

1 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
2 **FOR THE COUNTY OF MARION**

3 PEO PEO MOX MOX, HEADMAN-CHIEF OF
4 THE WALLA WALLA TRIBE CARL D.
5 SAMPSON AND PETER GOODMAN,

6 Petitioners,

7 and

8 DEAPRTMENT OF TRANSPORTATION,

9 Respondent.
10

Case No.

PETITION FOR REVIEW OF AGENCY
ORDER PURSUANT TO ORS 183.484

NOT SUBJECT TO MANDATORY
ARBITRATION

11
12 Petitioners Peo Peo Mox Mox Chief-Headman of the Walla Walla Tribe Carl Sampson,
13 Act on Climate, an Oregon non-profit organization, and Peter Goodman, by and though their
14 attorney of record Pamela Hardy, petition for judicial review of a final order in other than a
15 contested case under ORS 183.484, and allege as follows:

16 **BACKGROUND**

17 1.

18 On February 6, 2014 the Oregon Department of Transportation (ODOT) issued variance
19 permits # STP241311 and STP241345 to Morgan Machinery Moving that allowed the
20 transportation of an oversized load (the “megaload”) through small back roads in eastern Oregon
21 to the Idaho border near Ontario.
22

23 2.

24 Variance permits are issued when the proposed load exceeds all normal standards in law
25 and rule. ORS 818.200.
26

1 3.

2 These loads are substantially larger than the largest, heaviest load allowed under normal
3 circumstances. They take up two lanes of traffic at the same time, and cannot travel on Interstate
4 highways because they do not fit under the bridges. ODOT *Press Release*, December 21, 2013
5 (attached); *accord* ODOT Permit # STP241311 and STP241345.

6 4.

7 State highway 395 is a rural 2-lane arterial highway with two 12-foot travel lanes and
8 shoulders that can range from two feet to eight feet wide, for a width that can range from 28 feet
9 to 40 feet per Federal Design Standards. ODOT *1999 Oregon Highway Plan*, Appendix D
10 Highway Classification by Milepoint (as amended August 22, 2013); *accord* US Department of
11 Transportation, Federal Highway Administration *Mitigation Strategies for Design Exceptions*,
12 Table 3 and Table 7 (July 2007).

13 5.

14 It is the petitioners understanding and belief that the load contains machinery bound for
15 the Tar Sands in Alberta Canada, which will make a significant contribution to global climate
16 change if fully developed. *See* Declaration of Patricia Weber.

17 6.

18 Petitioners here submitted extensive comments regarding the need for ODOT to fully
19 consider the public interest, including climate change impacts, when determining whether to
20 grant this permit. *See attached comments*.

21 7.

22 It is the petitioners understanding and belief that other citizens from all over Oregon also
23 submitted comments regarding their concerns about the impact of these mega loads on Oregon
24 highways and on climate change.

25 8.

26 Other citizens, including many tribal members, are concerned about the affront to cultural

1 values created by allowing the loads to pass through their traditional hunting and fishing
2 grounds. *See attached Declaration of Carl Sampson.*

3 9.

4 The Oregon State Legislature has recognized that “[g]lobal warming poses a serious
5 threat to the economic well-being, public health, natural resources and environment of Oregon.”
6 ORS 468A.200(3), and had declared that “it is the policy of this state to reduce greenhouse gas
7 emissions.” ORS 468A.205(1).

8 10.

9 The law under which ODOT has the authority to issue variance permits states, “[a] road
10 authority, or a private contractor authorized by a road authority to do so, may issue a variance
11 permit *if it determines the public interests will be served.*” ORS 818.200(1).

12 11.

13 ODOT policy regarding public involvement states:

14 It is the policy of the State of Oregon to ensure that citizens, businesses, regional
15 and local governments, state agencies, and tribal governments have opportunities
16 to have input into decisions regarding proposed policies, plans, programs, and
improvement projects that affect the state highway system.

17 1999 Oregon Highway Plan, Policy 2D, page 80 (NOTE: The Oregon Highway plan was written
18 in 1999, and is updated regularly. None of the updates apply to this policy.)

19 12.

20 As far as petitioners can tell, ODOT has declined to hold public hearings, or provide
21 notice or opportunity to comment on the matter. It is petitioners understanding and belief that
22 ODOT has made no findings regarding whether the public interest has been served.

23 13.

24 Petitioners pray this court will issue a declaratory ruling clarifying that such loads require
25 a substantive determination of public interest.

PARTIES

14.

Petitioner Peo Peo Mox Mox, Chief-Headman of the Walla Walla tribe Carl Sampson is an enrolled member and cultural leader of the Confederated Tribes of the Umatilla Indian Reservation (“CTUIR”). His tribe has federally recognized treaty rights to hunting and fishing along many miles of Highway 395 and 26, the primary roads traveled by the megaloads. The lands also contain historic sacred sites important to the cultural integrity of the CTUIR. Chief Carl Sampson has been personally involved in the protests, and has been an inspirational leader to those who have tried to stop the loads by demonstrating along the highway. Additionally, he has personally hunted and fished on these lands for over 60 years, and is currently teaching the next generation to do so as well. He has led and participated in sacred cultural events along this corridor, and intends to do so again in the future. *See Declaration of Peo Peo Mox Mox, Chief-Headman of the Walla Walla tribe Carl Sampson.*

15.

Carl Sampson is adversely affected or aggrieved by the transportation of the megaloads through lands where he hunts, fishes, and travels for cultural purposes because they threaten the scenic and ecological integrity along the corridor, and are an affront to the traditional cultural values in the area. *See Affidavit of Peo Peo Mox Mox, Chief-Headman of the Walla Walla tribe Carl Sampson.*

16.

Petitioner Peter Goodman is director, and a founding member of Act on Climate, an Oregon non-profit organization. Act on Climate exists to address the need to take individual and collective action on personal, local, regional, state, national, and international levels to reduce the human contribution to the global climate crisis, to help others understand that we must take significant and quick action now and to facilitate that action, as best we can, through every available means in our power.

1 *See Declaration of Peter Goodman.*

2 17.

3 Mr. Peter Goodman, is adversely affected and aggrieved by the decision because he has
4 spent considerable amounts of time, money and energy working in the public interest to halt
5 global climate change. He does this by educating the public, and participating in a wide variety
6 of political campaigns aimed at ensuring that global climate change concerns are considered at
7 every step. In particular he has been working to halt the shipments of these megaloads by
8 seeking to educate the public about their impact and importance, and now by asking to have the
9 public interest in this matter taken seriously. *See Declaration of Peter Goodman.*

10 18.

11 His organization, Act on Climate, is similarly adversely affected or aggrieved because it
12 exists for the sole purpose of preventing global climate change. It does this primarily by
13 informing the public of the problems of climate change, participating in major public decisions
14 to ensure that concerns about climate change are considered, and challenging those decisions
15 where it appears that they are made contrary to existing law. *See Declaration of Peter Goodman.*

16 19.

17 The Department of Transportation is an executive agency of the State of Oregon and has
18 delegated authority to review applications for variance permits under ORS 818.200.

19 **JURISDICTION**

20 20.

21 Petitioner files this petition under ORS 183.484 for review of an agency order in other
22 than a contested case. This court has jurisdiction under ORS 183.480 and ORS 183.484.

23 21.

24 Petitioners in this matter are adversely affected and aggrieved by the order.
25
26

22.

Because the statute in question here specifically requires a consideration of the public interest, those who represent the public interest can be considered to be persons “affected by the administrative action.” *WaterWatch v. Water Resources Commission*, 193 Or App 87, 91-92, 88 P3d 327 (2004), vac'd and rem'd on other grounds, 339 Or 275, 119 P3d 221 (2005); *See also People for Ethical Treatment v. Inst. Animal Care*, 312 Or. 95, 817 P2d 1299 (1991) (“a person is “aggrieved” under ORS 183.480(1) if the person . . . seeks to further an interest that the legislature expressly wished to have considered” quoting *Marbet v. Portland Gen. Elect.*, 277 Or. 447, 561 P2d 154 (1977), affirmed in *Kellas v. Dept. of Corrections*, 341 Or. 471, 145 P.3d 139 (2006).

THE ORDER

23.

ODOT permits # STP241311 and STP241345 are a Final Orders in other than a contested case because it constitutes “agency action expressed in writing . . . ” not arising from any of the four categories described in ORS 183.310(2)(a).

24.

Permits # STP241311 and STP241345 were issued by ODOT on February 6, 2014 at 10:03 am. There was no associated Staff Report or other explanation. The permit is attached.

25.

Pursuant to ORS 183.482(1), this petition is filed within 60 days following that date.

PETITION FOR JUDICIAL REVIEW PURSUANT TO ORS 183.484

26.

ODOT has acted contrary to ORS 183.200(1) because it has issued a permit allowing a massively oversized load to be transported across Oregon highways without determining whether the public interest would be served, nor providing an adequate procedure for making such a

1 determination.

2 27.

3 **FIRST ALLEGATION OF ERROR**

4 **ODOT misinterpreted state law when it issued a permit under ORS 818.200(1)**
5 **without making any determination, or issuing any findings determining whether the permit**
6 **served the public interest.**

7 28.

8 ORS 818.200(1) states:

9 A road authority, or a private contractor authorized by a road authority to do so,
10 may issue a variance permit *if it determines the public interests will be served.*

11 29.

12 ODOT has implemented the above legislation in OAR 734-82-0060. That rule states:

13 Some extraordinary movements may exceed the limits established by these rules.
14 The Chief Engineer may vary from these rules and issue single trip permits *if the*
15 *movement would be in the public interest.* Any such deviations may be
16 considered on an individual basis and not be construed as a change in policy. The
17 Chief Engineer will consider potential damage to the highway and the potential
18 hazard to the motoring public by allowing such loads.

19 (emphasis added). Again, the rule re-emphasizes that the movement must be “in the public
20 interest.”

21 30.

22 ODOT has provided no findings showing that it has determined that the movement of this
23 load is “in the public interest.”

24 31.

25 Such a determination cannot be reached by only examining potential damage to the
26 highway, or hazard to the motoring public. For example, hazard to the bicycling public along the
roads would clearly be contrary to the public interest, but would not be accounted for if the only

determination was hazard to the motoring public.

32.

This rule requires three distinct determinations, one of which is that the movement would be in the public interest. To find that something is in the public interest is more than a simple finding that not much harm is done. It requires a determination that on balance more good than harm accrues to the public because the action is taken.

33.

ODOT is required to and has failed to make findings explaining how it has reached the conclusion that this movement is “in the public interest.”

34.

Without an explanation of the decision there is no way for interested parties or a reviewing court to determine whether the agency is acting in accord with the law it is charged with carrying out.

35.

In *Schoch v. Leupold & Stevens*, the Supreme Court explained that

At a minimum, where the basis for an agency's discretionary choice is not obvious, an agency must provide sufficient explanation to allow a reviewing court to examine the agency's action in relation to the range of discretion granted by the legislature.

934 P.2d 410, 414, 325 Or. 112 (1997)

36.

In *City of Roseburg v. Roseburg City Firefighters*, the Supreme Court explained

On judicial review, the court will not substitute its judgment for that of the agency in drawing an inference, but the court must be satisfied that agency judgment has actually been exercised.

* * *

In such an inference, we will not assume the existence of a rationale. Rather, we look to the order to state the rational basis of the agency's inference. The explanation need not be complex, but it should be sufficient to demonstrate the

1 existence of a rational basis and to allow for judicial review.
2
3 292 Or. 266, 271, 639 P.2d 90 (1981).

4 37.

5 ODOT has not provided any opinion or decision, other than the permit issued, connecting
6 the inference that the permit was in the public interest to the facts from which is drew that
7 conclusion.

8 38.

9 ORS 183.484(5)(a) states

10 If the court finds that the agency has erroneously interpreted a provision of law
11 and that a correct interpretation compels a particular action, it shall:

12 (A) Set aside or modify the order; or

13 (B) Remand the case to the agency for further action under a correct interpretation
14 of the provision of law.

15 39.

16 Petitioners pray this court will remand this case to the agency for further action under a
17 correct interpretation of the law, which requires that the agency make an actual determination of
18 public interest in an opinion “sufficient to demonstrate the existence of a rational basis.”
19 *Roseburg*, 292 Or at 271.

20 **SECOND ALLEGATION OF ERROR**

21 **ODOT misinterpreted state law when it issued a permit under ORS 818.200(1)**
22 **without adequate public notice, and opportunity for comment.**

23 40.

24 Statutes as broad as ORS 818.200(1) risk being an unconstitutional delegation of the
25 powers of the legislature because they give ODOT an enormous amount of discretion to
26 determine what “serves the public interest.” The Oregon Constitution provides that “[t]he
legislative power of the state, except for the initiative and referendum powers reserved to the

1 people, is vested in a Legislative Assembly.” OR CONST art IV, §1(1). Early cases took the
2 position that “the legislature cannot confer upon any person, officer, agency or tribunal the
3 power to determine what the law shall be.” *Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 461–
4 462, 49 P2d, 1140 (1935). Under such an understanding a delegation of power giving ODOT the
5 authority to grant permits so long as they found it “serves the public interest” would likely have
6 been overturned.

7 41.

8 However, recent courts have said that such wide authority is acceptable as long as “*the*
9 *procedure established for the exercise of the power furnishes adequate safeguards to those*
10 *who are affected by the administrative action.*” *Warren v. Marion County*, 222 Or. 307, 313-14,
11 353 P.2d 257 (1960).

12 42.

13 “[T]he procedure established for the exercise of that power must furnish adequate
14 safeguards against the arbitrary exercise of the delegated power.” *Macpherson v. DAS*, 340 Or
15 117, 136-37, 130 P.3d 308 (2006).

16 43.

17 ODOT here has established no procedure to adequately safeguard the interests of those
18 who are affected by the administrative action nor to safeguard against the arbitrary exercise of
19 power.

20 44.

21 Rather, when requested to officially consider petitioners comments, ODOT wrote in an
22 email to petitioner’s attorney that

23 over dimension permits are administratively issued using specific legal authority
24 given to the Department in ORS Chapter 818. There is no associated quasi-
25 judicial or legislative action in which party status is an issue. There is no
requirement for a public hearing.

26 * * *

1 I would be happy to informally review any additional detailed comments that your
2 clients desire to submit as I would do for any member of the public who wanted to
3 convey their personal opinions regarding the ongoing work of the Department.

4 (email attached)

5 45.

6 Under ORS 818.200(1) the interests that the legislature specifically wished to have
7 considered are the public interests.

8 46.

9 Petitioners represent public interests that will be affected by the issuance of these permits,
10 and are seeking to have their concerns seriously considered in the issuance of these permits.

11 47.

12 Such a lack of public procedure where the agency is charged with determining the public
13 interest is inadequate under *Warren and Macpherson*.

14 48.

15 ORS 183.484(5)(a) states

16 If the court finds that the agency has erroneously interpreted a provision of law
17 and that a correct interpretation compels a particular action, it shall:

18 (A) Set aside or modify the order; or

19 (B) Remand the case to the agency for further action under a correct interpretation
20 of the provision of law.

21 49.

22 Petitioners here pray that this court will declare ORS 818.200(1) an unconstitutional
23 delegation of legislative power, or in the alternative, remand the matter to ODOT with direction
24 to provide a procedure that adequately protects the interests of the public.
25
26

1 **PRAYER FOR RELIEF**

2 50.

3 WHEREFORE, Petitioner prays that this Court, exercising its authority under ORS
4 183.484, 183.486, 183.497 and pursuant to its equitable authority:

5 1. Declare ORS 818.200(1) an unconstitutional delegation of power because it
6 provides no adequate procedure to safeguard against arbitrary exercise of power.

7 2. Declare that ODOT Permits # STP241311 and STP241345 are inconsistent with
8 state law and not supported by substantial evidence;

9 3. Set aside and/or remand ODOT Permits # STP241311 and STP241345 with
10 directions that any subsequent permit must comply with state law, including that:

11 (a) Issuance of a variance permit requires a determination in writing that the
12 movement “serves the public interest” pursuant to ORS 818.200(1);

13 (b) Before issuing a variance permit ODOT must provide adequate notice to
14 the public, and provide an opportunity for comment;

15 (c) Any such permit must be based on substantial evidence.

16 4. Issue a declaration that issuance of variance permits under ORS 818.200(1)
17 require:

18 (a) Findings in writing, based on substantial evidence in the record as a
19 whole, explaining how the proposed movement “serves the public
20 interest.”

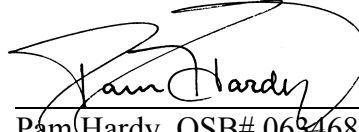
21 (b) a public process in which notice, and opportunity to comment is provided
22 to any party that has concerns or comments about the public interests
23 being served or harmed by the proposed action.

24 5. Issue a permanent injunction against future variance permits until such time as
25 ODOT establishes a rule providing a public process that adequately protects the public interest,
26 including notice, and opportunity to comment.

- 1 6. Award Petitioner attorney fees and costs pursuant to ORS 183.497; and
2 7. Provide such other equitable, injunctive, declaratory or other relief as may be just
3 and proper.

4 DATED this 11th day of February, 2014.

5 Respectfully submitted,

6 
7 Pam Hardy, OSB# 063468

8 Attorney for Petitioners
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
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Respondent.

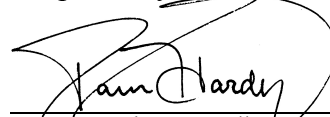
Case No.

PROOF of SERVICE of
SUMMONS & PETITION

Petitioners, by and through their undersigned counsel Pam Hardy, hereby certify that the service of a Summons and the Petition for Review was made via certified mail, return receipt requested on February 10, 2014. Pursuant to ORCP 7F, the Petitioner provided proof of service of the Summons and Petition for Review to Respondent, the State of Oregon.

DATED this 11th day of February, 2014.

Respectfully submitted,



Pam Hardy, OSB# 06346
Attorney for Petitioner
1629 NW Fresno Ave
Bend, OR 97701

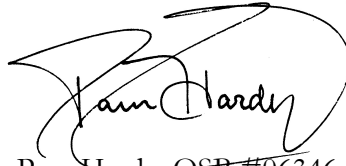
CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing PROOF OF SERVICE OF SUMMONS AND PETITION on February 11, 2014, by causing it to be hand delivered to the Marion County Court.

I further certify that I served the foregoing PROOF OF SERVICE OF SUMMONS AND PETITION on February 11, 2014, by mailing a copy of it by certified mail, return receipt requested, at the United States Postal Service office in Bend, Oregon, to:

Stacey Posgate
Attorney in Charge
Dept. of Justice – Defense of Agency Orders Division
158 12th Street, Salem
Salem, OR 97301-4096
Attorney for the ODOT – State of Oregon

DATED: February 11, 2014.



Pam Hardy, OSB #06346
Attorney for Petitioner