; raymundo.ribota@usdoj.gov
United States Department Of Justice David Harder	999 18th St South Terr. #370 Denver CO 80202	dharder@enrd.usdoj.gov
United States Department Of Justice Daniel McCarl	999 18th St. South Terr. #370 Denver CO 80202	daniel.mccarl@usdoj.gov
Native American Rights Foundation: Representing The Klamath Tribes Joe M. Tenorio	250 Arapahoe Ave Boulder CO 80302-5821	tenorio@narf.org; jschmidt@narf.org
Native American Rights Foundation: Representing The Klamath Tribes Ada Montague	250 Arapahose Ave Boulder CO 80302-5821	montague@narf.org
Carollo Law Group, LLC: Representing The Upper Basin Irrigators (UBI) Dominic M. Carollo	PO Box 2456 Roseburg OR 97470	dcarollo@carollolegal.com; nsmith@carollolegal.com; kharp@carollolegal.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Paul Simmons	500 Capitol Mall Suite 1000 Sacramento CA 95814	psimmons@somachlaw.com
Rietmann & Kim, LLP: Representing Klamath Project Water Users (KPWU) Nathan R. Rietmann	1270 Chemeketa St. NE Salem OR 97301	nathan@rietmannlaw.com
Parks & Ratliff, PC: Representing The Klamath Project Water Users (KPWU) Nathan Ratliff	620 Main St. Klamath Falls OR 97601	nathan@parksandrattliff.com; reception@parksandrattliff.com
Davis, Wright, Tremaine, LLP: Representing Klamath Project Water Users (KPWU) Olivier Jamin	560 SW 10th Ave Suite 700 Portland OR 97205	olivierjamin@dwt.com



Davis, Wright, Tremaine, LLP: Representing The Klamath Project Water Users (KPWU) Andy McStay	560 SW 10th Ave Suite 700 Portland OR 97205	andymcstay@dwt.com
Clyde Snow, Attorneys at Law: Representing The Klamath Project Water Users (KPWU) Reagan L.B. Desmond	377 SW Century Drive Bend OR 97702	rlbd@clydesnow.com
Blain Law, LLC: Representing The Klamath Project Water Users (KPWU) Mika Blain	517 Main St. Klamath Falls OR 97601	mika@blainlawllc.com
Brandsness, Brandsness & Rudd, PC: Representing The Klamath Project Water Users (KPWU) Michael P. Rudd	411 Pine St. Klamath Falls OR 97601	mike@brandsnessrudd.com
Will Davidson	725 Summer St NE Suite A Salem OR 97301	will.d.davidson@water.oregon.gov
Denise Ruttan	1162 Court St NE Salem OR 97301	denise.ruttan@doj.oregon.gov
Jesse D Ratcliffe	1162 Court St NE Salem OR 97301	Jesse.D.Ratcliffe@doj.oregon.gov

/s/Alexandria N Whitley  
Hearing Coordinator

# Exhibit C

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

**In the Matter of the Determination of  
the Relative Rights to the Use of the  
Waters of the Klamath River and its  
Tributaries** ) **RULING ON REQUEST FOR CHANGE  
OF ADMINISTRATIVE LAW JUDGE**  
)  
)  
)  
)  
**Claim 622 (Upper Klamath Lake)** ) OAH Reference No. 2024-OWRD-00136  
) Former OAH Case No. 277

Pursuant to Oregon Revised Statute (ORS) 183.645 and Oregon Administrative Rule (OAR) 471-060-0005(3), the Upper Basin Irrigators (UBI) requested a change of the administrative law judge (ALJ) assigned to hear the above-entitled case. On October 29, 2024, the Klamath Tribes (Tribes) filed a Klamath Tribes’ Response to UBI Request for Change of Administrative Law Judge, opposing UBI’s request.

**ISSUE**

Whether a different ALJ should be assigned to hear this case. *See* ORS 183.645, OAR 471-060-0005.

**FINDINGS OF FACT**

1. On or about October 4, 1999, the Oregon Water Resources Department (OWRD) issued a Preliminary Evaluation regarding Claim 622. Beginning in 2000, UBI contestants and other contestants filed their Statement of Contests. Thereafter, OWRD referred this matter to the Office of Administrative Hearings (OAH). On April 2, 2010, the OAH issued a written notice assigning Senior Administrative Law Judge (ALJ) Joe L. Allen to preside over this matter.
2. An in-person cross-examination hearing convened on April 18, 2011. ALJ Allen presided over the hearing. UBI participated in the hearing. On April 16, 2012, ALJ Allen issued a Proposed Order. At the time ALJ Allen issued the Proposed Order, the OAH used a system called “Access” to store case information. The OAH did not use Access to electronically store case documents. Rather, documents for contested cases were kept in paper hardcopy.
3. This case was identified as Case No. 2 in the Access database. The OAH case file was the official record. After issuance of the Proposed Order, the OAH case file associated with this matter was returned to OWRD so it could be certified as part of the record for the circuit court to issue a judgment affirming or modifying the order of the director. OWRD issued and referred the Findings of Fact and Order of Determination to the Klamath County Circuit Court in 2013.

4. In 2013, the OAH implemented the use of an electronic Case Management System (CMS). Since that time, the OAH has received contested case referrals through CMS. All file documents are stored in CMS, which serves as the official record for contested cases referred to the OAH. The implementation of CMS resulted in a new case number naming convention. Existing cases that were transferred to CMS were assigned new case numbers. For these matters, documents issued under CMS list both the former Access and current CMS case number. On February 28, 2014, OWRD issued the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD) and submitted it to the Klamath County Circuit Court.

5. On June 7, 2023, the Klamath County Circuit Court issued an Opinion Re Motion to Present Non-record Evidence for Tribal Group (Phase 3, Part 2, Group C) Claims (Klamath Opinion). The Klamath Opinion remanded the matter to OWRD to conduct a hearing to supplement the existing record. The remand is for the limited purpose of taking additional evidence concerning a specific factor- the “moderate living standard.” The Klamath Opinion addressed the role of the OAH. UBI specifically requested that the remand should be to a referee rather than an OAH ALJ. The Klamath Opinion found: “UBI’s request for a remand to a referee rather than to OAH is denied. ORS 539.150(3) provides that the court ‘may, if necessary’ remand the case for further evidence ‘to be taken by the director or by a referee appointed by the court for that purpose.’ The court has determined that a remand is necessary, but it declines to appoint a referee and instead remands the contested claims at issue to the OWRD director in accordance with the statute.” (Klamath Order at 15). The Court also found “The director may-- but is not required to by this opinion -- delegate to an OAH administrative law judge the responsibility to conduct the additional contested case proceedings on remand. Any requests for discovery will be submitted to and decided in the forum that will take the additional evidence.” (Klamath Opinion at 15-16).

6. OWRD issued an Order on Scope of Hearing on Remand (Order on Remand).<sup>1</sup> As part of the Order on Remand, OWRD elected to refer the matter back to the OAH for further hearing. OWRD specified that the scope of the remand hearing is “[t]o take additional evidence on the determination of the moderate living standard issue a proposed order determining what, if any, effect the determination of the moderate living standard has on the existing quantification levels in the ACFFOD.” Order on Remand at 2.

7. On May 3, 2024, OWRD re-referred this matter to the OAH. The referral is entered in CMS and, therefore, has been assigned a new case number consistent with OAH procedure.

8. On October 11, 2024, the OAH issued a Notice of Continuation of Administrative Law Judge (Notice) by email. The Notice stated, in part, “The assignment of **ALJ Allen** issued April 2, 2010, remains in place.” (Notice at 1; Emphasis in original). The Notice provided all parties with instructions on how and who to submit correspondence to at the OAH.

9. On October 23, 2024, UBI filed a Request for Change of Administrative Law Judge (Request) with Chief ALJ Jeffrey Rhoades. In its Request, UBI asserts this is its first request for change of ALJ. As indicated in the Notice, prior to ALJ Allen’s formal assignment to this matter in April of 2010, four separate ALJs presided over the motion and discovery process.<sup>2</sup>

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<sup>1</sup> The Order on Scope of Hearing on Remand is undated.

<sup>2</sup> Because the OAH does not have access to the official paper file returned to the agency, the OAH will accept as fact UBI’s representation that this is their first request for change of ALJ.

## CONCLUSION OF LAW

A different ALJ should not be assigned to hear this case.

## OPINION

ORS 183.645(1) provides:

After assignment of an administrative law judge from the Office of Administrative Hearings to conduct a hearing on behalf of an agency, the chief administrative law judge shall assign a different administrative law judge for the hearing upon receiving a written request from any party in the contested case or from the agency. The chief administrative law judge may by rule establish time limitations and procedures for requests under this section.

The current version of OAR 471-060-0005<sup>3</sup> (2021) provides, in relevant part:

- (1) The purpose of this rule is to establish uniform procedures for the change of assignment of administrative law judges.
- (2) The words and terms used in OAR 471-060-0005 have the following meanings:
  - (a) An administrative law judge is “assigned to the case” when a written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier.
  - (b) “Good cause” to support a request for a change of administrative law judge is any reason why an administrative law judge’s impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.
- (3) Every party and agency in a contested case is entitled to request a change of administrative law judge. Except for hearings provided under ORS 813.410 or 813.440 on suspension of driving privileges, the first request of that party or agency shall be automatically granted so long as it is filed within the time limits established by section (4). If that party or agency makes a subsequent request, the party or agency must show good cause why the administrative law judge should not preside over the hearing. A request for change of administrative law judge in hearings provided under ORS 813.410 or 813.440 on suspension of driving privileges may only be granted on a showing of good cause. The Chief

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<sup>3</sup> OAR 137-003-0501(8) provides that OAR 471-060-0005 applies to all contested case hearings conducted by the Office of Administrative Hearings.

Administrative Law Judge may designate in writing a person (or persons) to rule on requests under this rule.

(4) All requests must be in writing and sent or delivered to the Chief Administrative Law Judge or designee by filing the request with the Office of Administrative Hearings by hand delivery, mail, facsimile transmission, or electronic mail. To be entitled to an automatic change of administrative law judge, the party making the request must do so within 10 business days after an administrative law judge is assigned to the case.

(a) For purposes of this rule, business days do not include days of scheduled office closure. Scheduled days of office closure include, but are not limited to, Saturdays and the legal holidays identified in ORS 187.010 and 187.020, including Sundays. A request will be considered filed on the date a party or agency mails, faxes, emails, hand delivers, or electronically transmits the request to the Office of Administrative Hearings.

(b) The time for filing a request for a change of the administrative law judge assigned to the case may be extended if the party or agency making the request can demonstrate that the failure to make a timely request was caused by an excusable mistake, surprise, excusable neglect, reasonable reliance on the statement of a party, agency, or the Office of Administrative Hearings relating to procedural requirements. In such cases, the party or agency may file the request within 10 business days after the circumstances that prevented a timely filing have come to an end.

UBI requests that the OAH assign a different ALJ to preside over this matter. UBI contends this is UBI's first such request. UBI does not allege good cause, as that term is defined in OAR 471-060-0005(2)(b), to support its request. Instead, UBI claims, under the current 2021 version of OAR 471-060-0005(3), they are automatically entitled to a change of the assigned ALJ, so long as that request is filed within the time limits established in the current version of OAR 471-060-0005(4). To be entitled to an automatic change of administrative law judge under the 2021 version of the rule, the party making the request must do so within 10 business days after an administrative law judge is assigned to the case. Under the current version of OAR 471-060-0005(4), an ALJ is "assigned to the case" when written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier. *See* OAR 471-060-0005(2)(b).

On April 2, 2010, the OAH sent written notice to all parties assigning ALJ Allen to this matter. On April 18, 2011, ALJ Allen convened and presided over the contested case hearing. UBI participated in the hearing. On April 16, 2012, ALJ Allen issued a Proposed Order. UBI filed its request for a change of the assigned ALJ on October 23, 2024.

UBI contends they timely filed the Request because it was filed within 10 days of the issuance of the Notice of Continuation of Administrative Law Judge. UBI asserts that the matter is a new referral to the OAH and that it is a "new and different case and proceeding, not a continuation of the prior administrative hearing completed nearly 13 years ago." Request at 2. UBI further argues the assignment

of a new case number, the issuance of the Notice that ALJ Allen was assigned to this case and the intervening change in the language of OAR 471-060-0005 all support its position that it is entitled to an automatic change of the assigned ALJ. UBI's position is inconsistent with the statutes and rules that govern the contested case process for water rights before 1909.

Proper application of the law requires close examination of the interplay between various statutes pertaining to both jurisdiction and procedure. ORS Chapter 539, specifically ORS 539.005 through ORS 539.240, addresses water rights before 1909 and is thus the statutory authority for this adjudication. ORS 539.005, which sets out the purpose of the chapter states, in relevant part:

(1) The Legislative Assembly declares that it is the purpose of this chapter to set for the procedures for carrying out a general stream adjudication in Oregon.

(2) In accordance with the applicable provisions of ORS chapter 183, the Water Resources Director shall adopt rules necessary to carry out the provisions of this chapter.

ORS 539.110 establishes the process by which a contested case hearing will be conducted.<sup>4</sup> ORS 183.635, "Agencies required to use administrative law judges from Office of Administrative Hearings," provides, in relevant part:

(1) Except as provided in this section, all agencies must use administrative law judges assigned from the Office of Administrative Hearings established under ORS 183.605 to conduct contested case hearings, without regard to whether those hearings are subject to the procedural requirements for contested case hearings.

ORS 539.150, "Court proceedings to review determination of director," defines the legal process to remand this matter to the OAH and provides:

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<sup>4</sup> ORS 539.110 provides:

The Water Resources Director shall fix the time and a convenient place for hearing the contest, and shall notify the contestant and the person whose rights are contested to appear before the director or the authorized assistant of the director at the designated time and place. The date of hearing shall not be less than 30 nor more than 60 days from the date the notice is served on the parties. The notice may be served personally or by registered or certified mail, return receipt requested, addressed to the parties at their post-office addresses as stated in the statement and proof of claimant. The director may adjourn the hearing from time to time upon reasonable notice to all the parties interested; may issue subpoenas and compel the attendance of witnesses to testify, which subpoenas shall be served in the same manner as subpoenas issued out of the circuit court; may compel the witnesses so subpoenaed to testify and give evidence in the matter; and may order the taking of depositions and issue commissions therefor in the same manner as depositions are taken in the circuit court. The witnesses shall receive fees as provided in ORS 44.415 (2), the costs to be taxed in the same manner as are costs in suits in equity. The evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest. The burden of establishing the claim shall be upon the claimant whose claim is contested. The evidence may be taken by a duly appointed reporter.

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries* - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286

Ruling on Request for Change of Administrative Law Judge

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(1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail or by certified mail with return receipt, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. ***The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.***

(4) After final hearing the court shall enter a judgment affirming or modifying the order of the director as the court considers proper, and may assess such costs as it may consider just except that a judgment for costs may not be rendered against the United States. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment.

*Emphasis added.*

In the present matter, the Klamath County Circuit Court determined it was necessary to remand this case for further testimony. The Court had the option of remanding the matter to the OWRD director or to a referee appointed by the Court. In accordance with ORS 183.635, a remand to OWRD director results in a remand to the OAH. UBI, based on the statutory authority found in ORS 539.150(3), specifically requested the court appoint a referee in lieu of remanding to the director. The court denied UBI's request.



OWRD utilized the legal remand process established in ORS 539.150(3). In accordance with ORS 539.005 and ORS 183.635, the matter was re-referred to the OAH. The re-referral process is outlined by OAR 137-003-0655, "Further Hearing and Issuance of Final Order," and provides:

(1) After issuance of the proposed order, if any, the administrative law judge shall not hold any further hearing or revise or amend the proposed order except at the request of the agency, except as provided in this subsection. The administrative law judge may withdraw a proposed order for correction within three working days of issuance of the proposed order. If the administrative law judge withdraws a proposed order for correction, the time for filing exceptions shall begin on the date the administrative law judge issues the corrected proposed order.

(2) If the agency requests the administrative law judge to conduct a further hearing under section (1) of this rule, the agency shall specify the scope of the hearing and the issues to be addressed. After further hearing, the administrative law judge shall issue a proposed order.

Pursuant to OAR 471-003-0655(2), OWRD issued the Order on Remand. OWRD specified the scope of the remand hearing "to take additional evidence on the determination of the moderate living standard and issue a proposed order determining what, if any, effect the determining of the moderate living standard has on the existing quantifications levels in the ACFOD." Order on Remand at 2. Pursuant to ORS 539.150(3), the court has the legal authority to enter a judgment affirming the determination of OWRD, as well as consider exceptions filed by any party in the matter. However, in the event the court determines further testimony is necessary to issue judgement, the court is required to either appoint a referee or remand to the OWRD Director. By operation of ORS 183.635, this results in a re-referral to the OAH. Pursuant to ORS Chapter 183 and associated rules, the ALJ's proposed order will be issued to OWRD and the parties. OWRD will, in turn, file its determination to the Klamath County Circuit Court. Once the Court enters a judgment either affirming or modifying the determination of the director, then, and only then, is the judgment final and subject to appeal by the Oregon Court of Appeals. *See* ORS 539.150(4).

UBI's contends that the ALJs issuance of the Proposed Order terminated the contested case process. UBI further asserts that a new and different case and proceeding was created by the remand. This is not supported by the plain language of the law, which clearly establishes the ongoing involvement of an entity, other than the court, to act as the finder of fact. *See* ORS 539.150. The law places no limit on the number of times the court can utilize its remand authority. Under UBI's interpretation, if the court decided to remand this matter multiple times to supplement the record, it would be terminating and creating multiple contested cases. This position is in clear contradiction of the process established by the legislature for the purpose of reaching a final judgment.

In further support of its position, UBI makes collateral arguments asserting this is a new contested case matter. These arguments will be addressed in turn.

UBI contends that the issuance of a new case number supports the proposition that the prior administrative proceeding was terminated. As established in the Findings of Fact, the OAH is currently operating under a new filing system that was established after the ALJ's Proposed Order was issued in this matter. *Supra* at 2. The implementation of CMS resulted in a new case numbering convention. The migration from old technology to new technology does not terminate a case and does not legally create a new contested case. Furthermore, UBI does not cite authority in support of this contention. Many judicial and administrative contested case systems have migrated to electronic case management over the past two decades. These migrations do not automatically create new cases by virtue of changing case numbering conventions.

UBI next asserts “[T]he fact that the OAH deemed it necessary to provide the parties with the Notice demonstrates that Upper Basin Irrigators did not *previously* have notice that ALJ Allen would be assigned *this* case.” Request at 2, *emphasis in original*. UBI's position disregards both the plain language of the title and content contained in the Notice. UBI has been aware since 2010 of ALJ Allen's assignment as the ALJ in this case. This is not a new case, but a continuation of the existing matter, as noted on the Notice issued to the parties. *See* ORS 539.150.

The Notice further serves as an update to all parties to the manner, means and method to file documents or make inquiries regarding the case. Again, the OAH has migrated to a different system over the life of this contested case. *Supra* at 2. The notice at issue provides the parties with the proper case caption referencing each claim number, the prior OAH case number under the old system and the current case number under CMS. Without conveying this information, the parties would not have the procedural information necessary to properly participate in this contested case matter.

UBI is correct that OAR 471-060-0005(4) was revised in 2021 resulting from *Pulito v. Oregon State Bd. of Nursing*, 366 Or 612 (2020). UBI appears to argue that, because this is a new contested case, the 2021 version of OAR 471-060-0005 must be applied. UBI's contention is not supported by the record or the law. This is a matter of remand, not a new contested case. The remand is a continuation of the contested case that will continue until a final judgment is issued by the Klamath County Circuit Court, at which point it is subject to appeal before the Oregon Court of Appeals. *See* ORS 539.150.

It is not uncommon for laws to change during the pendency of an action. Under Oregon law, whether an administrative rule applies retroactively depends upon the intent of the promulgating agency or legislature. *Delehant v. Board on Police Standards & Training*, 317 Or 273, 278, 855 P.2d 1088 (1993). To ascertain the agency's intent, a factfinder must first consider both the text and context of the rule. If the rule is silent on the issue, then one must look to the circumstances surrounding the promulgation of the rule. *E.g., U.S. Bancorp v. Dept. of Revenue*, 337 Or 625, 103 P.3d 85, 91-92 (2004) (noting that circumstances surrounding the agency's promulgation of the rule offered insight into the agency's intent, because the circumstances illustrated the agency had adopted the rule in response to a judicial decision that had invalidated a prior rule). There is nothing in the text of OAR 471-060-0005 (2021) to indicate an intent to apply the rule retroactively.<sup>5</sup>

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<sup>5</sup> When the rule was promulgated in 1999 it did anticipate there could be an impact on cases assigned to an ALJ with the OAH. Therefore, the rule included the following clause: OAR 471-060-0005(6) For all

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries* - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286

Ruling on Request for Change of Administrative Law Judge  
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In *Delehant*, although there was no specific provision in the rule itself indicating that the agency intended the rule at issue to apply retroactively, the court found that “the procedural history of this case clearly establishes such an intent.” 317 Or at 279. The court determined that because the agency had promulgated the rule during the progress of the case, and had applied the rule to the case, it intended the rule to apply retroactively. *Id.*; See also *May Trucking v. Dept. of Transportation*, 203 Or App 564, 126 P3d 695, 702 (2006) (similarly finding that the agency’s passage and application of a rule during the pendency of a contested case established the agency’s intent to apply the rule retroactively).

In *U.S. Bancorp*, *Delehant*, and *May Trucking*, the petitioners specifically challenged the application of the subsequently promulgated rule. In each of those cases, the retroactive application of the agency’s rule was a disputed issue, and the hearing record included evidence of the circumstances surrounding the promulgation of the rule and evidence from which the court could ascertain the agency’s intent. In contrast, here, UBI did not offer evidence of the circumstances surrounding the amendments to 471-060-0005 (2021) to demonstrate any agency intent to apply the new version of the rule retroactively to existing contested cases. Nothing in the *Pulito* decision supports a finding that the rule change should be applied retroactively to pending actions.

The version of OAR 471-060-0005 that was in effect when this matter was initially referred to the OAH provides as follows:

OAR 471-060-0005<sup>6</sup> (1999) provides:

- (1) The purpose of this rule is to establish uniform procedures for the change of assignment of administrative law judges.
- (2) The words and terms used in OAR 471-060-0005 have the following meanings:
  - (a) An administrative law judge is "assigned" when a written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier.
  - (b) "Good cause" is any reason why an administrative law judge's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.
- (3) Every party and agency in a contested case is entitled to request a change of administrative law judge. The first request of that party or agency shall be automatically granted. If that party or agency makes a subsequent request, it must show good cause why

---

contested cases pending on January 1, 2000, the Chief Administrative Law Judge shall not assign or change assignments of administrative law judges unless the agency on whose behalf the hearing is conducted requests assignment of a administrative law judge from the Office of Administrative Hearings to continue the conduct and conclude the proceedings of a pending case.

<sup>6</sup> OAR 137-003-0501(8) provides that OAR 471-060-0005 applies to all contested case hearings conducted by the Office of Administrative Hearings.

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries* - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286

Ruling on Request for Change of Administrative Law Judge  
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the administrative law judge should not preside over the hearing. The Chief administrative law judge or designee shall decide all requests.

(4) Notwithstanding section (3), *no request shall be granted if a party or agency had a reasonable opportunity to request a change of administrative law judge but did not do so. "Reasonable opportunity" is determined under the totality of circumstances.* All requests must be in writing and sent or delivered to the Chief Administrative Law Judge or designee at the mailing address, telephone number, or electronic mail address indicated in the notice of assignment of administrative law judge. Requests may be sent by mail, facsimile transmission, or electronic mail.

(5) The Chief Administrative Law Judge may exempt an agency or a class of cases from this section. All requests must be in writing.

(6) For all contested cases pending on January 1, 2000,<sup>7</sup> the Chief Administrative Law Judge shall not assign or change assignments of administrative law judges unless the agency on whose behalf the hearing is conducted requests assignment of a administrative law judge from the Office of Administrative Hearings to continue the conduct and conclude the proceedings of a pending case.

*Emphasis added.*

As noted above, the former version of OAR 471-060-0005(4) (1999) provided that no request for a change of administrative law judge would be granted if the party making such request had a reasonable opportunity to request a change but failed to do so. Reasonable opportunity was reviewed under the totality of the circumstances.

UBI was informed of the change in ALJ and assignment to ALJ Allen on April 2, 2010. This allowed UBI its first opportunity to request a change in ALJ. Instead, UBI continued with the discovery process, as well as the written direct testimony process. For some of the cases at issue, UBI also participated in the hearing process conducted by ALJ Allen. UBI received ALJ Allen's Proposed Order. UBI had a reasonable opportunity throughout this process to request reassignment. UBI did not make this request. Instead, UBI continued to participate in the process with the potential to obtain a ruling in UBI's favor.

UBI is incorrect that the current version of OAR 137-060-0005 (2021) is the controlling law in this matter. OAR 471-060-0005(4) (1999) provided UBI a reasonable opportunity to object to ALJ Allen's assignment to this matter in 2010, and not when the matter was remanded for a limited scope supplemental hearing. Under the totality of the circumstances, UBI had a reasonable opportunity to file for a request for change of ALJ in 2010. UBI's October 23, 2024, Request for Change of Administrative Law Judge is therefore untimely and is denied.

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<sup>7</sup> No party in this matter asserts that this matter was referred to the OAH prior to January 1, 2000. The earliest contests in these matters were filed in May of 2000.

## **RULING**

Upper Basin Irrigators' request for change of assigned ALJ is DENIED. The matter remains assigned to Senior ALJ Joe L. Allen.

Jeffrey R. Rhoades

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Chief Administrative Law Judge  
Office of Administrative Hearings

## CERTIFICATE OF MAILING

On 26<sup>th</sup> day of November, 2024, I emailed the foregoing RULING ON REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE in **OAH Reference No. 2024-OWRD-00136**:

BY ELECTRONIC MAIL:

<b>Name</b>	<b>Address</b>	<b>Contact</b>
United States Department Of Justice Guss Guarino	999 18th St. South Terr. # 370 Denver CO 80202	guss.guarino@usdoj.gov; raymundo.ribota@usdoj.gov
United States Department Of Justice David Harder	999 18th St South Terr. #370 Denver CO 80202	david.harder@usdoj.gov
Native American Rights Fund: Representing The Klamath Tribes Joe M. Tenorio	250 Arapahoe Ave Boulder CO 80302-5821	tenorio@narf.org; jschmidt@narf.org
Native American Rights Fund: Representing The Klamath Tribes Ada Montague	250 Arapahose Ave Boulder CO 80302-5821	montague@narf.org
Carollo Law Group, LLC: Representing The Upper Basin Irrigators (UBI) Dominic M. Carollo	PO Box 2456 Roseburg OR 97470	dcarollo@carollolegal.com; nsmith@carollolegal.com; kharp@carollolegal.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Paul Simmons	500 Capitol Mall Suite 1000 Sacramento CA 95814	psimmons@somachlaw.com; ydelacruz@somachlaw.com; crivera@somachlaw.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Maximilian Bricker	500 Capitol Mall Suite 1000 Sacramento CA 95814	mbricker@somachlaw.com
Rietmann & Kim, LLP: Representing Klamath Project Water Users (KPWU) Nathan R. Rietmann	1270 Chemeketa St. NE Salem OR 97301	nathan@rietmannlaw.com

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286*  
Ruling on Request for Change of Administrative Law Judge  
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Parks & Ratliff, PC: Representing The Klamath Project Water Users (KPWU) Nathan Ratliff	620 Main St. Klamath Falls OR 97601	nathan@parksandratliff.com; reception@parksandratliff.com
Davis, Wright, Tremaine, LLP: Representing Klamath Project Water Users (KPWU) Olivier Jamin	560 SW 10th Ave Suite 700 Portland OR 97205	olivierjamin@dwt.com
Davis, Wright, Tremaine, LLP: Representing The Klamath Project Water Users (KPWU) Andy McStay	560 SW 10th Ave Suite 700 Portland OR 97205	andymcstay@dwt.com
Clyde Snow, Attorneys at Law: Representing The Klamath Project Water Users (KPWU) Reagan L.B. Desmond	377 SW Century Drive Bend OR 97702	rlbd@clydesnow.com
Blain Law, LLC: Representing The Klamath Project Water Users (KPWU) Mika Blain	517 Main St. Klamath Falls OR 97601	mika@blainlawllc.com
Brandsness, Brandsness & Rudd, PC: Representing The Klamath Project Water Users (KPWU) Michael P. Rudd	411 Pine St. Klamath Falls OR 97601	mike@brandsnessrudd.com
Will Davidson	725 Summer St NE Suite A Salem OR 97301	will.d.davidson@water.oregon.gov
Jesse D Ratcliffe	1162 Court St NE Salem OR 97301	Jesse.D.Ratcliffe@doj.oregon.gov; Denise.Ruttan@doj.oregon.gov

/s/Alexandria N Whitley

Hearing Coordinator

# Exhibit D



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

**In the Matter of the Determination of  
the Relative Rights to the Use of the  
Waters of the Klamath River and its  
Tributaries** ) **RULING ON REQUEST FOR  
RECONSIDERATION REQUEST FOR  
CHANGE OF ADMINISTRATIVE LAW  
JUDGE**  
)  
**Claim 622 (Upper Klamath Lake)** ) OAH Reference No. 2024-OWRD-00136  
) Former OAH Case No. 286

Pursuant to Oregon Revised Statute (ORS) 183.645 and Oregon Administrative Rule (OAR) 471-060-0005(3), the Upper Basin Irrigators (UBI) requested a change of the administrative law judge (ALJ) assigned to hear the above-entitled case. The relevant procedural history is as follows:

1. On October 29, 2024, the Klamath Tribes (Tribes) filed a Klamath Tribes' Response to UBI Request for Change of Administrative Law Judge, opposing UBI's request;
2. On November 25, 2024, a Ruling on Request for Change of Administrative Law Judge (Ruling) denying UBI's request was issued;
3. On December 10, 2024, pursuant to OAR 137-003-0675, UBI filed a Petition for Reconsideration of Ruling on Request for Change of Administrative Law Judge (Reconsideration);
4. On December 17, 2024, the Oregon Water Resources Department (OWRD) filed WRD's Response to Petition for Reconsideration of Ruling on Request for Change of Administrative Law Judge (OWRD Response);
5. On December 23, 2024, the Klamath Tribes (Tribes) and the United States of America (United States), filed Klamath Tribes' and United States of America's Reply to OWRD's Response to UBI's Petition for Reconsideration of its Request for Change of Administrative Law Judge (Tribes' Response);
6. On January 30, 2025, UBI filed a Reply in Support of Reconsideration and Final Affidavit of Dominic M. Carollo;
7. On February 7, 2025, the Tribes and the United States filed Klamath Tribes' Motion for Leave to File Surreply to Replies in Support of Petition for Reconsideration on Request for Change of Administrative Law Judge (Surreply); and
8. On February 11, 2025, UBI filed a Response to Klamath Tribes' Motion for Leave to File Surreply (Surreply Response).

**OPINION**

OAR 137-003-0675, entitled Reconsideration and Rehearing - Contested Cases, provides:

(1) Unless otherwise provided by statute, a party may file a petition for reconsideration or rehearing of ***a final order in a contested case with the agency within 60 calendar days after the order is served.*** A copy of the petition shall also

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries* - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286

RULING ON REQUEST FOR RECONSIDERATION REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE

Page 1 of 5

Klamath Tribes' Petition  
Exhibit D  
Page 1 of 5

be delivered or mailed to all parties or other persons and agencies required by statute, rule or order to receive notice of the proceeding.

(2) The agency may, by rule, require a party to file a petition for reconsideration or rehearing as a condition of judicial review. The agency may, by rule or in writing, require any petition for reconsideration or rehearing to be filed with the administrative law judge.

(3) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0690(3).

(5) Within 60 calendar days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. If a petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.482(6) before taking further action on the order. The procedural and substantive effect of reconsideration or rehearing under this section shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(6) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(a) If the agency determines that reconsideration alone is appropriate, the agency shall enter a new final order in accordance with OAR 137-003-0665, which may be an order affirming the existing order.

(b) If the agency determines that rehearing is appropriate, the agency shall decide upon the scope of the rehearing. The agency shall request the administrative law judge to conduct further hearing on such issues as the agency specifies and to prepare a proposed order as appropriate. The agency shall issue a new final order in accordance with OAR 137-003-0665. The agency may adopt the proposed order prepared by the administrative law judge as the final order, or modify the proposed order and issue the modified order as the final order.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) Unless otherwise provided by law, a final order remains in effect during reconsideration or rehearing until stayed or changed.

*Emphasis added.*

On November 25, 2024, a Ruling on Request for Change of Administrative Law Judge denying UBI's request was issued. Citing OAR 137-003-0675, on December 10, 2024, UBI filed a Petition for Reconsideration of Ruling on Request for Change of Administrative Law Judge.

OAR 137-003-0675(1) grants the ALJ the authority to reconsider a Final Order when the request is filed within 60 days of issuance of the final order. In the present matter, the Reconsideration was timely filed. OAR 137-003-0675(1) specifically limits request for reconsideration to review of final orders. The Ruling issued on November 25, 2024, does not constitute a final order. UBI has failed to state a rule or provide statutory authority that would provide the legal authority to reconsider the Ruling issued in this matter. Due to the absence of legal authority for the requested action, UBI's Petition for Reconsideration of Ruling on Request for Change of Administrative Law Judge is denied.

### **RULING**

Upper Basin Irrigators' request for reconsideration is DENIED. The matter remains assigned to Senior ALJ Joe L. Allen.

---

Jeffrey R. Rhoades  
Chief Administrative Law Judge  
Office of Administrative Hearings

**CERTIFICATE OF MAILING**

On 3rd day of March, 2025, I emailed the foregoing **RULING ON REQUEST FOR RECONSIDERATION REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE** in **OAH Reference No. 2024-OWRD-00136**:

BY ELECTRONIC MAIL:

<b>Name</b>	<b>Address</b>	<b>Contact</b>
United States Department Of Justice Guss Guarino	999 18th St. South Terr. # 370 Denver CO 80202	guss.guarino@usdoj.gov; raymundo.ribota@usdoj.gov
United States Department Of Justice David Harder	999 18th St South Terr. #370 Denver CO 80202	david.harder@usdoj.gov
Native American Rights Fund: Representing The Klamath Tribes Joe M. Tenorio	250 Arapahoe Ave Boulder CO 80302-5821	tenorio@narf.org; jschmidt@narf.org
Native American Rights Fund: Representing The Klamath Tribes Ada Montague	250 Arapahose Ave Boulder CO 80302-5821	montague@narf.org
Carollo Law Group, LLC: Representing The Upper Basin Irrigators (UBI) Dominic M. Carollo	PO Box 2456 Roseburg OR 97470	dcarollo@carollolegal.com; nsmith@carollolegal.com; kharp@carollolegal.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Paul Simmons	500 Capitol Mall Suite 1000 Sacramento CA 95814	psimmons@somachlaw.com; ydelacruz@somachlaw.com; crivera@somachlaw.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Maximilian Bricker	500 Capitol Mall Suite 1000 Sacramento CA 95814	mbricker@somachlaw.com
Rietmann & Kim, LLP: Representing Klamath Project Water Users (KPWU) Nathan R. Rietmann	1270 Chemeketa St. NE Salem OR 97301	nathan@rietmannlaw.com

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286*  
**RULING ON REQUEST FOR RECONSIDERATION REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE**

Parks & Ratliff, PC: Representing The Klamath Project Water Users (KPWU) Nathan Ratliff	620 Main St. Klamath Falls OR 97601	nathan@parksandratliff.com; reception@parksandratliff.com
Davis, Wright, Tremaine, LLP: Representing Klamath Project Water Users (KPWU) Olivier Jamin	560 SW 10th Ave Suite 700 Portland OR 97205	olivierjamin@dwt.com
Davis, Wright, Tremaine, LLP: Representing The Klamath Project Water Users (KPWU) Andy McStay	560 SW 10th Ave Suite 700 Portland OR 97205	andymcstay@dwt.com
Clyde Snow, Attorneys at Law: Representing The Klamath Project Water Users (KPWU) Reagan L.B. Desmond Nathaniel E. Broadhurst	377 SW Century Drive Bend OR 97702	rlbd@clydesnow.com; neb@clydesnow.com
Blain Law, LLC: Representing The Klamath Project Water Users (KPWU) Mika Blain	517 Main St. Klamath Falls OR 97601	mika@blainlawllc.com
Brandsness, Brandsness & Rudd, PC: Representing The Klamath Project Water Users (KPWU) Michael P. Rudd	411 Pine St. Klamath Falls OR 97601	mike@brandsnessrudd.com
Will Davidson	725 Summer St NE Suite A Salem OR 97301	will.d.davidson@water.oregon.gov
Jesse D Ratcliffe	1162 Court St NE Salem OR 97301	Jesse.D.Ratcliffe@doj.oregon.gov; Denise.Ruttan@doj.oregon.gov

/s/Alexandria N Whitley  
Hearing Coordinator

# Exhibit E

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

<p>UPPER BASIN IRRIGATORS; AGRI WATER, LLC; AUSAYMAS CATTLE CO.; BK RANCH (AKA LILLIAN HILL AND VINCENT HILL); C AND A VOGT COMMUNITY PROPERTY TRUST; MARY RABE AND ESTATE OF CLIFFORD RABE; DAVID M. AND THERESA COWAN; DUANE F. MARTIN; DUARTE LIVESTOCK; E.G. KERNS RANCH LLC; BARNES LAKE COUNTY, LLC; FIVE MILE RANCH LLC; FLYNN AND SONS LLC; GERALD H. HAWKINS; GOOSE NEST RANCHES, LLC; GREG HARRIS; GRIFFITH LIVESTOCK LLC; HARLOWE RANCH, LLC; HAWKINS CATTLE CO.; JACK FLYNN CATTLE CO.; JAMES HADYN-MYER; JOE FLYNN RANCH; JOHN B. OWENS; JOHN R. BRIGGS, JR.; KENNETH OWENS; LON BROOKS; LYNNE RICHARDSON CABRAL; MARTIN NICHOLSON; MICHAEL LAGRANDE; NBCC, LLC; NEWMAN ENTERPRISES, INC.; NICHOLSON INVESTMENTS, LLC; NICHOLSON LOVING TRUST; OBENCHAIN CATTLE CO. (AKA CAROLYN OBENCHAIN AND MARGARET JACOBS); OWENS &amp; HAWKINS; PRODUCTIVE TIMBERLAND LLC; RANDALL KIZER (SUCCESSOR TO MAXINE KIZER); RICHARD NICHOLSON; ROGER NICHOLSON; T &amp; B RANCH; TOM AND JACQUELINE BENTLEY (J&amp;T RANCH CO.); TP BAR</p>	<p>Case No. <u>25CV20984</u></p> <p>PETITION FOR WRIT OF MANDAMUS</p>
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<p>1 RANCH LLC; VINCENT BRIGGS; MODOC 2 POINT IRRIGATION DISTRICT; AND 3 WAYNE AND MARGARET JACOBS</p> <p style="text-align: center;">4 Applicants-Relators,</p> <p style="text-align: center;">5 v.</p> <p>6 JEFFREY R. RHOADES, in his official 7 capacity as Chief Administrative Law Judge 8 for the Oregon Office of Administrative 9 Hearings; OREGON OFFICE OF 10 ADMINISTRATIVE HEARINGS,</p> <p style="text-align: center;">11 Defendants.</p>	
---	--

12 Pursuant to ORS 34.110 and ORS 34.120(1), Relators<sup>1</sup> petition this Court for a peremptory  
13 writ of mandamus, or in the alternative, an alternative writ of mandamus, directing Defendants Chief  
14 Administrative Law Judge Jeffrey R. Rhoades and the Oregon Office of Administrative Hearings  
15 (“OAH”) to grant Relators a change in administrative law judge pursuant to ORS 183.645, OAR  
16 471-060-0005(3), and OAR 137-003-0501(8). Specifically, Relators seek an order commanding  
17 Defendants to grant Upper Basin Irrigators’ Request for Change of Administrative Law Judge

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18 <sup>1</sup> Relators are Agri Water, LLC; Ausaymas Cattle Co.; BK Ranch (AKA Lillian Hill and Vincent  
19 Hill); C and A Vogt Community Property Trust; Mary Rabe and Estate of Clifford Rabe; David M.  
20 and Theresa Cowan; Duane F. Martin; Duarte Livestock; E.G. Kerns Ranch LLC; Barnes Lake  
21 County, LLC; Five Mile Ranch LLC; Flynn and Sons LLC; Gerald H. Hawkins; Goose Nest  
22 Ranches, LLC; Greg Harris; Griffith Livestock LLC; Harlowe Ranch, LLC; Hawkins Cattle Co.;  
23 Jack Flynn Cattle Co.; James Hadyn-Myer; Joe Flynn Ranch; John B. Owens; John R. Briggs, Jr.;  
24 Kenneth Owens; Lon Brooks; Lynne Richardson Cabral; Martin Nicholson; Michael Lagrande;  
NBCC, LLC; Newman Enterprises, Inc.; Nicholson Investments, LLC; Nicholson Loving Trust;  
Obenchain Cattle Co. (aka Carolyn Obenchain and Margaret Jacobs); Owens & Hawkins; Productive  
Timberland LLC; Randall Kizer (successor to Maxine Kizer); Richard Nicholson; Roger Nicholson;  
T & B Ranch; Tom and Jacqueline Bentley (J&T Ranch Co.); TP Bar Ranch LLC; Vincent Briggs;  
Modoc Point Irrigation District; and Wayne and Margaret Jacobs. These parties are generally referred  
to as the “Upper Basin Irrigators” or “UBI.”



1 (“Request for Change”) or, alternatively, Upper Basin Irrigators’ Petition for Reconsideration of the  
2 Request for Change, all filed in OAH Case Nos. 2024-OWRD-00134, 2024-OWRD-00136, 2024-  
3 OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-OWRD-00140, and 2024-OWRD-  
4 00141.<sup>2</sup> A writ of mandamus from this Court is the only available remedy that can provide Relators  
5 with their statutorily-guaranteed right to request and receive an automatic change of administrative  
6 law judge, and Relators have no plain, speedy, or adequate remedy in the ordinary course of law.  
7 Relators’ relief is singularly-focused on Defendants’ refusal to allow for a change of the  
8 Administrative Law Judge assigned to OAH Case Nos. 2024-OWRD-00134, 2024-OWRD-00136,  
9 2024-OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-OWRD-00140, and 2024-  
10 OWRD-00141, which is the proper subject of a writ of mandamus.

11 **PARTIES**

12 1.

13 Relators, also known as Upper Basin Irrigators, primarily consist of livestock producers, and  
14 their ranches are located throughout what is known as the Upper Klamath Basin in Klamath County,  
15 Oregon. Relators’ ranches are in the drainages of the Wood River, the Sprague River, the Williamson  
16 River, and their tributaries, which flow into Upper Klamath Lake, which, in turn, empties into the  
17 mainstem Klamath River. The Upper Klamath Basin contains approximately 180,000 acres of  
18 irrigated pasture, with much of that development supported by the U.S. Indian Irrigation Service in  
19 the early 1900s; but acres in production have been actively declining. Because Relators’ livelihoods  
20 are based on livestock production, they depend on water to irrigate their pastures.

21

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22 <sup>2</sup> The OAH Case Numbers described above have more-or-less proceeded on parallel tracks, and share  
23 the same issues of law. Rather than burden the Court with duplicative exhibits filed in each case,  
24 Relators are attaching to this Petition exhibits from OAH Case No. 2024-OWRD-00136, which  
pertains to Claim 622 in the Klamath Basin Adjudication.

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2.

Defendants are Chief Administrative Law Judge (“ALJ”) Jeffrey R. Rhoades, and the Oregon Office of Administrative Hearings (“OAH”). The OAH is created by statute to conduct contested case hearings on behalf of agencies, and to perform such other services as may be requested by an agency. The OAH is managed by Chief ALJ Jeffrey R. Rhoades. The OAH contains approximately 70 ALJs that conduct hearings on behalf of approximately 70 state agencies.

3.

Other parties to the OAH case numbers<sup>3</sup> identified in the opening paragraph of this Petition include:

- a. The “Klamath Project Water Users” (“KPWU”), including: Ady District Improvement Company; Enterprise Irrigation District; Klamath Drainage District; Klamath Irrigation District; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Plevna District Improvement Company; Shasta View Irrigation District; Klamath Basin Improvement District; Poe Valley Improvement District; Sunnyside Irrigation District; Tulelake Irrigation District; Van Brimmer Ditch Company; and many more. While Relators mostly own and irrigate lands upstream of Upper Klamath Lake, KPWU members largely irrigate lands around and downstream of Upper Klamath Lake.
- b. The Klamath Tribes, beneficiaries of water rights in the Klamath Basin, which are held in trust by the United States Bureau of Indian Affairs (“BIA”).

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<sup>3</sup> The OAH cases subject to this Petition are: OAH Case Nos. 2024-OWRD-00134, 2024-OWRD-00136, 2024-OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-OWRD-00140, and 2024-OWRD-00141.

1 c. The United States of America, owners of federally-reserved water rights in the  
2 Klamath Basin.

3 d. The Oregon Water Resources Department, the state agency charged with making the  
4 initial determination of water right claims filed in the Klamath Basin Adjudication,  
5 and the agency which referred the OAH cases subject to this petition to the Office of  
6 Administrative Hearings.

7 **JURISDICTION AND VENUE**

8 4.

9 This Court has jurisdiction over this Petition pursuant to ORS 34.120(1), as the “circuit court  
10 ... wherein the defendant ... exercises functions.” Defendant Chief ALJ Jeffrey R. Roades exercises  
11 his functions from the OAH’s office at 4600 25th Ave. NE, Suite 140 Salem, OR 97301. Defendant  
12 OAH has offices, and exercise functions, in Salem, Tualatin, and Eugene. Venue is proper in Marion  
13 County Circuit Court.

14 **THE PETITION IS TIMELY**

15 5.

16 “The time period within which a party must file a petition for mandamus relief is governed by  
17 laches, not by statute.” *State v. Peekema*, 328 Or 342, 346, 976 P2d 1128 (1999) (*citing State ex rel.*  
18 *Carlile v. Frost*, 326 Or 607, 620-21, 956 P2d 202 (1998)). The rule of thumb in ORAP 11.05 n. 4  
19 says relators usually should file the petition within 30 days of the date of the action that the relator  
20 seeks to challenge.

21 6.

22 This petition has been filed within 30 days following the OAH issuing a ruling denying  
23 Relators’ Petition for Reconsideration, which sought reconsideration of Chief ALJ Jeffrey R.  
24

1 Rhoades' prior ruling denying Relators' Request for Change of Administrative Law Judge in the  
2 OAH Cases identified in footnote 2. In addition, the petition has been filed at a juncture when the  
3 OAH is scheduling a prehearing conference in OAH Case No. 2024-OWRD-00136. Under either, or  
4 certainly both, circumstances, the petition is timely.

5 **ALLEGATIONS OF FACT**

6 **I. Introduction to the Klamath Basin Adjudication ("KBA")**

7 7.

8 The KBA is a general stream adjudication subject to ORS Chapter 539, which has contained  
9 an "administrative phase" that was before OWRD and the OAH, followed by a "judicial phase"  
10 before the Klamath County Circuit Court. The administrative phase of the KBA was technically  
11 initiated in 1975 and lasted approximately 38 years, due, in part, to numerous federal court  
12 proceedings that effectively delayed various aspects of the state proceedings. *See United States v.*  
13 *Adair*, 478 F. Supp. 336 (D. Or. 1979) ("*Adair I*"); *United States v. Adair*, 723 F.2d 1394 (9th Cir.  
14 1983) ("*Adair II*"); *United States v. Oregon*, 774 F. Supp. 1568 (D. Or. 1991); *United States v.*  
15 *Oregon*, 44 F.3d 758 (9th Cir. 1994); *United States v. Adair*, 187 F. Supp.2d 1273 (D. Or. 2002)  
16 ("*Adair III*"), *vacated sub nom. United States v. Braren*, 338 F.3d 1971 (9th Cir. 2003).

17 8.

18 The administrative phase included hearings before the OAH and orders issued by OWRD.  
19 The parties in the administrative phase were "claimants," who filed water right claims in the KBA,  
20 and "contestants," who contested the claims that were filed. Between 1999 and 2010, four different  
21 ALJs presided over the administrative phase. ALJ Joe Allen was assigned on April 2, 2010, after ALJ  
22 Maurice L. Russell became unexpectedly unavailable. ALJ Allen presided over hearings in 2010 and  
23 2011, and issued proposed orders in 2011 and 2012. The administrative phase officially concluded on  
24

1 March 7, 2013 when the Oregon Water Resources Department issued the Findings of Fact and Order  
2 of Determination (“FFOD”), determining all water right claims at issue in the KBA, and filed it with  
3 the Klamath County Circuit Court. *See* ORS 539.130(1). In 2014, OWRD issued an Amended and  
4 Corrected Findings of Fact and Orders of Determination (“ACFFOD”) to address errors in the 2013  
5 version.

6 9.

7 The ACFFOD quantified certain claims held in trust for the Klamath Tribes. Those “Tribal  
8 Claims” included Claim 622 (Upper Klamath Lake), Claim 623 (Klamath Marsh), Claim 624 (seeps  
9 and springs), claims 625-640 (Williamson River), Claims 641-657 (Sprague River), Claims 658-667  
10 (Sycan River), and Claims 668-670 (Wood River). The Tribal Claims were granted “time  
11 immemorial” water rights for the maintenance of quantified lake elevations and stream flows that  
12 vary by claim.

13 10.

14 The ACFFOD is under judicial review in the Klamath County Circuit Court. *See* ORS  
15 539.150. Judicial review is based on the “exceptions” parties file against the ACFFOD. *See id.*  
16 Now-Oregon Supreme Court Justice Stephen K. Bushong is the presiding judge in the Klamath Basin  
17 Adjudication.

18 **II. Parties to the Klamath Basin Adjudication**

19 11.

20 Upon OWRD’s referral of the agency’s FFOD to the Klamath County Circuit Court, parties  
21 were given an opportunity to file exceptions in writing to the FFOD. ORS 539.150. By statute, any  
22 party may file exceptions, regardless of whether they participated in the administrative phase. *Id.*

1 Some parties filed exceptions to various claims despite not participating in the administrative  
2 hearings on those claims.

3 12.

4 The Upper Basin Irrigators parties filed exceptions to the Tribal Claims owned by the United  
5 States, held in trust for the Klamath Tribes. The Klamath Project Water Users also filed exceptions to  
6 some of the same claims. The Klamath Tribes and United States of America filed exceptions to some  
7 of the claims made by the Upper Basin Irrigators.

8 **III. Relators' Exceptions to the Tribal Claims**

9 13.

10 Relators' right to a judicial determination of the water right claims at issue in the KBA is  
11 protected by ORS Chapter 539. *See In re Willow Creek*, 74 Or. 592, 610-11 (1914) (“The findings of  
12 the board are advisory rather than authoritative”); *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 450-51  
13 (1916) (“The supreme court of the state holds that while the proceeding is pending before the board it  
14 is merely preliminary and administrative, not judicial, and as this holding is a necessary result of that  
15 court's construction of the statute, we accept it as correct.”). ORS 539.150(1) provides that “[f]rom  
16 and after the filing of the evidence and [FFOD] in the trial court, the proceedings shall be like those  
17 in an action not triable by right to a jury[.]” *Id.* “[A]ny party or parties jointly interested may file  
18 exceptions in writing to the [FFOD], or any part thereof, which exceptions shall state with reasonable  
19 certainty the grounds and shall specify the particular paragraphs or parts of the [FFOD] excepted to.”  
20 *Id.*

21 14.

22  
23  
24

1 In accordance with ORS 539.150, Relators filed comprehensive exceptions against the Tribal  
2 Claims in October, 2014. Although Relators' exceptions to the Tribal instream claims address  
3 numerous legal and factual issues, one in particular is relevant here.

4 15.

5 Relators took exception to the fact that OWRD, in the ACFFOD, inexplicably found that the  
6 Ninth Circuit's explanation of a legal standard governing quantification of the Tribal instream water  
7 rights was "inapplicable." In *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) ("*Adair*  
8 *II*"), the Ninth Circuit Court of Appeals was tasked with reviewing the existence and limits of the  
9 water rights that were federally-reserved in the Klamath Treaty. The Ninth Circuit held that the water  
10 rights consist of "the amount of water necessary to support [the Tribes'] hunting and fishing rights as  
11 currently exercised to maintain the livelihood of Tribe members, not as these rights once were  
12 exercised by the Tribe in 1864" and that "authority for such a construction of the Indians' rights" is  
13 found in the "moderate living standard" adopted by the U.S. Supreme Court in *Washington v. Fishing*  
14 *Vessel Ass'n*, 443 U.S. 658 (1979) ("*Fishing Vessel*"). The moderate living standard is premised on  
15 the concept that "that Indian tribes are not generally entitled to the same level of exclusive use and  
16 exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving  
17 their interest in the resource." *Adair II*, 723 F.2d 1414-15. The Ninth Circuit reached this decision in  
18 direct response to irrigators' concerns that recognizing Tribal instream water rights would result in a  
19 "wilderness servitude," prohibiting all irrigation. *Id.* at 1414. The Ninth Circuit explained that it did  
20 not interpret the water right "so expansively." *Id.*

21 16.

22 In the first administrative proceedings phase, the initial water right determination was made  
23 by ALJ Joe Allen. ALJ Allen essentially awarded the full amounts claimed by the BIA for each of  
24

1 the stream reaches at issue in the Upper Klamath Basin, which the ALJ did based on evidence  
2 through the lens of a “productive habitat” standard that was recognized whole cloth in *United States*  
3 *v. Adair*, 187 F. Supp. 2d 1273, 1276 (D. Or. 2002) (“*Adair III*”), but subsequently vacated by the  
4 Ninth Circuit in *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003). In doing so, ALJ Allen  
5 expressly rejected the legal standard from *Adair II*, finding that the “moderate living standard”  
6 invoked by the Ninth Circuit was “inapplicable.” OWRD adopted the ALJ’s Proposed Order in this  
7 respect into the ACFFOD without modification. Through their exceptions, Relators assigned this as  
8 legal error and sought, *inter alia*, a re-quantification of the Tribal instream claims, under the Ninth  
9 Circuit’s holding in *Adair II*.

#### 10 **IV. The Trial Court’s Ruling on Relators’ Exceptions**

11 17.

12 The Klamath County Circuit Court’s review of the KBA has proceeded slowly, and in  
13 numerous phases. Pursuant to Case Management Order 33, issued April 27, 2018, the Klamath  
14 County Circuit Court directed exceptors to file motions on legal issues regarding the Tribal Claims.  
15 The Circuit Court, in CMO 33, listed the legal issues it expected to be raised in “Phase 3, Part 1,  
16 Group C” of the KBA. These issues included: (1) “The applicability of judgments entered in the  
17 *United States v. Adair* litigation to the Klamath Basin Adjudication”; (2) “General legal principles  
18 pertaining to the tribal water rights and/or recognition of tribal water rights based on any claimed  
19 limitation of the purpose(s) for the rights”; (3) “General legal principles pertaining to the burden of  
20 proof for tribal claims that were imposed during the claims/contests process before the Adjudicator”;  
21 (4) “Whether the Adjudicator applied the correct quantification standard to the tribal claims”; and (5)  
22 “Whether the Adjudicator properly completed the quantification of the tribal claims.”

23 18.





1 purposes of re-quantifying the Tribal Claims. The Klamath County Circuit Court issued its Opinion  
2 RE Motions to Present Non-Record Evidence for Tribal (Phase 3, Part 2, Group C) Claims on June 7,  
3 2023. Judge Bushong granted UBI’s motion in part, ruling that “[b]ecause the ALJ declined to  
4 consider the ‘moderate living standard’ during the OAH case proceedings, on remand, UBI is entitled  
5 to submit evidence and argument on that standard.” The Circuit Court further “remand[ed] the  
6 contested claims at issue to the OWRD director ... The director may – but is not required to by this  
7 order – delegate the responsibility for conducting the additional contested case proceedings to one or  
8 more administrative law judges from OAH[.]”

9 **V. OWRD’s Referral to the OAH**

10 21.

11 On May 3, 2024, OWRD referred the remand of the Tribal Claims to the OAH. The referral  
12 form indicated that the OAH would send a Notice of Hearing and Notice of Contested Case Rights  
13 and Procedures. OWRD’s referral also described the scope of hearing on remand, stating that “the  
14 scope of this hearing is as stated in the following order of Klamath County Circuit Court Judge  
15 Stephen Bushong: Order on Phase 3, Part 2, Group C Motions (Motions to Present Non-Record  
16 Evidence for Tribal Claims), dated June 28, 2023.” OWRD stated that the decision as to whether  
17 discovery would be allowed would be left to the ALJ on remand. OWRD’s referral did not indicate  
18 that ALJ Joe Allen would preside over the remand.

19 **VI. Assignment of ALJ Joe Allen**

20 22.

21 On October 11, 2024, the OAH issued a “Notice of Continuation of Administrative Law  
22 Judge Assignment” for each of the OAH cases on the remand of the Tribal Claims. The “Notice of  
23 Continuation” stated that the “assignment of ALJ Allen issued April 2, 2010, remains in place.”  
24

1 23.

2 On October 23, 2024, Relators timely submitted a “Request for Change of Administrative  
3 Law Judge” in each of the OAH cases on the remand of the Tribal Claims. Relators’ Request for  
4 Change asserted that the “Notice of Continuation” was a notice of judicial assignment pursuant to  
5 OAR 471-060-0005 and that, as such, Relators had a right to request a change, without need to  
6 demonstrate good cause. Relators’ Request for Change further asserted that the OAH’s jurisdiction  
7 over the KBA ended in 2012, when ALJ Allen issued the last proposed orders. Relators explained  
8 that the remand of the Tribal Claims to OWRD, and OWRD’s decision to assign the remand to the  
9 OAH, started a new hearings process, wherein Relators could request an automatic change in the  
10 administrative law judge pursuant to OAR 471-060-0005(3).

11 24.

12 A round of briefing followed Relators’ Request for Change. On November 26, 2024, the OAH  
13 issued its ruling denying Relators’ Request for Change. *See Exhibit 2.* Chief ALJ Jeffrey R. Rhoades  
14 reasoned that the OWRD utilized the “re-referral process” outlined by OAR 137-003-0655. *Id.* at 7.  
15 ALJ Rhoades also reasoned that the *new* case numbers assigned to OWRD’s referrals were irrelevant  
16 under OAR 471-060-0005 and that the assignment of ALJ Allen in the *prior* contested cases were  
17 still controlling. ALJ Rhoades explained that, following the remand, “OWRD will, in turn, file its  
18 determination to the Klamath County Circuit Court. Once the Court enters a judgment either  
19 affirming or modifying the determination of the director, then, and only then, is the judgment final  
20 and subject to appeal by the Oregon Court of Appeals.” *Id.*

21 25.

22 Relators filed a Petition for Reconsideration of the OAH’s ruling on December 10, 2024,  
23 citing as authority “OAR 137-003-0675 and the Office of Administrative Hearing’s (‘OAH’)  
24

1 *discretionary authority.*” In the Petition for Reconsideration, Relators challenged ALJ Rhoades  
2 reasoning. Realtors explained that the “re-referral process” outlined by OAR 137-003-0655 was  
3 inapplicable because it only applies to proposed orders that have not become final. Realtors further  
4 questioned whether the OAH had ever utilized a “Notice of Continuation of Assignment” procedural  
5 device in any other case or whether it was invented for these newly referred contested cases.  
6 Realtors further informed the OAH that the “UBI parties to this referral are not identical to the UBC  
7 (Upper Basin Contestants) parties that participated in the prior administrative phase of the Klamath  
8 Adjudication. There are unique UBI parties to this proceeding, such as C and A Vogt Community  
9 Property Trust, who is not a predecessor in interest to a party who contested the Tribal instream water  
10 right claims or otherwise appeared in the OAH hearings before ALJ Allen, but later properly filed  
11 exceptions in circuit court. *See* ORS 539.150(1) ... Thus, even if, assuming *arguendo*, this referral  
12 was a ‘continuation’ of the OAH process for some parties, for others this referral will be a first  
13 appearance, and unquestionably their *first opportunity* to request such a change.”

14 26.

15 Further briefing ensued on Relators’ Petition for Reconsideration. On December 17, 2024,  
16 OWRD filed a response. OWRD, in its response, addressed Relators’ contention that “at least one of  
17 its parties was not a contestant nor a successor-in-interest to a contestant to the claims at issue during  
18 the prior administrative phase of the Klamath Adjudication.” OWRD wrote that “[i]f UBI’s  
19 contention is true, OWRD agrees that UBI’s Request for Change of Administrative Law Judge (“UBI  
20 Request”) was timely filed as to that party *and must be granted.*” OWRD further requested that  
21 “UBI ... provide a declaration in support of its contention.” On January 30, 2025, Relators filed a  
22 reply in support of reconsideration, along with an affidavit of counsel Dominic M. Carollo. In his  
23 affidavit, Mr. Carollo attached deeds demonstrating the chain of title for the property now owned by  
24

1 the C & A Vogt Community Property Trust, and averred that, to the best of his knowledge, the  
2 predecessors in interest to the C & A Vogt Community Property Trust were never a contestant of any  
3 of the Tribal Claims. No party contested this assertion.

4 27.

5 The OAH issued a ruling on Relators’ Petition for Reconsideration on March 3, 2025. Chief  
6 ALJ Jeffrey R. Rhoades ruled that the “Ruling issued on November 25, 2024, does not constitute a  
7 final order” and “UBI has failed to state a rule or provide statutory authority that would provide the  
8 legal authority to reconsider the Ruling issued in this matter.” *See* Exhibit 1 at 3. ALJ Rhoades  
9 ignored that the Petition for Reconsideration also relied upon the OAH’s discretionary authority. ALJ  
10 Rhoades also failed to recognize that the OAH has ruled on the merits of Petitions for  
11 Reconsideration in identical situations based on its discretionary authority, including in the contested  
12 case subject to *Pulito v. Oregon State Bd. of Nursing*, 366 Or. 612, 625, 468 P.3d 401, 408 (2020).  
13 ALJ Rhoades denied Relators’ Petition for Reconsideration and concluded that the matter remains  
14 assigned to ALJ Joe Allen.

15 **PETITION FOR WRIT OF MANDAMUS**

16 28.

17 Relators seek a peremptory—or in the alternative, an alternative writ—of mandamus ordering  
18 the Chief ALJ Jeffrey R. Rhoades and/or the OAH to abide by ORS 183.645 and OAR 471-060-0005  
19 and, specifically, ordering the OAH to grant Relators’ Request for Change of Administrative Law  
20 Judge in the OAH case numbers listed in the caption of this petition.

21 29.

22 This Court should issue the writ for the following reasons:  
23  
24

1 a. The OAH's failure to abide by, and properly execute, ORS 183.645 and OAR 471-  
2 060-0005 is a clear, highly prejudicial, and fundamental legal error.

3 b. In the absence of this Court issuing a writ of mandamus, Relators lack a speedy, plain,  
4 and adequate remedy.

5 30.

6 A plain remedy is one that is "obvious, clear, and without uncertainty." *State ex rel Dewberry*  
7 *v. Kulongoski*, 346 Or 260, 273, 210 P3d 884 (2009). As demonstrated by the OAH's rulings on  
8 Relators' Request for Change, and Petition for Reconsideration, the OAH has refused to grant  
9 Relators a change in the administrative law judge assigned to the remand of the Tribal Claims,  
10 contrary to ORS 183.645 and OAR 471-060-0005. Relators have no means of appealing the OAH's  
11 rulings, other than to wait until proposed orders are issued following the remand process, and new  
12 final orders are lodged by OWRD with the Klamath County Circuit Court. These administrative  
13 proceedings are distinct from contested cases strictly governed by the Oregon Administrative  
14 Procedures Act. The adjudication of water rights is controlled by ORS Chapter 539, which requires  
15 hearings of contests before the Water Resources Director, followed by findings of fact and orders of  
16 determination filed with the circuit court. Appeal of the findings of the OAH, and any resulting final  
17 orders, is not taken to the Court of Appeals. The Oregon APA does not control the parties' rights to  
18 appeal in the KBA. The Klamath County Circuit Court has discretion over the form of any remand,  
19 like the present remand, under ORS 539.150(3), which provides that "[t]he court may, if necessary,  
20 remand the case for further testimony, to be taken by the director or by a referee appointed by the  
21 court for that purpose. Upon completion of the testimony and its report to the director, the director  
22 may be required to make a further determination."

23 31.



1 hearing, date, time and location of the hearing, and other matters relating to the hearing.” Pre-hearing  
2 conferences for the other cases have not been set yet. It has been made clear to Relators, and other  
3 parties, that these cases will involve significant litigation over discovery rights, the parties’ rights to  
4 submit evidence, and what kind of evidence may be submitted. All told, if the first administrative  
5 phase of the KBA is any indication, this process before the OAH may take **two-to-three years or**  
6 **more**. Then, after the OAH holds hearings in these cases and issues proposed orders, OWRD will  
7 review the proposed orders, and decide whether to adopt or amend the orders, before lodging a new  
8 Amended Order of Determination on the Tribal Claims with the Klamath County Circuit Court. This  
9 action will re-start the judicial phase for the Tribal Claims. If this Court does not accept mandamus  
10 jurisdiction, then only once the matter is back before the Klamath County Circuit Court would  
11 Relators then have an opportunity to seek review of the OAH’s rulings denying Relators’ Request for  
12 Change of Administrative Law Judge, and Petition for Reconsideration. Thus, absent this Court  
13 exercising mandamus jurisdiction, Relators’ first opportunity to bring the challenge described in this  
14 Petition would likely be at least two-to-three years down the road, after discovery motions have been  
15 litigated, hearings have been held, proposed orders issued, amended orders of determination lodged,  
16 exceptions filed with the circuit court, and briefing on legal issues allowed. What is more, if, at that  
17 time, the Klamath County Circuit Court were to find that the OAH *erred* by refusing to grant  
18 Relators’ Request for Change of Administrative Law Judge, *then the entire process will need to start*  
19 *over again, before a new ALJ. See Pulito v. Oregon State Bd. of Nursing*, 366 Or. 612, 625, 468 P.3d  
20 401, 408 (2020) (finding that the OAH’s error in denying a request for change of an ALJ compels  
21 vacatur of an agency’s order, or remand). Similarly, even if the Circuit Court found that the OAH did  
22 not err, once the KBA reaches a final decree, it is appealable to the Oregon Court of Appeals and  
23 could then be reversed and remanded for a new remand, with a new ALJ. All told, if the legality of  
24



1 the OAH's rulings on Relators' Request for Change of Administrative Law Judge and Petition for  
2 Reconsideration is not determined now, a final determination on the Tribal Claims could be delayed  
3 for a decade more. Meanwhile, Relators will continue to experience severe hardship, as the  
4 magnitude of the Tribal Claims largely preclude Relators from exercising their irrigation rights and  
5 will continue to do so unless or until the Tribal Claims are properly re-quantified under the moderate  
6 living standard. The OAH's denial of Upper Basin Irrigator's Request for Change is an issue that  
7 clearly should be addressed now, not later.

8 33.

9 A writ of mandamus may issue, even when other remedies are available, "if they are not  
10 sufficiently speedy to prevent material injury." *State ex rel. Pierce v. Slusher*, 117 Or 498, 501--02,  
11 244 P 540 (1926) (internal citations omitted). Similarly, an adequate remedy is one that provides  
12 relief upon the subject matter of the application for a writ and must be equally convenient, beneficial,  
13 and effective. *Dewberry*, 346 Or at 271-72. Even if other remedies exist, a writ of mandamus may  
14 issue if those remedies are inadequate or not sufficiently speedy. *State ex rel Ricco v. Biggs*, 198 Or  
15 413, 425, 255 P2d 1055 (1953). Relators' petition clearly presents such a case meeting both  
16 standards. Relators should not have to wait for an illusory and distant remedy in an appeal simply to  
17 have the opportunity to avail itself now to the protections afforded litigants in the OAH, as a matter  
18 of right, under ORS 183.645 and OAR 471-060-0005.

19 34.

20 Finally, the nature and gravity of the OAH's errors and the serious harm done to Relators  
21 warrants exercise of this's Court's mandamus jurisdiction.

22 35.



1 Judge Jeffrey R. Rhoades and the Oregon Office of Administrative Hearings (“OAH”) to abide by  
2 OAR 471-060-0005(3) and OAR 137-003-0501(8), and to grant Upper Basin Irrigators’ Request for  
3 Change of Administrative Law Judge (“Request for Change”) in OAH Case Nos. 2024-OWRD-  
4 00134, 2024-OWRD-00136, 2024-OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-  
5 OWRD-00140, and 2024-OWRD-00141.

6  
7 **DATED** this 1st day of April, 2025.

8 **CAROLLO LAW GROUP**

9 s/ Dominic M. Carollo  
10 **Dominic M. Carollo, OSB No. 093057**  
11 Email: [dcarollo@carollolegal.com](mailto:dcarollo@carollolegal.com)  
12 **Nolan G. Smith, OSB No. 215034**  
13 Email: [nsmith@carollolegal.com](mailto:nsmith@carollolegal.com)  
14 Carollo Law Group LLC  
15 Mail: P.O. Box 2456  
16 Roseburg, OR 97470  
17 Office: 2315 Old Highway 99 South  
18 Roseburg, OR 97471  
19 Ph: (541) 957-5900  
20 Fax: (541) 957-5923

21 *Of Attorneys for Relators*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 1, 2025 I caused to be served the foregoing PETITION FOR  
3 WRIT OF MANDAMUS on Defendants via certified mail, return receipt requested, at the following  
4 addresses:

5 Chief Administrative Law Judge Jeffrey R. Rhoades  
6 4600 25th Ave. NE, Suite 140  
7 Salem, OR 97301

8 Oregon Office of Administrative Hearings  
9 Salem Regional Office  
10 PO Box 14020  
11 Salem, OR 97309-4020

12 Attorney General Dan Rayfield  
13 Justice Building, 1162 Court St. NE  
14 Salem OR, 97301-4096

15 I further certify that on April 1, 2025 I caused to be served the foregoing PETITION FOR  
16 WRIT OF MANDAMUS on the following persons via U.S. mail, at the following addresses:

17 Jesse D. Ratcliffe  
18 Oregon Department of Justice  
19 1162 Court St NE  
20 Salem, OR 97301  
21 Email: Jesse.D.Ratcliffe@doj.oregon.gov  
22 Email: Denise.Ruttan@doj.oregon.gov

23 Will Davidson  
24 Oregon Water Resources Department  
725 Summer St NE Suite A  
Salem, OR 97301  
Email: will.d.davidson@water.oregon.gov

Guss Guarino  
David Harder  
United States Department of Justice  
999 18th St.  
South Terr. # 370

1 Denver, CO 80202  
Email: guss.guarino@usdoj.gov  
2 Email: raymundo.ribota@usdoj.gov  
Email: david.harder@usdoj.gov  
3 *Attorneys for the United States of America*

4 Joe M. Tenorio  
Ada Montague  
5 Native American Rights Fund  
250 Arapahoe Ave  
6 Boulder, CO 80302-5821  
Email: tenorio@narf.org  
7 Email: jschmidt@narf.org  
Email: montague@narf.org  
8 *Attorneys for the Klamath Tribes*

9 Paul Simmons  
Maximilian Bricker  
10 Somach, Simmons & Dunn  
500 Capitol Mall  
11 Suite 1000  
Sacramento, CA 95814  
12 Email: psimmons@somachlaw.com  
Email: ydelacruz@somachlaw.com  
13 Email: crivera@somachlaw.com  
Email: mbricker@somachlaw.com  
14 *Attorneys for the Klamath Project Water Users*

15 Nathan R. Rietmann  
Rietmann & Kim, LLP  
16 1270 Chemeketa St. NE  
Salem, OR 97301  
17 Email: nathan@rietmannlaw.com  
*Attorney for the Klamath Project Water Users*

18 Nathan Ratliff  
19 Parks & Ratliff, PC  
620 Main St.  
20 Klamath Falls, OR 97601  
Email: nathan@parksandratliff.com  
21 Email: reception@parksandratliff.com  
*Attorney for the Klamath Project Water Users*

22 Olivier Jamin  
23 Andy McStay  
Davis, Wright, Tremaine  
24

1 560 SW 10th Ave  
Suite 700  
2 Portland, OR 97205  
Email: olivierjamin@dwt.com  
3 Email: andymcstay@dwt.com  
*Attorneys for the Klamath Project Water Users*

4  
Reagan L.B. Desmond  
5 Nathaniel E. Broadhurst  
Clyde Snow, Attorneys at Law  
6 377 SW Century Drive  
Bend, OR 97702  
7 Email: rlbd@clydesnow.com  
Email: neb@clydesnow.com  
8 *Attorneys for the Klamath Project Water Users*

9 Mika Blain  
Blain Law, LLC  
10 517 Main St.  
Klamath Falls, OR 97601  
11 Email: mika@blainlawllc.com  
*Attorney for the Klamath Project Water Users*

12 Michael P. Rudd  
13 Brandsness, Brandsness & Rudd, PC  
411 Pine St.  
14 Klamath Falls, OR 97601  
Email: mike@brandsnessrudd.com  
15 *Attorney for the Klamath Project Water Users*

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be delivered or mailed to all parties or other persons and agencies required by statute, rule or order to receive notice of the proceeding.

(2) The agency may, by rule, require a party to file a petition for reconsideration or rehearing as a condition of judicial review. The agency may, by rule or in writing, require any petition for reconsideration or rehearing to be filed with the administrative law judge.

(3) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0690(3).

(5) Within 60 calendar days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. If a petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.482(6) before taking further action on the order. The procedural and substantive effect of reconsideration or rehearing under this section shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(6) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(a) If the agency determines that reconsideration alone is appropriate, the agency shall enter a new final order in accordance with OAR 137-003-0665, which may be an order affirming the existing order.

(b) If the agency determines that rehearing is appropriate, the agency shall decide upon the scope of the rehearing. The agency shall request the administrative law judge to conduct further hearing on such issues as the agency specifies and to prepare a proposed order as appropriate. The agency shall issue a new final order in accordance with OAR 137-003-0665. The agency may adopt the proposed order prepared by the administrative law judge as the final order, or modify the proposed order and issue the modified order as the final order.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) Unless otherwise provided by law, a final order remains in effect during reconsideration or rehearing until stayed or changed.

*Emphasis added.*



On November 25, 2024, a Ruling on Request for Change of Administrative Law Judge denying UBI's request was issued. Citing OAR 137-003-0675, on December 10, 2024, UBI filed a Petition for Reconsideration of Ruling on Request for Change of Administrative Law Judge.

OAR 137-003-0675(1) grants the ALJ the authority to reconsider a Final Order when the request is filed within 60 days of issuance of the final order. In the present matter, the Reconsideration was timely filed. OAR 137-003-0675(1) specifically limits request for reconsideration to review of final orders. The Ruling issued on November 25, 2024, does not constitute a final order. UBI has failed to state a rule or provide statutory authority that would provide the legal authority to reconsider the Ruling issued in this matter. Due to the absence of legal authority for the questioned action, UBI's Petition for Reconsideration of Ruling on Request for Change of Administrative Law Judge is denied.

### **RULING**

Upper Basin Irrigators' request for reconsideration is DENIED. The matter remains assigned to Senior ALJ Joe L. Allen.

Jeffrey R. Rhoades  
\_\_\_\_\_  
Chief Administrative Law Judge  
Office of Administrative Hearings

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286*

RULING ON REQUEST FOR RECONSIDERATION REQUEST FOR CHANGE OF ADMINISTRATIVE  
LAW JUDGE

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**Exhibit 1**

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Klamath Tribes' Petition

Exhibit E

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## CERTIFICATE OF MAILING

On 3rd day of March, 2025, I emailed the foregoing **RULING ON REQUEST FOR RECONSIDERATION REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE** in **OAH Reference No. 2024-OWRD-00136**:

BY ELECTRONIC MAIL:

<b>Name</b>	<b>Address</b>	<b>Contact</b>
United States Department Of Justice Guss Guarino	999 18th St. South Terr. # 370 Denver CO 80202	guss.guarino@usdoj.gov; raymundo.ribota@usdoj.gov
United States Department Of Justice David Harder	999 18th St South Terr. #370 Denver CO 80202	david.harder@usdoj.gov
Native American Rights Fund: Representing The Klamath Tribes Joe M. Tenorio	250 Arapahoe Ave Boulder CO 80302-5821	tenorio@narf.org; jschmidt@narf.org
Native American Rights Fund: Representing The Klamath Tribes Ada Montague	250 Arapahose Ave Boulder CO 80302-5821	montague@narf.org
Carollo Law Group, LLC: Representing The Upper Basin Irrigators (UBI) Dominic M. Carollo	PO Box 2456 Roseburg OR 97470	dcarollo@carollolegal.com; nsmith@carollolegal.com; kharp@carollolegal.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Paul Simmons	500 Capitol Mall Suite 1000 Sacramento CA 95814	psimmons@somachlaw.com; ydelacruz@somachlaw.com; crivera@somachlaw.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Maximilian Bricker	500 Capitol Mall Suite 1000 Sacramento CA 95814	mbricker@somachlaw.com
Rietmann & Kim, LLP: Representing Klamath Project Water Users (KPWU) Nathan R. Rietmann	1270 Chemeketa St. NE Salem OR 97301	nathan@rietmannlaw.com

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286*

**RULING ON REQUEST FOR RECONSIDERATION REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE**

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Parks & Ratliff, PC:  
Representing The Klamath  
Project Water Users (KPWU)  
Nathan Ratliff

620 Main St.  
Klamath Falls OR 97601

nathan@parksandratliff.com;  
reception@parksandratliff.com

---

Davis, Wright, Tremaine,  
LLP: Representing Klamath  
Project Water Users (KPWU)  
Olivier Jamin

560 SW 10th Ave  
Suite 700  
Portland OR 97205

olivierjamin@dwt.com

---

Davis, Wright, Tremaine,  
LLP: Representing The  
Klamath Project Water Users  
(KPWU)  
Andy McStay

560 SW 10th Ave  
Suite 700  
Portland OR 97205

andymcstay@dwt.com

---

Clyde Snow, Attorneys at  
Law: Representing The  
Klamath Project Water Users  
(KPWU)  
Reagan L.B. Desmond  
Nathaniel E. Broadhurst

377 SW Century Drive  
Bend OR 97702

rlbd@clydesnow.com;  
neb@clydesnow.com

---

Blain Law, LLC:  
Representing The Klamath  
Project Water Users (KPWU)  
Mika Blain

517 Main St.  
Klamath Falls OR 97601

mika@blainlawllc.com

---

Brandsness, Brandsness &  
Rudd, PC: Representing The  
Klamath Project Water Users  
(KPWU)  
Michael P. Rudd

411 Pine St.  
Klamath Falls OR 97601

mike@brandsnessrudd.com

---

Will Davidson

725 Summer St NE Suite A  
Salem OR 97301

will.d.davidson@water.oregon.gov

---

Jesse D Ratcliffe

1162 Court St NE  
Salem OR 97301

Jesse.D.Ratcliffe@doj.oregon.gov;  
Denise.Ruttan@doj.oregon.gov

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/s/Alexandria N Whitley  
Hearing Coordinator

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its  
Tributaries - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286*

RULING ON REQUEST FOR RECONSIDERATION REQUEST FOR CHANGE OF ADMINISTRATIVE  
LAW JUDGE

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

<b>In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries</b>	) ) ) ) ) )	<b>RULING ON REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE</b>
<b>Claim 622 (Upper Klamath Lake)</b>	) )	OAH Reference No. 2024-OWRD-00136 Former OAH Case No. 277

Pursuant to Oregon Revised Statute (ORS) 183.645 and Oregon Administrative Rule (OAR) 471-060-0005(3), the Upper Basin Irrigators (UBI) requested a change of the administrative law judge (ALJ) assigned to hear the above-entitled case. On October 29, 2024, the Klamath Tribes (Tribes) filed a Klamath Tribes’ Response to UBI Request for Change of Administrative Law Judge, opposing UBI’s request.

**ISSUE**

Whether a different ALJ should be assigned to hear this case. *See* ORS 183.645, OAR 471-060-0005.

**FINDINGS OF FACT**

1. On or about October 4, 1999, the Oregon Water Resources Department (OWRD) issued a Preliminary Evaluation regarding Claim 622. Beginning in 2000, UBI contestants and other contestants filed their Statement of Contests. Thereafter, OWRD referred this matter to the Office of Administrative Hearings (OAH). On April 2, 2010, the OAH issued a written notice assigning Senior Administrative Law Judge (ALJ) Joe L. Allen to preside over this matter.
2. An in-person cross-examination hearing convened on April 18, 2011. ALJ Allen presided over the hearing. UBI participated in the hearing. On April 16, 2012, ALJ Allen issued a Proposed Order. At the time ALJ Allen issued the Proposed Order, the OAH used a system called “Access” to store case information. The OAH did not use Access to electronically store case documents. Rather, documents for contested cases were kept in paper hardcopy.
3. This case was identified as Case No. 2 in the Access database. The OAH case file was the official record. After issuance of the Proposed Order, the OAH case file associated with this matter was returned to OWRD so it could be certified as part of the record for the circuit court to issue a judgment affirming or modifying the order of the director. OWRD issued and referred the Findings of Fact and Order of Determination to the Klamath County Circuit Court in 2013.

4. In 2013, the OAH implemented the use of an electronic Case Management System (CMS). Since that time, the OAH has received contested case referrals through CMS. All file documents are stored in CMS, which serves as the official record for contested cases referred to the OAH. The implementation of CMS resulted in a new case number naming convention. Existing cases that were transferred to CMS were assigned new case numbers. For these matters, documents issued under CMS list both the former Access and current CMS case number. On February 28, 2014, OWRD issued the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD) and submitted it to the Klamath County Circuit Court.

5. On June 7, 2023, the Klamath County Circuit Court issued an Opinion Re Motion to Present Non-record Evidence for Tribal Group (Phase 3, Part 2, Group C) Claims (Klamath Opinion). The Klamath Opinion remanded the matter to OWRD to conduct a hearing to supplement the existing record. The remand is for the limited purpose of taking additional evidence concerning a specific factor- the “moderate living standard.” The Klamath Opinion addressed the role of the OAH. UBI specifically requested that the remand should be to a referee rather than an OAH ALJ. The Klamath Opinion found: “UBI’s request for a remand to a referee rather than to OAH is denied. ORS 539.150(3) provides that the court ‘may, if necessary’ remand the case for further evidence ‘to be taken by the director or by a referee appointed by the court for that purpose.’ The court has determined that a remand is necessary, but it declines to appoint a referee and instead remands the contested claims at issue to the OWRD director in accordance with the statute.” (Klamath Order at 15). The Court also found “The director may-- but is not required to by this opinion -- delegate to an OAH administrative law judge the responsibility to conduct the additional contested case proceedings on remand. Any requests for discovery will be submitted to and decided in the forum that will take the additional evidence.” (Klamath Opinion at 15-16).

6. OWRD issued an Order on Scope of Hearing on Remand (Order on Remand).<sup>1</sup> As part of the Order on Remand, OWRD elected to refer the matter back to the OAH for further hearing. OWRD specified that the scope of the remand hearing is “[t]o take additional evidence on the determination of the moderate living standard issue a proposed order determining what, if any, effect the determination of the moderate living standard has on the existing quantification levels in the ACFFOD.” Order on Remand at 2.

7. On May 3, 2024, OWRD re-referred this matter to the OAH. The referral is entered in CMS and, therefore, has been assigned a new case number consistent with OAH procedure.

8. On October 11, 2024, the OAH issued a Notice of Continuation of Administrative Law Judge (Notice) by email. The Notice stated, in part, “The assignment of **ALJ Allen** issued April 2, 2010, remains in place.” (Notice at 1; Emphasis in original). The Notice provided all parties with instructions on how and who to submit correspondence to at the OAH.

9. On October 23, 2024, UBI filed a Request for Change of Administrative Law Judge (Request) with Chief ALJ Jeffrey Rhoades. In its Request, UBI asserts this is its first request for change of ALJ. As indicated in the Notice, prior to ALJ Allen’s formal assignment to this matter in April of 2010, four separate ALJs presided over the motion and discovery process.<sup>2</sup>

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<sup>1</sup> The Order on Scope of Hearing on Remand is undated.

<sup>2</sup> Because the OAH does not have access to the official paper file returned to the agency, the OAH will accept as fact UBI’s representation that this is their first request for change of ALJ.

## CONCLUSION OF LAW

A different ALJ should not be assigned to hear this case.

## OPINION

ORS 183.645(1) provides:

After assignment of an administrative law judge from the Office of Administrative Hearings to conduct a hearing on behalf of an agency, the chief administrative law judge shall assign a different administrative law judge for the hearing upon receiving a written request from any party in the contested case or from the agency. The chief administrative law judge may by rule establish time limitations and procedures for requests under this section.

The current version of OAR 471-060-0005<sup>3</sup> (2021) provides, in relevant part:

- (1) The purpose of this rule is to establish uniform procedures for the change of assignment of administrative law judges.
- (2) The words and terms used in OAR 471-060-0005 have the following meanings:
  - (a) An administrative law judge is “assigned to the case” when a written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier.
  - (b) “Good cause” to support a request for a change of administrative law judge is any reason why an administrative law judge’s impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.
- (3) Every party and agency in a contested case is entitled to request a change of administrative law judge. Except for hearings provided under ORS 813.410 or 813.440 on suspension of driving privileges, the first request of that party or agency shall be automatically granted so long as it is filed within the time limits established by section (4). If that party or agency makes a subsequent request, the party or agency must show good cause why the administrative law judge should not preside over the hearing. A request for change of administrative law judge in hearings provided under ORS 813.410 or 813.440 on suspension of driving privileges may only be granted on a showing of good cause. The Chief

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<sup>3</sup> OAR 137-003-0501(8) provides that OAR 471-060-0005 applies to all contested case hearings conducted by the Office of Administrative Hearings.

Administrative Law Judge may designate in writing a person (or persons) to rule on requests under this rule.

(4) All requests must be in writing and sent or delivered to the Chief Administrative Law Judge or designee by filing the request with the Office of Administrative Hearings by hand delivery, mail, facsimile transmission, or electronic mail. To be entitled to an automatic change of administrative law judge, the party making the request must do so within 10 business days after an administrative law judge is assigned to the case.

(a) For purposes of this rule, business days do not include days of scheduled office closure. Scheduled days of office closure include, but are not limited to, Saturdays and the legal holidays identified in ORS 187.010 and 187.020, including Sundays. A request will be considered filed on the date a party or agency mails, faxes, emails, hand delivers, or electronically transmits the request to the Office of Administrative Hearings.

(b) The time for filing a request for a change of the administrative law judge assigned to the case may be extended if the party or agency making the request can demonstrate that the failure to make a timely request was caused by an excusable mistake, surprise, excusable neglect, reasonable reliance on the statement of a party, agency, or the Office of Administrative Hearings relating to procedural requirements. In such cases, the party or agency may file the request within 10 business days after the circumstances that prevented a timely filing have come to an end.

UBI requests that the OAH assign a different ALJ to preside over this matter. UBI contends this is UBI's first such request. UBI does not allege good cause, as that term is defined in OAR 471-060-0005(2)(b), to support its request. Instead, UBI claims, under the current 2021 version of OAR 471-060-0005(3), they are automatically entitled to a change of the assigned ALJ, so long as that request is filed within the time limits established in the current version of OAR 471-060-0005(4). To be entitled to an automatic change of administrative law judge under the 2021 version of the rule, the party making the request must do so within 10 business days after an administrative law judge is assigned to the case. Under the current version of OAR 471-060-0005(4), an ALJ is "assigned to the case" when written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier. *See* OAR 471-060-0005(2)(b).

On April 2, 2010, the OAH sent written notice to all parties assigning ALJ Allen to this matter. On April 18, 2011, ALJ Allen convened and presided over the contested case hearing. UBI participated in the hearing. On April 16, 2012, ALJ Allen issued a Proposed Order. UBI filed its request for a change of the assigned ALJ on October 23, 2024.

UBI contends they timely filed the Request because it was filed within 10 days of the issuance of the Notice of Continuation of Administrative Law Judge. UBI asserts that the matter is a new referral to the OAH and that it is a "new and different case and proceeding, not a continuation of the prior administrative hearing completed nearly 13 years ago." Request at 2. UBI further argues the assignment

of a new case number, the issuance of the Notice that ALJ Allen was assigned to this case and the intervening change in the language of OAR 471-060-0005 all support its position that it is entitled to an automatic change of the assigned ALJ. UBI's position is inconsistent with the statutes and rules that govern the contested case process for water rights before 1909.

Proper application of the law requires close examination of the interplay between various statutes pertaining to both jurisdiction and procedure. ORS Chapter 539, specifically ORS 539.005 through ORS 539.240, addresses water rights before 1909 and is thus the statutory authority for this adjudication. ORS 539.005, which sets out the purpose of the chapter states, in relevant part:

(1) The Legislative Assembly declares that it is the purpose of this chapter to set for the procedures for carrying out a general stream adjudication in Oregon.

(2) In accordance with the applicable provisions of ORS chapter 183, the Water Resources Director shall adopt rules necessary to carry out the provisions of this chapter.

ORS 539.110 establishes the process by which a contested case hearing will be conducted.<sup>4</sup> ORS 183.635, "Agencies required to use administrative law judges from Office of Administrative Hearings," provides, in relevant part:

(1) Except as provided in this section, all agencies must use administrative law judges assigned from the Office of Administrative Hearings established under ORS 183.605 to conduct contested case hearings, without regard to whether those hearings are subject to the procedural requirements for contested case hearings.

ORS 539.150, "Court proceedings to review determination of director," defines the legal process to remand this matter to the OAH and provides:

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<sup>4</sup> ORS 539.110 provides:

The Water Resources Director shall fix the time and a convenient place for hearing the contest, and shall notify the contestant and the person whose rights are contested to appear before the director or the authorized assistant of the director at the designated time and place. The date of hearing shall not be less than 30 nor more than 60 days from the date the notice is served on the parties. The notice may be served personally or by registered or certified mail, return receipt requested, addressed to the parties at their post-office addresses as stated in the statement and proof of claimant. The director may adjourn the hearing from time to time upon reasonable notice to all the parties interested; may issue subpoenas and compel the attendance of witnesses to testify, which subpoenas shall be served in the same manner as subpoenas issued out of the circuit court; may compel the witnesses so subpoenaed to testify and give evidence in the matter; and may order the taking of depositions and issue commissions therefor in the same manner as depositions are taken in the circuit court. The witnesses shall receive fees as provided in ORS 44.415 (2), the costs to be taxed in the same manner as are costs in suits in equity. The evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest. The burden of establishing the claim shall be upon the claimant whose claim is contested. The evidence may be taken by a duly appointed reporter.



(1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail or by certified mail with return receipt, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. ***The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.***

(4) After final hearing the court shall enter a judgment affirming or modifying the order of the director as the court considers proper, and may assess such costs as it may consider just except that a judgment for costs may not be rendered against the United States. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment.

*Emphasis added.*

In the present matter, the Klamath County Circuit Court determined it was necessary to remand this case for further testimony. The Court had the option of remanding the matter to the OWRD director or to a referee appointed by the Court. In accordance with ORS 183.635, a remand to OWRD director results in a remand to the OAH. UBI, based on the statutory authority found in ORS 539.150(3), specifically requested the court appoint a referee in lieu of remanding to the director. The court denied UBI's request.

OWRD utilized the legal remand process established in ORS 539.150(3). In accordance with ORS 539.005 and ORS 183.635, the matter was re-referred to the OAH. The re-referral process is outlined by OAR 137-003-0655, “Further Hearing and Issuance of Final Order,” and provides:

(1) After issuance of the proposed order, if any, the administrative law judge shall not hold any further hearing or revise or amend the proposed order except at the request of the agency, except as provided in this subsection. The administrative law judge may withdraw a proposed order for correction within three working days of issuance of the proposed order. If the administrative law judge withdraws a proposed order for correction, the time for filing exceptions shall begin on the date the administrative law judge issues the corrected proposed order.

(2) If the agency requests the administrative law judge to conduct a further hearing under section (1) of this rule, the agency shall specify the scope of the hearing and the issues to be addressed. After further hearing, the administrative law judge shall issue a proposed order.

Pursuant to OAR 471-003-0655(2), OWRD issued the Order on Remand. OWRD specified the scope of the remand hearing “to take additional evidence on the determination of the moderate living standard and issue a proposed order determining what, if any, effect the determining of the moderate living standard has on the existing quantifications levels in the ACFFOD.” Order on Remand at 2. Pursuant to ORS 539.150(3), the court has the legal authority to enter a judgment affirming the determination of OWRD, as well as consider exceptions filed by any party in the matter. However, in the event the court determines further testimony is necessary to issue judgement, the court is required to either appoint a referee or remand to the OWRD Director. By operation of ORS 183.635, this results in a re-referral to the OAH. Pursuant to ORS Chapter 183 and associated rules, the ALJ’s proposed order will be issued to OWRD and the parties. OWRD will, in turn, file its determination to the Klamath County Circuit Court. Once the Court enters a judgment either affirming or modifying the determination of the director, then, and only then, is the judgment final and subject to appeal by the Oregon Court of Appeals. *See* ORS 539.150(4).

UBI’s contends that the ALJs issuance of the Proposed Order terminated the contested case process. UBI further asserts that a new and different case and proceeding was created by the remand. This is not supported by the plain language of the law, which clearly establishes the ongoing involvement of an entity, other than the court, to act as the finder of fact. *See* ORS 539.150. The law places no limit on the number of times the court can utilize its remand authority. Under UBI’s interpretation, if the court decided to remand this matter multiple times to supplement the record, it would be terminating and creating multiple contested cases. This position is in clear contradiction of the process established by the legislature for the purpose of reaching a final judgment.

In further support of its position, UBI makes collateral arguments asserting this is a new contested case matter. These arguments will be addressed in turn.

UBI contends that the issuance of a new case number supports the proposition that the prior administrative proceeding was terminated. As established in the Findings of Fact, the OAH is currently operating under a new filing system that was established after the ALJ's Proposed Order was issued in this matter. *Supra* at 2. The implementation of CMS resulted in a new case numbering convention. The migration from old technology to new technology does not terminate a case and does not legally create a new contested case. Furthermore, UBI does not cite authority in support of this contention. Many judicial and administrative contested case systems have migrated to electronic case management over the past two decades. These migrations do not automatically create new cases by virtue of changing case numbering conventions.

UBI next asserts “[T]he fact that the OAH deemed it necessary to provide the parties with the Notice demonstrates that Upper Basin Irrigators did not *previously* have notice that ALJ Allen would be assigned *this* case.” Request at 2, *emphasis in original*. UBI's position disregards both the plain language of the title and content contained in the Notice. UBI has been aware since 2010 of ALJ Allen's assignment as the ALJ in this case. This is not a new case, but a continuation of the existing matter, as noted on the Notice issued to the parties. *See* ORS 539.150.

The Notice further serves as an update to all parties to the manner, means and method to file documents or make inquiries regarding the case. Again, the OAH has migrated to a different system over the life of this contested case. *Supra* at 2. The notice at issue provides the parties with the proper case caption referencing each claim number, the prior OAH case number under the old system and the current case number under CMS. Without conveying this information, the parties would not have the procedural information necessary to properly participate in this contested case matter.

UBI is correct that OAR 471-060-0005(4) was revised in 2021 resulting from *Pulito v. Oregon State Bd. of Nursing*, 366 Or 612 (2020). UBI appears to argue that, because this is a new contested case, the 2021 version of OAR 471-060-0005 must be applied. UBI's contention is not supported by the record or the law. This is a matter of remand, not a new contested case. The remand is a continuation of the contested case that will continue until a final judgment is issued by the Klamath County Circuit Court, at which point it is subject to appeal before the Oregon Court of Appeals. *See* ORS 539.150.

It is not uncommon for laws to change during the pendency of an action. Under Oregon law, whether an administrative rule applies retroactively depends upon the intent of the promulgating agency or legislature. *Delehant v. Board on Police Standards & Training*, 317 Or 273, 278, 855 P.2d 1088 (1993). To ascertain the agency's intent, a factfinder must first consider both the text and context of the rule. If the rule is silent on the issue, then one must look to the circumstances surrounding the promulgation of the rule. *E.g., U.S. Bancorp v. Dept. of Revenue*, 337 Or 625, 103 P.3d 85, 91-92 (2004) (noting that circumstances surrounding the agency's promulgation of the rule offered insight into the agency's intent, because the circumstances illustrated the agency had adopted the rule in response to a judicial decision that had invalidated a prior rule). There is nothing in the text of OAR 471-060-0005 (2021) to indicate an intent to apply the rule retroactively.<sup>5</sup>

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<sup>5</sup> When the rule was promulgated in 1999 it did anticipate there could be an impact on cases assigned to an ALJ with the OAH. Therefore, the rule included the following clause: OAR 471-060-0005(6) For all

In *Delehant*, although there was no specific provision in the rule itself indicating that the agency intended the rule at issue to apply retroactively, the court found that “the procedural history of this case clearly establishes such an intent.” 317 Or at 279. The court determined that because the agency had promulgated the rule during the progress of the case, and had applied the rule to the case, it intended the rule to apply retroactively. *Id.*; *See also May Trucking v. Dept. of Transportation*, 203 Or App 564, 126 P3d 695, 702 (2006) (similarly finding that the agency’s passage and application of a rule during the pendency of a contested case established the agency’s intent to apply the rule retroactively).

In *U.S. Bancorp*, *Delehant*, and *May Trucking*, the petitioners specifically challenged the application of the subsequently promulgated rule. In each of those cases, the retroactive application of the agency’s rule was a disputed issue, and the hearing record included evidence of the circumstances surrounding the promulgation of the rule and evidence from which the court could ascertain the agency’s intent. In contrast, here, UBI did not offer evidence of the circumstances surrounding the amendments to 471-060-0005 (2021) to demonstrate any agency intent to apply the new version of the rule retroactively to existing contested cases. Nothing in the *Pulito* decision supports a finding that the rule change should be applied retroactively to pending actions.

The version of OAR 471-060-0005 that was in effect when this matter was initially referred to the OAH provides as follows:

OAR 471-060-0005<sup>6</sup> (1999) provides:

(1) The purpose of this rule is to establish uniform procedures for the change of assignment of administrative law judges.

(2) The words and terms used in OAR 471-060-0005 have the following meanings:

(a) An administrative law judge is "assigned" when a written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier.

(b) "Good cause" is any reason why an administrative law judge's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.

(3) Every party and agency in a contested case is entitled to request a change of administrative law judge. The first request of that party or agency shall be automatically granted. If that party or agency makes a subsequent request, it must show good cause why

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contested cases pending on January 1, 2000, the Chief Administrative Law Judge shall not assign or change assignments of administrative law judges unless the agency on whose behalf the hearing is conducted requests assignment of a administrative law judge from the Office of Administrative Hearings to continue the conduct and conclude the proceedings of a pending case.

<sup>6</sup> OAR 137-003-0501(8) provides that OAR 471-060-0005 applies to all contested case hearings conducted by the Office of Administrative Hearings.

the administrative law judge should not preside over the hearing. The Chief administrative law judge or designee shall decide all requests.

(4) Notwithstanding section (3), *no request shall be granted if a party or agency had a reasonable opportunity to request a change of administrative law judge but did not do so. "Reasonable opportunity" is determined under the totality of circumstances.* All requests must be in writing and sent or delivered to the Chief Administrative Law Judge or designee at the mailing address, telephone number, or electronic mail address indicated in the notice of assignment of administrative law judge. Requests may be sent by mail, facsimile transmission, or electronic mail.

(5) The Chief Administrative Law Judge may exempt an agency or a class of cases from this section. All requests must be in writing.

(6) For all contested cases pending on January 1, 2000,<sup>7</sup> the Chief Administrative Law Judge shall not assign or change assignments of administrative law judges unless the agency on whose behalf the hearing is conducted requests assignment of an administrative law judge from the Office of Administrative Hearings to continue the conduct and conclude the proceedings of a pending case.

*Emphasis added.*

As noted above, the former version of OAR 471-060-0005(4) (1999) provided that no request for a change of administrative law judge would be granted if the party making such request had a reasonable opportunity to request a change but failed to do so. Reasonable opportunity was reviewed under the totality of the circumstances.

UBI was informed of the change in ALJ and assignment to ALJ Allen on April 2, 2010. This allowed UBI its first opportunity to request a change in ALJ. Instead, UBI continued with the discovery process, as well as the written direct testimony process. For some of the cases at issue, UBI also participated in the hearing process conducted by ALJ Allen. UBI received ALJ Allen's Proposed Order. UBI had a reasonable opportunity throughout this process to request reassignment. UBI did not make this request. Instead, UBI continued to participate in the process with the potential to obtain a ruling in UBI's favor.

UBI is incorrect that the current version of OAR 137-060-0005 (2021) is the controlling law in this matter. OAR 471-060-0005(4) (1999) provided UBI a reasonable opportunity to object to ALJ Allen's assignment to this matter in 2010, and not when the matter was remanded for a limited scope supplemental hearing. Under the totality of the circumstances, UBI had a reasonable opportunity to file for a request for change of ALJ in 2010. UBI's October 23, 2024, Request for Change of Administrative Law Judge is therefore untimely and is denied.

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<sup>7</sup> No party in this matter asserts that this matter was referred to the OAH prior to January 1, 2000. The earliest contests in these matters were filed in May of 2000.

## **RULING**

Upper Basin Irrigators' request for change of assigned ALJ is DENIED. The matter remains assigned to Senior ALJ Joe L. Allen.

Jeffrey R. Rhoades  
\_\_\_\_\_  
Chief Administrative Law Judge  
Office of Administrative Hearings

## CERTIFICATE OF MAILING

On 26<sup>th</sup> day of November, 2024, I emailed the foregoing RULING ON REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE in **OAH Reference No. 2024-OWRD-00136**:

BY ELECTRONIC MAIL:

<u>Name</u>	<u>Address</u>	<u>Contact</u>
United States Department Of Justice Guss Guarino	999 18th St. South Terr. # 370 Denver CO 80202	guss.guarino@usdoj.gov; raymundo.ribota@usdoj.gov
United States Department Of Justice David Harder	999 18th St South Terr. #370 Denver CO 80202	david.harder@usdoj.gov
Native American Rights Fund: Representing The Klamath Tribes Joe M. Tenorio	250 Arapahoe Ave Boulder CO 80302-5821	tenorio@narf.org; jschmidt@narf.org
Native American Rights Fund: Representing The Klamath Tribes Ada Montague	250 Arapahose Ave Boulder CO 80302-5821	montague@narf.org
Carollo Law Group, LLC: Representing The Upper Basin Irrigators (UBI) Dominic M. Carollo	PO Box 2456 Roseburg OR 97470	dcarollo@carollolegal.com; nsmith@carollolegal.com; kharp@carollolegal.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Paul Simmons	500 Capitol Mall Suite 1000 Sacramento CA 95814	psimmons@somachlaw.com; ydelacruz@somachlaw.com; crivera@somachlaw.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Maximilian Bricker	500 Capitol Mall Suite 1000 Sacramento CA 95814	mbricker@somachlaw.com
Rietmann & Kim, LLP: Representing Klamath Project Water Users (KPWU) Nathan R. Rietmann	1270 Chemeketa St. NE Salem OR 97301	nathan@rietmannlaw.com

Parks & Ratliff, PC: Representing The Klamath Project Water Users (KPWU) Nathan Ratliff	620 Main St. Klamath Falls OR 97601	nathan@parksandratliff.com; reception@parksandratliff.com
Davis, Wright, Tremaine, LLP: Representing Klamath Project Water Users (KPWU) Olivier Jamin	560 SW 10th Ave Suite 700 Portland OR 97205	olivierjamin@dwt.com
Davis, Wright, Tremaine, LLP: Representing The Klamath Project Water Users (KPWU) Andy McStay	560 SW 10th Ave Suite 700 Portland OR 97205	andymcstay@dwt.com
Clyde Snow, Attorneys at Law: Representing The Klamath Project Water Users (KPWU) Reagan L.B. Desmond	377 SW Century Drive Bend OR 97702	rlbd@clydesnow.com
Blain Law, LLC: Representing The Klamath Project Water Users (KPWU) Mika Blain	517 Main St. Klamath Falls OR 97601	mika@blainlawllc.com
Brandsness, Brandsness & Rudd, PC: Representing The Klamath Project Water Users (KPWU) Michael P. Rudd	411 Pine St. Klamath Falls OR 97601	mike@brandsnessrudd.com
Will Davidson	725 Summer St NE Suite A Salem OR 97301	will.d.davidson@water.oregon.gov
Jesse D Ratcliffe	1162 Court St NE Salem OR 97301	Jesse.D.Ratcliffe@doj.oregon.gov; Denise.Ruttan@doj.oregon.gov

/s/Alexandria N Whitley  
Hearing Coordinator



# Exhibit F

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

UPPER BASIN IRRIGATORS; AGRI WATER, LLC; AUSAYMAS CATTLE CO.; BK RANCH (AKA LILLIAN HILL AND VINCENT HILL); C AND A VOGT COMMUNITY PROPERTY TRUST; MARY RABE AND ESTATE OF CLIFFORD RABE; DAVID M. AND THERESA COWAN; DUANE F. MARTIN; DUARTE LIVESTOCK; E.G. KERNS RANCH LLC; BARNES LAKE COUNTY, LLC; FIVE MILE RANCH LLC; FLYNN AND SONS LLC; GERALD H. HAWKINS; GOOSE NEST RANCHES, LLC; GREG HARRIS; GRIFFITH LIVESTOCK LLC; HARLOWE RANCH, LLC; HAWKINS CATTLE CO.; JAMES HADYN-MYER; JOE FLYNN RANCH; JOHN B. OWENS; JOHN R. BRIGGS, JR.; KENNETH OWENS; LON BROOKS; LYNNE RICHARDSON CABRAL; MARTIN NICHOLSON; MICHAEL LAGRANDE; NBCC, LLC; NEWMAN ENTERPRISES, INC.; NICHOLSON INVESTMENTS, LLC; NICHOLSON LOVING TRUST; OBENCHAIN CATTLE CO. (AKA CAROLYN OBENCHAIN AND MARGARET JACOBS); OWENS & HAWKINS; PRODUCTIVE TIMBERLAND LLC; RANDALL KIZER (SUCCESSOR TO MAXINE KIZER; RICHARD NICHOLSON; ROGER NICHOLSON; T & B RANCH; TOM AND JACQUELINE BENTLEY (J&T RANCH CO.); TP BAR RANCH LLC; VINCENT BRIGGS; MODOC POINT IRRIGATION DISTRICT; AND WAYNE AND MARGARET JACOBS,

Plaintiffs,

v.

JEFFREY R. RHOADES, in his official

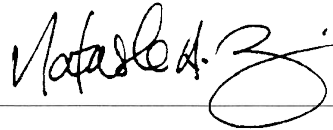
Case No. 25CV20984  
Honorable Natasha A. Zimmerman  
STIPULATED JUDGMENT OF DISMISSAL  
  
**ORS 20.140 - State fees deferred at filing**

1 capacity as Chief Administrative Law Judge  
2 for the Oregon Office of Administrative  
Hearings; OREGON OFFICE OF  
ADMINISTRATIVE HEARINGS,


3 Defendants.

4  
5 Based on the stipulation of the parties, as shown by the signatures of their counsel below,  
6 IT IS HEREBY ADJUDGED that the above-entitled case is dismissed without prejudice and  
7 without fees or costs to any party.

8  
9 8/25/2025 3:10:18 PM

10 

11  
12 Circuit Court Judge Natasha A. Zimmerman

13  
14   
15 Nolan G. Smith, OSB #215034  
16 Attorney for Plaintiffs  
DATED: 8/19/2025

17  
18 s/ Tracy Ickes White  
19 Tracy Ickes White, OSB #904127  
20 Senior Assistant Attorney General  
21 Attorney for Defendants  
22 DATED: 8/20/2025

23  
24 Submitted by: Tracy Ickes White  
25 Senior Assistant Attorney General  
26 Attorneys for Defendants

1 **CERTIFICATE OF READINESS**

2 This proposed **STIPULATED JUDGMENT OF DISMISSAL** is ready for judicial  
3 signature because:

4 1.  Each party affected by this order or judgment has stipulated to the order or  
5 judgment, as shown by each opposing party's signature on the document being submitted.

6 2.  Each party affected by this order or judgment has approved the order or judgment,  
7 as shown by each party's signature on the document being submitted or by written confirmation  
8 of approval sent to me.

9 3.  I served a copy of this order or judgment on each party entitled to service on  
10 (DATE OF SERVICE) and:

11 a.  No objection has been served on me.

12 b.  I received objections that I could not resolve with a party despite  
13 reasonable efforts to do so. I have filed a copy of the objections I received and indicated which  
14 objections remain unresolved.

15 c.  After conferring about objections, [role and name of objecting party]  
16 agreed to independently file any remaining objection.

17 4.  Service is not required pursuant to subsection (3) of this rule, or by statute, rule,  
18 or otherwise.

19 5.  Each other party previously filed a waiver of appearance.

20 6.  This is a proposed judgment that includes an award of punitive damages and  
21 notice has been served on the Director of the Crime Victims' Assistance Section as required by  
22 subsection (5) of this rule.

23 DATED this 20 day of August, 2025.

24 s/ Tracy Ickes White  
25 TRACY ICKES WHITE #904127  
26 Senior Assistant Attorney General  
Trial Attorney  
Tel (503) 947-4700  
Tracy.I.White@doj.oregon.gov  
Attorneys for Defendant

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**CERTIFICATE OF SERVICE**

I certify that on August 20, 2025, I served the foregoing STIPULATED JUDGMENT OF DISMISSAL upon the parties hereto by the method indicated below, and addressed to the following:

Dominic Carollo  
Nolan G. Smith  
Carollo Law Group LLC  
PO Box 2456  
Roseburg, OR 97470  
*Of Attorneys for Plaintiffs*

HAND DELIVERY  
 MAIL DELIVERY  
 OVERNIGHT MAIL  
 SERVED BY E-FILING  
 SERVED BY EMAIL  
[dcarollo@carollolegal.com](mailto:dcarollo@carollolegal.com)  
[nsmith@carollolegal.com](mailto:nsmith@carollolegal.com)

*s/ Tracy Ickes White*  
TRACY ICKES WHITE #904127  
Senior Assistant Attorney General  
Trial Attorney  
Tel (503) 947-4700  
Fax (503) 947-4791  
Tracy.I.White@doj.oregon.gov  
Of Attorneys for Defendants

# Exhibit G

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

In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries ) **KLAMATH TRIBES’ MOTION TO VACATE SUA SPONTE RULINGS OF THE CHIEF ADMINISTRATIVE LAW JUDGE**  
 Claims 625-640 (Williamson River) )  
 Claim 622 (Upper Klamath Lake) ) **(EXPEDITED CONSIDERATION REQUESTED)**  
 Claims 641-657 (Sprague River) )  
 Claims 658-667 (Sycan River) )  
 Claims 668-670 (Wood River) ) OAH Reference Nos. 2024-OWRD-00134,  
 Claim 623 (Klamath Marsh) ) 2024-OWRD-00136, 2024-OWRD-00137,  
 Claim 624 (Seeps & Springs) ) 2024-OWRD-00138, 2024-OWRD-00139,  
 ) 2024-OWRD-00140, 2024-OWRD-00141  
 )  
 ) (Formerly OAH Case Nos. 277, 286, 280, 279,  
 ) 281, 284, 285, respectively)

**MOTION**

Pursuant to OAR 137-003-0630, the Klamath Tribes (“Tribes”) hereby moves to vacate the Rulings on Change of Administrative Law Judge Assignment dated August 29, 2025, (“Sua Sponte Rulings”) entered in the above-captioned cases, which vacated the November 26, 2024, Rulings on Request for Change of Administrative Law Judge (“2024 Rulings”) and granted the Upper Basin Irrigators’ (“UBI”) Requests for Change of Administrative Law Judge.<sup>1</sup> For the reasons set forth herein, the Sua Sponte Rulings should be vacated, Administrative Law Judge Allen should be reinstated as the presiding judge in these matters, and these remand proceedings, including the current briefing schedule, should be stayed pending the resolution of this Motion.

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<sup>1</sup> The Sua Sponte Rulings vacated the “November 25, 2024, . . . Ruling on Request for Change of Administrative Law Judge . . . in its entirety.” The Sua Sponte Rulings erred on the date of the vacated rulings. The vacated rulings were emailed to the parties on November 26, 2024. To avoid confusion, this Motion refers to the vacated rulings as the “2024 Rulings.”

1 **BACKGROUND**

2 On February 24, 2021, the Klamath County Circuit Court affirmed the quantification of  
3 the Tribes’ reserved water rights,<sup>2</sup> but found that the Oregon Water Resources Department  
4 (“OWRD”) erred in failing to apply the “moderate living” defense to the analysis of the Tribes’  
5 water rights, as required by the *Adair* cases.<sup>3</sup> The Circuit Court specifically held that the step  
6 one analysis of healthy and productive habitat – the basis of the Tribes’ reserved water right –  
7 could not be disturbed; however, the quantification of the tribal rights must be reviewed under  
8 the “moderate living” defense.<sup>4</sup> Subsequently, the Circuit Court remanded the instant  
9 proceedings to the OWRD for, among other things, application of the “moderate living” defense  
10 to the Klamath Tribes’ quantified water rights.<sup>5</sup> On May 3, 2024, OWRD re-referred the remand  
11 proceedings to the OAH.

12 After the matters were referred to OAH, on October 11, 2024, OAH issued Notices of  
13 Continuation of Administrative Law Judge Assignment in each of the remanded cases. The

14 \_\_\_\_\_  
15 <sup>2</sup> Ct.’s Op. & Conclusions of Law on Phase 3, Pt. 1, Grp. C Mots. 16, Feb. 24, 2021 (“2021  
16 Circuit Court Opinion”). While the Court determined that the “moderate living” defense should  
17 be applied in these proceedings, that did not mean that the Tribes’ water rights were vacated.  
18 Case Management Order No. 54 Ex. A at 2, Apr. 7, 2021 (“CMO # 54”); Revised Order on  
19 Phase 3, Pt. 1, Grp. C Mots. Ex. D at 1, Jan. 7, 2022 (“2022 Revised Order”).

20 <sup>3</sup> CMO # 54 Ex. A at 2; 2022 Revised Order Ex. D at 1; Op. re Mots. to Present Non-R. Evid. for  
21 Tribal (Phase 3, Pt. 2, Grp. C) Claims at 14-15, June 7, 2023 (“2023 Circuit Court Opinion”); *see*  
22 *U.S. v. Adair*, 723 F.2d 1394, 1414-15 (1983) (“*Adair I*”); *U.S. v. Adair*, 187 F. Supp. 2d 1273,  
23 1277-79 (D. Or. 2002) (“*Adair III*”), *vacated on ripeness grounds sub nom, United States v.*  
24 *Braren*, 338 F.3d 971 (9th Cir. 2003).

<sup>4</sup> 2021 Circuit Court Opinion 15-17.

<sup>5</sup> Op. re Mots. to Present Non-R. Evid. for Tribal (Phase 3, Pt. 2, Grp. C) Claims, at 16, June 7,  
2023. That 2023 Circuit Opinion also remanded the Tribes’ water right in the Upper Klamath  
Lake to provide Klamath Project Water Users (“KPWU”) their opportunity to present the  
evidence and argument it would have presented in 2011. *Id.* at 12. However, because the  
underlying request to change ALJ is made only by UBI, this Motion limits the background  
context to UBI and its limited opportunity to present evidence and argument on how the  
“moderate living” defense may affect the quantification of the Tribal water rights, if at all.



1 Notice of Continuation of ALJ informed the parties that “[t]he assignment of **ALJ [Joe] Allen**  
2 issued April 2, 2010, remains in place.” UBI filed Requests for Change of Administrative Law  
3 Judge, October 23, 2024, with Chief ALJ Jeffrey Rhoades. The Tribes opposed UBI’s requests,  
4 arguing that ALJ Allen should preside over the remand proceedings because they are a  
5 continuation of the original action.<sup>6</sup> On November 26, 2024, Chief ALJ Rhoades issued his 2024  
6 Rulings, which contained nine findings of fact, one conclusion of law, and an eight-page  
7 Opinion.<sup>7</sup> The 2024 Rulings concluded that a different ALJ should not be assigned to hear the  
8 case and that the remand “matter remains assigned to Senior ALJ Joe L. Allen.”<sup>8</sup> While UBI did  
9 not challenge the validity of that non-final order pursuant to ORS 183.480(3), they filed a  
10 petition for reconsideration on December 10, 2024,<sup>9</sup> which Chief ALJ Rhoades denied on March  
11 3, 2025.<sup>10</sup>

12 On August 29, 2025, nine months after the 2024 Rulings (and well past any appeal period  
13 that might have applied were the ALJ assignment order a final, appealable one), without motion  
14 by any party and without notice or opportunity to be heard, Chief ALJ Rhoades issued the Sua  
15 Sponte Rulings, vacating the assignment and thereby removing ALJ Allen:

16 On November 25, 2024, Chief Administrative Law Judge Jeffrey Rhoades  
17 issued a Ruling on Request for Change of Administrative Law Judge. That ruling  
18 is hereby vacated in its entirety. Upper Basin Irrigators’ request for change of  
assigned Administrative Law Judge is GRANTED. Pursuant to ORS 183.645, the  
matter is reassigned to Senior ALJ Alison Webster.<sup>11</sup>

19 <sup>6</sup> Klamath Tribes’ Resps. to UBI Reqs. for Change of ALJ, Oct. 28, 2024.

20 <sup>7</sup> 2024 Rulings.

21 <sup>8</sup> *Id.* at 11.

22 <sup>9</sup> Pets. for Recons. of Ruling on Req. for Change of ALJ, Dec. 10, 2024.

23 <sup>10</sup> Rulings on Req. for Recons. for Change of ALJ, Mar. 3, 2025 (“Rulings on Requests for  
24 Reconsideration”).

<sup>11</sup> Sua Sponte Rulings 1; *See supra* note 1, describing error as to the date of issuance of the 2024  
Rulings.

1 Chief ALJ Rhoades gave no reason, demonstrated necessity, or legal authority for the sudden  
2 withdrawal of the 2024 Rulings, which came as a surprise to the Tribes (and likely other parties  
3 to this case). In fact, the Sua Sponte Rulings were 180 degrees opposite of the twelve-page 2024  
4 Rulings, which were well-reasoned and followed briefing by the parties. The Sua Sponte  
5 Rulings should not stand and should be vacated.

## 6 ARGUMENT

7 OAR 137-003-0630(1) provides that “[a] request for any order or other relief may be  
8 made by filing a motion in writing. The motion need not be in any particular form.” By this  
9 Motion, the Tribes, by and through undersigned counsel, respectfully moves to vacate the Sua  
10 Sponte Rulings for the following reasons:

### 11 A. Lack of Regulatory or Statutory Authority

12 The current applicable Oregon administrative rule provides that a party is entitled to  
13 request a change, within ten business days of the ALJ assignment notice, for automatic  
14 reassignment.<sup>12</sup> Subsequent requests require a showing of good cause, which includes personal  
15 bias or prejudice of the ALJ, the ALJ’s personal knowledge of disputed facts, conflict of interest  
16 or other interest substantially affected by outcome, or any reason why impartiality might  
17 reasonably be questioned.<sup>13</sup> Nothing in the applicable administrative rules or Oregon statutes

18 \_\_\_\_\_  
19 <sup>12</sup> OAR 471-060-0005(3) to (4); *see also Pulito v. Or. State Bd. of Nursing*, 366 Or. 612, 623-24  
20 (2020) (“the text and context establish that, where the legislature provided the opportunity to  
21 make a one-time, no-cause request for a different ALJ, the chief ALJ must grant that request if it  
22 is received ‘within the time allowed,’ *i.e.*, within a specific time period. The ordinary meaning  
23 of the term ‘time limitations’ in ORS 183.645(1) means a specific time period – one that  
24 provides certainty or predictability as to when a request for a different ALJ must be submitted –  
and is thus the standard from which OAR 471-060-0005 may not depart.” (citing *Nay v. Dep’t. of  
Hum. Servs.*, 360 Or. 668, 695 (2016))).

<sup>13</sup> *See* OAR 471-060-0005(2)(b); *see also* OAR 438-085-0750 (an administrative law judge may  
recuse himself or the chief administrative law judge may excuse him on the grounds of personal  
bias or conflict of interest, upon such showing by a party objecting to that judge).

1 confers unilateral authority upon the Chief ALJ to overturn a duly issued assignment of an ALJ  
2 without motion or cause.<sup>14</sup> Assignment orders, once entered, establish jurisdiction in the  
3 designated ALJ until recusal, disqualification, unavailability, or demonstrated necessity.<sup>15</sup>

4 Nothing with respect to the Sua Sponte Rulings comply with the applicable statutes and  
5 regulations for reassignment of administrative law judges in administrative proceedings before  
6 the OAH. As stated, UBI objected to the assignment of ALJ Allen in proceedings before the  
7 Chief ALJ following remand from the Circuit Court, and after briefing by the parties, the Chief  
8 ALJ determined to maintain the assignment of ALJ Allen to the remanded proceedings. UBI did  
9 not contest that determination under ORS 183.480(3),<sup>16</sup> and there is no evidence in the record or

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10 <sup>14</sup> See, e.g., ORCP 71 (outlining procedure for relief from judgment or order); ORS 18.107  
11 (provision allowing corrections to civil judgments); ORS 419B.923 (juvenile court provision  
12 allowing court to set aside a ruling upon motion). Unilateral action without a motion is limited  
13 to correction of clerical errors or mistakes. See also ORCP 71 A; *Yarbrough v. Viewcrest Invs.,*  
14 *LLC*, 299 Or. App. 143, 155, 162-63 (2019). Here, the Sua Sponte Rulings go beyond the  
15 correction of a mere clerical mistake thus requiring any action to modify the 2024 Rulings to be  
16 made by motion of a party. No motion was pending before the OAH when the Sua Sponte  
17 Rulings were issued.

18 <sup>15</sup> ORS 183.645(1) (“After assignment of an administrative law judge from the Office of  
19 Administrative Hearings to conduct a hearing on behalf of an agency [here, the Oregon Water  
20 Resources Department], the chief administrative law judge shall assign a different administrative  
21 law judge upon receiving a written request from any party in the contested case or from the  
22 agency.”); ORS 183.645(2) (“Only one request for a change of assignment of administrative law  
23 judge under subsection (1) of this section may be granted by the chief administrative law judge  
24 without a showing of good cause. If a party or agency fails to make a request under subsection  
(1) of this section within the time allowed, or if a party or agency objects to an administrative  
law judge assigned after a request for a different administrative law judge has been granted under  
subsection (1) of this section, the chief administrative law judge shall assign a different  
administrative law judge only upon a showing of good cause.”). The legislature has, thus,  
established a process for removing ALJs, and that process circumscribed Chief ALJ Rhoades’  
authority. Specifically, that process does not recognize the OAH to act sua sponte. Chief ALJ  
Rhoades, therefore, exceeded his authority by acting sua sponte. See, e.g., *Garner v. Garner*,  
182 Or. 549, 562 (1948) (explaining that judges are without jurisdiction if they act in excess of  
statutory limitations).

<sup>16</sup> ORS 183.480(3) provides the only avenue for judicial relief from a non-final order in a  
contested case. *Or. Health Care Ass’n. v. Health Div.*, 329 Or. 480, 492-94 (1999). UBI filed an  
un timely petition for reconsideration in the OAH cases, but Chief ALJ Rhoades denied the

**PAGE 5 – KLAMATH TRIBES’ MOTION TO VACATE SUA SPONTE RULINGS OF  
THE CHIEF ADMINISTRATIVE LAW JUDGE**

1 notice to the parties that UBI sought a timely second reassignment of administrative law judge  
2 upon any showing of good cause, as required by the applicable statutes and regulations. The  
3 Chief ALJ, nevertheless, reversed his own 2024 Rulings and – without any explanation, rationale  
4 or other reasoning – reassigned these proceedings to ALJ Alison Webster. Because the Sua  
5 Sponte Rulings failed to adhere to the statutory and regulatory requirements for changes in  
6 administrative law judges, they must be vacated.<sup>17</sup>

7 **B. Denial of Due Process**

8 The parties are entitled to a fair and impartial adjudication before the assigned ALJ. The  
9 prior process which culminated in the 2024 Rulings accomplished a fair and impartial  
10 determination of the ALJ to handle the remand proceedings. To the contrary, the Sua Sponte  
11 Rulings disrupted the parties’ expectations without providing notice, reasons, necessity, or  
12 opportunity to contest reassignment. In short, the Sua Sponte Rulings denied the Tribes’ due  
13 process of law and should, therefore, be vacated.

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17 petition because there was no basis in the OAR for reconsideration of a non-final order and the  
18 section of OAR that UBI relied upon applies only to final orders in contested cases. *See infra*  
19 subsection C.

20 <sup>17</sup> Chief ALJ Rhoades acted without any active motion or request before him. The 2024 Rulings  
21 found that UBC (now UBI) had a reasonable opportunity to object in 2010, when ALJ Allen was  
22 first assigned. They did not and proceeded to participate in the proceedings. The 2024 Ruling  
23 also said that since these are a continuation of the proceedings, the time to object has long  
24 passed. Reassignment of the Administrative Law Judge at this stage of these multi-decade,  
complex proceedings undermines principles of judicial efficiency and wise use of scarce judicial  
resources, risks duplication of work, and threatens inconsistent handling of critical water  
adjudication issues. Vacating the Sua Sponte Rulings and restoring ALJ Allen to these matters  
would restore continuity and stability. *See Klamath Tribes’ Resps. to UBI Reqs. for Change of*  
*ALJ 5 n.4, Oct. 28, 2024 (noting UBI has attempted to change administrative law judges various*  
*times without success). See also supra notes 14 & 15.*

1           The fundamental requirements of due process are (i) notice and (ii) the opportunity to be  
2 heard ““at a meaningful time and in a meaningful manner.””<sup>18</sup> Indeed, “a ‘fair trial in a fair  
3 tribunal is a basic requirement of due process.’ *In re Merchison*, 349 U.S. 133, 136 (1955). This  
4 applies to administrative agencies which adjudicate as well as to court.”<sup>19</sup> The briefing process  
5 leading up to the 2024 Rulings provided the parties with due process, because it gave the parties  
6 with notice and an opportunity to be heard and the 2024 Rulings provided a detailed explanation  
7 supporting the denial of UBI’s requests to change administrative law judges. Unlike the Sua  
8 Sponte Rulings, the 2024 Rulings are examples of how the process is supposed to work.<sup>20</sup> The  
9 2024 Rulings were clear, written decisions denying UBI’s prior ALJ change requests, explaining  
10 that: (i) UBI’s requests were untimely; (ii) that the remand to the OAH was a continuation of the  
11 same stream adjudication proceeding and did not result in a new proceeding; and (iii) UBI did  
12 not otherwise demonstrate good cause for why ALJ Allen should be removed from the case on  
13 remand.<sup>21</sup> The bare-bones, three-line Sua Sponte Rulings stand in stark contrast to the lengthy  
14 2024 Rulings denying UBI’s requests, and it in no way protect the Tribes’ and other parties’ due  
15 process rights in this case.<sup>22</sup>

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18 <sup>18</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545,  
19 552, (1965)); *see also Grannis v. Ordean*, 234 U.S. 385, 394 (1914), *cited in Mathews*, 424 U.S.  
20 at 333; *Sachdev v. Or. Med. Bd.*, 312 Or. App. 392, 398 (2021) (citing *Mathews*, 424 U.S. at  
21 333). Constitutional due process rights are enumerated in the Fifth and Fourteenth Amendments.  
22 U.S. Const. amends. V, XIV.

21 <sup>19</sup> *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (other citation omitted).

22 <sup>20</sup> *See infra* subsection C (describing UBI’s prior effort to remove ALJ Allen, which Chief ALJ  
23 Rhoades denied in carefully reasoned, twelve-page rulings).

23 <sup>21</sup> 2024 Rulings 4-7.

24 <sup>22</sup> ORS 183.417(8) (The ALJ must “ensure that the record . . . shows a full and fair inquiry into  
the facts necessary for consideration of all issues properly before the presiding officer.”).

1 The Sua Sponte Rulings did not comply with these fundamental requirements of due  
2 process: they were sua sponte without notice to anyone; at no time did the parties have an  
3 opportunity to provide argument on the reversal of the 2024 Rulings; and it merely stated that it  
4 vacated the 2024 Rulings. The Sua Sponte Rulings should be vacated as a matter of  
5 constitutional law.

6 **C. The Sua Sponte Rulings Were Issued in Violation of OAR 137-003-0625 Regarding**  
7 **Ex Parte Communications**

8 On March 3, 2025, Chief ALJ Judge Rhoades issued decisions in the OAH Cases,  
9 denying UBI's petitions for reconsideration of the 2024 Rulings.<sup>23</sup> Chief ALJ Rhoades relied on  
10 an interpretation of OAR 137-003-0675, the plain language of which applies to the  
11 reconsideration of a final order in a contested case and reconsideration must be lodged "with the  
12 agency." UBI, however, directed its Petitions for Reconsideration to the Chief ALJ, seeking  
13 reconsideration of interlocutory rulings, as opposed to final orders of the agency. Chief ALJ  
14 Rhoades found that (i) UBI's Petitions for Reconsideration were timely filed, but (ii) the orders  
15 for which it sought reconsideration were not final orders and OAR 137-003-0675(1) specifically  
16 limits petitions for reconsideration to final orders.<sup>24</sup>

17 On April 1, 2025, following the denials of UBI's reconsideration requests, UBI filed a  
18 Petition for Writ of Mandamus in the Marion County Circuit Court, asking the court to issue a  
19 writ of mandamus directing Chief ALJ Rhoades to grant UBI a change of ALJ in the OAH  
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23 <sup>23</sup> Rulings on Request for Reconsideration.

24 <sup>24</sup> Ruling on Request for Reconsideration 3.

1 Cases.<sup>25</sup> UBI filed their petition over four months after the 2024 Rulings, and after ALJ Allen  
2 already had issued an order in the OAH Cases.

3 The Petition for Writ for Mandamus was untimely, was filed despite the existence of a  
4 plain, adequate and speedy remedy in the ordinary course of the law, and was filed in a court that  
5 lacked jurisdiction, because the prior exclusive jurisdiction of the KBA is in the Klamath Basin  
6 Adjudication court, which is the Circuit Court of Klamath County.<sup>26</sup> No writ of mandamus was  
7 ever issued in the mandamus action, contrary to statutory requirements.<sup>27</sup> On August 25, 2025,  
8 the Circuit Court of Marion County dismissed the mandamus action without prejudice “[b]ased  
9 on the stipulation of the parties.”<sup>28</sup> No written stipulation or agreement was attached to the  
10 stipulated judgment dismissing the mandamus action.

11 Both the Stipulated Judgment of Dismissal and the Sua Sponte Rulings were made  
12 without notice to the parties in the OAH Cases and without any opportunity to respond. This is  
13 problematic in its own right given the obvious relationship of this matter to the issues on remand.  
14 The Model Rules of Procedure for Contested Cases<sup>29</sup> do not contain any provision which allows  
15 for reconsideration of a ruling on a request for change of judge, which is an interlocutory or non-

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17 <sup>25</sup> Pet. for Writ of Mandamus, *Upper Basin Irrigators v. Jeffrey R. Rhoades & Or. Office of*  
*Administrative Hearings*, Case No. 25CV20984 (Apr. 1, 2025), attached hereto as Exhibit 1.

18 <sup>26</sup> The Tribes, who were adverse to the relator UBI, prepared to intervene in the mandamus  
19 action, but the court never acted on the Mandamus Petition by issuing either an alternative writ  
20 or a preemptory writ. ORS 34.150. Because a petition for a writ of mandamus is not a pleading,  
the first pleading that triggers responsive deadlines is the issuance of a writ. ORS 34.190; *see*  
*also Venn v. Reid*, 207 Or. 617, 622 (1956).

21 <sup>27</sup> ORS 34.130(3) (“Except as to a petition filed in the Supreme Court, the writ shall be allowed  
22 by the court or judge thereof on the petition. On the filing of the order of allowance, the clerk or  
court administrator forthwith shall issue the writ in accordance with the petition.”).

23 <sup>28</sup> Stipulated Judgment of Dismissal, Aug. 25, 2025, attached hereto as Exhibit 2.

24 <sup>29</sup> Ellen F. Rosenblum, Oregon Attorney General’s Administrative Law Manual and Uniform  
Model Rules of Procedure under the Administrative Procedures Act at G-24 to G-108 (2024).

1 final ruling. On September 4, 2025, subsequent to the issuance of the Sua Sponte Rulings, the  
2 Tribes learned that the dismissal of the UBI’s mandamus action in the Marion County Circuit  
3 Court was based upon an agreement of the parties to that separate case. UBI, Chief ALJ  
4 Rhoades, and OAH agreed that a new ALJ would be assigned to the OAH Cases.<sup>30</sup> This  
5 agreement was made without the knowledge or participation of the Tribes or, upon information  
6 and belief, any of the other parties to the OAH cases.

7 Any communication of the settlement in the mandamus action to OAH would necessarily  
8 constitute: (i) a communication by both parties to the settlement, including UBI; and (ii) a  
9 request to take an action that affects the rights of all parties to the OAH Cases on a contested  
10 issue previously litigated and decided. Because the agreement in UBI’s mandamus action was  
11 communicated to OAH, it is an apparent violation of OAR 137-003-0625, which addresses ex  
12 parte communications with Administrative Law Judges.

13 When OAH received communication that the mandamus action had been settled based  
14 upon an agreement between the parties to the mandamus action that a new ALJ be assigned to  
15 the OAH Cases, OAR 137-003-0625 required that: (i) the ALJ make a record of the ex parte  
16 communication; and (ii) the ALJ “shall advise the agency and all parties in the proceeding that  
17 an ex parte communication has been made a part of the record. The administrative law judge  
18 shall allow the agency and parties an opportunity to respond to the ex parte communication.”

19 The Tribes were not notified of the communication of the agreement in the mandamus action to  
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23 <sup>30</sup> See email exchanges between Tracy White, Oregon Department of Justice, and Tom Murphy,  
24 Native American Rights Fund, attached hereto as Exhibit 3 (Oregon Department of Justice  
confirming that “the stipulation of the parties in the mandamus action was an agreement that the  
ALJ in the pending cases would be changed, but there was no agreement on who the ALJ  
assigned would be.”).



1 OAH, and the Sua Sponte Rulings were issued without providing the Tribes an opportunity to  
2 respond or be heard.<sup>31</sup> This warrants vacating the Sua Sponte Rulings.

3 **D. These Proceedings on Remand Should Be Stayed Pending Resolution of This Motion**  
4 **to Vacate**

5 Presently, the parties have been engaged in briefing in response to the motions submitted  
6 by UBI and KPWU. Following the United States' motion to extend the schedule for filing  
7 responses to the UBI and KPWU,<sup>32</sup> ALJ Allen allowed the parties until September 19, 2025 to  
8 file such responses.<sup>33</sup> Briefing, colloquy with and rulings by ALJ Allen have taken place in  
9 preparation for the limited discovery and "moderate living" defense application, all in reliance on  
10 the 2024 Rulings assigning ALJ Allen to these remand proceedings. Changing ALJs in the  
11 middle of the briefing would be a waste of judicial resources, as well as time and expense to the  
12 Tribes, since ALJ Allen is familiar with the issues raised thus far on remand. Good cause,  
13 therefore, exists for suspension of the briefing schedule until resolution of the Tribes' motion to  
14 vacate.<sup>34</sup>

15 As stated herein, the Chief ALJ's Sua Sponte Rulings to reassign these matters to ALJ  
16 Webster raises critical issues of judicial continuity and the propriety of the reassignment order  
17 without providing notice or opportunity to be heard to the Tribes and other parties to these

18 <sup>31</sup> See *supra* subsection B. The OAR take a clear approach to how ALJs are to handle the receipt  
19 of outside matters. For example, OAR 137-003-0615 requires that an ALJ provide notice to the  
20 parties and an opportunity to respond if the ALJ takes judicial notice of facts outside the record.

21 <sup>32</sup> UBC Mot. & Mem. on Scope of Remand Hr'g & Remand Process, July 1, 2025; KPWU Mot.  
22 for Rulings on Issues Regarding Remand Process & Mem. in Supp., July 1, 2025.

23 <sup>33</sup> Am. Briefing Schedule to Identify Scope of Remand & Additional Hr'g Processes, Aug. 22,  
24 2025.

<sup>34</sup> Good cause "exists when an action, delay, or failure to act arises from an excusable mistake,  
surprise, excusable neglect, reasonable reliance on the statement of a party or agency relating to  
procedural requirements, or from fraud, misrepresentation, or other misconduct of a party or  
agency participating in the proceeding." OAR 137-003-0501(7).

1 proceedings. The Sua Sponte Rulings also raise questions about the integrity, impartiality, and  
2 fairness of these proceedings.<sup>35</sup> The Tribes, therefore, respectfully request that the OAH suspend  
3 the briefing schedule until the ALJ reassignment issue and this motion to vacate are resolved.

4 **E. Conferral**

5 The undersigned counsel for the Tribes requested conferral with counsel for the United  
6 States, UBI, OWRD and KPWU regarding this Motion. The United States takes no position on  
7 this Motion. UBI and KPWU did not respond to the request for conferral. OWRD opposes this  
8 Motion.

9 **REQUEST FOR RELIEF**

10 For the foregoing reasons, the Klamath Tribes respectfully requests that the Chief  
11 Administrative Law Judge:

- 12
- 13 • Vacate the Sua Sponte Rulings of the Chief ALJ dated August 29, 2025;
  - 14 • Reinstate the prior November 26, 2024 Rulings retaining ALJ Allen in these matters; and
  - 15 • Stay the current proceedings, including the briefing schedule, pending resolution of this  
16 Motion.

17 Respectfully submitted this 15th day of September, 2025,

18 **NATIVE AMERICAN RIGHTS FUND**

19 s/ Joe M. Tenorio  
JOE M. TENORIO (OSB # 210623)

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21 <sup>35</sup> See OAH Code of Ethics § 2-102(A), [https://www.oregon.gov/oah/pages/code\\_of\\_ethics.aspx](https://www.oregon.gov/oah/pages/code_of_ethics.aspx)  
22 (“An Administrative Law Judge shall provide to all parties or participants in a proceeding, and to  
23 their legal representatives, the right to be heard according to law.”); *see also id. at* § 1-101(A)  
24 (“An Administrative Law Judge shall observe high standards of conduct so that the integrity,  
impartiality and independence of Oregon’s administrative hearings system is preserved, and shall  
act at all times in a manner that promotes public confidence in the conduct of administrative  
hearings as a part of state government.”).

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Thomas L. Murphy (*pro hac vice*, CO # 61180)  
Alice E. Walker (*pro hac vice*, CO # 22696)  
Ashley Dawn Anderson (*pro hac vice*, DC # 90031298)  
  
250 Arapahoe Ave.  
Boulder, CO 80302  
(303) 447-8760  
  
Email: tenorio@narf.org  
murphy@narf.org  
walker@narf.org  
anderson@narf.org

**ATTORNEYS FOR THE KLAMATH TRIBES**

# Exhibits

## DECLARATION OF THOMAS L. MURPHY

I, Thomas L. Murphy, declare as follows:

1. I am an attorney admitted to practice law before courts in the states of New Mexico (Bar No. 7705), Arizona (Bar No. 022953) and Colorado (Bar No. 61180). I am admitted in these matters pro hac vice.
2. Attached hereto as **Exhibit 1** is a true and correct copy of Upper Basin Irrigators, et al.'s Petition for Writ of Mandamus, filed on April 1, 2025, as Case No. 25CV20984 in Marion Circuit Court.
3. Attached hereto as **Exhibit 2** is a true and correct copy of the Stipulated Judgment of Dismissal of Case No. 25CV20984 in Marion Circuit Court, signed (i) on August 25, 2025, by Marion Circuit Court Judge Natasha A. Zimmerman; (ii) on August 19, 2025, by Upper Basin Irrigators, et al.'s attorney, Nolan G. Smith; and (iii) on August 20, 2025, by Senior Assistant Attorney General Tracy Ickes White, attorney for Defendants Chief ALJ Jeffrey R. Rhoades and the Oregon Office of Administrative hearings.
4. In the late afternoon on September 4, 2025, I had a telephone conversation with Ms. Tracy Ickes White regarding the dismissal of the mandamus action captioned *Upper Basin Irrigators, et al. v. Jeffrey R. Rhoades & Ore. Office of Admin. Hearings*, No. 25CV20984 in the Marion Circuit Court.
5. Ms. Ickes White expressed to me that the stipulation referred to in the Stipulated Judgment of Dismissal in the mandamus action entered on August 25, 2025, was an agreement between the parties that the mandamus action would be dismissed and a new ALJ would be appointed in the pending OAH cases.
6. Attached hereto as **Exhibit 3** is a true and correct copy of an e-mail exchange between myself and Ms. Ickes White on September 4 and 5, 2025.

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

Respectfully submitted this 15th day of September, 2025.



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Thomas L. Murphy (pro hac vice, CO # 61180)  
250 Arapahoe Ave.  
Boulder, CO 80302  
(303) 447-8760  
murphy@narf.org

# Exhibit 1

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

<p>UPPER BASIN IRRIGATORS; AGRI WATER, LLC; AUSAYMAS CATTLE CO.; BK RANCH (AKA LILLIAN HILL AND VINCENT HILL); C AND A VOGT COMMUNITY PROPERTY TRUST; MARY RABE AND ESTATE OF CLIFFORD RABE; DAVID M. AND THERESA COWAN; DUANE F. MARTIN; DUARTE LIVESTOCK; E.G. KERNS RANCH LLC; BARNES LAKE COUNTY, LLC; FIVE MILE RANCH LLC; FLYNN AND SONS LLC; GERALD H. HAWKINS; GOOSE NEST RANCHES, LLC; GREG HARRIS; GRIFFITH LIVESTOCK LLC; HARLOWE RANCH, LLC; HAWKINS CATTLE CO.; JACK FLYNN CATTLE CO.; JAMES HADYN-MYER; JOE FLYNN RANCH; JOHN B. OWENS; JOHN R. BRIGGS, JR.; KENNETH OWENS; LON BROOKS; LYNNE RICHARDSON CABRAL; MARTIN NICHOLSON; MICHAEL LAGRANDE; NBCC, LLC; NEWMAN ENTERPRISES, INC.; NICHOLSON INVESTMENTS, LLC; NICHOLSON LOVING TRUST; OBENCHAIN CATTLE CO. (AKA CAROLYN OBENCHAIN AND MARGARET JACOBS); OWENS &amp; HAWKINS; PRODUCTIVE TIMBERLAND LLC; RANDALL KIZER (SUCCESSOR TO MAXINE KIZER); RICHARD NICHOLSON; ROGER NICHOLSON; T &amp; B RANCH; TOM AND JACQUELINE BENTLEY (J&amp;T RANCH CO.); TP BAR</p>	<p>Case No. <u>25CV20984</u></p> <p>PETITION FOR WRIT OF MANDAMUS</p>
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<p>RANCH LLC; VINCENT BRIGGS; MODOC POINT IRRIGATION DISTRICT; AND WAYNE AND MARGARET JACOBS</p> <p style="text-align: center;">Applicants-Relators,</p> <p style="text-align: center;">v.</p> <p>JEFFREY R. RHOADES, in his official capacity as Chief Administrative Law Judge for the Oregon Office of Administrative Hearings; OREGON OFFICE OF ADMINISTRATIVE HEARINGS,</p> <p style="text-align: center;">Defendants.</p>	
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Pursuant to ORS 34.110 and ORS 34.120(1), Relators<sup>1</sup> petition this Court for a peremptory writ of mandamus, or in the alternative, an alternative writ of mandamus, directing Defendants Chief Administrative Law Judge Jeffrey R. Rhoades and the Oregon Office of Administrative Hearings (“OAH”) to grant Relators a change in administrative law judge pursuant to ORS 183.645, OAR 471-060-0005(3), and OAR 137-003-0501(8). Specifically, Relators seek an order commanding Defendants to grant Upper Basin Irrigators’ Request for Change of Administrative Law Judge

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<sup>1</sup> Relators are Agri Water, LLC; Ausaymas Cattle Co.; BK Ranch (AKA Lillian Hill and Vincent Hill); C and A Vogt Community Property Trust; Mary Rabe and Estate of Clifford Rabe; David M. and Theresa Cowan; Duane F. Martin; Duarte Livestock; E.G. Kerns Ranch LLC; Barnes Lake County, LLC; Five Mile Ranch LLC; Flynn and Sons LLC; Gerald H. Hawkins; Goose Nest Ranches, LLC; Greg Harris; Griffith Livestock LLC; Harlowe Ranch, LLC; Hawkins Cattle Co.; Jack Flynn Cattle Co.; James Hadyn-Myer; Joe Flynn Ranch; John B. Owens; John R. Briggs, Jr.; Kenneth Owens; Lon Brooks; Lynne Richardson Cabral; Martin Nicholson; Michael Lagrande; NBCC, LLC; Newman Enterprises, Inc.; Nicholson Investments, LLC; Nicholson Loving Trust; Obenchain Cattle Co. (aka Carolyn Obenchain and Margaret Jacobs); Owens & Hawkins; Productive Timberland LLC; Randall Kizer (successor to Maxine Kizer); Richard Nicholson; Roger Nicholson; T & B Ranch; Tom and Jacqueline Bentley (J&T Ranch Co.); TP Bar Ranch LLC; Vincent Briggs; Modoc Point Irrigation District; and Wayne and Margaret Jacobs. These parties are generally referred to as the “Upper Basin Irrigators” or “UBI.”



1 (“Request for Change”) or, alternatively, Upper Basin Irrigators’ Petition for Reconsideration of the  
2 Request for Change, all filed in OAH Case Nos. 2024-OWRD-00134, 2024-OWRD-00136, 2024-  
3 OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-OWRD-00140, and 2024-OWRD-  
4 00141.<sup>2</sup> A writ of mandamus from this Court is the only available remedy that can provide Relators  
5 with their statutorily-guaranteed right to request and receive an automatic change of administrative  
6 law judge, and Relators have no plain, speedy, or adequate remedy in the ordinary course of law.  
7 Relators’ relief is singularly-focused on Defendants’ refusal to allow for a change of the  
8 Administrative Law Judge assigned to OAH Case Nos. 2024-OWRD-00134, 2024-OWRD-00136,  
9 2024-OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-OWRD-00140, and 2024-  
10 OWRD-00141, which is the proper subject of a writ of mandamus.

11 **PARTIES**

12 1.

13 Relators, also known as Upper Basin Irrigators, primarily consist of livestock producers, and  
14 their ranches are located throughout what is known as the Upper Klamath Basin in Klamath County,  
15 Oregon. Relators’ ranches are in the drainages of the Wood River, the Sprague River, the Williamson  
16 River, and their tributaries, which flow into Upper Klamath Lake, which, in turn, empties into the  
17 mainstem Klamath River. The Upper Klamath Basin contains approximately 180,000 acres of  
18 irrigated pasture, with much of that development supported by the U.S. Indian Irrigation Service in  
19 the early 1900s; but acres in production have been actively declining. Because Relators’ livelihoods  
20 are based on livestock production, they depend on water to irrigate their pastures.

21 \_\_\_\_\_  
22 <sup>2</sup> The OAH Case Numbers described above have more-or-less proceeded on parallel tracks, and share  
23 the same issues of law. Rather than burden the Court with duplicative exhibits filed in each case,  
24 Relators are attaching to this Petition exhibits from OAH Case No. 2024-OWRD-00136, which  
pertains to Claim 622 in the Klamath Basin Adjudication.

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2.

Defendants are Chief Administrative Law Judge (“ALJ”) Jeffrey R. Rhoades, and the Oregon Office of Administrative Hearings (“OAH”). The OAH is created by statute to conduct contested case hearings on behalf of agencies, and to perform such other services as may be requested by an agency. The OAH is managed by Chief ALJ Jeffrey R. Rhoades. The OAH contains approximately 70 ALJs that conduct hearings on behalf of approximately 70 state agencies.

3.

Other parties to the OAH case numbers<sup>3</sup> identified in the opening paragraph of this Petition include:

- a. The “Klamath Project Water Users” (“KPWU”), including: Ady District Improvement Company; Enterprise Irrigation District; Klamath Drainage District; Klamath Irrigation District; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Plevna District Improvement Company; Shasta View Irrigation District; Klamath Basin Improvement District; Poe Valley Improvement District; Sunnyside Irrigation District; Tulelake Irrigation District; Van Brimmer Ditch Company; and many more. While Relators mostly own and irrigate lands upstream of Upper Klamath Lake, KPWU members largely irrigate lands around and downstream of Upper Klamath Lake.
- b. The Klamath Tribes, beneficiaries of water rights in the Klamath Basin, which are held in trust by the United States Bureau of Indian Affairs (“BIA”).

<sup>3</sup> The OAH cases subject to this Petition are: OAH Case Nos. 2024-OWRD-00134, 2024-OWRD-00136, 2024-OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-OWRD-00140, and 2024-OWRD-00141.

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c. The United States of America, owners of federally-reserved water rights in the Klamath Basin.

d. The Oregon Water Resources Department, the state agency charged with making the initial determination of water right claims filed in the Klamath Basin Adjudication, and the agency which referred the OAH cases subject to this petition to the Office of Administrative Hearings.

**JURISDICTION AND VENUE**

4.

This Court has jurisdiction over this Petition pursuant to ORS 34.120(1), as the “circuit court ... wherein the defendant ... exercises functions.” Defendant Chief ALJ Jeffrey R. Roades exercises his functions from the OAH’s office at 4600 25th Ave. NE, Suite 140 Salem, OR 97301. Defendant OAH has offices, and exercise functions, in Salem, Tualatin, and Eugene. Venue is proper in Marion County Circuit Court.

**THE PETITION IS TIMELY**

5.

“The time period within which a party must file a petition for mandamus relief is governed by laches, not by statute.” *State v. Peekema*, 328 Or 342, 346, 976 P2d 1128 (1999) (*citing State ex rel. Carlile v. Frost*, 326 Or 607, 620-21, 956 P2d 202 (1998)). The rule of thumb in ORAP 11.05 n. 4 says relators usually should file the petition within 30 days of the date of the action that the relator seeks to challenge.

6.

This petition has been filed within 30 days following the OAH issuing a ruling denying Relators’ Petition for Reconsideration, which sought reconsideration of Chief ALJ Jeffrey R.

1 Rhoades' prior ruling denying Relators' Request for Change of Administrative Law Judge in the  
2 OAH Cases identified in footnote 2. In addition, the petition has been filed at a juncture when the  
3 OAH is scheduling a prehearing conference in OAH Case No. 2024-OWRD-00136. Under either, or  
4 certainly both, circumstances, the petition is timely.

5 **ALLEGATIONS OF FACT**

6 **I. Introduction to the Klamath Basin Adjudication ("KBA")**

7 7.

8 The KBA is a general stream adjudication subject to ORS Chapter 539, which has contained  
9 an "administrative phase" that was before OWRD and the OAH, followed by a "judicial phase"  
10 before the Klamath County Circuit Court. The administrative phase of the KBA was technically  
11 initiated in 1975 and lasted approximately 38 years, due, in part, to numerous federal court  
12 proceedings that effectively delayed various aspects of the state proceedings. *See United States v.*  
13 *Adair*, 478 F. Supp. 336 (D. Or. 1979) ("*Adair I*"); *United States v. Adair*, 723 F.2d 1394 (9th Cir.  
14 1983) ("*Adair II*"); *United States v. Oregon*, 774 F. Supp. 1568 (D. Or. 1991); *United States v.*  
15 *Oregon*, 44 F.3d 758 (9th Cir. 1994); *United States v. Adair*, 187 F. Supp.2d 1273 (D. Or. 2002)  
16 ("*Adair III*"), *vacated sub nom. United States v. Braren*, 338 F.3d 1971 (9th Cir. 2003).

17 8.

18 The administrative phase included hearings before the OAH and orders issued by OWRD.  
19 The parties in the administrative phase were "claimants," who filed water right claims in the KBA,  
20 and "contestants," who contested the claims that were filed. Between 1999 and 2010, four different  
21 ALJs presided over the administrative phase. ALJ Joe Allen was assigned on April 2, 2010, after ALJ  
22 Maurice L. Russell became unexpectedly unavailable. ALJ Allen presided over hearings in 2010 and  
23 2011, and issued proposed orders in 2011 and 2012. The administrative phase officially concluded on  
24

1 March 7, 2013 when the Oregon Water Resources Department issued the Findings of Fact and Order  
2 of Determination (“FFOD”), determining all water right claims at issue in the KBA, and filed it with  
3 the Klamath County Circuit Court. *See* ORS 539.130(1). In 2014, OWRD issued an Amended and  
4 Corrected Findings of Fact and Orders of Determination (“ACFFOD”) to address errors in the 2013  
5 version.

6 9.

7 The ACFFOD quantified certain claims held in trust for the Klamath Tribes. Those “Tribal  
8 Claims” included Claim 622 (Upper Klamath Lake), Claim 623 (Klamath Marsh), Claim 624 (seeps  
9 and springs), claims 625-640 (Williamson River), Claims 641-657 (Sprague River), Claims 658-667  
10 (Sycan River), and Claims 668-670 (Wood River). The Tribal Claims were granted “time  
11 immemorial” water rights for the maintenance of quantified lake elevations and stream flows that  
12 vary by claim.

13 10.

14 The ACFFOD is under judicial review in the Klamath County Circuit Court. *See* ORS  
15 539.150. Judicial review is based on the “exceptions” parties file against the ACFFOD. *See id.*  
16 Now-Oregon Supreme Court Justice Stephen K. Bushong is the presiding judge in the Klamath Basin  
17 Adjudication.

18 **II. Parties to the Klamath Basin Adjudication**

19 11.

20 Upon OWRD’s referral of the agency’s FFOD to the Klamath County Circuit Court, parties  
21 were given an opportunity to file exceptions in writing to the FFOD. ORS 539.150. By statute, any  
22 party may file exceptions, regardless of whether they participated in the administrative phase. *Id.*

23

24

1 Some parties filed exceptions to various claims despite not participating in the administrative  
2 hearings on those claims.

3 12.

4 The Upper Basin Irrigators parties filed exceptions to the Tribal Claims owned by the United  
5 States, held in trust for the Klamath Tribes. The Klamath Project Water Users also filed exceptions to  
6 some of the same claims. The Klamath Tribes and United States of America filed exceptions to some  
7 of the claims made by the Upper Basin Irrigators.

8 **III. Relators' Exceptions to the Tribal Claims**

9 13.

10 Relators' right to a judicial determination of the water right claims at issue in the KBA is  
11 protected by ORS Chapter 539. *See In re Willow Creek*, 74 Or. 592, 610-11 (1914) (“The findings of  
12 the board are advisory rather than authoritative”); *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 450-51  
13 (1916) (“The supreme court of the state holds that while the proceeding is pending before the board it  
14 is merely preliminary and administrative, not judicial, and as this holding is a necessary result of that  
15 court's construction of the statute, we accept it as correct.”). ORS 539.150(1) provides that “[f]rom  
16 and after the filing of the evidence and [FFOD] in the trial court, the proceedings shall be like those  
17 in an action not triable by right to a jury[.]” *Id.* “[A]ny party or parties jointly interested may file  
18 exceptions in writing to the [FFOD], or any part thereof, which exceptions shall state with reasonable  
19 certainty the grounds and shall specify the particular paragraphs or parts of the [FFOD] excepted to.”  
20 *Id.*

21 14.

1 In accordance with ORS 539.150, Relators filed comprehensive exceptions against the Tribal  
2 Claims in October, 2014. Although Relators' exceptions to the Tribal instream claims address  
3 numerous legal and factual issues, one in particular is relevant here.

4 15.

5 Relators took exception to the fact that OWRD, in the ACFFOD, inexplicably found that the  
6 Ninth Circuit's explanation of a legal standard governing quantification of the Tribal instream water  
7 rights was "inapplicable." In *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) ("*Adair*  
8 *II*"), the Ninth Circuit Court of Appeals was tasked with reviewing the existence and limits of the  
9 water rights that were federally-reserved in the Klamath Treaty. The Ninth Circuit held that the water  
10 rights consist of "the amount of water necessary to support [the Tribes'] hunting and fishing rights as  
11 currently exercised to maintain the livelihood of Tribe members, not as these rights once were  
12 exercised by the Tribe in 1864" and that "authority for such a construction of the Indians' rights" is  
13 found in the "moderate living standard" adopted by the U.S. Supreme Court in *Washington v. Fishing*  
14 *Vessel Ass'n*, 443 U.S. 658 (1979) ("*Fishing Vessel*"). The moderate living standard is premised on  
15 the concept that "that Indian tribes are not generally entitled to the same level of exclusive use and  
16 exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving  
17 their interest in the resource." *Adair II*, 723 F.2d 1414-15. The Ninth Circuit reached this decision in  
18 direct response to irrigators' concerns that recognizing Tribal instream water rights would result in a  
19 "wilderness servitude," prohibiting all irrigation. *Id.* at 1414. The Ninth Circuit explained that it did  
20 not interpret the water right "so expansively." *Id.*

21 16.

22 In the first administrative proceedings phase, the initial water right determination was made  
23 by ALJ Joe Allen. ALJ Allen essentially awarded the full amounts claimed by the BIA for each of  
24

1 the stream reaches at issue in the Upper Klamath Basin, which the ALJ did based on evidence  
2 through the lens of a “productive habitat” standard that was recognized whole cloth in *United States*  
3 *v. Adair*, 187 F. Supp. 2d 1273, 1276 (D. Or. 2002) (“*Adair III*”), but subsequently vacated by the  
4 Ninth Circuit in *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003). In doing so, ALJ Allen  
5 expressly rejected the legal standard from *Adair II*, finding that the “moderate living standard”  
6 invoked by the Ninth Circuit was “inapplicable.” OWRD adopted the ALJ’s Proposed Order in this  
7 respect into the ACFOD without modification. Through their exceptions, Relators assigned this as  
8 legal error and sought, *inter alia*, a re-quantification of the Tribal instream claims, under the Ninth  
9 Circuit’s holding in *Adair II*.

10 **IV. The Trial Court’s Ruling on Relators’ Exceptions**

11 17.

12 The Klamath County Circuit Court’s review of the KBA has proceeded slowly, and in  
13 numerous phases. Pursuant to Case Management Order 33, issued April 27, 2018, the Klamath  
14 County Circuit Court directed exceptors to file motions on legal issues regarding the Tribal Claims.  
15 The Circuit Court, in CMO 33, listed the legal issues it expected to be raised in “Phase 3, Part 1,  
16 Group C” of the KBA. These issues included: (1) “The applicability of judgments entered in the  
17 *United States v. Adair* litigation to the Klamath Basin Adjudication”; (2) “General legal principles  
18 pertaining to the tribal water rights and/or recognition of tribal water rights based on any claimed  
19 limitation of the purpose(s) for the rights”; (3) “General legal principles pertaining to the burden of  
20 proof for tribal claims that were imposed during the claims/contests process before the Adjudicator”;  
21 (4) “Whether the Adjudicator applied the correct quantification standard to the tribal claims”; and (5)  
22 “Whether the Adjudicator properly completed the quantification of the tribal claims.”

23 18.

24





1 purposes of re-quantifying the Tribal Claims. The Klamath County Circuit Court issued its Opinion  
2 RE Motions to Present Non-Record Evidence for Tribal (Phase 3, Part 2, Group C) Claims on June 7,  
3 2023. Judge Bushong granted UBI’s motion in part, ruling that “[b]ecause the ALJ declined to  
4 consider the ‘moderate living standard’ during the OAH case proceedings, on remand, UBI is entitled  
5 to submit evidence and argument on that standard.” The Circuit Court further “remand[ed] the  
6 contested claims at issue to the OWRD director ... The director may – but is not required to by this  
7 order – delegate the responsibility for conducting the additional contested case proceedings to one or  
8 more administrative law judges from OAH[.]”

9 **V. OWRD’s Referral to the OAH**

10 21.

11 On May 3, 2024, OWRD referred the remand of the Tribal Claims to the OAH. The referral  
12 form indicated that the OAH would send a Notice of Hearing and Notice of Contested Case Rights  
13 and Procedures. OWRD’s referral also described the scope of hearing on remand, stating that “the  
14 scope of this hearing is as stated in the following order of Klamath County Circuit Court Judge  
15 Stephen Bushong: Order on Phase 3, Part 2, Group C Motions (Motions to Present Non-Record  
16 Evidence for Tribal Claims), dated June 28, 2023.” OWRD stated that the decision as to whether  
17 discovery would be allowed would be left to the ALJ on remand. OWRD’s referral did not indicate  
18 that ALJ Joe Allen would preside over the remand.

19 **VI. Assignment of ALJ Joe Allen**

20 22.

21 On October 11, 2024, the OAH issued a “Notice of Continuation of Administrative Law  
22 Judge Assignment” for each of the OAH cases on the remand of the Tribal Claims. The “Notice of  
23 Continuation” stated that the “assignment of ALJ Allen issued April 2, 2010, remains in place.”  
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23.

On October 23, 2024, Relators timely submitted a “Request for Change of Administrative Law Judge” in each of the OAH cases on the remand of the Tribal Claims. Relators’ Request for Change asserted that the “Notice of Continuation” was a notice of judicial assignment pursuant to OAR 471-060-0005 and that, as such, Relators had a right to request a change, without need to demonstrate good cause. Relators’ Request for Change further asserted that the OAH’s jurisdiction over the KBA ended in 2012, when ALJ Allen issued the last proposed orders. Relators explained that the remand of the Tribal Claims to OWRD, and OWRD’s decision to assign the remand to the OAH, started a new hearings process, wherein Relators could request an automatic change in the administrative law judge pursuant to OAR 471-060-0005(3).

24.

A round of briefing followed Relators’ Request for Change. On November 26, 2024, the OAH issued its ruling denying Relators’ Request for Change. *See* Exhibit 2. Chief ALJ Jeffrey R. Rhoades reasoned that the OWRD utilized the “re-referral process” outlined by OAR 137-003-0655. *Id.* at 7. ALJ Rhoades also reasoned that the *new* case numbers assigned to OWRD’s referrals were irrelevant under OAR 471-060-0005 and that the assignment of ALJ Allen in the *prior* contested cases were still controlling. ALJ Rhoades explained that, following the remand, “OWRD will, in turn, file its determination to the Klamath County Circuit Court. Once the Court enters a judgment either affirming or modifying the determination of the director, then, and only then, is the judgment final and subject to appeal by the Oregon Court of Appeals.” *Id.*

25.

Relators filed a Petition for Reconsideration of the OAH’s ruling on December 10, 2024, citing as authority “OAR 137-003-0675 and the *Office of Administrative Hearing’s* (‘OAH’)

1 *discretionary authority.*” In the Petition for Reconsideration, Relators challenged ALJ Rhoades  
2 reasoning. Relators explained that the “re-referral process” outlined by OAR 137-003-0655 was  
3 inapplicable because it only applies to proposed orders that have not become final. Relators further  
4 questioned whether the OAH had ever utilized a “Notice of Continuation of Assignment” procedural  
5 device in any other case or whether it was invented for these newly referred contested cases.  
6 Relators further informed the OAH that the “UBI parties to this referral are not identical to the UBC  
7 (Upper Basin Contestants) parties that participated in the prior administrative phase of the Klamath  
8 Adjudication. There are unique UBI parties to this proceeding, such as C and A Vogt Community  
9 Property Trust, who is not a predecessor in interest to a party who contested the Tribal instream water  
10 right claims or otherwise appeared in the OAH hearings before ALJ Allen, but later properly filed  
11 exceptions in circuit court. *See* ORS 539.150(1) ... Thus, even if, assuming *arguendo*, this referral  
12 was a ‘continuation’ of the OAH process for some parties, for others this referral will be a first  
13 appearance, and unquestionably their *first opportunity* to request such a change.”

14 26.

15 Further briefing ensued on Relators’ Petition for Reconsideration. On December 17, 2024,  
16 OWRD filed a response. OWRD, in its response, addressed Relators’ contention that “at least one of  
17 its parties was not a contestant nor a successor-in-interest to a contestant to the claims at issue during  
18 the prior administrative phase of the Klamath Adjudication.” OWRD wrote that “[i]f UBI’s  
19 contention is true, OWRD agrees that UBI’s Request for Change of Administrative Law Judge (“UBI  
20 Request”) was timely filed as to that party *and must be granted.*” OWRD further requested that  
21 “UBI ... provide a declaration in support of its contention.” On January 30, 2025, Relators filed a  
22 reply in support of reconsideration, along with an affidavit of counsel Dominic M. Carollo. In his  
23 affidavit, Mr. Carollo attached deeds demonstrating the chain of title for the property now owned by  
24

1 the C & A Vogt Community Property Trust, and averred that, to the best of his knowledge, the  
2 predecessors in interest to the C & A Vogt Community Property Trust were never a contestant of any  
3 of the Tribal Claims. No party contested this assertion.

4 27.

5 The OAH issued a ruling on Relators’ Petition for Reconsideration on March 3, 2025. Chief  
6 ALJ Jeffrey R. Rhoades ruled that the “Ruling issued on November 25, 2024, does not constitute a  
7 final order” and “UBI has failed to state a rule or provide statutory authority that would provide the  
8 legal authority to reconsider the Ruling issued in this matter.” *See* Exhibit 1 at 3. ALJ Rhoades  
9 ignored that the Petition for Reconsideration also relied upon the OAH’s discretionary authority. ALJ  
10 Rhoades also failed to recognize that the OAH has ruled on the merits of Petitions for  
11 Reconsideration in identical situations based on its discretionary authority, including in the contested  
12 case subject to *Pulito v. Oregon State Bd. of Nursing*, 366 Or. 612, 625, 468 P.3d 401, 408 (2020).  
13 ALJ Rhoades denied Relators’ Petition for Reconsideration and concluded that the matter remains  
14 assigned to ALJ Joe Allen.

15 **PETITION FOR WRIT OF MANDAMUS**

16 28.

17 Relators seek a peremptory—or in the alternative, an alternative writ—of mandamus ordering  
18 the Chief ALJ Jeffrey R. Rhoades and/or the OAH to abide by ORS 183.645 and OAR 471-060-0005  
19 and, specifically, ordering the OAH to grant Relators’ Request for Change of Administrative Law  
20 Judge in the OAH case numbers listed in the caption of this petition.

21 29.

22 This Court should issue the writ for the following reasons:  
23  
24

- 1 a. The OAH's failure to abide by, and properly execute, ORS 183.645 and OAR 471-  
2 060-0005 is a clear, highly prejudicial, and fundamental legal error.
- 3 b. In the absence of this Court issuing a writ of mandamus, Relators lack a speedy, plain,  
4 and adequate remedy.

5 30.

6 A plain remedy is one that is "obvious, clear, and without uncertainty." *State ex rel Dewberry*  
7 *v. Kulongoski*, 346 Or 260, 273, 210 P3d 884 (2009). As demonstrated by the OAH's rulings on  
8 Relators' Request for Change, and Petition for Reconsideration, the OAH has refused to grant  
9 Relators a change in the administrative law judge assigned to the remand of the Tribal Claims,  
10 contrary to ORS 183.645 and OAR 471-060-0005. Relators have no means of appealing the OAH's  
11 rulings, other than to wait until proposed orders are issued following the remand process, and new  
12 final orders are lodged by OWRD with the Klamath County Circuit Court. These administrative  
13 proceedings are distinct from contested cases strictly governed by the Oregon Administrative  
14 Procedures Act. The adjudication of water rights is controlled by ORS Chapter 539, which requires  
15 hearings of contests before the Water Resources Director, followed by findings of fact and orders of  
16 determination filed with the circuit court. Appeal of the findings of the OAH, and any resulting final  
17 orders, is not taken to the Court of Appeals. The Oregon APA does not control the parties' rights to  
18 appeal in the KBA. The Klamath County Circuit Court has discretion over the form of any remand,  
19 like the present remand, under ORS 539.150(3), which provides that "[t]he court may, if necessary,  
20 remand the case for further testimony, to be taken by the director or by a referee appointed by the  
21 court for that purpose. Upon completion of the testimony and its report to the director, the director  
22 may be required to make a further determination."

23 31.

24



1 hearing, date, time and location of the hearing, and other matters relating to the hearing.” Pre-hearing  
2 conferences for the other cases have not been set yet. It has been made clear to Relators, and other  
3 parties, that these cases will involve significant litigation over discovery rights, the parties’ rights to  
4 submit evidence, and what kind of evidence may be submitted. All told, if the first administrative  
5 phase of the KBA is any indication, this process before the OAH may take two-to-three years or  
6 more. Then, after the OAH holds hearings in these cases and issues proposed orders, OWRD will  
7 review the proposed orders, and decide whether to adopt or amend the orders, before lodging a new  
8 Amended Order of Determination on the Tribal Claims with the Klamath County Circuit Court. This  
9 action will re-start the judicial phase for the Tribal Claims. If this Court does not accept mandamus  
10 jurisdiction, then only once the matter is back before the Klamath County Circuit Court would  
11 Relators then have an opportunity to seek review of the OAH’s rulings denying Relators’ Request for  
12 Change of Administrative Law Judge, and Petition for Reconsideration. Thus, absent this Court  
13 exercising mandamus jurisdiction, Relators’ first opportunity to bring the challenge described in this  
14 Petition would likely be at least two-to-three years down the road, after discovery motions have been  
15 litigated, hearings have been held, proposed orders issued, amended orders of determination lodged,  
16 exceptions filed with the circuit court, and briefing on legal issues allowed. What is more, if, at that  
17 time, the Klamath County Circuit Court were to find that the OAH *erred* by refusing to grant  
18 Relators’ Request for Change of Administrative Law Judge, *then the entire process will need to start*  
19 *over again, before a new ALJ. See Pulito v. Oregon State Bd. of Nursing, 366 Or. 612, 625, 468 P.3d*  
20 *401, 408 (2020) (finding that the OAH’s error in denying a request for change of an ALJ compels*  
21 *vacatur of an agency’s order, or remand). Similarly, even if the Circuit Court found that the OAH did*  
22 *not err, once the KBA reaches a final decree, it is appealable to the Oregon Court of Appeals and*  
23 *could then be reversed and remanded for a new remand, with a new ALJ. All told, if the legality of*  
24



1 the OAH's rulings on Relators' Request for Change of Administrative Law Judge and Petition for  
2 Reconsideration is not determined now, a final determination on the Tribal Claims could be delayed  
3 for a decade more. Meanwhile, Relators will continue to experience severe hardship, as the  
4 magnitude of the Tribal Claims largely preclude Relators from exercising their irrigation rights and  
5 will continue to do so unless or until the Tribal Claims are properly re-quantified under the moderate  
6 living standard. The OAH's denial of Upper Basin Irrigator's Request for Change is an issue that  
7 clearly should be addressed now, not later.

8 33.

9 A writ of mandamus may issue, even when other remedies are available, "if they are not  
10 sufficiently speedy to prevent material injury." *State ex rel. Pierce v. Slusher*, 117 Or 498, 501--02,  
11 244 P 540 (1926) (internal citations omitted). Similarly, an adequate remedy is one that provides  
12 relief upon the subject matter of the application for a writ and must be equally convenient, beneficial,  
13 and effective. *Dewberry*, 346 Or at 271-72. Even if other remedies exist, a writ of mandamus may  
14 issue if those remedies are inadequate or not sufficiently speedy. *State ex rel Ricco v. Biggs*, 198 Or  
15 413, 425, 255 P2d 1055 (1953). Relators' petition clearly presents such a case meeting both  
16 standards. Relators should not have to wait for an illusory and distant remedy in an appeal simply to  
17 have the opportunity to avail itself now to the protections afforded litigants in the OAH, as a matter  
18 of right, under ORS 183.645 and OAR 471-060-0005.

19 34.

20 Finally, the nature and gravity of the OAH's errors and the serious harm done to Relators  
21 warrants exercise of this's Court's mandamus jurisdiction.

22 35.

23

24



1 Judge Jeffrey R. Rhoades and the Oregon Office of Administrative Hearings (“OAH”) to abide by  
2 OAR 471-060-0005(3) and OAR 137-003-0501(8), and to grant Upper Basin Irrigators’ Request for  
3 Change of Administrative Law Judge (“Request for Change”) in OAH Case Nos. 2024-OWRD-  
4 00134, 2024-OWRD-00136, 2024-OWRD-00137, 2024-OWRD-00138, 2024-OWRD-00139, 2024-  
5 OWRD-00140, and 2024-OWRD-00141.

6  
7 **DATED** this 1st day of April, 2025.

8 **CAROLLO LAW GROUP**

9 s/ Dominic M. Carollo

10 **Dominic M. Carollo, OSB No. 093057**

11 Email: [dcarollo@carollolegal.com](mailto:dcarollo@carollolegal.com)

12 **Nolan G. Smith, OSB No. 215034**

13 Email: [nsmith@carollolegal.com](mailto:nsmith@carollolegal.com)

14 Carollo Law Group LLC

15 Mail: P.O. Box 2456

16 Roseburg, OR 97470

17 Office: 2315 Old Highway 99 South

18 Roseburg, OR 97471

19 Ph: (541) 957-5900

20 Fax: (541) 957-5923

21 *Of Attorneys for Relators*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 1, 2025 I caused to be served the foregoing PETITION FOR  
3 WRIT OF MANDAMUS on Defendants via certified mail, return receipt requested, at the following  
4 addresses:

5 Chief Administrative Law Judge Jeffrey R. Rhoades  
6 4600 25th Ave. NE, Suite 140  
7 Salem, OR 97301

8 Oregon Office of Administrative Hearings  
9 Salem Regional Office  
10 PO Box 14020  
11 Salem, OR 97309-4020

12 Attorney General Dan Rayfield  
13 Justice Building, 1162 Court St. NE  
14 Salem OR, 97301-4096

15 I further certify that on April 1, 2025 I caused to be served the foregoing PETITION FOR  
16 WRIT OF MANDAMUS on the following persons via U.S. mail, at the following addresses:

17 Jesse D. Ratcliffe  
18 Oregon Department of Justice  
19 1162 Court St NE  
20 Salem, OR 97301  
21 Email: Jesse.D.Ratcliffe@doj.oregon.gov  
22 Email: Denise.Ruttan@doj.oregon.gov

23 Will Davidson  
24 Oregon Water Resources Department  
725 Summer St NE Suite A  
Salem, OR 97301  
Email: will.d.davidson@water.oregon.gov

Guss Guarino  
David Harder  
United States Department of Justice  
999 18th St.  
South Terr. # 370

1 Denver, CO 80202  
Email: guss.guarino@usdoj.gov  
2 Email: raymundo.ribota@usdoj.gov  
Email: david.harder@usdoj.gov  
3 *Attorneys for the United States of America*

4 Joe M. Tenorio  
Ada Montague  
5 Native American Rights Fund  
250 Arapahoe Ave  
6 Boulder, CO 80302-5821  
Email: tenorio@narf.org  
7 Email: jschmidt@narf.org  
Email: montague@narf.org  
8 *Attorneys for the Klamath Tribes*

9 Paul Simmons  
Maximilian Bricker  
10 Somach, Simmons & Dunn  
500 Capitol Mall  
11 Suite 1000  
Sacramento, CA 95814  
12 Email: psimmons@somachlaw.com  
Email: ydelacruz@somachlaw.com  
13 Email: crivera@somachlaw.com  
Email: mbricker@somachlaw.com  
14 *Attorneys for the Klamath Project Water Users*

15 Nathan R. Rietmann  
Rietmann & Kim, LLP  
16 1270 Chemeketa St. NE  
Salem, OR 97301  
17 Email: nathan@rietmannlaw.com  
*Attorney for the Klamath Project Water Users*

18 Nathan Ratliff  
19 Parks & Ratliff, PC  
620 Main St.  
20 Klamath Falls, OR 97601  
Email: nathan@parksandratliff.com  
21 Email: reception@parksandratliff.com  
*Attorney for the Klamath Project Water Users*

22 Olivier Jamin  
23 Andy McStay  
Davis, Wright, Tremaine  
24

1 560 SW 10th Ave  
Suite 700  
2 Portland, OR 97205  
Email: olivierjamin@dwt.com  
3 Email: andymcstay@dwt.com  
*Attorneys for the Klamath Project Water Users*

4 Reagan L.B. Desmond  
5 Nathaniel E. Broadhurst  
Clyde Snow, Attorneys at Law  
6 377 SW Century Drive  
Bend, OR 97702  
7 Email: rldb@clydesnow.com  
Email: neb@clydesnow.com  
8 *Attorneys for the Klamath Project Water Users*

9 Mika Blain  
Blain Law, LLC  
10 517 Main St.  
Klamath Falls, OR 97601  
11 Email: mika@blainlawllc.com  
*Attorney for the Klamath Project Water Users*

12 Michael P. Rudd  
13 Brandsness, Brandsness & Rudd, PC  
411 Pine St.  
14 Klamath Falls, OR 97601  
Email: mike@brandsnessrudd.com  
15 *Attorney for the Klamath Project Water Users*

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be delivered or mailed to all parties or other persons and agencies required by statute, rule or order to receive notice of the proceeding.

(2) The agency may, by rule, require a party to file a petition for reconsideration or rehearing as a condition of judicial review. The agency may, by rule or in writing, require any petition for reconsideration or rehearing to be filed with the administrative law judge.

(3) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0690(3).

(5) Within 60 calendar days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. If a petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.482(6) before taking further action on the order. The procedural and substantive effect of reconsideration or rehearing under this section shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(6) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(a) If the agency determines that reconsideration alone is appropriate, the agency shall enter a new final order in accordance with OAR 137-003-0665, which may be an order affirming the existing order.

(b) If the agency determines that rehearing is appropriate, the agency shall decide upon the scope of the rehearing. The agency shall request the administrative law judge to conduct further hearing on such issues as the agency specifies and to prepare a proposed order as appropriate. The agency shall issue a new final order in accordance with OAR 137-003-0665. The agency may adopt the proposed order prepared by the administrative law judge as the final order, or modify the proposed order and issue the modified order as the final order.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) Unless otherwise provided by law, a final order remains in effect during reconsideration or rehearing until stayed or changed.

*Emphasis added.*



On November 25, 2024, a Ruling on Request for Change of Administrative Law Judge denying UBI's request was issued. Citing OAR 137-003-0675, on December 10, 2024, UBI filed a Petition for Reconsideration of Ruling on Request for Change of Administrative Law Judge.

OAR 137-003-0675(1) grants the ALJ the authority to reconsider a Final Order when the request is filed within 60 days of issuance of the final order. In the present matter, the Reconsideration was timely filed. OAR 137-003-0675(1) specifically limits request for reconsideration to review of final orders. The Ruling issued on November 25, 2024, does not constitute a final order. UBI has failed to state a rule or provide statutory authority that would provide the legal authority to reconsider the Ruling issued in this matter. Due to the absence of legal authority for the requested action, UBI's Petition for Reconsideration of Ruling on Request for Change of Administrative Law Judge is denied.

### **RULING**

Upper Basin Irrigators' request for reconsideration is DENIED. The matter remains assigned to Senior ALJ Joe L. Allen.

Jeffrey R. Rhoades

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Chief Administrative Law Judge  
Office of Administrative Hearings

**CERTIFICATE OF MAILING**

On 3rd day of March, 2025, I emailed the foregoing **RULING ON REQUEST FOR RECONSIDERATION REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE** in **OAH Reference No. 2024-OWRD-00136**:

BY ELECTRONIC MAIL:

<b>Name</b>	<b>Address</b>	<b>Contact</b>
United States Department Of Justice Guss Guarino	999 18th St. South Terr. # 370 Denver CO 80202	guss.guarino@usdoj.gov; raymundo.ribota@usdoj.gov
United States Department Of Justice David Harder	999 18th St South Terr. #370 Denver CO 80202	david.harder@usdoj.gov
Native American Rights Fund: Representing The Klamath Tribes Joe M. Tenorio	250 Arapahoe Ave Boulder CO 80302-5821	tenorio@narf.org; jschmidt@narf.org
Native American Rights Fund: Representing The Klamath Tribes Ada Montague	250 Arapahose Ave Boulder CO 80302-5821	montague@narf.org
Carollo Law Group, LLC: Representing The Upper Basin Irrigators (UBI) Dominic M. Carollo	PO Box 2456 Roseburg OR 97470	dcarollo@carollolegal.com; nsmith@carollolegal.com; kharp@carollolegal.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Paul Simmons	500 Capitol Mall Suite 1000 Sacramento CA 95814	psimmons@somachlaw.com; ydelacruz@somachlaw.com; crivera@somachlaw.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Maximilian Bricker	500 Capitol Mall Suite 1000 Sacramento CA 95814	mbricker@somachlaw.com
Rietmann & Kim, LLP: Representing Klamath Project Water Users (KPWU) Nathan R. Rietmann	1270 Chemeketa St. NE Salem OR 97301	nathan@rietmannlaw.com

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Parks & Ratliff, PC: Representing The Klamath Project Water Users (KPWU) Nathan Ratliff	620 Main St. Klamath Falls OR 97601	nathan@parksandratliff.com; reception@parksandratliff.com
Davis, Wright, Tremaine, LLP: Representing Klamath Project Water Users (KPWU) Olivier Jamin	560 SW 10th Ave Suite 700 Portland OR 97205	olivierjamin@dwt.com
Davis, Wright, Tremaine, LLP: Representing The Klamath Project Water Users (KPWU) Andy McStay	560 SW 10th Ave Suite 700 Portland OR 97205	andymcstay@dwt.com
Clyde Snow, Attorneys at Law: Representing The Klamath Project Water Users (KPWU) Reagan L.B. Desmond Nathaniel E. Broadhurst	377 SW Century Drive Bend OR 97702	rlbd@clydesnow.com; neb@clydesnow.com
Blain Law, LLC: Representing The Klamath Project Water Users (KPWU) Mika Blain	517 Main St. Klamath Falls OR 97601	mika@blainlawllc.com
Brandsness, Brandsness & Rudd, PC: Representing The Klamath Project Water Users (KPWU) Michael P. Rudd	411 Pine St. Klamath Falls OR 97601	mike@brandsnessrudd.com
Will Davidson	725 Summer St NE Suite A Salem OR 97301	will.d.davidson@water.oregon.gov
Jesse D Ratcliffe	1162 Court St NE Salem OR 97301	Jesse.D.Ratcliffe@doj.oregon.gov; Denise.Ruttan@doj.oregon.gov

/s/Alexandria N Whitley  
Hearing Coordinator

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

<b>In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries</b>	)	<b>RULING ON REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE</b>
	)	
	)	
	)	
<b>Claim 622 (Upper Klamath Lake)</b>	)	OAH Reference No. 2024-OWRD-00136
	)	Former OAH Case No. 277

Pursuant to Oregon Revised Statute (ORS) 183.645 and Oregon Administrative Rule (OAR) 471-060-0005(3), the Upper Basin Irrigators (UBI) requested a change of the administrative law judge (ALJ) assigned to hear the above-entitled case. On October 29, 2024, the Klamath Tribes (Tribes) filed a Klamath Tribes’ Response to UBI Request for Change of Administrative Law Judge, opposing UBI’s request.

**ISSUE**

Whether a different ALJ should be assigned to hear this case. *See* ORS 183.645, OAR 471-060-0005.

**FINDINGS OF FACT**

1. On or about October 4, 1999, the Oregon Water Resources Department (OWRD) issued a Preliminary Evaluation regarding Claim 622. Beginning in 2000, UBI contestants and other contestants filed their Statement of Contests. Thereafter, OWRD referred this matter to the Office of Administrative Hearings (OAH). On April 2, 2010, the OAH issued a written notice assigning Senior Administrative Law Judge (ALJ) Joe L. Allen to preside over this matter.
2. An in-person cross-examination hearing convened on April 18, 2011. ALJ Allen presided over the hearing. UBI participated in the hearing. On April 16, 2012, ALJ Allen issued a Proposed Order. At the time ALJ Allen issued the Proposed Order, the OAH used a system called “Access” to store case information. The OAH did not use Access to electronically store case documents. Rather, documents for contested cases were kept in paper hardcopy.
3. This case was identified as Case No. 2 in the Access database. The OAH case file was the official record. After issuance of the Proposed Order, the OAH case file associated with this matter was returned to OWRD so it could be certified as part of the record for the circuit court to issue a judgment affirming or modifying the order of the director. OWRD issued and referred the Findings of Fact and Order of Determination to the Klamath County Circuit Court in 2013.

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4. In 2013, the OAH implemented the use of an electronic Case Management System (CMS). Since that time, the OAH has received contested case referrals through CMS. All file documents are stored in CMS, which serves as the official record for contested cases referred to the OAH. The implementation of CMS resulted in a new case number naming convention. Existing cases that were transferred to CMS were assigned new case numbers. For these matters, documents issued under CMS list both the former Access and current CMS case number. On February 28, 2014, OWRD issued the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD) and submitted it to the Klamath County Circuit Court.

5. On June 7, 2023, the Klamath County Circuit Court issued an Opinion Re Motion to Present Non-record Evidence for Tribal Group (Phase 3, Part 2, Group C) Claims (Klamath Opinion). The Klamath Opinion remanded the matter to OWRD to conduct a hearing to supplement the existing record. The remand is for the limited purpose of taking additional evidence concerning a specific factor- the “moderate living standard.” The Klamath Opinion addressed the role of the OAH. UBI specifically requested that the remand should be to a referee rather than an OAH ALJ. The Klamath Opinion found: “UBI’s request for a remand to a referee rather than to OAH is denied. ORS 539.150(3) provides that the court ‘may, if necessary’ remand the case for further evidence ‘to be taken by the director or by a referee appointed by the court for that purpose.’ The court has determined that a remand is necessary, but it declines to appoint a referee and instead remands the contested claims at issue to the OWRD director in accordance with the statute.” (Klamath Order at 15). The Court also found “The director may-- but is not required to by this opinion -- delegate to an OAH administrative law judge the responsibility to conduct the additional contested case proceedings on remand. Any requests for discovery will be submitted to and decided in the forum that will take the additional evidence.” (Klamath Opinion at 15-16).

6. OWRD issued an Order on Scope of Hearing on Remand (Order on Remand).<sup>1</sup> As part of the Order on Remand, OWRD elected to refer the matter back to the OAH for further hearing. OWRD specified that the scope of the remand hearing is “[t]o take additional evidence on the determination of the moderate living standard issue a proposed order determining what, if any, effect the determination of the moderate living standard has on the existing quantification levels in the ACFFOD.” Order on Remand at 2.

7. On May 3, 2024, OWRD re-referred this matter to the OAH. The referral is entered in CMS and, therefore, has been assigned a new case number consistent with OAH procedure.

8. On October 11, 2024, the OAH issued a Notice of Continuation of Administrative Law Judge (Notice) by email. The Notice stated, in part, “The assignment of **ALJ Allen** issued April 2, 2010, remains in place.” (Notice at 1; Emphasis in original). The Notice provided all parties with instructions on how and who to submit correspondence to at the OAH.

9. On October 23, 2024, UBI filed a Request for Change of Administrative Law Judge (Request) with Chief ALJ Jeffrey Rhoades. In its Request, UBI asserts this is its first request for change of ALJ. As indicated in the Notice, prior to ALJ Allen’s formal assignment to this matter in April of 2010, four separate ALJs presided over the motion and discovery process.<sup>2</sup>

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<sup>1</sup> The Order on Scope of Hearing on Remand is undated.

<sup>2</sup> Because the OAH does not have access to the official paper file returned to the agency, the OAH will accept as fact UBI’s representation that this is their first request for change of ALJ.

## CONCLUSION OF LAW

A different ALJ should not be assigned to hear this case.

## OPINION

ORS 183.645(1) provides:

After assignment of an administrative law judge from the Office of Administrative Hearings to conduct a hearing on behalf of an agency, the chief administrative law judge shall assign a different administrative law judge for the hearing upon receiving a written request from any party in the contested case or from the agency. The chief administrative law judge may by rule establish time limitations and procedures for requests under this section.

The current version of OAR 471-060-0005<sup>3</sup> (2021) provides, in relevant part:

- (1) The purpose of this rule is to establish uniform procedures for the change of assignment of administrative law judges.
- (2) The words and terms used in OAR 471-060-0005 have the following meanings:
  - (a) An administrative law judge is “assigned to the case” when a written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier.
  - (b) “Good cause” to support a request for a change of administrative law judge is any reason why an administrative law judge’s impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.
- (3) Every party and agency in a contested case is entitled to request a change of administrative law judge. Except for hearings provided under ORS 813.410 or 813.440 on suspension of driving privileges, the first request of that party or agency shall be automatically granted so long as it is filed within the time limits established by section (4). If that party or agency makes a subsequent request, the party or agency must show good cause why the administrative law judge should not preside over the hearing. A request for change of administrative law judge in hearings provided under ORS 813.410 or 813.440 on suspension of driving privileges may only be granted on a showing of good cause. The Chief

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<sup>3</sup> OAR 137-003-0501(8) provides that OAR 471-060-0005 applies to all contested case hearings conducted by the Office of Administrative Hearings.

Administrative Law Judge may designate in writing a person (or persons) to rule on requests under this rule.

(4) All requests must be in writing and sent or delivered to the Chief Administrative Law Judge or designee by filing the request with the Office of Administrative Hearings by hand delivery, mail, facsimile transmission, or electronic mail. To be entitled to an automatic change of administrative law judge, the party making the request must do so within 10 business days after an administrative law judge is assigned to the case.

(a) For purposes of this rule, business days do not include days of scheduled office closure. Scheduled days of office closure include, but are not limited to, Saturdays and the legal holidays identified in ORS 187.010 and 187.020, including Sundays. A request will be considered filed on the date a party or agency mails, faxes, emails, hand delivers, or electronically transmits the request to the Office of Administrative Hearings.

(b) The time for filing a request for a change of the administrative law judge assigned to the case may be extended if the party or agency making the request can demonstrate that the failure to make a timely request was caused by an excusable mistake, surprise, excusable neglect, reasonable reliance on the statement of a party, agency, or the Office of Administrative Hearings relating to procedural requirements. In such cases, the party or agency may file the request within 10 business days after the circumstances that prevented a timely filing have come to an end.

UBI requests that the OAH assign a different ALJ to preside over this matter. UBI contends this is UBI's first such request. UBI does not allege good cause, as that term is defined in OAR 471-060-0005(2)(b), to support its request. Instead, UBI claims, under the current 2021 version of OAR 471-060-0005(3), they are automatically entitled to a change of the assigned ALJ, so long as that request is filed within the time limits established in the current version of OAR 471-060-0005(4). To be entitled to an automatic change of administrative law judge under the 2021 version of the rule, the party making the request must do so within 10 business days after an administrative law judge is assigned to the case. Under the current version of OAR 471-060-0005(4), an ALJ is "assigned to the case" when written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier. *See* OAR 471-060-0005(2)(b).

On April 2, 2010, the OAH sent written notice to all parties assigning ALJ Allen to this matter. On April 18, 2011, ALJ Allen convened and presided over the contested case hearing. UBI participated in the hearing. On April 16, 2012, ALJ Allen issued a Proposed Order. UBI filed its request for a change of the assigned ALJ on October 23, 2024.

UBI contends they timely filed the Request because it was filed within 10 days of the issuance of the Notice of Continuation of Administrative Law Judge. UBI asserts that the matter is a new referral to the OAH and that it is a "new and different case and proceeding, not a continuation of the prior administrative hearing completed nearly 13 years ago." Request at 2. UBI further argues the assignment

of a new case number, the issuance of the Notice that ALJ Allen was assigned to this case and the intervening change in the language of OAR 471-060-0005 all support its position that it is entitled to an automatic change of the assigned ALJ. UBI's position is inconsistent with the statutes and rules that govern the contested case process for water rights before 1909.

Proper application of the law requires close examination of the interplay between various statutes pertaining to both jurisdiction and procedure. ORS Chapter 539, specifically ORS 539.005 through ORS 539.240, addresses water rights before 1909 and is thus the statutory authority for this adjudication. ORS 539.005, which sets out the purpose of the chapter states, in relevant part:

- (1) The Legislative Assembly declares that it is the purpose of this chapter to set for the procedures for carrying out a general stream adjudication in Oregon.
- (2) In accordance with the applicable provisions of ORS chapter 183, the Water Resources Director shall adopt rules necessary to carry out the provisions of this chapter.

ORS 539.110 establishes the process by which a contested case hearing will be conducted.<sup>4</sup> ORS 183.635, "Agencies required to use administrative law judges from Office of Administrative Hearings," provides, in relevant part:

- (1) Except as provided in this section, all agencies must use administrative law judges assigned from the Office of Administrative Hearings established under ORS 183.605 to conduct contested case hearings, without regard to whether those hearings are subject to the procedural requirements for contested case hearings.

ORS 539.150, "Court proceedings to review determination of director," defines the legal process to remand this matter to the OAH and provides:

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<sup>4</sup> ORS 539.110 provides:

The Water Resources Director shall fix the time and a convenient place for hearing the contest, and shall notify the contestant and the person whose rights are contested to appear before the director or the authorized assistant of the director at the designated time and place. The date of hearing shall not be less than 30 nor more than 60 days from the date the notice is served on the parties. The notice may be served personally or by registered or certified mail, return receipt requested, addressed to the parties at their post-office addresses as stated in the statement and proof of claimant. The director may adjourn the hearing from time to time upon reasonable notice to all the parties interested; may issue subpoenas and compel the attendance of witnesses to testify, which subpoenas shall be served in the same manner as subpoenas issued out of the circuit court; may compel the witnesses so subpoenaed to testify and give evidence in the matter; and may order the taking of depositions and issue commissions therefor in the same manner as depositions are taken in the circuit court. The witnesses shall receive fees as provided in ORS 44.415 (2), the costs to be taxed in the same manner as are costs in suits in equity. The evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest. The burden of establishing the claim shall be upon the claimant whose claim is contested. The evidence may be taken by a duly appointed reporter.



(1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail or by certified mail with return receipt, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. ***The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.***

(4) After final hearing the court shall enter a judgment affirming or modifying the order of the director as the court considers proper, and may assess such costs as it may consider just except that a judgment for costs may not be rendered against the United States. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment.

*Emphasis added.*

In the present matter, the Klamath County Circuit Court determined it was necessary to remand this case for further testimony. The Court had the option of remanding the matter to the OWRD director or to a referee appointed by the Court. In accordance with ORS 183.635, a remand to OWRD director results in a remand to the OAH. UBI, based on the statutory authority found in ORS 539.150(3), specifically requested the court appoint a referee in lieu of remanding to the director. The court denied UBI's request.

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OWRD utilized the legal remand process established in ORS 539.150(3). In accordance with ORS 539.005 and ORS 183.635, the matter was re-referred to the OAH. The re-referral process is outlined by OAR 137-003-0655, "Further Hearing and Issuance of Final Order," and provides:

(1) After issuance of the proposed order, if any, the administrative law judge shall not hold any further hearing or revise or amend the proposed order except at the request of the agency, except as provided in this subsection. The administrative law judge may withdraw a proposed order for correction within three working days of issuance of the proposed order. If the administrative law judge withdraws a proposed order for correction, the time for filing exceptions shall begin on the date the administrative law judge issues the corrected proposed order.

(2) If the agency requests the administrative law judge to conduct a further hearing under section (1) of this rule, the agency shall specify the scope of the hearing and the issues to be addressed. After further hearing, the administrative law judge shall issue a proposed order.

Pursuant to OAR 471-003-0655(2), OWRD issued the Order on Remand. OWRD specified the scope of the remand hearing "to take additional evidence on the determination of the moderate living standard and issue a proposed order determining what, if any, effect the determining of the moderate living standard has on the existing quantifications levels in the ACFFOD." Order on Remand at 2. Pursuant to ORS 539.150(3), the court has the legal authority to enter a judgment affirming the determination of OWRD, as well as consider exceptions filed by any party in the matter. However, in the event the court determines further testimony is necessary to issue judgement, the court is required to either appoint a referee or remand to the OWRD Director. By operation of ORS 183.635, this results in a re-referral to the OAH. Pursuant to ORS Chapter 183 and associated rules, the ALJ's proposed order will be issued to OWRD and the parties. OWRD will, in turn, file its determination to the Klamath County Circuit Court. Once the Court enters a judgment either affirming or modifying the determination of the director, then, and only then, is the judgment final and subject to appeal by the Oregon Court of Appeals. *See* ORS 539.150(4).

UBI's contends that the ALJ's issuance of the Proposed Order terminated the contested case process. UBI further asserts that a new and different case and proceeding was created by the remand. This is not supported by the plain language of the law, which clearly establishes the ongoing involvement of an entity, other than the court, to act as the finder of fact. *See* ORS 539.150. The law places no limit on the number of times the court can utilize its remand authority. Under UBI's interpretation, if the court decided to remand this matter multiple times to supplement the record, it would be terminating and creating multiple contested cases. This position is in clear contradiction of the process established by the legislature for the purpose of reaching a final judgment.

In further support of its position, UBI makes collateral arguments asserting this is a new contested case matter. These arguments will be addressed in turn.

UBI contends that the issuance of a new case number supports the proposition that the prior administrative proceeding was terminated. As established in the Findings of Fact, the OAH is currently operating under a new filing system that was established after the ALJ's Proposed Order was issued in this matter. *Supra* at 2. The implementation of CMS resulted in a new case numbering convention. The migration from old technology to new technology does not terminate a case and does not legally create a new contested case. Furthermore, UBI does not cite authority in support of this contention. Many judicial and administrative contested case systems have migrated to electronic case management over the past two decades. These migrations do not automatically create new cases by virtue of changing case numbering conventions.

UBI next asserts "[T]he fact that the OAH deemed it necessary to provide the parties with the Notice demonstrates that Upper Basin Irrigators did not *previously* have notice that ALJ Allen would be assigned *this* case." Request at 2, *emphasis in original*. UBI's position disregards both the plain language of the title and content contained in the Notice. UBI has been aware since 2010 of ALJ Allen's assignment as the ALJ in this case. This is not a new case, but a continuation of the existing matter, as noted on the Notice issued to the parties. *See* ORS 539.150.

The Notice further serves as an update to all parties to the manner, means and method to file documents or make inquiries regarding the case. Again, the OAH has migrated to a different system over the life of this contested case. *Supra* at 2. The notice at issue provides the parties with the proper case caption referencing each claim number, the prior OAH case number under the old system and the current case number under CMS. Without conveying this information, the parties would not have the procedural information necessary to properly participate in this contested case matter.

UBI is correct that OAR 471-060-0005(4) was revised in 2021 resulting from *Pulito v. Oregon State Bd. of Nursing*, 366 Or 612 (2020). UBI appears to argue that, because this is a new contested case, the 2021 version of OAR 471-060-0005 must be applied. UBI's contention is not supported by the record or the law. This is a matter of remand, not a new contested case. The remand is a continuation of the contested case that will continue until a final judgment is issued by the Klamath County Circuit Court, at which point it is subject to appeal before the Oregon Court of Appeals. *See* ORS 539.150.

It is not uncommon for laws to change during the pendency of an action. Under Oregon law, whether an administrative rule applies retroactively depends upon the intent of the promulgating agency or legislature. *Delehant v. Board on Police Standards & Training*, 317 Or 273, 278, 855 P.2d 1088 (1993). To ascertain the agency's intent, a factfinder must first consider both the text and context of the rule. If the rule is silent on the issue, then one must look to the circumstances surrounding the promulgation of the rule. *E.g., U.S. Bancorp v. Dept. of Revenue*, 337 Or 625, 103 P.3d 85, 91-92 (2004) (noting that circumstances surrounding the agency's promulgation of the rule offered insight into the agency's intent, because the circumstances illustrated the agency had adopted the rule in response to a judicial decision that had invalidated a prior rule). There is nothing in the text of OAR 471-060-0005 (2021) to indicate an intent to apply the rule retroactively.<sup>5</sup>

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<sup>5</sup> When the rule was promulgated in 1999 it did anticipate there could be an impact on cases assigned to an ALJ with the OAH. Therefore, the rule included the following clause: OAR 471-060-0005(6) For all

In *Delehant*, although there was no specific provision in the rule itself indicating that the agency intended the rule at issue to apply retroactively, the court found that “the procedural history of this case clearly establishes such an intent.” 317 Or at 279. The court determined that because the agency had promulgated the rule during the progress of the case, and had applied the rule to the case, it intended the rule to apply retroactively. *Id.*; *See also May Trucking v. Dept. of Transportation*, 203 Or App 564, 126 P3d 695, 702 (2006) (similarly finding that the agency’s passage and application of a rule during the pendency of a contested case established the agency’s intent to apply the rule retroactively).

In *U.S. Bancorp*, *Delehant*, and *May Trucking*, the petitioners specifically challenged the application of the subsequently promulgated rule. In each of those cases, the retroactive application of the agency’s rule was a disputed issue, and the hearing record included evidence of the circumstances surrounding the promulgation of the rule and evidence from which the court could ascertain the agency’s intent. In contrast, here, UBI did not offer evidence of the circumstances surrounding the amendments to 471-060-0005 (2021) to demonstrate any agency intent to apply the new version of the rule retroactively to existing contested cases. Nothing in the *Pulito* decision supports a finding that the rule change should be applied retroactively to pending actions.

The version of OAR 471-060-0005 that was in effect when this matter was initially referred to the OAH provides as follows:

OAR 471-060-0005<sup>6</sup> (1999) provides:

- (1) The purpose of this rule is to establish uniform procedures for the change of assignment of administrative law judges.
- (2) The words and terms used in OAR 471-060-0005 have the following meanings:
  - (a) An administrative law judge is "assigned" when a written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier.
  - (b) "Good cause" is any reason why an administrative law judge's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.
- (3) Every party and agency in a contested case is entitled to request a change of administrative law judge. The first request of that party or agency shall be automatically granted. If that party or agency makes a subsequent request, it must show good cause why

---

contested cases pending on January 1, 2000, the Chief Administrative Law Judge shall not assign or change assignments of administrative law judges unless the agency on whose behalf the hearing is conducted requests assignment of a administrative law judge from the Office of Administrative Hearings to continue the conduct and conclude the proceedings of a pending case.

<sup>6</sup> OAR 137-003-0501(8) provides that OAR 471-060-0005 applies to all contested case hearings conducted by the Office of Administrative Hearings.

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries* - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286

Ruling on Request for Change of Administrative Law Judge

Page 9 of 13

**Exhibit 2**

**Page 9 of 13**

Klamath Tribes Motion to Vacate

Exhibit 1

Page 38 of 42

Klamath Tribes' Petition

Exhibit G

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the administrative law judge should not preside over the hearing. The Chief administrative law judge or designee shall decide all requests.

(4) Notwithstanding section (3), *no request shall be granted if a party or agency had a reasonable opportunity to request a change of administrative law judge but did not do so. "Reasonable opportunity" is determined under the totality of circumstances.* All requests must be in writing and sent or delivered to the Chief Administrative Law Judge or designee at the mailing address, telephone number, or electronic mail address indicated in the notice of assignment of administrative law judge. Requests may be sent by mail, facsimile transmission, or electronic mail.

(5) The Chief Administrative Law Judge may exempt an agency or a class of cases from this section. All requests must be in writing.

(6) For all contested cases pending on January 1, 2000,<sup>7</sup> the Chief Administrative Law Judge shall not assign or change assignments of administrative law judges unless the agency on whose behalf the hearing is conducted requests assignment of an administrative law judge from the Office of Administrative Hearings to continue the conduct and conclude the proceedings of a pending case.

*Emphasis added.*

As noted above, the former version of OAR 471-060-0005(4) (1999) provided that no request for a change of administrative law judge would be granted if the party making such request had a reasonable opportunity to request a change but failed to do so. Reasonable opportunity was reviewed under the totality of the circumstances.

UBI was informed of the change in ALJ and assignment to ALJ Allen on April 2, 2010. This allowed UBI its first opportunity to request a change in ALJ. Instead, UBI continued with the discovery process, as well as the written direct testimony process. For some of the cases at issue, UBI also participated in the hearing process conducted by ALJ Allen. UBI received ALJ Allen's Proposed Order. UBI had a reasonable opportunity throughout this process to request reassignment. UBI did not make this request. Instead, UBI continued to participate in the process with the potential to obtain a ruling in UBI's favor.

UBI is incorrect that the current version of OAR 137-060-0005 (2021) is the controlling law in this matter. OAR 471-060-0005(4) (1999) provided UBI a reasonable opportunity to object to ALJ Allen's assignment to this matter in 2010, and not when the matter was remanded for a limited scope supplemental hearing. Under the totality of the circumstances, UBI had a reasonable opportunity to file for a request for change of ALJ in 2010. UBI's October 23, 2024, Request for Change of Administrative Law Judge is therefore untimely and is denied.

---

<sup>7</sup> No party in this matter asserts that this matter was referred to the OAH prior to January 1, 2000. The earliest contests in these matters were filed in May of 2000.

**RULING**

Upper Basin Irrigators' request for change of assigned ALJ is DENIED. The matter remains assigned to Senior ALJ Joe L. Allen.

Jeffrey R. Rhoades  
\_\_\_\_\_  
Chief Administrative Law Judge  
Office of Administrative Hearings

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries* - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286

Ruling on Request for Change of Administrative Law Judge

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**Exhibit 2**

**Page 11 of 13**

Klamath Tribes Motion to Vacate

Exhibit 1

Page 40 of 42

Klamath Tribes' Petition

Exhibit G

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## CERTIFICATE OF MAILING

On 26<sup>th</sup> day of November, 2024, I emailed the foregoing RULING ON REQUEST FOR CHANGE OF ADMINISTRATIVE LAW JUDGE in **OAH Reference No. 2024-OWRD-00136**:

BY ELECTRONIC MAIL:

<b>Name</b>	<b>Address</b>	<b>Contact</b>
United States Department Of Justice Guss Guarino	999 18th St. South Terr. # 370 Denver CO 80202	guss.guarino@usdoj.gov; raymundo.ribota@usdoj.gov
United States Department Of Justice David Harder	999 18th St South Terr. #370 Denver CO 80202	david.harder@usdoj.gov
Native American Rights Fund: Representing The Klamath Tribes Joe M. Tenorio	250 Arapahoe Ave Boulder CO 80302-5821	tenorio@narf.org; jschmidt@narf.org
Native American Rights Fund: Representing The Klamath Tribes Ada Montague	250 Arapahose Ave Boulder CO 80302-5821	montague@narf.org
Carollo Law Group, LLC: Representing The Upper Basin Irrigators (UBI) Dominic M. Carollo	PO Box 2456 Roseburg OR 97470	dcarollo@carollolegal.com; nsmith@carollolegal.com; kharp@carollolegal.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Paul Simmons	500 Capitol Mall Suite 1000 Sacramento CA 95814	psimmons@somachlaw.com; ydelacruz@somachlaw.com; crivera@somachlaw.com
Somach, Simmons & Dunn, Attorneys at Law: Representing Klamath Project Water Users (KPWU) Maximilian Bricker	500 Capitol Mall Suite 1000 Sacramento CA 95814	mbricker@somachlaw.com
Rietmann & Kim, LLP: Representing Klamath Project Water Users (KPWU) Nathan R. Rietmann	1270 Chemeketa St. NE Salem OR 97301	nathan@rietmannlaw.com

*In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Klamath River and its Tributaries - OAH Case No. 2024-OWRD-00136, former OAH Case No. 286*  
Ruling on Request for Change of Administrative Law Judge  
Page 12 of 13

**Exhibit 2**  
**Page 12 of 13**  
Klamath Tribes Motion to Vacate  
Exhibit 1  
Page 41 of 42  
Klamath Tribes' Petition  
Exhibit G  
Page 57 of 71

Parks & Ratliff, PC: Representing The Klamath Project Water Users (KPWU) Nathan Ratliff	620 Main St. Klamath Falls OR 97601	nathan@parksandratliff.com; reception@parksandratliff.com
Davis, Wright, Tremaine, LLP: Representing Klamath Project Water Users (KPWU) Olivier Jamin	560 SW 10th Ave Suite 700 Portland OR 97205	olivierjamin@dwt.com
Davis, Wright, Tremaine, LLP: Representing The Klamath Project Water Users (KPWU) Andy McStay	560 SW 10th Ave Suite 700 Portland OR 97205	andymcstay@dwt.com
Clyde Snow, Attorneys at Law: Representing The Klamath Project Water Users (KPWU) Reagan L.B. Desmond	377 SW Century Drive Bend OR 97702	rlbd@clydesnow.com
Blain Law, LLC: Representing The Klamath Project Water Users (KPWU) Mika Blain	517 Main St. Klamath Falls OR 97601	mika@blainlawllc.com
Brandsness, Brandsness & Rudd, PC: Representing The Klamath Project Water Users (KPWU) Michael P. Rudd	411 Pine St. Klamath Falls OR 97601	mike@brandsnessrudd.com
Will Davidson	725 Summer St NE Suite A Salem OR 97301	will.d.davidson@water.oregon.gov
Jesse D Ratcliffe	1162 Court St NE Salem OR 97301	Jesse.D.Ratcliffe@doj.oregon.gov; Denise.Ruttan@doj.oregon.gov

/s/Alexandria N Whitley  
Hearing Coordinator



# Exhibit 2

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

UPPER BASIN IRRIGATORS; AGRI WATER, LLC; AUSAYMAS CATTLE CO.; BK RANCH (AKA LILLIAN HILL AND VINCENT HILL); C AND A VOGT COMMUNITY PROPERTY TRUST; MARY RABE AND ESTATE OF CLIFFORD RABE; DAVID M. AND THERESA COWAN; DUANE F. MARTIN; DUARTE LIVESTOCK; E.G. KERNS RANCH LLC; BARNES LAKE COUNTY, LLC; FIVE MILE RANCH LLC; FLYNN AND SONS LLC; GERALD H. HAWKINS; GOOSE NEST RANCHES, LLC; GREG HARRIS; GRIFFITH LIVESTOCK LLC; HARLOWE RANCH, LLC; HAWKINS CATTLE CO.; JAMES HADYN-MYER; JOE FLYNN RANCH; JOHN B. OWENS; JOHN R. BRIGGS, JR.; KENNETH OWENS; LON BROOKS; LYNNE RICHARDSON CABRAL; MARTIN NICHOLSON; MICHAEL LAGRANDE; NBCC, LLC; NEWMAN ENTERPRISES, INC.; NICHOLSON INVESTMENTS, LLC; NICHOLSON LOVING TRUST; OBENCHAIN CATTLE CO. (AKA CAROLYN OBENCHAIN AND MARGARET JACOBS); OWENS & HAWKINS; PRODUCTIVE TIMBERLAND LLC; RANDALL KIZER (SUCCESSOR TO MAXINE KIZER; RICHARD NICHOLSON; ROGER NICHOLSON; T & B RANCH; TOM AND JACQUELINE BENTLEY (J&T RANCH CO.); TP BAR RANCH LLC; VINCENT BRIGGS; MODOC POINT IRRIGATION DISTRICT; AND WAYNE AND MARGARET JACOBS,

Plaintiffs,

v.

JEFFREY R. RHOADES, in his official

Case No. 25CV20984  
Honorable Natasha A. Zimmerman  
STIPULATED JUDGMENT OF DISMISSAL

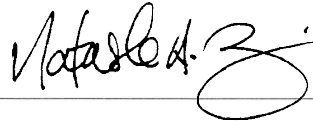
**ORS 20.140 - State fees deferred at filing**

1 capacity as Chief Administrative Law Judge  
2 for the Oregon Office of Administrative  
Hearings; OREGON OFFICE OF  
ADMINISTRATIVE HEARINGS,


3 Defendants.

4  
5 Based on the stipulation of the parties, as shown by the signatures of their counsel below,  
6 IT IS HEREBY ADJUDGED that the above-entitled case is dismissed without prejudice and  
7 without fees or costs to any party.

8  
9 8/25/2025 3:10:18 PM

10 

11  
12 Circuit Court Judge Natasha A. Zimmerman

13  
14   
15 Nolan G. Smith, OSB #215034  
16 Attorney for Plaintiffs  
DATED: 8/19/2025

17  
18 *s/ Tracy Ickes White*  
19 Tracy Ickes White, OSB #904127  
20 Senior Assistant Attorney General  
21 Attorney for Defendants  
22 DATED: 8/20/2025

23  
24  
25  
26  
27 Submitted by: Tracy Ickes White  
28 Senior Assistant Attorney General  
29 Attorneys for Defendants

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**CERTIFICATE OF READINESS**

This proposed **STIPULATED JUDGMENT OF DISMISSAL** is ready for judicial signature because:

- 1.  Each party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.
- 2.  Each party affected by this order or judgment has approved the order or judgment, as shown by each party's signature on the document being submitted or by written confirmation of approval sent to me.
- 3.  I served a copy of this order or judgment on each party entitled to service on (DATE OF SERVICE) and:
  - a.  No objection has been served on me.
  - b.  I received objections that I could not resolve with a party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.
  - c.  After conferring about objections, [role and name of objecting party] agreed to independently file any remaining objection.
- 4.  Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.
- 5.  Each other party previously filed a waiver of appearance.
- 6.  This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (5) of this rule.

DATED this 20 day of August, 2025.

*s/ Tracy Ickes White*  
 \_\_\_\_\_  
 TRACY ICKES WHITE #904127  
 Senior Assistant Attorney General  
 Trial Attorney  
 Tel (503) 947-4700  
 Tracy.I.White@doj.oregon.gov  
 Attorneys for Defendant

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**CERTIFICATE OF SERVICE**

I certify that on August 20, 2025, I served the foregoing STIPULATED JUDGMENT OF DISMISSAL upon the parties hereto by the method indicated below, and addressed to the following:

Dominic Carollo  
Nolan G. Smith  
Carollo Law Group LLC  
PO Box 2456  
Roseburg, OR 97470  
*Of Attorneys for Plaintiffs*

HAND DELIVERY  
 MAIL DELIVERY  
 OVERNIGHT MAIL  
 SERVED BY E-FILING  
 SERVED BY EMAIL  
[dcarollo@carollolegal.com](mailto:dcarollo@carollolegal.com)  
[nsmith@carollolegal.com](mailto:nsmith@carollolegal.com)

*s/ Tracy Ickes White*  
TRACY ICKES WHITE #904127  
Senior Assistant Attorney General  
Trial Attorney  
Tel (503) 947-4700  
Fax (503) 947-4791  
Tracy.I.White@doj.oregon.gov  
Of Attorneys for Defendants

# Exhibit 3

**From:** [White Tracy I](#)  
**To:** [Tom Murphy](#)  
**Subject:** RE: Upper Basin Irrigators v. Rhoades & OAH/No. 25CV20984  
**Date:** Friday, September 5, 2025 12:58:40 PM  
**Attachments:** [image.png](#)

CAUTION: This email originated from outside of the NARF organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Yes.

Sincerely,

**Tracy Ickes White**

Senior Assistant Attorney General | Civil Litigation Section | Trial Division  
Oregon Department of Justice  
(503) 508-9982

**From:** Tom Murphy <Murphy@narf.org>  
**Sent:** Friday, September 5, 2025 11:58 AM  
**To:** White Tracy I <Tracy.I.White@doj.oregon.gov>  
**Subject:** RE: Upper Basin Irrigators v. Rhoades & OAH/No. 25CV20984

**\*CAUTION EXTERNAL EMAIL\* This email originated from outside of DOJ. Treat attachments and links with caution. \*CAUTION EXTERNAL EMAIL\***

Thanks for taking the time to talk with me yesterday.

Just to confirm, the stipulation of the parties in the mandamus action was an agreement that the ALJ in the pending cases would be changed, but there was no agreement on who the ALJ assigned would be.

If I have this wrong, please let me know.

-tom

Tom Murphy  
Staff Attorney  
Native American Rights Fund

250 Arapahoe Ave.  
Boulder, CO 80302-5821  
[murphy@narf.org](mailto:murphy@narf.org)  
tel 303-447-8760  
direct 720-738-3237

New Mexico Bar No. 7705  
Arizona Bar No. 022953  
Colorado Bar No. 61180



THIS MESSAGE IS INTENDED ONLY FOR THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS CONFIDENTIAL, PRIVILEGED, AND EXEMPT FROM DISCLOSURE. IF YOU ARE NOT THE INTENDED RECIPIENT, PLEASE DELETE IT FROM YOUR SYSTEM WITHOUT COPYING, PRINTING OR FORWARDING IT, AND NOTIFY US BY REPLY EMAIL OR BY CALLING 303-447-8760. THANK YOU.

---

**From:** White Tracy I <[Tracy.I.White@doj.oregon.gov](mailto:Tracy.I.White@doj.oregon.gov)>  
**Sent:** Thursday, September 4, 2025 4:37 PM  
**To:** Tom Murphy <[Murphy@narf.org](mailto:Murphy@narf.org)>  
**Subject:** RE: Upper Basin Irrigators v. Rhoades & OAH/No. 25CV20984

CAUTION: This email originated from outside of the NARF organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Tom,

I'm happy to talk. Am in a meeting currently but could call later this afternoon or tomorrow.

I was forwarded a similar email from Joe Tenorio. Is he in your office? Are you two interchangeable, so to speak, as I was planning to call or email him.

Klamath Tribes Motion to Vacate  
Exhibit 3  
Page 2 of 4  
Klamath Tribes' Petition  
Exhibit G  
Page 66 of 71



Sincerely,

**Tracy Ickes White**

Senior Assistant Attorney General | Civil Litigation Section | Trial Division  
Oregon Department of Justice  
(503) 508-9982

---

**From:** Tom Murphy <[Murphy@narf.org](mailto:Murphy@narf.org)>  
**Sent:** Thursday, September 4, 2025 3:34 PM  
**To:** White Tracy I <[Tracy.I.White@doj.oregon.gov](mailto:Tracy.I.White@doj.oregon.gov)>  
**Subject:** Upper Basin Irrigators v. Rhoades & OAH/No. 25CV20984

**\*CAUTION EXTERNAL EMAIL\* This email originated from outside of DOJ. Treat attachments and links with caution. \*CAUTION EXTERNAL EMAIL\***

Good afternoon.

I'm one of the attorneys who represent the Klamath Tribes in the Klamath Basin Adjudication.

We've been monitoring the above case and noticed that a stipulated judgment of dismissal was entered on August 25, 2025. Are you able to discuss the basis of the stipulation between the parties that led to the dismissal?

Thanks.

-tom

Tom Murphy  
Staff Attorney  
Native American Rights Fund

250 Arapahoe Ave.  
Boulder, CO 80302-5821  
[murphy@narf.org](mailto:murphy@narf.org)  
tel 303-447-8760  
direct 720-738-3237

New Mexico Bar No. 7705  
Arizona Bar No. 022953  
Colorado Bar No. 61180

Klamath Tribes Motion to Vacate  
Exhibit 3  
Page 3 of 4  
Klamath Tribes' Petition  
Exhibit G  
Page 67 of 71



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\*\*\*\*\* CONFIDENTIALITY NOTICE \*\*\*\*\* This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system. \*\*\*\*\*

\*\*\*\*\* CONFIDENTIALITY NOTICE \*\*\*\*\* This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system. \*\*\*\*\*

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 15th day of September, 2025, I sent one true and correct copy by email and the original by first class mail of **KLAMATH TRIBES’ MOTION TO VACATE SUA SPONTE RULINGS OF THE CHIEF ADMINISTRATIVE LAW JUDGE** for OAH Ref. No. 2024-OWRD-00134, 2024-OWRD-0036 to 2024-OWRD-0041, to Alexandria N. Whitley, Hearing Coordinator, Office of Administrative Hearings, PO Box 14020, Salem, OR 97309-4020, OED\_OAH\_OWrd@employ.oregon.gov.

I further certify that I served a true and correct copy of **KLAMATH TRIBES’ MOTION TO VACATE SUA SPONTE RULINGS OF THE CHIEF ADMINISTRATIVE LAW JUDGE** on the parties hereby listed below by email.

DATED this 15th day of September, 2025.

s/ Jeff Schmidt  
JEFF SCHMIDT  
Paralegal  
Native American Rights Fund

<b>Name</b>	<b>Address</b>	<b>Contact</b>
Will Davidson Oregon Water Resources Dep’t	725 Summer St. NE Suite A Salem, OR 97301	will.d.davidson@water.oregon.gov
Jesse D. Ratcliffe Denise Ruttan Oregon Dep’t of Justice	1162 Court St. NE Salem, OR 97301	jesse.d.ratcliffe@doj.oregon.gov denise.ruttan@doj.oregon.gov
David W. Harder Andrew “Guss” Guarino Emmi Blades U.S. Dep’t of Justice, ENRD	South Terrace, Suite 370 999 18th St. Denver, CO 80202	david.harder@usdoj.gov guss.guarino@usdoj.gov emmi.blades@usdoj.gov wade.gibson@usdoj.gov alyssa.martin@usdoj.gov matthew.lamb2@usdoj.gov
Joe M. Tenorio Thomas L. Murphy Alice Elizabeth Walker Ashley Dawn Anderson Native American Rights Fund Representing: The Klamath Tribes	250 Arapahoe Ave. Boulder, CO 80302	tenorio@narf.org murphy@narf.org walker@narf.org anderson@narf.org jschmidt@narf.org

**PAGE 1 – CERTIFICATE OF SERVICE – KLAMATH TRIBES’ MOTION TO VACATE SUA SPONTE ORDERS OF THE CHIEF ADMINISTRATIVE LAW JUDGE**

1	<b>Name</b>	<b>Address</b>	<b>Contact</b>
2	Dominic M Carollo Carollo Law Group, LLC Representing: The Upper Basin Irrigators (UBI)	PO Box 2456 Roseburg, OR 97470	dcarollo@carollolegal.com nsmith@carollolegal.com kharp@carollolegal.com
5	Maximilian C. Bricker Theresa C. Barfield Somach, Simmons & Dunn, Attorneys at Law Representing: Klamath Project Water Users (KPWU)	500 Capitol Mall Suite 1000 Sacramento, CA 95814	mbricker@somachlaw.com tbarfield@somachlaw.com crivera@somachlaw.com ydelacruz@somachlaw.com
9	Nathan R. Rietmann Rietmann & Kim, LLP Representing: Klamath Project Water Users (KPWU)	1270 Chemeketa St. NE Salem, OR 97301	nathan@rietmannlaw.com
12	Nathan Ratliff Parks & Ratliff, PC Representing: Klamath Project Water Users (KPWU)	620 Main St. Klamath Falls, OR 97601	nathan@parksandratliff.com reception@parksandratliff.com
15	Olivier Jamin Andy McStay Davis, Wright, Tremaine, LLP Representing: Klamath Project Water Users (KPWU)	560 SW 10th Ave Suite 700 Portland, OR 97205	olivierjamin@dwt.com andymcstay@dwt.com
18	Mika Blain Blain Law, LLC Representing: Klamath Project Water Users (KPWU)	517 Main St. Klamath Falls, OR 97601	mika@blainlawllc.com
21	Michael P. Rudd Brandsness, Brandsness & Rudd, PC Representing: Klamath Project Water Users (KPWU)	411 Pine St. Klamath Falls, OR 97601	mike@brandsnessrudd.com

**PAGE 2 – CERTIFICATE OF SERVICE – KLAMATH TRIBES’ MOTION TO VACATE SUA SPONTE ORDERS OF THE CHIEF ADMINISTRATIVE LAW JUDGE**

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<b>Name</b>	<b>Address</b>	<b>Contact</b>
Reagan L.B. Desmond	377 SW Century Drive	rlbd@clydesnow.com
Nathaniel E. Broadhurst	Suite 203	neb@clydesnow.com
Clyde Snow & Sessions, P.C.	Bend, OR 97702	
Representing: Klamath Drainage District; Ady District Improvement Company; Midland District Improvement Company; Inter- County Properties Co., which acquired title as Inter-County Title Company; and Randy and Jane Walthall		

**PAGE 3 – CERTIFICATE OF SERVICE – KLAMATH TRIBES’ MOTION TO  
VACATE SUA SPONTE ORDERS OF THE CHIEF ADMINISTRATIVE LAW  
JUDGE**

1 **CERTIFICATE OF SERVICE**

2 (1) I certify that on December 4, 2025, I served a true and correct copy of **KLAMATH**  
3 **TRIBES’ AMENDED PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF**  
4 **FROM A NON-FINAL AGENCY ORDER, OR, IN THE ALTERNATIVE, PETITION**  
5 **FOR WRIT OF MANDAMUS (“AMENDED PETITION”)** on parties with interests affected  
6 by the **AMENDED PETITION**, listed below, using the Oregon Judicial Department Odyssey  
7 File and Serve system for service to the electronic service contacts registered in this case at the  
8 email addresses as recorded on the date of service in the eFiling system:

8 **Oregon Water Resources Department**

9 Shaunee Vanessa Morgan  
10 Anuradha Sawkar  
11 Austin D. Saylor  
12 Sara Van Loh  
13 Oregon Dep’t of Justice. Trial Division  
14 100 SW Market St.  
15 Portland, OR 97201  
16 shaunee.morgan@doj.oregon.gov  
17 anu.sawkar@doj.oregon.gov  
18 austin.saylor@doj.oregon.gov  
19 sara.vanloh@doj.oregon.gov

8 **U.S. Department of Justice, ENRD**

9 David W. Harder  
10 Andrew “Guss” Guarino  
11 Emmi Blades  
12 South Terrace, Suite 370  
13 999 18th St.  
14 Denver, CO 80202  
15 david.harder@usdoj.gov  
16 guss.guarino@usdoj.gov  
17 emmi.blades@usdoj.gov

14 **The Upper Basin Irrigators (UBI)**

15 Dominic M Carollo  
16 Nolan Smith  
17 Carollo Law Group, LLC  
18 PO Box 2456  
19 Roseburg, OR 97470  
20 dcarollo@carollolegal.com  
21 nsmith@carollolegal.com

14 **Klamath Project Water Users (KPWU)**

15 Maximilian C. Bricker,  
16 Theresa C. Barfield  
17 Somach, Simmons & Dunn  
18 Attorneys at Law  
19 500 Capitol Mall, Suite 1000  
20 Sacramento, CA 95814  
21 mbricker@somachlaw.com  
22 tbarfield@somachlaw.com  
23 crivera@somachlaw.com  
24 ydelacruz@somachlaw.com

20 **Klamath Project Water Users (KPWU)**

21 Nathan Ratliff  
22 Parks & Ratliff, PC  
23 620 Main St.  
24 Klamath Falls, OR 97601  
nathan@parksandratliff.com

20 **Klamath Project Water Users (KPWU)**

21 Olivier Jamin  
22 Andy McStay  
23 Davis, Wright, Tremaine, LL  
24 560 SW 10th Ave, Suite 700  
Portland, OR 97205  
olivierjamin@dwt.com  
andymcstay@dwt.com

1 **Klamath Project Water Users (KPWU)**  
Michael P. Rudd  
2 Brandsness, Brandsness & Rudd, PC  
411 Pine St.  
3 Klamath Falls, OR 97601  
mike@brandsnessrudd.com

**Klamath Drainage District; Ady  
District Improvement Company;  
Midland District Improvement  
Company; Inter-County Properties  
Co., which acquired title as Inter-  
County Title Company; and Randy  
and Jane Walthall**  
Reagan L.B. Desmond  
Nathaniel E. Broadhurst  
Clyde Snow & Sessions, P.C.  
377 SW Century Drive, Suite 203  
Bend, OR 97702  
rlbd@clydesnow.com  
neb@clydesnow.com

8  
9 (2) I further certify that on December 4, 2025, I served a true and correct copy of the  
10 **AMENDED PETITION** on the remaining counsel for parties with interests affected by this  
11 **AMENDED PETITION**, listed below, by email, as listed in the service list provided by the  
Office of Administrative Hearings for the remanded Tribal claims in this case:

12 **Oregon Water Resources Department**  
Will Davidson  
13 725 Summer St. NE, Suite A  
Salem, OR 97301  
14 will.d.davidson@water.oregon.gov

**Oregon Department of Justice**  
Jesse D. Ratcliffe  
Denise Ruttan  
1162 Court St. NE  
Salem, OR 97301  
jesse.d.ratcliffe@doj.oregon.gov  
denise.ruttan@doj.oregon.gov

16 **U.S. Department of Justice, ENRD**  
South Terrace, Suite 370  
17 999 18th St.  
Denver, CO 80202  
18 wade.gibson@usdoj.gov  
alyssa.martin@usdoj.gov  
19 matthew.lamb2@usdoj.gov

**Klamath Project Water Users (KPWU)**  
Nathan R. Rietmann  
Rietmann & Kim, LLP  
1270 Chemeketa St. NE  
Salem, OR 97301  
nathan@rietmannlaw.com

20 **Klamath Project Water Users (KPWU)**  
Mika Blain  
21 Blain Law, LLC  
517 Main St.  
22 Klamath Falls, OR 97601  
mika@blainlawllc.com

23  
24 (3) I further certify that on December 4, 2025, I served a true and correct copy of the

1 **AMENDED PETITION** on counsel for Respondents-Defendants Jeffrey R. Rhoades and the  
2 Oregon Office of Administrative Hearings, by email at the addresses listed below, as requested  
3 by counsel for Respondents-Defendants, in accordance with ORCP 9 G.

3 **Respondents-Defendants Jeffrey R.**  
4 **Rhoades and the Oregon Office of**  
5 **Administrative Hearings**

6 Marc Abrams  
7 Oregon Department of Justice  
8 100 SW Market Street  
9 Portland, OR 97201  
10 marc.abrams@doj.oregon.gov  
11 jo-ann.baccari@doj.oregon.gov  
12 marianna.almasi@doj.oregon.gov

13 DATED 4th day of December, 2025.

14 s/ Jeff Schmidt  
15 JEFF SCHMIDT, PARALEGAL  
16 Native American Rights Fund  
17 250 Arapahoe Avenue  
18 Boulder, Colorado 80302-5821  
19 Tel: (303) 447-8760  
20 Fax: (303) 443-7776  
21 jschmidt@narf.org  
22  
23  
24