



CAROLLO LAW GROUP LLC  
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2315 OLD HIGHWAY 99 SOUTH, P.O. BOX 2456, ROSEBURG, OR 97470 | PHONE: 541-957-5900 | FAX: 541-957-5923 | [WWW.CAROLLOLEGAL.COM](http://WWW.CAROLLOLEGAL.COM)

DOMINIC M. CAROLLO, MANAGING ATTORNEY  
EMAIL: [DCAROLLO@CAROLLOLEGAL.COM](mailto:DCAROLLO@CAROLLOLEGAL.COM)

June 16, 2022

Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem OR, 97301

**Re: Comments of Ft. Klamath Critical Habitat Landowners, Inc., et al. In  
Opposition to Temporary Rules to Clarify Applicability of Automatic Stay**

## **I. Background**

Fort Klamath Critical Habitat Landowners, Inc., NBCC, LLC, Agri Water, LLC, Roger Nicholson, Martin Nicholson, Goose Nest Ranches, LLC, Randall Kizer, Gerald Hawkins, Harlowe Ranch, LLC, and E. Martin Kerns (together, “Ft. Klamath Landowners”) offer the following comments opposing the proposed temporary rules to clarify the applicability of the automatic stay provision under ORS 536.075 (“temporary rules”). Our client, Water For Life, Inc. also joins these comments.

ORS 536.075, and the automatic stay provision of ORS 536.075(5), plays an integral role in the appeal of orders from the Oregon Water Resources Department (OWRD) by prohibiting potentially-disastrous final orders from taking effect before effective judicial relief can be granted, while simultaneously allowing to agency to enforce otherwise-stayed final orders if necessary to avoid substantial public harm. In recent years, the automatic stay provision of ORS 536.075(5) has been repeatedly attacked under the false premise that it has been a vehicle for abuse by litigants. In fact, the vast majority of lawsuits filed against OWRD under ORS 536.075(5) have been settled on terms favorable to the petitioners who filed the lawsuits or OWRD has lost the lawsuits outright. In light of this background, it is appalling that OWRD is proposing a temporary rule that would eliminate the applicability of the ORS 536.075 stay provision to a wide swath of OWRD final orders in direct violation of the statute, ignorance of the legislative history, and without any justification besides to assist themselves in ongoing litigation. Because the proposed temporary rules directly contradict the statute, are entirely unjustified, and are simply a method to eliminate an ongoing stay in current litigation for the benefit of the department, the state of California, and private parties the Commission should **reject** the temporary rules.

Water is, of course, a vital resource. Any decision by the commission or department which may affect the availability, allocation, diversion, etc. of water can have sweeping impacts to individuals, communities, the state, and even this Country. It was likely with this in mind that the Oregon Legislature in 1985 made a deliberate choice to prescribe special requirements and procedures for judicial review of all OWRD final orders. These special requirements prescribe that OWRD final orders are automatically stayed, preventing unlawful final orders from destroying one’s

interest in their crops, livestock, water rights, nature, environment, or more before effective judicial relief can be granted.<sup>1</sup> Put simply, this is a unique situation that calls for a unique legal process; and that is exactly what the Legislature wisely prescribed in 1985 in ORS 536.075.

In 2021 the Oregon legislature amended the automatic stay provision. Originally, this 2021 amendment to ORS 536.075 proposed to nullify the stay for final orders which regulated off a diversion, appropriation, or other use of surface or ground water in favor of a senior water right. The amendment to ORS 536.075 that was passed, however, instead added certain requirements—the service of a petition for review on the agency and the court—that must be met before the ORS 536.075(5) automatic stay applies to a *specific category* of final orders. Now, OWRD is proposing that the Commission make a new sweeping change to ORS 536.075 through the adoption of a temporary rule that would eliminate the applicability of the automatic stay provision for what the agency has deemed “non-regulatory” final orders—a significant proportion of all final orders issued by OWRD.

The importance—and egregiousness—of the proposed temporary rules and the agency’s process for their adoption cannot be understated. The temporary stay provision of ORS 536.075(5) is the shield which permits those that utilize and/or enjoy Oregon’s water resources from being stripped of their interests without having an opportunity for effective judicial recourse. Appallingly, the regulatory process being used to propose these rules for adoption is itself attempting to illegally and secretly circumvent the express statutory requirements of ORS 536.075. Ft. Klamath Landowners were first made aware of the proposed temporary rules from OWRD counsel Renee Moulon on June 3 because these rules will affect ongoing litigation between Ft. Klamath Landowners and OWRD. However, Ft. Klamath Landowners were unable to obtain a copy of the proposed rules until 2.5 days before the June 17 hearing when the Staff Report was finally published, despite requesting a copy of the rules on June 3. To propose such a substantial change to a vitally-important statute on 2.5-days’ notice is unacceptable, leaving the Commission with inadequate or insufficient time to discover the illegality and risk posed by the proposed temporary rules.

Moreover, the justifications for the temporary rules given in the Staff Report are founded on false premises. The Staff Report asserts that “[i]ncreasingly, ... petitioners seeking review of final orders assert that the automatic stay provision applies to Department orders that authorize and allow the transfers of existing water rights.” Ft. Klamath Landowners are the petitioners the staff report references. *See* Ft. Klamath Landowners’ Interests, *infra*. However, Ft. Klamath Landowners has *never* asserted in its ongoing litigation with OWRD that ORS 536.075(5) automatically stayed enforcement of the temporary transfer of water rights being litigated.<sup>2</sup> Instead, it has been OWRD’s *own position* that ORS 536.075(5) applied to a challenge to a transfer of water rights. It is insulting that the staff report is painting Ft. Klamath Landowners as a bad actor somehow abusing the ORS

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<sup>1</sup> Because an “order in other than contested case” is, by definition, *issued without any prior due process*, the stay provision in ORS 536.075(5) ensures that when such final orders are subject to judicial review, they will not be enforced until after the petitioner is afforded due process in circuit court, unless the agency makes the requisite finding of “substantial public harm.”

<sup>2</sup> Nor are Ft. Klamath Landowners aware of any other lawsuit where any other party has asserted that ORS 536.075(5) stayed a transfer of water rights. To our knowledge, it has always been OWRD’s *own position* that ORS 536.075(5) applied to all challenged final orders.

536.075(5) automatic stay when in fact it is *OWRD* who has rightfully assumed the automatic stay applies to *all* final orders challenged under ORS 536.075.

These temporary rules are already tainted. The blatant deception, woefully insufficient justifications, and legally-deficient administrative process used for the proposed temporary rules should be of utmost concern to the Commission. That the rules are outright-inconsistent with ORS 536.075 and, therefore, illegal just tops it all off. The Commission should **reject** the proposed adoption of these unlawful temporary rules.

## **II. Ft. Klamath Landowners' Interests**

Ft. Klamath Landowners are the owners of real property in the Wood River Valley in Klamath County, Oregon. Ft. Klamath Landowners' properties enjoy appurtenant water rights for irrigation and stock watering. Some of Ft. Klamath Landowners' water rights have been provisionally recognized in the Klamath Basin Adjudication as having a priority date of 1864. Other Ft. Klamath Landowners hold water rights that were adjudicated in the prior adjudication of the Wood River, with pre-1909 priority dates, while some hold water rights that were issued by OWRD after 1909. Within the last few years, Ft. Klamath Landowners have all been issued written shut-off orders which have resulted from senior calls on the river by instream water rights held by the BIA and have, in many cases, required them to cease all irrigation and stock water use from Wood River and/or its tributaries (*e.g.* Fort Creek, Crooked Creek, Annie Creek, and Sun Creek).

Currently, Ft. Klamath Landowners are engaged in litigation concerning OWRD's decision to permit the temporary transfer of water from the Wood River Valley to the Lower Klamath Wildlife Refuge in California. Ft. Klamath Landowners are concerned that such a transfer will result in additional shut-off orders of their own water rights to serve the transferred water right. Therefore, on September 20, 2021 Ft. Klamath Landowners filed a lawsuit challenging OWRD's unlawful final order approving the temporary transfer. In March of 2022, Ft. Klamath Landowners served a Request for Production of documents on OWRD, hoping to receive responsive records and brief the merits of the lawsuit before any diversions may be made to serve the temporary transfer this summer. OWRD did not produce documents responsive to Ft. Klamath's request until June 14—the same day OWRD released the Staff Report for the proposed temporary rules.

At this time the temporary transfer is unlikely to be enforced because of OWRD's recognition that the automatic stay provision of ORS 536.075 applies.<sup>3</sup> Determining, by rule, that ORS 536.075 does not apply to challenged orders such as the temporary transfer order currently being litigated by Ft. Klamath Landowners would substantially harm their ability to obtain effective judicial relief,

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<sup>3</sup> To be clear, Ft. Klamath Landowners have not themselves asserted that the automatic stay applies. Since the inception of this lawsuit, it has been assumed by all parties that the ORS 536.075(5) automatic stay applies to OWRD's final order approving the temporary transfer. Now, instead of determining that the stay not apply to avoid "substantial public harm" consistent with ORS 536.075(6), OWRD is asking the Commission to adopt a rule which would eliminate the stay for this litigation. OWRD's justification for the temporary rule is, of course, that substantial public harm may result without it. OWRD is simply circumventing ORS 536.075 and asking the Commission to adopt unlawful rules to avoid the automatic stay.

cause confusion and inefficiencies in the ongoing litigation, and would run afoul of the current statutory scheme.<sup>4</sup>

### III. Argument

#### A. The Temporary Rules are Inconsistent with ORS 536.075.

The proposed temporary rules are an unprecedented—and unwarranted—departure from OWRD’s statutory authorities and create a clearly-unlawful regulatory scheme whereby the department ignores all reasonable meaning of the word “enforcement” as well as all reasonable interpretations of ORS 536.075 in order to contrive of a regulation which will hamstring current and future litigants of OWRD’s orders. The proposed temporary rules directly contradict ORS 536.075 and would therefore be unlawful pursuant to ORS 183.400. Therefore, the Commission should not adopt the temporary rules.

The temporary rules take ORS 536.075 and turn it on its head. Instead of applying the automatic stay provision to all OWRD final orders as the statute contemplates, the temporary rules take the novel approach of finding that ORS 536.075(5) may only stay *OWRD’s newly-defined enforcement* of Final Orders, therefore any final orders which OWRD does not *themselves* enforce according to their unsupportable definition of enforcement are not stayed.

ORS 183.400 provides that a rule is invalid if the rule: “(a) Violates constitutional provisions; (b) Exceeds the statutory authority of the agency; or (c) Was adopted without compliance with applicable rulemaking procedures.” The temporary rules exceed the statutory authority of the agency, and therefore are unlawful.<sup>5</sup> Oregon courts follow a methodology for interpreting statutes and determining whether rules are within an agency’s statutory authority. “First, the court examines the text and context of the statute.” *State v. Gaines*, 346 Or. 160, 164, 206 P.3d 1042, 1046 (2009). Next, the court considers the legislature’s intent. *Id.* Finally, if the statute is not clear after the first two steps, the court turns to general maxims of statutory construction. *Id.*

ORS 536.075 is clear that the automatic stay provision applies to all final orders issued by OWRD or the Water Resources Commission. ORS 536.075(1) is unambiguous that *any* person affected by *a* final order may appeal that order. ORS 536.075(5) is similarly unambiguous that, when such orders are appealed, they are automatically stayed. The only time a final order from OWRD is not stayed under ORS 536.075 is when the agency determines that “substantial public harm” would result from the stay or if the appealed order is a regulatory order and the protestant does not serve the

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<sup>4</sup> The temporary rules would cause judicial inefficiencies by either forcing Ft. Klamath Landowners to file a preliminary injunction to stay the enforcement of the clearly-unlawful temporary transfer—a litigation strategy which will likely result in OWRD incurring tremendous attorney’s fees—or Ft. Klamath Landowners will be required to wait until the temporary transfer results in shut-off orders and then be forced to file *another lawsuit* challenging a call of their water rights to fulfill the water rights subject to the temporary transfer, which would then result in stay under ORS 536.075.

<sup>5</sup> The temporary rules also may violate constitutional provisions and were adopted without compliance with applicable rulemaking procedures. These arguments could be better developed, but the temporary rules were not made publicly available until a mere 2.5 days prior to the hearing, leaving Ft. Klamath Landowners unable to fully evaluate the rules. Because the rules, if adopted, were done so in such a rash and secretive manner, such that the public could not provide meaningful insight, it is likely that the rules violated applicable rulemaking procedures.

petition for judicial review on the commission or OWRD or the proof of service is not filed with the court. In other words, all orders appealed under ORS 536.075 are automatically stayed *unless* there is a finding of “substantial public harm” or a regulatory order is being challenged but the petition is not properly served or the proof of service not properly filed.

From this unambiguous statutory scheme, it is clear that limiting the automatic stay provision to only regulatory orders would violate the text of ORS 536.075. Courts have found that ORS 536.075 applies to non-regulatory final orders. In *WaterWatch of Oregon, Inc. v. Water Res. Dep't*, 259 Or. App. 717, 730, 316 P.3d 330, 337 (2013) the court found that the automatic stay provision would be applicable to a challenge to OWRD’s granting of an extension of time to perfect water rights. Nothing in the statute permits the Commission to limit the automatic stay provision to regulatory orders. In fact, the statute contemplates just the opposite by carving out an exception *specifically for* regulatory orders. See *Nw. Nat. Gas Co. v. City of Gresham*, 359 Or. 309, 323, 374 P.3d 829, 838 (2016) (“Another corollary of that maxim of construction is that, if the legislature uses *different* terms in related statutes, it likely intended them to have different meanings. *Dept. of Transportation v. Stallcup*, 341 Or. 93, 101, 138 P.3d 9 (2006). And finally, *inclusio unius est exclusio alterius*—the inclusion of one is the exclusion of the other—appears to have some bearing here.”). Where the legislator specifically made an exception for regulatory orders, adding certain requirements to the applicability of the automatic stay provision to regulatory orders, *but did not do so for any other orders* it is clear that the statute applies the automatic stay to all final orders reviewed under ORS 536.075.

The proposed attempt to make ORS 536.075 only apply to orders OWRD is actively enforcing ignores both the statute and the plain meaning of the term “enforce.” OWRD “enforces” an order when it issues it. Thus, when such an order is stayed, OWRD’s giving affect to that order is stayed. The temporary rule runs afoul of this clear statutory interpretation and therefore must not be adopted.

The term “enforce” means “to give force or effect to.” ENFORCE, Black's Law Dictionary (11th ed. 2019); ENFORCE, Merriam-Webster (last accessed June 15, 2022) <https://www.merriam-webster.com/dictionary/enforce>. When OWRD issues a final order, they “give force or effect” to that order. In other words, they “enforce” that order. That enforcement does not stop if the beneficiary of the order themselves operate the terms of the order. In other words, OWRD does not stop giving effect to an order simply because the beneficiary is the one operating under the order. If OWRD did stop giving force to such an order, there is no question that the order would no longer be valid. It cannot be questioned that an order is only valid so long as OWRD gives force or effect to that order—i.e., so long as OWRD *enforces* the order. The temporary rules propose that the opposite is true—that an order still has effect even if *OWRD* is not giving effect to that order. That is simply implausible.

Take, for example, an order approving a temporary transfer application. OWRD gives said order “force or effect.” If OWRD stops giving the order force or effect, then the order is no longer valid and the beneficiary can no longer operate under the temporary transfer. Thus, the order’s effectiveness depends on OWRD’s continued “enforcement” of the order. Under the temporary rules, once OWRD approves a temporary transfer the rules suggest that the order would operate in a void, untethered to OWRD, who would no longer be “enforcing” the order, not being given affect by any law, and thus simply operating outside the bounds of the government. Of course, that is not how our system of laws work. One simply cannot legally operate outside the bounds of the government. If

such were true, our system of laws would be meaningless. The temporary rules are implausible for suggesting that OWRD does not “enforce” orders where the order beneficiary primarily operates under the order. OWRD cannot create a void where orders operate outside the bounds of the law, nor can OWRD both “give force or effect” to an order and simultaneously not “enforce” the order. This directly contradicts the language of ORS 536.075 and therefore is unlawful.

Because the temporary rules would exceed the agency’s statutory authority under ORS 536.075 by limiting the applicability of the automatic stay provision despite clear legislative language to the contrary, the proposed temporary rules would be unlawful if adopted. Therefore, Ft. Klamath Landowners urge the Commission not to adopt the temporary rules.

**B. The Justification for the Temporary Rules is Meritless.**

ORS 536.075 provides that the temporary stay provision can be sidestepped upon a finding that the stay would result in substantial public harm. The temporary rules purport to find, *through a hasty rulemaking where the public was first able to view the rules 2.5 days prior to the hearing*, that “substantial public harm” exists without actually following the requirements of ORS 536.075.

The staff report for the temporary rules argues that they are justified because: “In light of the serious drought conditions covering much of this state, the inability to use water where such use is authorized will seriously prejudice the interests of those persons who have been granted authority to use water but are precluded from doing so because they do not know whether using water as authorized by the order would or would not be lawful.”<sup>6</sup> Ultimately, what the staff report seems to suggest is that the enforcement of the ORS 536.075(5) stay provision will result in “substantial public harm,” and therefore the stay provision should not impact a certain class of final orders.

If the agency wishes to eliminate the stay for certain final orders upon a finding of substantial public harm, OWRD must do so through the statutory requirements of ORS 536.075(6). This means that the automatic stay may be denied *only* if the commission or department finds, *in writing*, that substantial public harm *will* result from staying the final order and, if the petitioner so requests, a hearing is held on the substantial public harm that may result. Here, the agency is attempting to eliminate the automatic stay, is justifying its rulemaking by suggesting that substantial public harm will result if the stay isn’t eliminated, but has not found, in writing, that substantial public harm *will* result and is not offering any party *the option of a hearing* to determine whether substantial public harm will result. Thus, the temporary rules directly run afoul of ORS 536.075(6) and therefore should be denied.

**C. The Agency Has Not Demonstrated Serious Prejudice to Public Interest or a Need for the Temporary Rules.**

The staff report prepared for the temporary rules does not lawfully find that a failure to act will result in serious prejudice or lawfully state the purpose and need for the rules. As recognized in

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<sup>6</sup> If there is such an urgent need to prevent the stay of temporary water right transfers, OWRD should simply find that the automatic stay not apply due to “substantial public harm” consistent with ORS 536.075(6). Instead, OWRD is using an unfounded fear of substantial public harm to justify new rules instead of making the requisite finding under ORS 536.075(6).

the staff report, ORS 183.335(5) states that a temporary rule may only be adopted if the agency prepares: “(a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice; (b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule; (c) A statement of the need for the rule and a statement of how the rule is intended to meet the need; (d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection[.]” The staff report for the temporary rules merely states “[t]he Department has determined that its failure to act promptly to clarify which orders are stayed by operation of ORS 536.075(5) will result in serious prejudice to the interest of persons whose orders are under review in the Circuit Court where petitioners assert that their orders are stayed. The lack of policy clarity on this point will result in serious prejudice to those persons who hold water use authorizations but have not used water in light of assertions by petitioners that they may not make use of that water because of the operation of ORS 536.075. In light of the serious drought conditions covering much of this state, the inability to use water where such use is authorized will seriously prejudice the interests of those persons who have been granted authority to use water but are precluded from doing so because they do not know whether using water as authorized by the order would or would not be lawful.”

The agency’s summary of why it believes prejudice will result without the temporary rules is woefully insufficient. It is extraordinarily telling that the staff report does not list *any* documents, reports, or studies relied upon by the agency in preparing the rule. This is likely because there are few, *if any*, lawful final orders currently being stayed under ORS 536.075 which are causing serious prejudice. Moreover, the staff report does not establish that there has *ever* been a history of the ORS 536.075(5) stay provision causing serious prejudice to parties affected by a lawful final order.

Furthermore, the staff report does not contain a “statement of need” for the rule as required by ORS 183.335(5)(C). As a result, the temporary rules would violate ORS 183.335(5). The closest the agency comes to a “Statement of Need” is in the conclusion, where the staff report states “there is an immediate need to eliminate confusion about the applicability of the automatic stay provisions.” However, the staff report does not indicate that any such confusion actually exists. In fact, it has been quite clear that the ORS 536.075(5) stay provision applies to all final orders. *See Waterwatch of Oregon, Inc. v. Oregon Water Res. Comm’n*, 97 Or. App. 1, 5, 774 P.2d 1118, 1120 (1989) (temporary rules unlawful where they statement and need and justifications presupposed a non-existent ambiguity.”). In *Waterwatch*, the court invalidated a temporary rule, holding:

[T]he ambiguity justification cannot conceivably support the distinction that the temporary rule draws between pre- and post-1987 junior rightholders: No ambiguity in the regulatory scheme could be resolved by placing some of the rightholders on one side and others on the opposite side of the supposedly fuzzy line. The apparent purpose of the 1987 dividing line was to distinguish between rights issued before and after the adoption of the basin program. That may well be a logical basis for a differentiation in substantive regulation. Nevertheless, the fact that the temporary rule creates the distinction further demonstrates that its aim or accomplishment is substantive regulation, rather than a simple resolution of which of two arguably applicable regulatory standards will be applied to all junior

rightholders in the North Fork. The rule makes each standard applicable to some rights, and it establishes a new basis for delineating their applicability.

*Id.* What the agency is attempting to do here is similarly inconceivable. No confusion exists in the current enforcement of the ORS 536.075(5) automatic stay provision. It applies to all final orders. The temporary rule would only add confusion by creating a void wherein the agency does not “enforce” certain orders despite giving those orders the effect of law.

Because the temporary rules are entirely unjustified and contain no purpose and need statement (or contain a plainly-incorrect purpose and need statement), the temporary rules violate the requirements of ORS 183.335(5).

**D. Adoption of Temporary Rules Would Be Unprecedented Attempt to Side-Step Litigation.**

The proposed temporary rules appear to be directed at specific ongoing litigation between Ft. Klamath Landowners and OWRD. The current litigation between Ft. Klamath Landowners and OWRD is premised on OWRD’s approval of a temporary transfer application, submitted by a private water right holder, to transfer water rights from the Wood River Valley, through Upper Klamath Lake, to the Lower Klamath Wildlife Refuge, which is located some 40 miles away in the State of California. Instead of finding, consistent with ORS 536.075, that the automatic stay provision should not apply because of a “substantial public interest,” it appears that the Commission is instead proposing that the automatic stay not apply at all because OWRD’s approval of the temporary transfer is not a “regulatory order.” The Commission inserting itself into this litigation through the adoption of such temporary rules would be unprecedented. It is truly bizarre that this agency would contemplate adopting rules to the benefit and detriment of private parties in litigation instead of following the statutory procedure for determining that the automatic stay provision does not apply. It is almost certain that a court would recognize the strange nature of this rule, as well as the hasty and veiled rulemaking process, in determining whether the temporary rules are valid under ORS 183.400. Because the temporary rules are such an unprecedented interposition into a litigation matter and represent such a stark departure from the statutory scheme, the Commission should not adopt the temporary rules.

**IV. Conclusion**

Ft. Klamath Landowners request that the Commission deny the Department’s request for adoption of the temporary rules consistent with the foregoing.

DATED this 16<sup>th</sup> day of June, 2022.

Sincerely,



Dominic M. Carollo

Nolan G. Smith



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Attorneys at Law

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Cc: client