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

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

12 Plaintiffs,

13 v.

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

19 — Defendants.

Case No. 09C23629
Honorable Susan Tripp

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

(28.010 *et seq*)

Oral argument requested
Estimated Time: 1 hr
Court reporting services requested

20 Pursuant to ORCP 79A(1), plaintiffs respectfully move the court for a preliminary
21 injunction to restrain defendants, pending further order of this court, from participating in
22 negotiations with the Klamath Tribes that directly or indirectly pertain, in any way, to the
23 federal reserved water rights of the Klamath Tribes unless said negotiations are open to
24 the public in conformance with ORS 539.310, and further; restraining defendants from
25 becoming party to any agreement defining the scope and attributes of federal reserved
26 water rights claimed by the Klamath Tribes unless the agreement is to be submitted to a
court in accordance with ORS 539.320 and made subject to the procedures of ORS
539.330 *et seq*.

This motion is supported by *Plaintiffs' Complaint for Declaratory Judgment/Injunctive Relief*, the *Declaration of Nathan R. Rietmann*, the points and

1 authorities set forth herein, and a Hearing Memorandum that will be filed with the court
2 on or before the time set for hearing as permitted by the court. Pursuant to ORCP
3 82A(1)(b)(ii), plaintiffs' request waiver of the requirement for posting security for
4 payment of any costs or damages incurred by defendants because the preliminary
5 injunction is being sought to prevent unlawful conduct and to restrict the defendants to
6 available judicial remedies.

7 **POINTS AND AUTHORITIES**

8 **1. Tribal Water Right Negotiations Must Be Open To The Public**

9 Oregon law specifically authorizes the Director of the Oregon Water Resources
10 Department to participate in negotiations with federally recognized Indian Tribes to
11 define the scope and attributes of federal reserved water rights claims. The law further
12 provides that all such negotiations shall be open to the public. The applicable statute,
13 ORS 539.310, provides as follows:

14 *539.310 Negotiation for water rights. (1) The Water Resources*
15 *Director may negotiate with representatives of any federally*
16 *recognized Indian tribe that may have a federal reserved water right*
17 *claim in Oregon and representatives of the federal government as*
18 *trustee for the federally recognized Indian tribe to define the scope*
19 *and attributes of rights to water claimed by the federally recognized*
20 *Indian tribe to satisfy tribal rights under treaty between the United*
21 *States and the tribes of Oregon. All negotiations in which the*
22 *director participates under this section shall be open to the public.*

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

- 25 *(a) Provide public notice of the negotiations;*
- 26 *(b) Allow for public input through the director; and*
- 27 *(c) Provide regular reports on the progress of the*
28 *negotiations to interested members of the public.*

29 **2. Defendants' Have Participated In Closed-Door Tribal Negotiations**

30 As alleged in plaintiffs' complaint, defendants have engaged in confidential
31 negotiations with the Klamath Tribes and other parties for several years. *Pltf. Complaint*

1 ¶17. These negotiations are ongoing and relate, *inter alia*, to the scope and attributes of
2 certain federal reserved water right claims of the Klamath Tribes. *Pltf. Complaint* ¶ 18.
3 The confidentiality of the negotiations is assured by a written confidentiality agreement.
4 *Pltf. Complaint* ¶ 19. Defendants are parties, or otherwise subject to, the confidentiality
5 agreement. *Pltf. Complaint* ¶ 17. Defendants’ past and ongoing participation in these
6 confidential negotiations violates ORS 539.310.

7 The negotiations at issue in this proceeding have produced a document entitled
8 *Proposed Klamath River Basin Restoration Agreement For The Sustainability Of Public*
9 *And Trust Resources And Affected Communities* (“KBRA”). *Rietmann Dec. Ex 1. Pg. 1.*
10 This document was made available to the public on January 15, 2008. Each page of the
11 document, except the cover, is labeled as being a “confidential and privileged settlement
12 communication.” The document indicates that defendant Oregon Water Resources
13 Department and the Klamath Tribes are among the twenty-six parties to the agreement.
14 *Rietmann Dec. Ex 1, Pg 16.*

15 A review of the KBRA demonstrates that it encompasses proposed agreements on
16 a variety of different subjects, including agreements relating to the federal reserved water
17 rights of the Klamath Tribes. *Rietmann Dec, Ex. 1, Pgs 1-15.* For example, Section
18 15.3.3A(i) “provisionally resolves and ends the contests filed by KPWU by recognizing
19 the tribal water rights at the claimed amounts and with the priority date of time
20 immemorial...” (emphasis added). *Id* at 20-21. Section 15.3.3B contains an agreement on
21 the part of the Klamath Tribes that said Tribes will not assert their water rights,
22 “whatever they may be, in a manner, that will interfere with the diversion, use or reuse of
23 water for the Klamath Project...” *Id.* This negotiated limitation upon the federal reserved
24 water right claims of the Klamath Tribes plainly serves to define the “scope” of the tribal
25 rights by imposing upon said rights a diversion limitation (i.e. an “attribute”) that did not
26 previously exist.

27 That defendants or their authorized designees were involved in the confidential
28 negotiations that produced the KBRA cannot seriously be contested. Following the public

1 release of the KBRA in January of 2008, defendants issued a public statement providing,
2 in part, as follows:

3 *“The Department is prepared to sign this agreement [KBRA]. One*
4 *of our primary interests as a participant in the Agreement*
5 *negotiations has been to ensure that it is consistent with Oregon*
6 *Water Law and the prior appropriation doctrine of water allocation*
7 *and management.” Rietmann Dec., Ex 2, Pg 1.*

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3. Defendants’ Participation In Closed-Door Negotiations Is Ongoing

Defendants have continued to participate in confidential negotiations relating to the KBRA and the federal reserved water right claims of the Klamath Tribes since the public release of the KBRA. As the Defendant Oregon Water Resources Department acknowledged in its *2008 Annual Government To Government Report*, dated December 15, 2008:

Tom Paul, the Department’s Deputy Director, and Ruben Ochoa, Policy Analyst in the Director’s Office, made several trips to the Klamath Falls area in January and February of 2008 to discuss issues related to the Klamath Basin Adjudication and the proposed Klamath Basin Restoration Agreement (KBRA) with community members that included representatives of the Klamath Tribe. Throughout the year, the Department maintained direct contact with representatives of the Klamath Tribe regarding the Klamath Basin Adjudication and KBRA. Rietmann Dec, Ex. 3, Pg 2.

More recent evidence of defendants’ ongoing participation in negotiations relating to the KBRA and the federal reserved water rights claims of the Klamath Tribes is contained in a stipulated order entered into by the Oregon Water Resources Department, the Klamath Tribes, and certain parties on June 19, 2009. The stipulated order provides, *inter alia*, that “The Parties have negotiated terms to resolve KPWU’s contests in the context of the proposed *Klamath River Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities*. The Stipulated Order further provides that:

1 *In the event there is any change, mutually agreed to by the*
2 *Parties and OWRD, to any relevant provision of the Restoration*
3 *Agreement between the time this Stipulation is entered into and the*
4 *time of final adoption of the Restoration Agreement [which has not*
5 *yet occurred], the Parties and OWRD intend to file an amended*
6 *version of this Stipulation and Attachments that will reflect those*
7 *mutually agreed changes. Rietmann Dec., Ex. 4, Pg 4.*

8 The existence of the stipulated order itself, coupled with the order’s recognition
9 that further changes may be mutually agreed upon by the parties, indicates that
10 confidential negotiations involving defendants and the federally recognized Klamath
11 Tribes relative to the federal reserved water right claims of the Klamath Tribes are
12 ongoing. That negotiations remain ongoing is also confirmed by recent media reports.
13 *Rietmann Dec., Ex 5, Pg. 1.*

14 **4. Plaintiffs’ Are Entitled To Preliminary Injunction**

15 **A. Conditions of ORCP 79A(1) Are Satisfied**

16 ORCP 79A(1) provides that a temporary restraining order or preliminary
17 injunction may be allowed:

- 18 a) When it appears that a party is entitled to relief demanded in a pleading,
19 and such relief, or any part thereof, consists of restraining the commission
20 or continuance of some act, the commission or continuance of which during
21 the litigation would produce injury to the party seeking the relief; or
- 22 b) When it appears that the party against whom a judgment is sought is doing
23 or threatens, or is about to do, or is procuring or suffering to be done, some
24 act in violation of the rights of a party seeking judgment concerning the
25 subject matter of the action and tending to render the judgment ineffectual.

26 The text of ORCP 79A(1) articulates the showing that a moving party must make
27 to warrant the issuance of a preliminary injunction. The showing is somewhat different
28 depending on whether the moving party is pursuing the preliminary injunction under
29 ORCP 79A(1)(a) or ORCP 79A(1)(b). Pursuant to ORCP 79A(1)(a), the moving party
30 must demonstrate a probability of success on the merits and that defendants are

1 threatening to continue some act during the litigation that will cause injury to the moving
2 party, which act the underlying complaint seeks to restrain. Pursuant to ORCP 79A(1)(b),
3 the moving party must show the nonmoving part is threatening to do something in
4 violation of the rights of the moving part, which relates to the subject matter of the action
5 and tends to render ineffectual the judgment being sought after. As plaintiffs claim they
6 are entitled to a preliminary injunction pursuant to ORCP 79A(1)(a) and/or ORCP
7 79A(1)(b), plaintiffs' motion for a preliminary injunction should be granted if the court
8 finds plaintiffs have made the showing required by either subsection of ORCP 79A(1).

9 Since the filing of plaintiffs' complaint, it has become increasingly apparent the
10 judgment plaintiffs are seeking will be rendered ineffectual if defendants are permitted to
11 continue engaging in confidential negotiations with the Klamath Tribes while this case is
12 pending. As recently as December 17, 2009, it was reported in the *Klamath Herald and*
13 *News* that confidential negotiations toward a final KBRA agreement were held
14 somewhere in Portland, Oregon during the week of December 6, 2009. The same article
15 reports that further confidential negotiations have or will take place in Sacramento
16 California during the week of December 13, 2009, and that the issuance of a final
17 agreement is imminent. *Rietmann Dec., Ex. 5, Pg 1.*

18 Plaintiffs' complaint requests a declaration from this court that defendants' past,
19 present, and future negotiations with the Klamath Tribes relative to the KBRA are subject
20 to ORS 539.310 *et seq.* *Plt. Complaint* ¶ 24. Plaintiffs' complaint also seeks an injunction
21 to remedy defendants' past violations of ORS 539.310 and prevent future ones. To
22 remedy past violations of ORS 539.310, plaintiffs' complaint asks the court to enjoin
23 defendants from entering into any agreement that defines the scope and attributes of
24 federal reserved water rights claimed by the Klamath Tribes until defendants have
25 publicly disclosed all records of the confidential negotiations that have previously taken
26 place. *Id.* To prevent future violations of ORS 539.310 *et seq.*, plaintiffs are seeking an
injunction that restrains defendants from prospectively engaging in confidential
negotiations with the Klamath Tribes or entering into any settlement agreement with the

1 Klamath Tribes that does not conform to the requirements and procedures of ORS
2 539.310 *et seq. Id.*

3 By virtue of ORS 539.310, plaintiffs have an affirmative right to notice of, and
4 access to, the negotiations surrounding the KBRA in which defendants are involved.
5 Consequently, plaintiffs sustain injury every time a confidential negotiation is held in
6 contravention of ORS 539.310. Moreover, defendants' continued participation in
7 confidential tribal water right negotiations undermines the purpose and effect of the
8 judgment plaintiffs are seeking. The purpose of the declaratory and injunctive relief
9 plaintiffs are seeking in their complaint is to ensure plaintiffs and the public are informed
10 of the decisions being made in the tribal water right negotiations. In addition, plaintiffs
11 are seeking opportunity to offer formal input through the director or informal input
12 through public/political action *before any agreement is finalized*. After the agreement is
13 finalized, *there is no longer opportunity to provide input through the director and
public/political objections will be incapable of influencing the terms of the agreement.*

14 In addition, plaintiffs are seeking through their action to determine whether
15 plaintiffs must be afforded opportunity to make exceptions to the KBRA or other
16 agreement defining the scope and attributes of the Klamath Tribes' water rights as
17 provided in ORS 539.340 before any such agreement may become effective. Obtaining a
18 declaratory judgment determining plaintiffs' rights under ORS 539.310 *et seq.* prior to
19 the KBRA being signed is far less disruptive to the KBRA process than bringing an
20 action after the KBRA is signed. Moreover, any potential disruption resulting from the
21 preliminary relief plaintiffs are requesting is substantially less than the irreparable harm
22 plaintiffs will sustain if preliminary relief is not granted. If the merits of plaintiffs' claims
23 are resolved in plaintiffs' favor before defendants sign the KBRA, the agreement can be
24 structured in a manner that conforms to the judgment and protects plaintiffs' rights
25 without violating them further. Conversely, if defendants enter into the KBRA before
26 plaintiffs' claims are resolved, the agreement will be in peril if a court later finds
defendants have not complied with the law and that plaintiffs rights have been violated.

1 As may be seen, the underlying judgment plaintiffs are seeking is designed to
2 protect plaintiffs and the public without prejudicing defendants or the efforts in which
3 they are engaged. Plaintiffs will be irreparably harmed and the judgment they are seeking
4 will be rendered ineffectual if plaintiffs are not afforded preliminary relief.

5 **B. Injunction Necessary To Maintain Status Quo**

6 A number of cases shed further light on the purposes ORCP 79A(1) is intended to
7 serve and may be helpful to the court in determining whether provisional relief is
8 warranted. These cases indicated the purpose of a preliminary injunction “is to maintain
9 the status quo so that, upon final hearing, full relief may be granted.” *Oregon Educ. Ass’n*
10 *v. Oregon Taxpayers United PAC*, 227 Or. App. 37, 45, 204 P.3d 855, 860 (2009)
11 (citation omitted). The status quo that is to be maintained is not the state of affairs
12 existing immediately before the commencing of the action, but rather, “the last
13 undisputed state of affairs that existed before the events that gave rise to the pending
14 controversy occurred.” *State ex re. McKinley Automotive, Inc. v. Oldham*, 283 Or. 511,
515, 584 P.2d 741, 743 (1978). As the Oregon Supreme Court has explained:

15 *The status quo to be maintained, however, is not necessarily the*
16 *state of affairs that exists at the time the suit was filed. In fact, if it*
17 *were, then few injunctions would be enforceable pending appeal*
18 *since the vast majority of suits seeking injunctions are filed after the*
19 *defendant has started to do the disputed acts. Further, if the status*
20 *quo were limited to the state of affairs at the time of filing, a*
21 *wrongdoer would be permitted to continue engaging in the disputed*
22 *conduct until the case was finally resolved, as long as the wrongdoer*
23 *began to act before the plaintiff filed suit. For this reason, the status*
24 *quo to be preserved should be the last undisputed state of affairs that*
25 *existed before the events that gave rise to the pending controversy*
26 *occurred. This is the rule for granting preliminary injunctions,*
[\[FN3\]](#) *which are granted even before there has been a trial on the*
merits; injunctions granted following a trial should be at least as
easily enforced pending appeal.

***FN3... *And by the status quo which will be preserved by*
preliminary injunction is meant the last actual, peaceable,
noncontested condition which preceded the pending controversy,

1 *and equity will not permit a wrongdoer to shelter himself behind a*
2 *suddenly and secretly changed status, although he succeeded in*
3 *making the change before the hand of the chancellor has actually*
4 *reached him. Id. (internal citations omitted).*

5 Plaintiffs’ action seeks to maintain the status quo pending hearing upon the merits.
6 The last actual, peaceable, noncontested condition, which preceded the pending
7 controversy, is the right of defendants to participate in water right negotiations with the
8 Klamath Tribes that are open to the public consistent with ORS 539.310. Though
9 defendants’ right to participate in closed-door tribal water right negotiations is in dispute,
10 the right of defendants to participate in tribal water right negotiations that are open to the
11 public is not. Therefore, to maintain the status quo, defendants should be enjoined from
12 participating in tribal water right negotiations with federally recognized Tribes behind
13 closed-doors until it can be determined whether defendants have any right to participate
14 in closed-door negotiations. Meanwhile, defendants should continue to be afforded their
15 right to engage in negotiations with the Klamath Tribes that are open to the public
16 consistent with ORS 539.310.

17 Similarly, there is no dispute that defendants are authorized to enter into tribal
18 water right agreements provided: (1) the agreement is filed with an appropriate court
19 (ORS 539.320), (2) there is public notice of the agreement and of the right to file
20 exceptions (ORS 539.330), and (3) the agreement does not become effective until
21 incorporated into a court degree (ORS 539.340). The preliminary injunction plaintiffs are
22 seeking maintains the status quo by restrain defendants from entering into any tribal
23 water rights agreement pursuant to some other procedure, the applicability of which is
24 disputed, pending hearing upon the merits.

25 **C. Plaintiffs’ Request For Preliminary Relief Consistent With**
26 **Analogous Federal Standards**

27 As the purpose of a preliminary injunction is to maintain the status quo, a hearing
28 upon a preliminary injunction is not a hearing upon the merits. Instead, the issue before
29 the court on a hearing for a preliminary injunction is “whether the party seeking the

1 injunction has made a sufficient showing to warrant the preservation of the status quo
2 until the later hearing on the merits.” *Oregon Educ. Ass’n v. Oregon Taxpayers United*
3 *PAC*, 227 Or. App. 37, 45, 204 P.3d 855, 860 (2009).

4 Beyond the plain text of ORCP 79A(1) and the cases cited above, there is little in
5 the way of Oregon case law to guide the court in determining whether plaintiffs have
6 made the showing necessary to warrant the issuance of a preliminary injunction. For this
7 reason, Oregon courts often look to analogous federal standards in determining whether
8 to issue a preliminary injunction. Federal cases relating to preliminary relief indicate,
9 consistently with ORCP 79A(1), that a party seeking such relief “must show either (1) a
10 combination of probable success on the merits and the possibility of irreparable injury, or
11 (2) that serious questions are raised and the balance of hardships tips sharply in its favor.”
12 *Big Country Foods, Inc. Bd. Of Educ. Of Anchorage School District*. 868 F.2d 1085,
13 1088 (9th Cir. 1989) (citation omitted). While stated as alternatives, “[t]hese formulations
14 are not different tests but represent two points on a sliding scale in which the degree of
15 reparable harm [that must be shown by the moving party] increases as the probability of
16 success on the merits decreases.” *Id.* Further, where the public interest is involved, as is
17 the case here, the court must consider whether the balance of public interests weighs in
18 favor of granting or denying the injunctive relief sought. *Westlands. Water Dist. v.*
19 *Natural Res. Def. Council*, 43 F.3d 457, 459 (9th Cir. 1994). Consideration of these
20 factors further supports plaintiffs’ claim for preliminary injunctive relief.

21 **i. Plaintiffs Have Likelihood Of Success On The Merits**

22 Whether plaintiffs are entitled to prevail on their claims is primarily a matter of
23 statutory construction. The objective of a court when interpreting a statute is to ascertain
24 the legislature’s intent. ORS 174.020(1)(a). In this regard, the Oregon Supreme Court has
25 long recognized “there is no more persuasive evidence of the intent of the legislature than
26 the words by which the legislature undertook to give expression to its wishes.” *State v.*
Gaines, 346 Or. 160, 171, 206 P.3d 1042, 1050 (2009). However, the court has also
recognized that “a party is free to proffer legislative history to the court, and the court

1 will consult it after examining text and context, even if the court does not perceive an
2 ambiguity in the statute's text, where that legislative history appears useful to the court's
3 analysis". *Id.*

4 The text of ORS 539.310 plainly authorizes defendants to "negotiate with
5 representatives of any federally recognized Indian Tribe that may have a federal reserved
6 water right claim in Oregon...to define the scope and attributes of rights to water claimed
7 by the federally recognized Indian Tribe." The Klamath Tribes are a federally recognized
8 Indian Tribe with federal reserved water right claims in Oregon. Defendants acknowledge
9 they participated in the negotiations involving the Klamath Tribes that produced the
10 KBRA. *Rietmann Dec., Ex. 2, Pg. 1.* The KBRA "defines the scope and attributes" of the
11 federal reserved water right claims of the Klamath Tribes by, *inter alia*, imposing
12 diversion limitations, preventing the rights from being asserted in certain ways, and
13 recognizing the rights as having a "time immemorial priority date" vis-à-vis certain
14 parties. *Rietmann Dec., Ex. 1, Pg 18-22.* The text of ORS 539.310 also plainly states, "all
15 such negotiations in which the director participates under this section shall be open to the
16 public." The negotiations that produced the KBRA, and in which defendants participated,
17 were not open to the public, but instead, subject to a written confidentiality agreement.

18 The legislative history surrounding ORS 539.310 further supports plaintiffs'
19 position. The statute that is now ORS 539.310 first became law in 1987, pursuant to
20 Senate Bill 137. As originally enacted in 1987, ORS 539.310 only granted the Oregon
21 Water Resources Department authority to negotiate with the Warm Springs Indian Tribes.
22 According to testimony provided in support of the bill by the Oregon Water Resources
23 Department, the bill was necessary because the "Department has jurisdiction over water
24 allocations but lacks legal authority to negotiate with tribes." *Rietmann Dec., Ex. 6, Pg. 1.*
25 The official Staff Measure Analysis provided to the Joint Legislative Committee on
26 Water Policy on March 31, 1987 described the measure in the following terms:

1 PROBLEM ADDRESSED

2 Under present statutes, the Water Resources Department has no authority to
3 enter into negotiations concerning water rights with the Confederated Tribes of the
4 Warm Springs Reservation.

5 FUNCTION AND PURPOSE OF MEASURE

6 SB 137 provides the Director of the Water Resources Department authority
7 to enter into negotiations with the confederated tribes and the federal government
8 concerning the “scope and attributes” of the water rights they hold. The bill
9 provides that all agreements shall be certified by a court and allows individuals
10 affected by an agreement to file exceptions to the agreement. The bill was written
11 to prevent problems associated with extended litigation over adjudication that have
12 affected other Indian Water Right claims.

13 MAJOR ISSUES DISCUSSED

- 14 History of Indian water rights
- 15 History of cooperation between Warm Springs Tribe and the Oregon Water
- 16 Resources Department.
- 17 Public involvement in the negotiation process
- 18 Specifying appropriate court for certification

19 EFFECT OF COMMITTEE AMENDMENTS

20 Specify that negotiations pursuant to this Act be open to the public and that
21 interested members of the public be informed of the progress of the negotiations.

22 (*Rietmann Dec., Ex. 6, Pg 17.*)

23 After ORS 539.310 *et seq.* first became law through the passage of SB 137, the
24 statute was amended in 1993 through passage of HB 2109. The purpose and effect of
25 HB 2109 was to extend the Water Resources Department’s authority to negotiate water
26 rights with the Warm Springs Tribes to any federally recognized Indian tribe having
reserved water rights claims. The official staff measure summary provided to the House
Committee on Natural Resources describes the effect of the bill in the following terms:

WHAT THE BILL DOES: Extends Water Resources Department current
authority to negotiate water rights with the Warm Springs Tribes to any federally
recognized Indian tribe having reserved water rights claims.

1 **ISSUES DISCUSSED:**

- 2 • Benefits to tribes and state of negotiation vs. court determination of rights.
3 • Potential effects of subordinating existing water rights to tribal rights –
4 intention of Umatilla Tribe to consider impact of assertion of rights on
5 neighbors.
6 • Litigation expenses associated with court determination of tribal rights in other
7 states.

8 **EFFECT OF COMMITTEE AMENDMENTS:** None

9 **BACKGROUND:** Federal law establishes, regardless of the sovereign immunity
10 granted Indian reservations, that states may consider all claims to water – federally
11 reserved as well as private – when adjudicating water rights in a basin.

12 Rather than allowing the adjudication process to be subject to the expensive,
13 laborious and sometimes inflexible jurisdiction of the courts, Water Resources and
14 the Warm Springs Tribe have begun a process of negotiation to determine their
15 rights. Other tribes are now interested in clarifying their rights through a similar
16 process, provided the Department has the requisite authority.

17 (*Rietmann Dec., Ex. 6, Pg. 46*)

18 It was not until 1997 that ORS 539.310 *et seq.* was again amended to have the
19 form that it presently has today through passage of SB 712. The effect of SB 712, which
20 was supported by the Oregon Water Resources Department, was to make certain the
21 statute protected the interests of water right claimants in the Klamath Basin adjudication.
22 The official Staff Measure Summary provided to the 1997 House Committee on Water
23 Policy describes the effect of the legislation in the following terms:

24 **WHAT THE BILL DOES:** Allows vested water right claimant who may be
25 affected by a negotiated settlement of the reserved water rights of any federally
26 recognized Indian tribe claiming rights in Oregon to file an exception to the
27 agreement.

28 **ISSUES DISCUSSED:**

- 29 * use of dispute resolution
30 * need for bill

1 **EFFECT OF COMMITTEE AMENDMENTS:** none

2 **BACKGROUND:** Current law authorizes the Director of the Water Resources
3 Department to negotiate settlement of the reserved water rights of any federally
4 recognized Indian tribe claiming rights in Oregon (ORS 539.310). An agreement,
5 pursuant to this statute, shall not become effective unless, and until, incorporated
6 in a final court decree. Under current law, any owner of a water right certificate or
7 permit, that may be affected by the agreement, may submit an exception to the
8 agreement to the court.

9 In basins that have not been adjudicated, vested rights have not been
10 determined and water right certificates have not been issued. Vested right holders
11 do not hold certificates of permits, and are, therefore, unable to submit exceptions
12 to an Indian water agreement. In an unadjudicated basin, such as the Klamath
13 Basin, a large percentage of water right holders have only vested, unadjudicated
14 rights. SB 712 amends ORS 539.340 to add vested right claimants in an
15 adjudication to the class of water right holders who may file exceptions to an
16 Indian water settlement agreement. The Water Resources Department states the
17 bill encourages these vested right holders to participate in the negotiation
18 proceeding because they will have the right to challenge the final agreement; and
19 the measure thereby facilitates the Klamath Basin adjudication process.

20 (*Rietmann Dec., Ex. 6, Pg 57*)

21 The legislative evolution of ORS 539.310 *et seq.*, as summarized above and
22 described more fully in Exhibit 6 of the Rietmann Declaration, supports plaintiffs' claims
23 in several key respects. First, the legislative history demonstrates that defendants'
24 authority to engage in water right negotiations with the Klamath Tribes arises from ORS
25 539.310 *et seq. Rietmann Dec., Ex. 6, Pg. 1*. Second, the legislative history shows the
26 legislature very clearly intended for all such negotiations to be open to the public so as to
protect the rights of individuals same or similarly situated to plaintiffs' herein. *Id.* at
pgs 12-15. Third, the legislative history demonstrates conclusively that ORS 539.310 was
specifically intended to be applicable to water right negotiations involving tribal claims in
the Klamath Basin water rights adjudication. *Id.* at Pgs 55-57. In short, the legislative
history confirms that ORS 539.310 is applicable to the facts and circumstances this case
presents and was intended to mean what it quite plainly says. That is, defendants are

1 authorized to engage in water right negotiations involving the Klamath Tribes, however:
2 (1) all such negotiations must be open to the public, (2) affected parties must be afforded
3 the opportunity to file exceptions, and (3) affected parties have the right to have their
4 exceptions ruled upon before any negotiated agreement can take effect. Defendants are
5 not acting in conformance with these requirements. Consequently, plaintiffs have a high
6 probability of success on the merits of their underlying claim.

7 **ii. Balance Of Equities Tips Sharply In Plaintiffs' Favor**

8 On December 2, 2009, Attorney General John Kroger issued a press release
9 announcing "a broad plan to improve government transparency in Oregon." *Rietmann*
10 *Dec., Ex. 7 Pg 1-2*. The press release states in part as follows:

11 *A democracy cannot properly function without strong open*
12 *government laws," said Attorney General Kroger. "We've*
13 *implemented some immediate reforms that will improve*
14 *transparency in state government. But I'm also committed to far*
15 *greater changes.*

16 * * *
17 *Government is most accountable to the public when the public*
18 *has easy access to its inner workings. Id.*

19 As the Attorney General's comments and new transparency initiative recognizes,
20 strong open government laws are in the public interest. Yet laws alone are not enough. As
21 this case demonstrates, strong open government laws such as ORS 539.310 are
22 meaningless if they are not adhered to and enforced. All that plaintiffs are asking is for
23 the court to give the public interest in enforcing open government laws the benefit of the
24 doubt while this matter is pending.

25 Defendants will inevitably respond to plaintiffs' application for preliminary relief
26 with convoluted arguments suggesting it is contrary to the public interest for this court to
make any type of decision that could conceivably interfere with development of a final
KBRA agreement relating to the federal reserved water rights of the Klamath Tribes.
Plaintiffs' responses to these arguments are simple and straightforward.

1 First, the preliminary injunction plaintiffs are seeking would not preclude
2 defendants from continuing to engage in negotiations with the Klamath Tribes and other
3 parties pending resolution of this matter. Rather, the preliminary injunction would simply
4 require that all such negotiations be conducted in public unless and until a judgment is
5 rendered finding that defendants have an affirmative right to engage in water right
6 negotiations with federally recognized tribes behind closed doors. In other words, the
7 worse case scenario of granting the preliminary relief plaintiffs are seeking is that
8 defendants' negotiations with the Klamath Tribes will be open to the public while this
9 case is pending. Though defendants will inevitably trot out a parade of horrors in their
10 arguments for why preliminary relief should be not granted, the bottom line is the
11 legislature has, through the enactment of ORS 539.310, already decided that public
transparency is more important than the harm defendants seek to prevent.

12 Second, plaintiffs do not seek to preclude defendants from entering into a final
13 agreement that defines the scope and attributes of federal reserved water rights claimed
14 by the Klamath Tribes. The preliminary injunction plaintiffs seek simply requires that
15 any such agreement to be made in accordance with the procedures of ORS 539.310 *et*
16 *seq.* unless and until such time as a judgment is rendered.

17 Third, the question of whether the KBRA is in the public interest is unknowable
18 because the public is not privy to what is occurring in the negotiations. Though guesses
19 can be made, the public ultimately does not know what was given, what was gained, what
20 was taken, and what was lost during the negotiations. For that matter, the public does not
21 even know what the most recent draft of the KBRA says, or how they will be affected,
because the most recent draft is confidential.

22 Fourth, any argument against the preliminary injunction plaintiffs are seeking is an
23 argument that the public not having any access to the negotiations benefits the public
24 interest. It is difficult to see how excluding the public from the decision making process
25 associated with such significant issues is beneficial to the public. This idea is akin to
26 asserting it is in the public interest for the Legislative Assembly to meet behind closed

1 doors so as to facilitate “more open public policy discussions”. The argument is also
2 rather difficult to swallow in light of the Attorney General’s new transparency initiative
3 and Oregon’s public meeting laws, which essentially represent omissions on the part of
4 the state that greater transparency in government is generally in the public interest. This
5 is especially true where, as here, the text of ORS 539.310 *et seq.*, and the legislative
6 history associated therewith, expressly embody a legislative policy that it is in the public
7 interest for tribal water right negotiations to be transparent and open to the public, which
8 just so happens to be precisely the circumstance this case presents.

9 Fifth, and finally, ORS 539.310 expressly provides certain affirmative rights to
10 plaintiffs and others same or similarly situated. Those rights include the right to open
11 negotiations concerning the scope and attributes of federal reserved water right claims of
12 federally recognized Indian Tribes. ORS 539.310. Those rights include the right to have
13 any agreement that defines the scope and attributes of tribal water right claims filed with
14 a court. ORS 539.320. Those rights include the right to file exceptions to any agreement
15 that is entered into, and the right to have those exceptions ruled upon before any
16 agreement defining the scope and attributes of federal reserved water rights takes effect.
17 ORS 539.330-340. There is absolutely no doubt these rights exist and plaintiffs
18 respectfully submit they have alleged a prima facie showing these rights are applicable to
19 the particular facts and circumstances presented. It is in the interests of plaintiffs, the
20 public, and defendants alike for these affirmative rights to be protected until such time as
21 a court, after full hearing upon the merits, renders a final determination as to whether
22 there is any basis for denying plaintiffs and the public of the affirmative protections ORS
23 539.310 *et seq.* expressly affords.

24 The balance of the equities tips sharply in plaintiffs’ favor. Plaintiffs and the
25 public will be irreparably harmed if defendants continue engaging in confidential
26 negotiations while this action is pending. Requiring defendants to adhere to the public
27 transparency requirements of ORS 539.310 pending final resolution of this matter will
28 not cause irreparable harm to defendants.

1 **5. Conclusion**

2 For all the reasons stated herein, and others that will be presented, plaintiffs'
3 motion for preliminary relief should be granted.

4 DATED this ___ day of December, 2009

5 Respectfully submitted,

6
7 _____
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CERTIFICATE OF SERVICE

I certify that on December __, 2009, I served a true and correct copy of this
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION by depositing the same in the U.S.
Mail in a sealed envelope to following attorney :

John J. Dunbar, OSB #842100
Attorney in Charge
Special Litigation Unit
1162 Court St. NE
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Attorney for Defendants

DATED this ___ day of December, 2009

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