



STATE OF OREGON  
KLAMATH COUNTY COURT  
2013 SEP -5 PM 9:40

CAMERON F. WOGAN  
Circuit Judge

**Circuit Court of the State of Oregon**

for KLAMATH COUNTY

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September 4, 2013

**SENT BY ELECTRONIC MAIL AND U.S. MAIL -**

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Re: In the Matter of the Waters of the Klamath River Basin  
Case No: WS1300003

Dear Counsel:

### INTRODUCTION

In this letter I explain my conclusion that the Oregon Rules of Civil Procedure (ORCP) 81-83 govern the right to a stay.

### THE ISSUES

ORS 539.180 provides:

At any time after the determination of the Water Resources Director has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond or an irrevocable letter of credit issued by an insured institution as defined in ORS 706.008 in the Circuit Court wherein the

determination is pending, in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced. (emphasis added) ...

This statute raises two issues:

- 1). Is the court required to issue a stay if a party files an appropriate bond or can the court consider whether a stay is appropriate?
- 2). If the court can consider whether a stay is appropriate, what law applies to that determination?

### DISCUSSION

The Mathis family trust argues that the first time the word “may” appears, the context indicates that it means “shall.” Others disagree and assert that the court should decide if a stay is appropriate. If so, there are further disagreements about how the court should make that decision. Unfortunately, the statute is not a model of clarity as demonstrated by the parties’ significantly different interpretations.

I look to the rules for interpreting statutes. *State v. Gaines*, 346 Or. 160 (2009); ORS 174.010. The legislature used the word “shall” many places in chapter 539 and could have used it in this instance rather than “may” if that is what they meant. Furthermore, if the court is not permitted to determine whether a stay is appropriate, a party with a claim that has no merit whatsoever could get one if they obtained an appropriate bond. That interpretation simply does not make sense.

The Oregon Rules of Civil Procedure “govern procedure and practice in all circuit courts of this state... for all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is specified by statute or rule.” ORCP 1A. The statute involved here, ORS 539.180, does not specify a different procedure and gives very little guidance at all on the process for requesting a stay therefore it is appropriate to look to the ORCP. “Clearly, the legislature is aware of how to specify a different procedure from what is required by the rules of civil procedure.” *Balboa Apartments v. Patrick*, 351 Or. 205 (2011). The laws governing stream adjudications indicate that they are to be treated as cases in equity. ORS 539.150(1); 539.150(4). Cases in equity are subject to the ORCP. ORCP 1A.

ORCP 81-83 apply for precisely what is involved here: a “judicial process or remedy which before entry of judgment enables a [party]... to take possession or control of, or to restrain use or disposition of ... property [i.e. water] in which [another party] ... claims an interest...”

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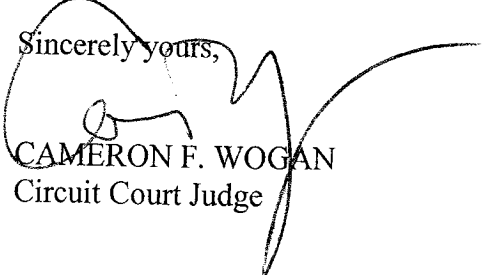
ORCP 81 A(9).

CONCLUSION

Although there are conflicting good arguments, I conclude that the court can determine if a stay will issue and that the Oregon Rules of Civil Procedure 81-83 apply in that determination. I have not decided if a stay is appropriate in this case and therefore do not reach the Klamath Tribe's arguments that they are not subject to one under state law. Some parties have asked for a chance to present further arguments after I made the decisions set forth in this letter. We can discuss that process at the case management conference now set for Friday September 6<sup>th</sup> at 11:30 am.

Please be prepared to suggest when any written and oral arguments should be submitted and what we should do, if anything, on September 25<sup>th</sup> and 26<sup>th</sup>, the days scheduled for arguments on the amount of a bond.

Sincerely yours,

  
CAMERON F. WOGAN  
Circuit Court Judge

CFW/bad