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## The Legal Challenges That Arise When Preparing for and Responding to Emergencies

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## Introduction

- Topics that I will cover:
  - Types of emergencies
  - Relationship of federal, state and local governments in emergency planning and response
  - Authority and preemption issues
  - Funding issues
  - Notable cases

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- What constitutes an emergency?
  - ORS 401.025(1):
    - An event or circumstance that causes or threatens widespread loss of life, injury to person or property, human suffering or financial loss.
      - May be caused by humans or natural forces
      - Includes "acts of god," releases of hazardous materials, contamination, disease, civil unrest, terrorism and war; and
      - The rapid influx of persons to Oregon or rapid movement of persons within Oregon when attributable to an emergency.

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- Definition of emergency is broad
- It “includes, but is not limited to” acts of god, disease, etc.

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### Considerations for Declaring an Emergency

- Scope and magnitude of the event
- Impact of damage and losses
- Ability of local jurisdictions to respond
- Economic health of the area affected

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### Types of Declarations

- Local
- State
- Federal
- In most situations, a local government will declare an emergency in accordance with an emergency management ordinance
- If city declares an emergency and wants to access state or federal funds, city will submit its declaration to county first. State funds are generally not available unless a county declares an emergency.

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### Local Declarations

- Governed by ORS 401.309 (Declaration of state of emergency by city or county) which sets forth procedures and criteria
- City/County authority conferred by ORS 401.309 is superseded by ORS 401.165 (Declaration of state of emergency by the governor)
- Authority conferred by ORS 401.309 is generally enacted through municipal codes
  - Including the authority to establish policies and protocols for defining and directing responsibilities during a time of emergency
- A local declaration allows a city or county governing body flexibility in managing resources under emergency conditions.

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### Local Declarations, continued

The declaration of a local emergency is the first step in requesting state. Local requests for state assistance must include:

- The type of emergency or disaster;
- The location(s) affected;
- Deaths, injuries, population still at risk;
- The current emergency conditions or threat;
- An initial estimate of the damage and impacts;
- Specific information about the assistance being requested; and
- Actions taken and resources committed by local governments (city and county).

The Office of Emergency Management (OEM) assists local officials in developing and reviewing declarations and requests that provide appropriate essential assistance in a timely manner.

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### Funding Issues During a State of Emergency

- ORS 294.471 and 294.473 specifies the conditions under which a local government may adopt a supplemental budget, and explains the process.
- Expenditure of funds to deal with involuntary conversion or damage or destruction from a civil disturbance or natural disaster may be made from any available source of revenue after the governing body enacts a resolution or ordinance authorizing the expenditure or after it adopts a supplemental budget (ORS 294.481)
- A financial plan can be adopted during a budget period to meet unexpected needs or to appropriate revenues not anticipated when the regular budget was adopted. It cannot be used to authorize a tax (ORS 294.471)
- If the governing body of a school district or community college declares that an emergency exists, and that additional expenditures are necessary to provide adequate facilities, supplies or personnel for the proper instruction of pupils for the remainder of the budget year, and additional money is available from the federal government or the ESD under ORS 334.370, the board may make such expenditures without adopting a supplemental budget (ORS 294.478)

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### Contracting Issues During a State of Emergency

- State law grants cities significant flexibility in matters of procurement during emergencies:
  - ORS Chapter 279B covers goods and services
    - ORS 279B.080 allows for direct awards or purchases
  - ORS Chapter 279C covers public improvements and construction
    - ORS 279C.110(11) allows for direct awards to design professionals
    - ORS 279C.320(1) requires “reasonable and appropriate” competition for construction but allows direct appointments “in cases of extreme necessity”

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### State Declarations

- In Oregon, the *Oregon Disaster Recovery Plan* addresses how the state manages recovery from disasters in support of local and tribal jurisdictions.
- The plan assists the state in implementing ORS chapter 401 (Emergency Management and Services) and is consistent with the *National Disaster Recovery Framework* published by FEMA.
- The governor has delegated the responsibility for coordination of the Oregon’s emergency program, including coordination of recovery planning activities to the Oregon Military Department, Office of Emergency Management (ORS 401.052).

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### Statutes Governing Emergency Declarations

- ORS 401.165: Declaration of State of Emergency
- ORS 476.510: Emergency Conflagration Act
- ORS 433.441: Proclamation of Public Health Emergency
- ORS 536.740: Drought Declaration
- ORS 823.012: ODOT Emergency Waivers
- ORS 176.775: Energy Resource Emergency
- ORS 561.510: Emergency Quarantine Order

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### ORS 401.165: Declaration of State of Emergency

- The governor can declare a state of emergency under authority granted in ORS Chapter 401.
- Under a declaration, the governor has complete authority over all state agencies and has the right to exercise, within the area designated in the proclamation, all police powers vested in the state by the Oregon Constitution.
- May only be terminated by governor or Oregon State Legislature.

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### ORS 401.165, continued

- Under extreme circumstances, a governor's declaration provides authority for the governor to suspend provisions of any order or rule of any state agency if the governor determines and declares that strict compliance with the provisions of the order or rule would in any way prevent, hinder, or delay mitigation of the effects of the emergency.
- Powers include activating the National Guard
- Usually enacted by executive order

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- Oregon Supreme Court recently interpreted ORS 401.165 in *Elkhorn Baptist Church v. Brown* 366 Or. 506, 466 P.3d 30 (2020)
- Copy of opinion available here: <https://tinyurl.com/6csy82he>
- Baker County Circuit Court enjoined enforcement of Governor Brown's COVID-19 executive orders
- Supreme Court vacated injunction based on the broad powers ORS Chapter 401 confers on the executive branch

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### ORS 433.441: Proclamation of Public Health Emergency

- A Proclamation of Public Health Emergency may be issued by the Governor at request of the State Public Health Director (Oregon Health Authority)
- Expires when terminated by a declaration of the Governor or no more than 14 days after the date the public health emergency is proclaimed unless the Governor expressly extends the proclamation for an additional 14-day period.
- Nothing in ORS 433.441 limits the authority of the Governor to declare a state of emergency under ORS 401.165.
- If a state of emergency is declared as authorized under ORS 401.165 (Declaration of state of emergency), the Governor may implement any action authorized by ORS 433.441 (Proclamation of public health emergency) to 433.452 (Detaining persons exposed to reportable condition or condition that is basis for state of public health emergency).

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### ORS 476.510: Emergency Conflagration Act

- Can only be invoked by the Governor
- Used only for fires that involve or threaten life and structures
- The Act authorizes the movement and utilization of "firefighting assets in response to a fire, a heightened danger of fire, or a significant reduction in available firefighting resources."
- The Fire Management Assistance Grant (FMAG) is a FEMA program authorized under the Stafford Act specifically for wildland fires which meet certain criteria
  - Federal aid request made by Oregon State Forester via the Governor

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### ORS 561.510: Emergency Quarantine Order

- ORS 561.510 provides the Director of the Oregon Department of Agriculture (ODA) with broad quarantine authorities.
- An emergency quarantine order may be issued by the ODA Director when an animal is found to be diseased, and/or suspected to be infected with a disease.
- There are two additional statutes which also apply:
  - Oregon Office of Emergency Management 9 ORS 596.392(3) and (4) - Authority of department relating to disease control, and
  - ORS 596.402 - Authority to summarily quarantine areas

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## Federal Declarations

- Presidential Declaration of Emergency or Major Disaster via the *Robert T. Stafford Emergency Relief and Disaster Assistance Act, P.L. 93-288*, as amended.
- These presidential declarations can provide funding and/or technical assistance from numerous federal agencies under the coordination of the Federal Emergency Management Agency (FEMA) to provide resources to assist states in expediting aid and emergency services, and in reconstruction and rehab of devastated areas.
- Only the governor of a state may request a presidential emergency or major disaster declaration, and time limits apply for doing so.
- 10<sup>th</sup> Amendment rights of states preserved
  - Mask mandates during the pandemic as an example

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## Questions or Comments?

- Please feel free to call or email me.

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