

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 ) OPINION RE MOTIONS TO PRESENT  
BASIN ) NON-RECORD EVIDENCE FOR TRIBAL  
) (PHASE 3, PART 2, GROUP C) CLAIMS  
)  
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**INTRODUCTION**

This matter came before the court on May 19, 2023, for hearing on three sets of motions to present non-record evidence in connection with tribal claims. Klamath Project Water Users (KPWU)<sup>1</sup> seek to present non-record evidence in support of their exceptions to claims 622 (Upper Klamath Lake)<sup>2</sup> and to address the "moderate living standard" to be applied in assessing their exceptions to tribal claims. Upper Basin Irrigators (UBI)<sup>3</sup> seeks to present non-record

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<sup>1</sup> Parties appearing collectively as the Klamath Project Water Users are: Ady District Improvement Company; Collins Products LLC; Enterprise Irrigation District; Inter-County Properties Co., aka Inter-County Tite Co.; Randy and Jane Walthall; Klamath Drainage District; Klamath Irrigation District; Malin Irrigation District; Midland District Improvement Company; Pioneer District Improvement Company; Plevna District Improvement Company; Shasta View Irrigation District; Tulelake Irrigation District; and Van Brimmer Ditch Company. This opinion refers to KPWU in the plural, consistent with KPWU's use of the plural in their filings.

<sup>2</sup> Claim 616 was a companion claim filed by the Klamath Tribes seeking the same minimum water levels as Claim 622. But since Claim 616 was functionally duplicative of Claim 622, Claim 616 was denied. *See* Klamath Basin Adjudication, Amended and Corrected Findings of Fact and Order of Determination (KBA\_ ACFFOD) 04909 (Feb 28, 2014).

<sup>3</sup> Parties appearing together as the Upper Basin Irrigators are: Agri Water, LLC; Ausaymas Cattle Co.; BK Ranch (aka Lillian Hill and Vincent Hill); C and A Vogt Community Property

evidence in support of its exceptions to tribal claim 622 (Upper Klamath Lake); claim 624 (Seeps and Springs); claims 625-30, 634, and 640 (Williamson River); claims 641-649 and 652-653 (Sprague River); claims 658-663 and 665-667 (Sycan River); and claims 668-670 (Wood River). Mosby Family Trust (Mosby) seeks to present non-record evidence in support of its exceptions to tribal claims 623 (Klamath Marsh) and claims 625-640 (Williamson River).

The United States and the Klamath Tribes (collectively, US/KT) contend that all motions should be denied because none of the moving parties have satisfied the "good cause" standard previously adopted by the court. The Oregon Water Resources Department (OWRD) does not oppose KPWU's motion based on KPWU's stipulated withdrawal from the contested case proceedings in accordance with the Klamath Basin Resolution Agreement (KBRA). OWRD contends that the UBI and Mosby motions should be granted with respect to the moderate living standard and otherwise denied. For the reasons explained below, the motions filed by KPWU, UBI and Mosby are granted in part and denied in part, and the tribal claims at issue are remanded to the Director of the Oregon Water Resources Department for further proceedings consistent with this opinion.

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Trust; Mary Rabe and Estate of Clifford Rabe; David M. and Thresa 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; Harlow Ranch, LLC; Hawkins Cattle Co.; Jack Flynn Cattle Co.; James Hadyn-Myer; Joe Flynn Ranch; John B. Owens; John R. Brigs, Jr.; Kenneth Owens; Lon Brooks; Lynne Richardson Cabral; Martin Nicholson; Michael Lagrande; NBCC, LLC; Newman Enterprises, LLC; 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. This opinion refers to UBI in the singular, consistent with UBI's use of the singular in its filings.

## BACKGROUND

### I. Agency proceedings

The Klamath Basin Adjudication (KBA) comprises the determination of pre-1909 'alleged use' and federally reserved water rights, which includes over 730 claims and 5,600 contests.<sup>4</sup> In September 1990, the Oregon Water Resources Department (OWRD) issued its "Notice to File Claims," kicking off the decades-long adjudication proceedings.<sup>5</sup> Pursuant to ORS chapter 539, OWRD has made initial findings of fact and published an order of determination establishing the water rights of these competing interests. The process involved receiving the parties' claims and contests, gathering evidence, conducting hearings, and developing a record of the proceedings by which these determinations were made.<sup>6</sup> The agency's final rulings are contained in the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD).

#### A. Claim 622/KPWU's Stipulated Withdrawal

In April 1997, the United States filed Claim 622, asserting a non-consumptive water right to maintain high, year-round elevations in Upper Klamath Lake on behalf of the Klamath Tribes.<sup>7</sup> Claim 622 was amended in October 1999, after which the claim and all its contests were consolidated into Case 286 before the Office of Administrative Hearings (OAH).<sup>8</sup>

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<sup>4</sup> KBA\_ACFFOD\_00001.

<sup>5</sup> KBA\_ACFFOD\_00007.

<sup>6</sup> KBA\_ACFFOD\_00002.

<sup>7</sup> KBA\_ACFFOD\_04949.

<sup>8</sup> KBA\_ACFFOD\_04949.

Case 286 worked its way through the administrative process until 2009, when claimants and contestants reached an agreement to resolve the Upper Klamath Lake dispute in anticipation of a comprehensive, basin-wide settlement agreement.<sup>9</sup> Although some discovery was taken on Case 286 between 2007 and 2009, KPWU withdrew their contests to Claim 622 pursuant to the agreement with claimants before completing discovery or submitting evidence in support of their exceptions.

The withdrawal agreement provided that KPWU would not contest Claim 622 during the administrative proceedings in exchange for an interim “no-call agreement” from the United States and the Tribes, pending the basin-wide settlement.<sup>10</sup> KPWU’s withdrawal was also conditioned on subsequent congressional action implementing the Klamath River Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities (commonly known as KBRA).<sup>11</sup> Pursuant to the withdrawal stipulations, KPWU reserved the right to fully litigate their interests in Claim 622 if the basin-wide settlement failed.<sup>12</sup>

An order reflecting that agreement was entered on June 19, 2009.<sup>13</sup> In relevant part, the terms of KPWU’s stipulated withdrawal provided that:

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<sup>9</sup> KBA\_ACFOD\_04938.

<sup>10</sup> KBA\_ACFOD\_04941-44.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> OWRD\_0638425-36. The parties jointly amended the stipulated withdrawal agreement in April 2012 -- updating it to reflect the terms of the Restoration Agreement. KBA\_ACFOD\_04982-90.

“If the [KBRA] does not become effective . . . the conditional withdrawal by KPWU of their contests in Case 286 shall no longer be in effect. Thereafter, the Parties shall be entitled to fully litigate KPWU’s exceptions, and KPWU shall be entitled to fully litigate the exceptions of the Klamath Tribes and United States or any other party, to any Findings of Fact and Order of Determination on [Claim 622] as required by ORS 539.150. \* \* \* KPWU’s right to fully litigate shall include all sufficient time to prepare and present and defend in the case and discovery opportunities equivalent to those of other parties; and all other parties to the case shall have equivalent opportunities to litigate against KPWU’s exceptions.”<sup>14</sup>

Ultimately, the “no-call agreement” lapsed because the Secretary of the Interior declined to make certain findings and the KBRA failed because Congress did not pass the necessary implementing legislation by December 31, 2015.<sup>15</sup> Thus, KPWU’s stipulated withdrawal became ineffective and their right to fully litigate their exceptions to Claim 622 reemerged.

**B. The ALJs' Treatment of the Moderate Living Standard.**

The ALJs failed to apply the moderate living standard because they determined that it was beyond the scope of their inquiry. From July 2005 to April 2006, UBI, KPWU, and US/KT sought rulings on the appropriate quantification standard to be used in the administrative adjudication.<sup>16</sup> While not binding on the proceedings, the ALJs chose to adopt the standards described in *Adair III*, which reconciled the healthy and productive habitat metric with the moderate living standard by explaining them as a two-step process: (1) quantify the Tribes’ water rights necessary to support a healthy and productive habitat; and (2) curtail the Tribes’ water rights to the extent that they provide treaty resources in excess of a moderate living.<sup>17</sup>

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<sup>14</sup> OWRD\_0638427-28.

<sup>15</sup> KBRA § 15.3.4(A)

<sup>16</sup> KBA\_ACFOD\_04949.

<sup>17</sup> KBA\_ACFOD\_04962; *See U.S. v. Adair*, 187 F Supp 2d 1273, 1276-78 (D. Or. 2002) (*Adair III*) (judgment vacated and further federal proceedings stayed by *U.S. v. Braren*, 338 F 3d 971

The ALJs also followed *Adair III*'s guidance on the application of *Adair II*'s "as currently exercised" language -- interpreting it as an ongoing present-tense reference, squarely opposed to contestants' efforts to quantify the Tribes' water rights based on resource circumstances at a fixed point in time.<sup>18</sup> The ALJs concluded that this language was relevant to the moderate living standard.<sup>19</sup>

However, the ALJs decided that the moderate living inquiry should be conducted in a separate proceeding before a different tribunal.<sup>20</sup> In their view, the moderate living standard presents a usage question of treaty resources -- which would require substantial sociological and economic analyses -- that fell outside the limits of their purpose and authority.<sup>21</sup> As such, the ALJs recommended that the moderate living standard be applied by a court of general jurisdiction in subsequent proceedings.<sup>22</sup>

## **II. Prior Court Rulings**

### **A. Moderate Living Standard.**

The ALJs' decision not to apply the moderate living standard was rejected by the court in its February 24, 2021, Opinion. There, the court approved the two-step quantification process

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(9th Cir. 2003)). Although this formulation of the quantification process was most clearly articulated in *Adair III*, it was based on principles that were established earlier in *Adair I* (478 F Supp 336 (1979)) and *Adair II* (723 F 2d 1394 (1983)). Moreover, this court upheld the ALJ's reliance on the analysis in *Adair III*, even though the *Adair III* judgment was later vacated. See Opinion dated February 24, 2021, on Phase 3, Part 1, Group C Motions, p. 15 n.1.

<sup>18</sup>Amended Order dated February 13, 2007, on Motions for Rulings on Legal Issues.

<sup>19</sup> KBA\_ACFOD\_04962.

<sup>20</sup> KBA\_ACFOD\_04962-64.

<sup>21</sup> KBA\_ACFOD\_04964.

<sup>22</sup> KBA\_ACFOD\_04963.

adopted by the ALJs under *Adair III*.<sup>23</sup> However, the court ordered that the moderate living standard be applied within the KBA, rather than a separate proceeding before a different tribunal.<sup>24</sup> The court also clarified the proper inquiry: “The ‘reservation of water \* \* \* sufficient to support exercise of treaty hunting and fishing rights’ is determined by the healthy and productive habitat standard.”<sup>25</sup> But “[t]hat reservation is \* \* \* limited by the moderate living standard \* \* \* as *Adair II* instructs.”<sup>26</sup>

The court also considered some of the practical ramifications of applying the moderate living standard, pointing out that it “may not have much effect” because “the water level cannot be reduced below \* \* \* the minimum required for a healthy and productive habitat.”<sup>27</sup> Put differently: “A level of water that is more than the minimum required for a healthy and productive habitat could be reduced by the moderate living standard; a level of water that is already the minimum cannot.”<sup>28</sup>

#### **B. UBI's Motion No. 5/Court's Ruling on Clarification**

UBI's Phase 3, Part 1, Group C Motion No. 5 asked the court to vacate and remand the Adjudicator's quantifications in several of the Tribes' claims based on the ALJs' failure to apply the moderate living standard to the initial determination of their instream water rights.<sup>29</sup> UBI's

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<sup>23</sup> Opinion dated February 24, 2021, on Phase 3, Part 1, Group C Motions, p. 15 n. 1.

<sup>24</sup> *Id.* at 16.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 17.

<sup>28</sup> *Id.*

<sup>29</sup> UBI Motion No. 5, dated December 20, 2019.

motion also sought to use current tribal harvest levels as the proper quantification standard, characterizing the healthy and productive habitat metric as a wilderness servitude.<sup>30</sup>

The court's original February 24, 2021, Opinion simply stated that UBI's Motion No. 5 was "granted," making it appear as if the court was granting UBI's request for vacatur while addressing the application of the moderate living standard as the second part of the two-step process. However, the court clarified its ruling in Case Management Order No. 54, addressing the Tribes' motion for clarification. The February 24, 2021, Opinion was amended to reflect that the court had meant to grant UBI's Motion No. 5 in part and deny it in part. The net effect was to specify the application of the moderate living standard without disturbing the Adjudicator's initial in-stream quantifications under the healthy and productive habitat metric.<sup>31</sup>

### **C. Good Cause Standard.**

In August 2017, the court concluded that non-record evidence "may be taken for good cause shown which will be determined on a case-by-case basis."<sup>32</sup> The court further concluded that it would apply the "guidelines" in the first sentence of ORS 183.482(5) to determine whether good cause exists.<sup>33</sup>

Five years later, in an opinion issued August 12, 2022, the court adhered to the "good cause" standard, rejecting arguments advanced by several parties that they had a statutory or constitutional right to present testimony and non-record evidence in the circuit court without

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<sup>30</sup> *Id.* at 5-6.

<sup>31</sup> Case Management Order No. 54 dated April 7, 2021, Ex. A at 2.

<sup>32</sup> Opinion letter dated August 1, 2017, on six Phase 1B issues, p. 3.

<sup>33</sup> Opinion letter dated August 1, 2017, on six Phase 1B issues, p. 3.



demonstrating "good cause" for consideration of that evidence.<sup>34</sup> The court explained that "good cause" under ORS 183.482(5) generally meant that "the evidence must be 'material' and there were 'good and substantial reasons' for failing to submit it in support of a claim or an exception to a claim."<sup>35</sup> The court further explained that, because it is using the "good cause" standard "for guidance only" it would not be required to strictly follow the case law applying that standard in the context of judicial review of a contested cases under the Oregon Administrative Procedures Act.<sup>36</sup>

#### **D. Discovery/Procedures on Remand**

To date, the court has not had occasion to determine the specific procedures on remand for the consideration of additional non-record evidence. However, the court has provided some general guidance on the subject.<sup>37</sup>

First, statutory authority vests the court with discretion to, "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."<sup>38</sup> Upon remand, the director or court-appointed referee is empowered to modify the ACFFOD to the extent warranted by the new evidence introduced.<sup>39</sup> Additional discovery may

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<sup>34</sup> Opinion dated August 12, 2022, on motions to present non-record evidence on non-tribal (Phase 3, Part 2, Groups A and B) claims.

<sup>35</sup> *Id.* at p. 6, n. 8.

<sup>36</sup> *Id.*

<sup>37</sup> *See* Opinion letter dated August 1, 2017, on six Phase 1B issues.

<sup>38</sup> *Id.* at 3 (citing ORS 539.150(3)).

<sup>39</sup> *Id.* at 3.

be available if the court determines that non-record evidence can be introduced.<sup>40</sup> If permitted, such discovery shall proceed under the rules of the hearing forum.<sup>41</sup>

## DISCUSSION

### I. KPWU's Motion

KPWU contend that their stipulated withdrawal from the contested case proceedings on claim 622 pursuant to the KBRA deprived them of the opportunity to present evidence in support of their exceptions to that claim. In KPWU's view, they reserved the right to present evidence in support of their exceptions if the contingencies contemplated in KBRA did not occur and the agreement terminated. As noted above, OWRD does not object to KPWU's motion. The US/KT do not dispute that KPWU's stipulated withdrawal from the contested case proceedings in accordance with the KBRA amounts to good and substantial reasons for KPWU's failure to submit evidence in support of their exceptions during the contested case proceedings. Instead, the US/KT contend that KPWU have failed to satisfy the "second prong" of the good cause standard because they did not show with sufficient specificity that the evidence KPWU seek to introduce would be material.

The court agrees with KPWU and OWRD. As previously explained, the court is using the good cause standard in ORS 183.482(5) *for guidance* in determining whether non-record evidence should be considered. Showing "good and substantial reasons" and "materiality" as described in ORS 183.482(5) should not be understood as discrete "prongs" of a "two-prong"

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<sup>40</sup> Opinion letter dated August 1, 2017, on six Phase IB issues, p. 4.

<sup>41</sup> *Id*

test. Rather, they are factors that the court may consider in deciding whether a moving party has established "good cause" to submit non-record evidence.

Thus, where a party has had a full opportunity to present evidence in support of a claim or an exception to a claim -- as in connection with the motions to submit non-record evidence on non-tribal claims addressed in the August 12, 2022, opinion -- the party will need to address both factors to convince the court that additional non-record evidence should be considered at this stage of the proceedings. Here, KPWU withdrew from the contested case proceedings without submitting any evidence in support of their exceptions to claim 622 in accordance with the KBRA, and all parties agreed that KPWU would have an opportunity to submit their evidence if the conditions for implementing the KBRA were not met. That is sufficient "good cause" to give KPWU the opportunity to submit non-record evidence in support of their exceptions to claim 622.

However, that does not mean there must be a complete "do-over" of claim 622. Before withdrawing from the contested case proceedings, KPWU filed their exceptions and participated in discovery in support of their position. KPWU withdrew from the contested case proceedings before the time for completing discovery closed. Thus, KPWU had an opportunity to conduct some discovery; they are not entitled to completely re-do the discovery already conducted. But they are entitled a reasonable opportunity to *complete* discovery. As this court previously stated, the scope and extent of any additional discovery will be determined by the forum that will receive the evidence.<sup>42</sup>

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<sup>42</sup> See Opinion letter dated August 1, 2017, on six Phase IB issues, p. 3; Opinion dated August 12, 2022, p. 7.

KPWU are not entitled to cross-examine the witnesses who testified during the contested case proceedings. By withdrawing from the proceedings, KPWU gave up their right to cross-examine the witnesses who testified during the contested case proceedings. Nothing in the parties' stipulation demonstrates an intent to reopen the proceedings for cross-examination of witnesses whose direct testimony was received many years ago.<sup>43</sup>

Instead, the court understands the parties' stipulation -- that KPWU can pursue and fully litigate their exceptions to claim 622 if the KBRA is not implemented -- to mean that (1) on remand, KPWU can finish whatever discovery is allowed on remand, present their evidence for consideration in that forum, and submit argument in support of their exceptions; and (2) upon review in the circuit court, KPWU can submit argument in support of their exceptions based on the record created during the contested case proceedings, as supplemented on remand. The court does not interpret the parties' stipulation to mean that discovery must be completely re-opened or that witnesses who testified in the contested case proceedings must be re-called for cross-examination by KPWU, either on remand or on review in the circuit court.

On remand, KPWU should submit whatever evidence they want to present on the "moderate living standard" that must be taken into consideration on claim 622. The parties disagree on how that standard affects the quantification of the tribal water rights. US/KT contend that KPWU seek to re-litigate the quantification standard by placing the burden of proof/persuasion on the US/KT to quantify the water right based on the current use of natural

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<sup>43</sup> The fact that the parties stipulated that KPWU can "fully litigate" their exceptions to claim 622 does not mean that KPWU are now entitled to cross-examine the witnesses who originally testified during the contested case proceedings. At the time of the stipulation, there was no guarantee that the witnesses who had testified during the contested case proceedings would be re-called to testify again, regardless of whether that testimony is taken in the contested case proceedings or in the circuit court.

resources by tribal members. KPWU acknowledge that the court's prior rulings on this issue are "law of the case" and argue that it is the US/KT that are seeking to re-litigate the court's adoption of the "moderate living standard" and how it applies in this context.

In the court's February 24, 2021, Opinion, the court ruled that the two-step process for quantifying the tribal water right "is correct with the addition of the moderate living standard in the second step."<sup>44</sup> Citing *Adair III*, the court indicated that the reservation of water sufficient to support exercise of treaty hunting and fishing rights "is determined by the healthy and productive habitat standard."<sup>45</sup> That reservation, the court explained, "is limited by the 'moderate living standard' as *Adair II* instructs."<sup>46</sup>

Implicit in the court's ruling was a determination of who has the burden of proof and persuasion on this issue. That understanding was made more explicit in *Adair III*, which stated that, consistent with the decisions in *Washington v. Fishing Vessel Ass'n*, 443 US 658, 685 (1979), and *United States v. Washington*, 873 F Supp 1422, 1445-46 (WD Wash 1994), *aff'd in relevant part, rev'd in part*, 135 F 3d 618 (9<sup>th</sup> Cir 1998), *opinion amended and superseded on other matters*, 157 F 3d 630 (9<sup>th</sup> Cir 1998), step two of the two-step process places the burden on "the parties opposing the tribal right" to produce evidence and persuade the court that "the full resource amount claimed by the tribes was in fact not necessary to provide the tribes with a moderate living."<sup>47</sup> The court in *Adair III* further explained that "if reducing the full resource amount would result in reducing the water level below that which is necessary to support

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<sup>44</sup> Opinion dated February 24, 2021, on Phase 3, Part 1, Group C motions, p. 16.

<sup>45</sup> Order dated June 7, 2022, clarifying February 24, 2021, opinion, at Ex. D, p. 1.

<sup>46</sup> *Id.*

<sup>47</sup> *Adair III*, 187 F.Supp 2d at 1278.

productive habitat, no such reduction may be made regardless of the outcome of the moderate living standard analysis."<sup>48</sup> This court has already determined that the reasoning in *Adair III* "makes sense" in this context.<sup>49</sup>

Thus, the court has already ruled that the burden of proof and persuasion is on the party opposing the tribal right -- in this instance, KPWU -- in accordance with *Adair II* and *Adair III*. The court makes explicit its continued adherence to that ruling, including the explanation stated in this opinion. On remand, the court's ruling on the "moderate living standard" and how that standard will be applied remains the governing law of the case.

## **II. UBI's Motion**

Unlike KPWU, UBI fully participated in the contested case proceedings and did not withdraw from those proceedings or participate in the KBRA. UBI relies on the court's decision requiring consideration of the "moderate living standard" to establish "good cause" to submit additional non-record evidence. UBI also contends that it did not have a full and fair opportunity to conduct discovery and develop evidence during the contested case proceedings, and that additional hydrological evidence --including new stream flow estimates -- must be developed and considered. UBI further contends that the quantification of the tribal water rights should be vacated and the matter remanding to a referee, not to the OAH.

In response, OWRD contends that UBI's motion should be granted only with respect to submission of additional evidence on the "moderate living standard" and otherwise denied. US/KT contend that UBI's motion should be denied in its entirety.

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<sup>48</sup> *Id.*

<sup>49</sup> Opinion dated February 24, 2021, on Phase 3, Part 1, Group C motions, p. 15, n. 1.

The court agrees with OWRD; UBI's motion is granted in part. Because the ALJ declined to consider the "moderate living standard" during the contested case proceedings, on remand, UBI is entitled to submit evidence and argument on that standard. That does not mean that additional discovery is required; UBI had a full opportunity to conduct discovery related to the "moderate living standard" during the contested case proceedings. On remand, UBI can request an opportunity to conduct additional, limited discovery as may be needed to supplement the record, but the tribunal addressing that request is not required by this court to grant (or to deny) UBI's request.

As for UBI's request to vacate the quantification of tribal claims, UBI contends that the court's February 24, 2021, Opinion stating that UBI's motion #5 -- which requested, among other things, to vacate the quantification of all tribal claims -- is granted means that the court has already decided the quantification must be vacated. The court disagrees. As explained above, the court subsequently clarified the rulings contained in the February 24, 2021, Opinion, indicating that UBI's motion # 5 was only granted in part. The court did not then -- and does not now -- vacate the quantification of tribal claims in the ACFFOD pending any modification of the quantification of the tribal water rights. On remand, the quantification of the tribal claims may be adjusted -- or not -- after considering whatever effect the "moderate living standard" may have on the determination of the tribal water rights.

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. The director may -- but is

not required to by this order -- delegate the responsibility for conducting the additional contested case proceedings to one or more administrative law judges from OAH in accordance with ORS 183.635(1).

Finally, UBI contends again that their constitutional rights are being violated by the procedures adopted by the court in this adjudication. The court addressed the constitutional arguments in its August 12, 2022, opinion. The court does not believe that UBI's constitutional rights have been or will be violated for the reasons stated in that opinion.

### **III. Mosby Motion**

Mosby seeks to present additional non-record evidence in support of its exceptions to claim 623 (Klamath Marsh) and 625-640 (Williamson River) for the same reasons asserted by UBI. Mosby's motion is granted in part and denied in part, consistent with the court's rulings on UBI's motion.

### **IV. Procedures on Remand**

To summarize, pursuant to ORS 539.150(3), these proceedings are remanded to the OWRD director to take further evidence on (1) KPWU's exceptions to claim 622, including evidence on how the "moderate living standard" may affect the quantification of the tribal water rights, if at all; (2) how the "moderate living standard" may affect the quantification of the tribal water rights granted in the claims challenged by UBI, if at all; and (3) how the "moderate living standard" may affect the quantification of the tribal water rights granted in the claims challenged by Mosby, if at all.

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 cases proceedings

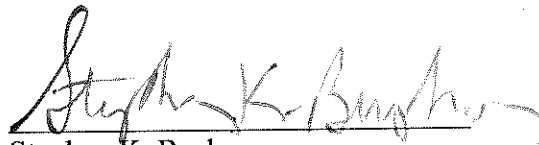


on remand. Any requests for discovery will be submitted to and decided in the forum that will take the additional evidence.

### **CONCLUSION**

This opinion sets forth the court's rulings on the motions to present non-record evidence on tribal (Phase 3, Part 2, Group C) claims. For the reasons discussed in this opinion, the motions to present non-record evidence filed by KPWU, UBI, and Mosby are granted in part and denied in part. The contested claims affected by those motions are remanded to the OWRD director for further proceedings consistent with this opinion. OWRD's counsel shall submit a form of order consistent with this opinion.

Dated this 7th day of June, 2023.

  
Stephen K. Bushong  
Klamath County Circuit Court Judge *pro tem*