

## Oregon Year in Review: 2007<sup>1</sup>

### 1. Judicial Developments

In *Fort Vannoy Irrigation District v. Water Resources Commission*<sup>2</sup>, the Oregon Court of Appeals held that an irrigation district named on a water certificate, and not the owner of the land to which the water right was appurtenant, was the “holder” of the water right. The case arose when an applicant, who owned property within the Fort Vannoy Irrigation District, filed an application with the Department of Water Resources to modify five certificated water rights appurtenant to the applicant’s farm lands. The application proposed consolidating seven points of diversion within the District’s system to two diversion points on the applicant’s out-of district lands. Two of the five certificated rights were in the District’s name. The District did not consent or join in the transfer application, but rather objected to the proposed changes. The District asserted that because it was the owner of the certificated rights, it was the holder of the rights subject to transfer and a necessary party to any application regarding a change in point of diversion. Following a hearing, the administrative law judge issued a proposed order rejecting Fort Vannoy’s objection to the Department’s approval of the application. The Water Resources Commission then issued a final order approving the changes in points of diversion. In reaching its conclusion, the Commission determined that it didn’t need to decide which of the two entities “owned” the water rights subject to the two certificates, but that it should focus instead on the statutes and administrative rules setting out the requirements for changing a point of diversion. It relied upon the fact that the relevant statutes and rules did not contemplate the need for the District’s approval of a change in the point of diversion.

On review, the court of appeals reversed and remanded the matter, reasoning that the holder of the water right is the proper party to seek a change in the point of diversion. The court based its conclusion on the language of ORS 540.520, which provides that any request for a change of a water right must relate to a holder’s own interest. Relying on common usage to define the term “holder” as a possessor or owner, the court concluded that the entity that possesses or owns an interest in the water’s use is the holder. ORS 537.250 states that the entity in whose name a water right is issued owns the water right. Because ORS 540.510 allows an irrigation district to own water rights for use other than on appurtenant lands, the court reasoned that an irrigation district holding a water right certificate is the holder of a water use subject to transfer, and is the proper entity to seek a change in the diversion point.

### 2. Legislative Developments

House Bill 2097<sup>3</sup> alters the sunset for split use leasing for in-stream use of all or a portion of an existing water right during the same water or calendar year from January 2, 2008 to January 2, 2014.

---

<sup>1</sup>Laura A. Schroeder and Lynn L. Steyaert, Schroeder Law Offices, P.C. The authors wish to acknowledge the assistance of Justin Denham in preparing this report. The authors’ report strives to list all significant judicial decisions issued in the area of water law for the year 2007. The legislative report addresses legislation enacted during the 2007 Legislative Session. The report’s administrative section is limited to rulemaking. It does not include final orders issued in 2007 by the Oregon Water Resources Department.

<sup>2</sup>*Fort Vannoy Irrigation District v. Water Resources Commission*, 214 Or. App. 88, 162 P.3d 1066 (2007).

<sup>3</sup>H.B. 2097, 74th Leg., Reg. Sess. (Or. 2007)

House Bill 2098<sup>4</sup> amends ORS 537.385 to clarify that the Water Resources Commission may promulgate a rule extending an irrigation season beyond the period established by rule, adjudication, or permit. Before this clarification, ORS 537.385 provided that the Water Resources Commission could extend an irrigation season by order.

House Bill 2099<sup>5</sup> allows the Water Resources Department to refund the protest fees paid under ORS 540.641 if all or part of a water right subject to cancellation proceedings has not been canceled or modified under ORS 540.610 to 540.650. The amendment does not affect protests filed before January 1, 2008, the effective date of the act.

House Bill 2100<sup>6</sup> amends ORS 537.141 by expanding the entities that qualify to use water without a water right for non-emergency fire-fighting training. Previously only public fire departments and rural fire protection districts could use water for non-emergency training without a permit. As amended, the statute will allow any group to use water for non-emergency fire-fighting training. Water users must receive approval from the watermaster that such use will not harm existing water rights or in-stream uses.

House Bill 2101<sup>7</sup>, effective June 1, 2007, increases certain fees charged by the Water Resources Department in ORS 536.050, 537.150 and 537.620.

House Bill 2294<sup>8</sup> integrates provisions relating to requirements for installation of fish screening or by-pass devices for water diversions of 30 cubic feet per second or more into ORS 498.306. The legislation also places limitations on cost-sharing program funds for water rights issued on or after January 1, 1996. Additional amendments were incorporated in ORS 498.306 specifying responsibilities for screening and by-pass device maintenance, and notification procedures to be followed by the State Department of Fish and Wildlife. The legislation also modifies tax credit requirements for fish screening and by-pass devices, and increases the fee that the department may charge for inspection or maintenance of a screening or by-pass device if the person responsible for the water diversion fails to conduct appropriate inspections and maintenance.

House Bill 2785<sup>9</sup> allows a water right holder to apply to the Water Resources Department for a certificate to use water for hydroelectric purposes within an artificial delivery system under the applicant's existing certified groundwater or surface water right. If the proposed project qualifies for a Federal Energy Regulatory Commission exemption the applicant may use an expedited process. Certificates granted under this section will not have their own priority date, and the Department may not regulate for or against any certificate used under these provisions based on the priority date of the certificate.

House Bill 3291<sup>10</sup> removes water control districts from the list of districts automatically extinguished following annexation of an entire district territory to a city.

House Bill 5051<sup>11</sup> approves, effective July 1, 2007, fees that the Water Resources Department may charge for examination of an application to change the place of use

---

<sup>4</sup>H.B. 2098, 74th Leg., Reg. Sess. (Or. 2007)

<sup>5</sup>H.B. 2099, 74th Leg., Reg. Sess. (Or. 2007)

<sup>6</sup>H.B. 2100, 74th Leg., Reg. Sess. (Or. 2007)

<sup>7</sup>H.B. 2101, 74th Leg., Reg. Sess. (Or. 2007)

<sup>8</sup>H.B. 2294, 74th Leg., Reg. Sess. (Or. 2007)

<sup>9</sup>H.B. 2785, 74th Leg., Reg. Sess. (Or. 2007)

<sup>10</sup>H.B. 3291, 74th Leg., Reg. Sess. (Or. 2007)

<sup>11</sup>H.B. 5051, 74th Leg., Reg. Sess. (Or. 2007)

under a certificate of registration and for examination of all other applications to modify certificates of registration.

Senate Bill 88<sup>12</sup> provides for the adoption, by the department, of a single water well constructor's license that specifies the type of well, well alteration or construction, or type of well drilling machine operation for which the constructor is qualified. The legislation also increases the license and renewal fees for water well constructors and repeals the sunset on continuing education requirements for renewal of licenses.

Senate Bill 89<sup>13</sup> extends the sunset for the Water Resource Department pilot project in which districts may temporarily allow, for water uses subject to transfer, the use of water on any land within the boundaries of a district established pursuant to ORS chapters 545, 547, 552, 553, or 554 to June 30, 2010.

### 3. Administrative Developments

Provisions were added to Oregon Administrative Rules Division 690-385 to address changes in points of diversion in response to an emergency. Emergency has been defined as a "sudden, unforeseen event resulting in damage to an authorized point of diversion structure or primary conveyance canal that prevents a district from diverting the water to which it is legally entitled."<sup>14</sup> The change in point of diversion must be from the same source of surface water or ground water from an unconfined aquifer that is hydraulically connected to the same source of surface water, and cannot enlarge the water right.<sup>15</sup> A district may apply for an emergency point of diversion, and the Department may approve a temporary change in response to an emergency for a period not to exceed one irrigation season. If more than one season is required to correct the emergency, a district may submit an application for the succeeding irrigation season. However, the district may be limited to filing no more than two temporary transfer applications in response to the same emergency. If the proposed transfer affects instream rights, the Department shall develop conditions or restrictions to prevent injury to the instream water right before approving the emergency transfer.

OAR 690-385-3200 has been modified to include the requirement that when a district requests an emergency change in point of diversion, the district must provide a list of agencies, local tribal governments, and the contacts with whom the applicant has consulted about the water change.<sup>16</sup>

OAR 690-518-0020, was modified to include reservations of water for multipurpose storage for future economic development on certain streams in the Mid-Coast Basin, including Rock Creek, tributary to Devil's Lake, Treat River, tributary to Salmon River, and "Side Creek" tributary to Devil's Lake.<sup>17</sup> The priority date for these rights is May 5, 2006.

---

<sup>12</sup>S.B. 88, 74th Leg., Reg. Sess. (Or. 2007)

<sup>13</sup>S.B. 89, 74th Leg., Reg. Sess. (Or. 2007)

<sup>14</sup>OR. ADMIN. R. 690-385-0100 (19)

<sup>15</sup>OR. ADMIN. R. 690-385-3145 (2)

<sup>16</sup>OR. ADMIN. R. 690-385-3200 (3)(a)(C)

<sup>17</sup>OR. ADMIN. R. 690-518-0020 (3)