

June 14, 2022

The Klamath Tribes Tribal Council

Water Resources Commission
C/O Nirvana Cook
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Support to the Water Resources Commission
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Submitted electronically to nirvana.cook@oregon.gov

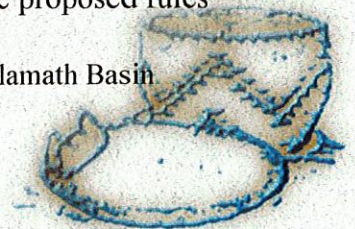
**RE: Comments by the Klamath Tribes on Item M of the Water Resources Commission
Virtual Meeting Agenda for June 16-17**

Dear Commissioners,

On behalf of The Klamath Tribes (Tribes), I submit these comments in response to Item M on the Water Resources Commission (OWRC or Commission) Agenda for June 16-17, 2022: Adoption of Temporary Rules to Clarify Applicability of Automatic Stay Associated with Petition for Judicial Review under ORS 536.075. The Tribes oppose the OWRC's adoption of the limited proposed temporary rules, and instead repeat our request for comprehensive amendment of the rules promulgated under ORS 536.075 to address the concerns that we have repeatedly identified with OWRD's actions and understandings related to the "automatic stay" of ORS 536.075(5).

The Tribes have repeatedly voiced their concerns with respect to ORS 536.075(5), and have to that end sought a wide-ranging re-visitation of the rules promulgated under that provision. Specifically, the Tribes seek to: (1) clarify that the contemplated automatic stays **do not apply** to enforcement of Determined Claims¹ in the ongoing Klamath Basin Adjudication; or, in the alternative and without conceding the former, (2) develop a more robust and efficient process for making the substantial public harm determination from which a denial of automatic stay may be issued. Despite these repeated requests, OWRC has taken no action and has left the inappropriate and, in our view, unlawful approach in place. Yet in apparent response to one or more transfer requests that OWRD supports, the agency is now ready, willing and able to move forward very quickly to forward an expedited request to adopt alternative temporary rules that narrow the language of ORS 536.075. This rushed temporary rule fails to address the considerations or comprehensive review repeatedly requested by the Tribes, nor do they clarify the language of the statute to accurately reflect its legal scope as requested by the Tribes. Rather, the proposed rules'

¹ Including those rights determined to be the Tribes in the administrative phase of the Klamath Basin Adjudication.



effect is to release only certain projects from the potential threat of automatic stay (despite the existence of the substantial public harm determination as a mechanism for lifting such stays where appropriate). The Tribes, meanwhile, continue to contend with the threat and adverse impacts of the automatic stay despite established law and strong policy reasons to the contrary.

The Tribes therefore ask the Commission to forego the adoption of the temporary rules described in Agenda Item M, and instead comprehensively review and amend the rules promulgated under ORS 536.075 to address the concerns of the Tribes (in addition to any concerns raised by other stakeholders). Put another way, the OWRC should not amend the rules clarifying ORS 536.075 in a piecemeal fashion that allows for certain stakeholders' needs to dictate the process, but should rather conduct a broad review that addresses all concerns raised by the Tribes and others. In support of these comments, we provide below background on both the Tribes and ORS 536.075, and further identify the Tribes' concerns related to the passage of only these proposed temporary rules.

1. The Klamath Tribes and the Klamath Basin Adjudication.

The Klamath Tribes are a federally-recognized Indian tribe that have occupied the lands of South Central Oregon and Northern California since time immemorial. The Klamath Tribes, with a current enrollment of around 5,611 members, are comprised of three historical tribes: the Klamath Tribe, the Modoc Tribe, and the Yahooskin Band of Paiute Indians. The Klamath Tribes signed the Treaty of 1864 with the United States, ceding over 22 million acres of aboriginal territory and reserving approximately one million acres for a permanent homeland.

Over the last several decades, the Tribes have litigated in the Klamath Basin Adjudication (KBA) to protect and quantify these federally reserved treaty water rights. At the conclusion of KBA's 38-year-long administrative phase in March 2013, the Oregon Water Rights Department (OWRD or Department) issued its findings determining all water-right claims at issue in the KBA, including the Tribal water-right claims filed by the United States and the Klamath Tribes. Water rights determined in those findings are required to be enforced by OWRD while judicial review is pending pursuant to ORS 539.130(4) and ORS 539.170. ORS chapter 539 occupies the field with regard to Determined Claims, including enforcement and stays (as OWRC is aware, there is a provision in chapter 539 that allows for stays). Nevertheless, enforcement of the Tribes' Determined Claims continues to be challenged and stayed under ORS 536.075, the statute for which the Commission now considers temporary rules.

2. The Tribes Request That the OWRC Not Adopt the Proposed Temporary Rules, But Rather Revise the Rules Promulgated Under ORS 536.075 in Their Entirety.

i. Background of ORS 536.075

The broad language of ORS 536.075 allows for junior water rights holder to file petitions for judicial review (PJR) against OWRD's orders enforcing senior water rights.² Under the current language of ORS 536.075(5), the simple act of filing a petition results in an automatic stay of enforcement by the OWRD in favor of the petitioner – without having to make any showing, without having to file a bond, and even without action by the Court –which allows that junior user to continue to take water even if the senior water right is entitled to that water.³ Should the Commission or Department determine that substantial public harm will result from the automatic stay of an order, however, they may deny the stay by issuing their finding of substantial public harm in writing.

ii. ORS 536.075(5) Does Not Apply to Determined Claims, and OWRC Should Adopt Rules to That Effect.

Because another statute, ORS Chapter 539, requires enforcement of senior water rights, and because that statute has its own specific stay mechanism, the Tribes have long argued their enforceable Determined Claims are not subject to ORS 536.075(05)'s automatic stay provision. Rather, that space is occupied by ORS 539.180, which allows for a stay only if accompanied by a bond. Indeed, shortly after the initial administrative KBA determinations were made, a number of parties requested the court to issue a stay against enforcement, but were ultimately rejected in part due to not filing the required bond.

Nevertheless, the majority of cases invoking PJRs have been filed since 2013 against the Tribes' Determined Claims. Several of these parties have managed to circumvent the ORS 539.180 bond requirement by filing PJRs under ORS 536.075. The results are clearly discriminatory: there is one entity in the entire state that is bearing the brunt of the abusive process permitted by ORS 536.075(5) – a federally-recognized Indian tribe. This situation has deplorable historical overtones. The Klamath Tribes lost its land base and even, for a time, its very recognition by the federal government based on a misinformed and misguided policy of "termination." The courts and, eventually, Congress recognized and reversed some of the results of termination – yet ORS 536.075(5) is being used effectively to "terminate" the recently determined water rights of the Tribes. A senior water right that cannot be protected is no water right at all.

² Oregon's water right system, as in most arid states in the Western United States, is based on the prior appropriation doctrine: the holder of a water right with senior priority date is entitled to receive all of their water before a junior user may use any water. OWRD's enforcement is based on prior appropriation: it regulates off junior users when a senior water right makes a "call" to indicate that it is not receiving sufficient water and that water is being diverted by juniors. The automatic stay provision of ORS 536.075(5), however, results in junior water rights holders taking water, sometimes for the entirety of an irrigation season, that rightfully belongs to the senior water right holder. This results in less certainty, less efficiency, and the potential for the kind of extrajudicial conflict that the prior appropriation system was meant to prevent.

³ At present, a party who seeks to avoid regulation during the irrigation season (and thus continue to exercise an out-of-priority use) can simply file a PJR and get an automatic stay of such enforcement and, due to the slow pace of litigation, simply wait until the end of the irrigation season and dismiss its case; then do the same thing the next year, and the year after that and on and on.

The Tribes have raised these concerns, alongside the supporting law, to OWRD. We have also raised a concern with the delays in issuing the substantial public harm determination in these repeated cases. Yet OWRC has not yet amended or promulgated rules to address these concerns. The temporary rules now before the Commission not only ignore the Tribes' stated concerns, but further alienate the Tribes. The proposed rules narrow the scope of the statute not as the Tribes has requested, but rather to relieve certain stakeholders from its restrictions. Further, the rules do nothing to address the potential "infinite loop" problem raised by OWRD's current interpretation and practice: a party files a Petition for Judicial Review (PJR) and obtains an automatic stay; OWRD issues a substantial public harm determination; the party files a new PJR against the substantial public harm determination, obtaining an automatic stay; OWRD is forced to issue another substantial public harm determination that could be subject to another PJR, and so on, potentially *ad infinitum*.

Instead of the narrow modifications sought by the temporary rules, the Tribes ask that the Commission instead amend their rules to make clear that the ORS 536.075 automatic stay does not apply to the enforcement of Determined Claims and cannot be abused by the infinite loop problem.

- iii. In the Alternative, the ORS 536.075 Rules Should Be Revisited to Set Forth a Robust and Streamlined Process for Findings of Substantial Harm.

The Tribes assert from the outset that the automatic stay provisions of ORS 536.075 do not apply to enforcement of their Determined Claims, and that the OWRC should amend its rules to clearly express the same. However, in the alternative, the Tribes request that OWRC amend its rules so as to clarify the substantial harm determination set forth under that statute. Importantly, the proposed temporary rules fail to address this noticeable regulatory gap.

At present, ORS 536.075 provides only that an automatic stay shall issue

unless the commission or the department determines that substantial public harm will result if the order is stayed. If the commission or the department denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that will result from allowing the stay.

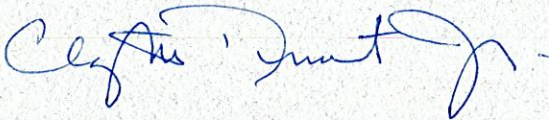
Neither the statute nor the rules provide further detail as to the process by which such a denial might issue, or guidance as to 'substantial public harm.'

To the extent the automatic stay provisions were found to apply to the Tribes' Determined Claims—which the Tribes strenuously argue they do not—the Tribes in the alternative seek clarity with respect to the process by which the Commission or Department might find and issue a determination that continued deprivation of the Tribes' quantified water right constitutes substantial public harm. Therefore, failing the amendment to the rules requested in Section 2(ii) of this Comment above, the Tribes ask that the OWRC amend its rules to set forth a robust and

efficient process for the Commission or Department to make a substantial harm determination rather than entertaining the proposed temporary rules.

For the reasons set forth above, the Tribes respectfully request that the Commission decline to adopt the proposed temporary rules set forth in Agenda Item M. Rather, we propose that the rules promulgated under ORS 536.075 be revisited in their entirety to also address those longstanding statutory concerns previously raised by the Tribes. We would be happy to sit down with the Commission and other concerned stakeholder to help craft language that meets these desired goals. We look forward to working with you and to strengthening the relationship between our governments.

Thank you,

A handwritten signature in blue ink, appearing to read "Clayton Dumont, Jr.", with a stylized flourish at the end.

Clayton Dumont, Jr., Chairman
The Klamath Tribes