

## Oregon Year in Review: 2006<sup>1</sup>

### 1. Judicial

No appellate level decisions regarding substantive water law were issued by Oregon's appellate courts over the last year. However, provisions of Chapter 545 of the Oregon Revised Statutes dealing with irrigation districts were considered by the Court of Appeals in December 2005.

In *Orr v. East Valley Water District*,<sup>2</sup> landowners filed a petition for writ of review following the district's denial of their request for exclusion from the district boundaries. The petitioners were owners of property located within the boundaries of the district who had not signed the formation petition. The district had not proposed the petitioners' property for assessment. The petitioners alleged that they were entitled to exclusion under Oregon Revised Statute section 545.099(2) because they had not been nor would they be served by the system of works for the proposed district. The petitioners claimed they had no assurances they would not be assessed costs and that their inclusion in the district precluded participation in alternative irrigation districts. The trial court granted the district's cross-motion for summary judgment finding petitioners' claim was not justiciable because the denial of the petition had no practical effect on their rights. The Court of Appeals reversed and remanded, finding that petitioners had an interest in the legal status of their property, and because a judgment on the merits would have a practical effect on that legal status, their claim was constitutionally justiciable.

### 2. Administrative

#### a. Klamath Adjudication

The Klamath Basin Adjudication proceedings are ongoing. The last groups of claims to be addressed in the contest case phase of the proceedings are the non-consumptive use claims of the Klamath Tribes and the Bureau of Indian Affairs. The Oregon Water Resources Department anticipates that a final order for the adjudication will be issued in 2010.

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<sup>1</sup> Laura A. Schroeder, Schroeder Law Offices, P.C. The author wishes to acknowledge the assistance of Lynn Steyaert and Wyatt Rolfe in preparing this report. The author's report strives to list all judicial decisions issued in the area of water law for the year 2006. A legislative report has been omitted in 2006 as the Oregon legislature meets biennially in odd-numbered years. The report's administrative section is limited to rulemaking. It does not include final orders issued in 2006 by the Oregon Water Resources Department. Notes on rulemaking pertaining to procedure and public records have been omitted.

<sup>2</sup> *Orr v. East Valley Water District*, 203 Or. App. 430, 125 P.3d 834 (2005) *petition for rev. denied*, 340 Or. 308, 132 P.3d 28 (2006).

## b. Regulations

The Oregon Water Resources Commission adopted and amended a significant number of rules in 2006 addressing municipal permit extensions, water right transfers, water use permits, instream rights.<sup>3</sup>

**Municipal Permit Extensions.** The Commission adopted and amended rules pertaining to municipal permit extensions. The process was first initiated in 1997 after a legal opinion from the Attorney General's office questioned the validity of the permit extension rules. The Department placed municipal permit extension applications on hold while it convened a rules advisory committee. In 2004, the Court of Appeals ruled that Oregon law required municipalities, like other appropriators, to commence actual physical construction of municipal diversions within five years of receiving a water permit.<sup>4</sup> The decision appeared to jeopardize a number of pending municipal permits that had been extended through the years even though little or no physical construction had commenced. A legislative fix followed in 2005 with House Bill 3038.<sup>5</sup> House Bill 3038 declared all previously issued municipal permit extensions to be valid.<sup>6</sup> In addition, the bill provided new statutory framework for dealing with municipal permits and municipal permit extensions.

In 2006, the Commission in turn adopted rules to implement House Bill 3038 and further address extension applications for municipal permits. The new Division 315 rules require municipalities to submit a water management and conservation plan prior to diverting water beyond the maximum amount currently beneficially used by a municipality.<sup>7</sup> In addition, when applying for an extension, holders of municipal permits issued on or after June 29, 2005 must provide evidence of actions taken to begin actual construction on the project.<sup>8</sup> Extensions for municipal permits issued before November 2, 1998, will be conditioned to "maintain the persistence" of listed fish species residing in waterways that will be affected by use under the permit where streamflow is a limited factor for listed fish species.<sup>9</sup>

**Water Transfers.** The Commission adopted rules to effectuate changes in place of use, type of use, or point of appropriation for registered ground water claims.<sup>10</sup> Registered ground water claims are unconfirmed ground water appropriations with priority dates arising prior to the enactment of the ground water code of 1955.<sup>11</sup> Prior to the adoption of House Bill 2123 in 2005<sup>12</sup>, the Department had no authority to effectuate modifications of registered ground water

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<sup>3</sup> The author notes that rules pertaining to contested case procedures and public record requests were also visited by the Commission in 2006. They have been omitted from this report.

<sup>4</sup> *Waterwatch of Oregon, Inc. v. Water Resources Com'n*, 193 Or. App. 87, 88 P.3d 327 (2004); *vacated and remanded by*, 339 Or. 275, 119 P.3d 221 (2005) (finding that recently enacted HB 3038 governed).

<sup>5</sup> H.B. 3038, 73<sup>rd</sup> Legislature (2005).

<sup>6</sup> 2005 Or. Laws c.410 §5(3).

<sup>7</sup> OR. ADMIN. R. § 690-315-0090.

<sup>8</sup> OR. ADMIN. R. § 690-315-0070(3)(d).

<sup>9</sup> OR. ADMIN. R. § 690-315-0080; OR. REV. STAT. § 537.230(2)(c).

<sup>10</sup> *See generally* OR. ADMIN. R. Chap. 690, Division 00382.

<sup>11</sup> *See* OR. ADMIN. R. § 690-315-0100(1); OR. REV. STAT. §§ 537.585, 537.610(4).

<sup>12</sup> H.B. 2123, 73<sup>rd</sup> Legislature (2005); 2005 Or. Laws. c.614.

uses. Under the new rules, applications to modify ground water registrations will be reviewed for injury, enlargement, or interference with Scenic Waterways.<sup>13</sup> Applications will also be subject to Department notice and comment provisions as well as protests and hearing requests.<sup>14</sup>

The Commission also amended the Division 380 rules governing water transfers generally.<sup>15</sup> The amendments clarify the rules' inclusion of ground water transfers.<sup>16</sup> Also, the Department added provisions governing transfers of "layered"<sup>17</sup> and supplemental rights.<sup>18</sup> Finally, the Division 380 amendments provide greater flexibility in transferring from a surface water diversion to a ground water appropriation. Surface to ground water transfers are no longer restricted to unconfined aquifers only. Instead, the rules provide that the proposed location of appropriation must be hydraulically connected and have a "similar" affect on the surface water from which the transfer originated.<sup>19</sup>

Instream Water Rights. The Commission amended its Division 77 rules governing instream water rights. The amendments eliminate redundant provisions and provide clarity to the instream transfer process.<sup>20</sup> Additional changes include more flexibility for split seasons within instream leases.<sup>21</sup> The rules now provide that an instream lease may be split for the duration of the entire lease or up to a maximum of five years.<sup>22</sup> Another Division 77 amendment instructs that state agencies applying for an instream water right must first document compliance with their own instream water right rules.<sup>23</sup> Division 380 rules regarding permissible instream water right quantities were also amended by the Commission. In general, Department rules limit instream water rights to a quantity equivalent to the average daily flow in the stream.<sup>24</sup> The new rules more clearly state that instream water rights can exceed the average daily flow for certain periods as requested by the Oregon Department of Fish and Wildlife.<sup>25</sup> In addition, the limitation may be exceeded where a stream is water quality limited and the Department of Environmental Quality has provided evidence that increased flows will improve water quality.<sup>26</sup>

Pending Rules.<sup>27</sup> In November 2006, the Commission adopted rules under Divisions 310 and 340 pertaining to water use permits. The new Division 310 rules expedite applications to appropriate stored water.<sup>28</sup> Permits to use stored water may be issued following a public

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<sup>13</sup> OR. ADMIN. R. § 690-382-0700.

<sup>14</sup> OR. ADMIN. R. §§ 690-382-0600, 690-382-0900.

<sup>15</sup> OR. ADMIN. R. Chap 690, Division 380.

<sup>16</sup> *See for example* OR. ADMIN. R. § 690-380-0010 (amended to include the term "appropriation" in many provisions).

<sup>17</sup> OR. ADMIN. R. § 690-380-2240.

<sup>18</sup> OR. ADMIN. R. § 690-380-2240(5).

<sup>19</sup> OR. ADMIN. R. § 690-380-2130.

<sup>20</sup> *See generally* OR. ADMIN. R. Chap. 690, Division 077 *et. Seq.*

<sup>21</sup> OR. ADMIN. R. § 690-077-0079.

<sup>22</sup> *Id.*

<sup>23</sup> OR. ADMIN. R. § 690-077-0020(k).

<sup>24</sup> OR. ADMIN. R. § 690-077-0015.

<sup>25</sup> OR. ADMIN. R. § 690-077-0015(5).

<sup>26</sup> *Id.*

<sup>27</sup> As of the time of this writing, the following rules have been adopted but have yet to be published by the Oregon Secretary of State.

<sup>28</sup> OR. ADMIN. R. § 690-310-0040.

comment period alone if no public interest issues are identified. The Commission also amended Division 340 rules to remove obsolete regulations pertaining to water use registrations.<sup>29</sup> Water use registrations, which allowed certain environmentally beneficial water uses to commence immediately, were deemed obsolete due to streamlining and expediting of the Department's overall review processes. Finally, the Commission amended its Mid-Coast Basin rules. The amendment reserves water for multipurpose storage for future economic development by Lincoln City, Oregon.<sup>30</sup>

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<sup>29</sup> OR. ADMIN. R. Chap. 690, Division 340.

<sup>30</sup> OR. ADMIN. R. Chap. 690, Division 518.