

## Oregon Year in Review: 2008<sup>1</sup>

### 1. Judicial

On July 10, 2008, the Oregon Supreme Court issued an opinion in *Fort Vannoy Irrigation District, et. al. v. Water Resources Commission and Ken-Wal Farms, Inc.*<sup>2</sup> In November 1999, Ken-Wal Farms, a landowner and member of the Fort Vannoy Irrigation District (“District”), applied to the Oregon Water Resources Department (“the Department”) to transfer and consolidate the points of diversion associated with five certificated water rights at two locations. Two of the water right certificates at issue were issued in the name of the District. The two new proposed points of diversion would be owned and operated exclusively by Ken-Wal Farms and would not require any water to be diverted and delivered through the District’s facilities. The District protested the proposed change, arguing that the District was the “holder” and proper applicant for transfer of two of the certificates at issue. In denying the protest, the Oregon Water Resources Commission (“Commission”) concluded that the “holder” of the water right is “the owner of the land to which the right is appurtenant.” The Department ultimately issued a final order affirming the determination of the Commission, allowing the transfer despite the District’s objection.

The District appealed the decision of the Commission to the Court of Appeals. The issue in the case was whether the petitioner, Ken-Wal Farms, Inc., was a “holder” of a water use “subject to transfer,” as provided in ORS 540.510.<sup>3</sup> The Court of Appeals reversed the Commission’s decision. The Supreme Court affirmed the decision of the Court of Appeals

Both the Court of Appeals and the Supreme Court held that the District holds an ownership interest in the certificated water right making it the proper applicant for a transfer because it was the District who (1) applied for the water permits and submitted all the required paperwork to the Department; (2) constructed the irrigation works that conveyed the water; and (3) requested the issuance of the water right certificates from the Department. The Supreme Court ruled that the party who initiates and completes the statutory steps necessary to acquire the water right and certificate holds an ownership interest in a certificated water right. The Supreme Court clarified that the person or entity that physically puts the certificated water right to beneficial use and owns the land to which the water right is appurtenant – if different from the party who completes the statutory process – also has an ownership interest in the certificated water right.

The Supreme Court confirmed that the agency relationship that existed between the District and Ken-Wal was that of a trustee relationship. The Court found that Ken-Wal Farms puts water to beneficial use as the agent of the District. In turn, the District holds the water right in trust for its patrons, rather than as the owner of the water right. The bifurcated ownership creates two ownership interests – one legal and the other

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<sup>1</sup>Laura A. Schroeder, Schroeder Law Offices, P.C. The author wishes to acknowledge the assistance of Cortney D. Duke in preparing this report. The author’s report strives to list all the judicial decisions issued in the area of water law for the year 2008. The report’s administrative section is limited to rulemaking. It does not include final orders issued in 2008 by the Oregon Water Resources Department.

<sup>2</sup>*Fort Vannoy Irrigation District and Herman Baertschiger, Jr. v. Water Resources Commission and Ken-Wal Farms, Inc., aka For Vannoy Farms, Inc.*, 345 Or. 56, 188 P.3d 277 (2008), *recons. den.* Nov. 05, 2008.

<sup>3</sup>The transfer statutes require a change in use or place of use be made by the “holder” of the water right.

equitable. Applying the usual tenants of trust law to the facts, the Court reasoned that allowing individual patrons to make decisions affecting the management of the trust property (i.e. the certificated water right) would run afoul of the trust relationship as the trustee is the party with the capacity to manage the trust property.

## 2. Administrative

### a. Klamath Adjudication

The Klamath Basin Adjudication proceedings are ongoing. In January 2008, after two years of negotiation between Klamath River Basin stakeholders the Klamath Basin Restoration Agreement was released to the public. The Klamath Basin Restoration Agreement is the result of the collaborative negotiations between Federal Agencies,<sup>4</sup> State Agencies,<sup>5</sup> Tribes,<sup>6</sup> Counties, parties related to the Klamath Project,<sup>7</sup> and off-project users and non-governmental organizations. The Agreement's main objectives include (1) removal of four dams to restore natural production and harvest opportunities for fish species throughout the Klamath Basin; (2) establishment of reliable water and power supplies, which will sustain agricultural uses, communities and National Wildlife Refuges; and (3) to contribute to the public welfare and sustainability of all Klamath Basin communities.<sup>8</sup> The owner of the dams, PacifiCorp, is not a signatory to the Klamath Basin Restoration Agreement. Thus, the effect of the agreement is unknown.

### b. Regulations

The Commission adopted and amended a significant number of rules in 2008 addressing well construction and maintenance. The Commission also adopted/amended rules regarding water conservation, reuse and storage.<sup>9</sup>

#### i. Well Construction and Maintenance.

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<sup>4</sup>U.S. Department of Agriculture, U.S. Department of Interior, including Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, and Fish and Wildlife Service. The author notes that other federal agencies were involved but have not been listed here.

<sup>5</sup>California Department of Fish and Game, Oregon Department of Fish and Wildlife, Oregon Water Resources Department. The author notes that other federal agencies were involved but have not been listed here.

<sup>6</sup>Hoopa Valley Tribe and Klamath Tribes. The author notes that other Tribes were involved but have not been listed here.

<sup>7</sup>Tulelake Irrigation District and Klamath Irrigation District. The author notes that other Project Users were involved but have not been listed here.

<sup>8</sup>See "Klamath Tribes Announce Approval of Historic Agreement" [http://www.klamathtribes.org/restoration\\_agreement.html](http://www.klamathtribes.org/restoration_agreement.html); See "Proposed Klamath River Basin Restoration Agreement" [http://www.edsheets.com/Proposed%20Klamath%20Basin%20Restoration%20Agreement%20%20January%202015,%202008%20\(Draft%2011\).pdf](http://www.edsheets.com/Proposed%20Klamath%20Basin%20Restoration%20Agreement%20%20January%202015,%202008%20(Draft%2011).pdf).

<sup>9</sup>The author notes that rules pertaining to well licensing, abandonment of wells, construction, maintenance, alteration, conservation and abandonment of monitoring wells, and geotechnical holes were all visited by the Commission in 2008. They have been omitted from this report.

The Commission adopted rules to establish special area well construction standards in the Eola Hills Ground Water Limited Area and in the Petes Mountain Area. The Commission adopted rules related to well construction and maintenance,<sup>10</sup> well construction standards,<sup>11</sup> and repair and deepening of water supply wells.<sup>12</sup> The rules grew out of growing concerns about the long-term ground water supply, caused by significant well development in the Eola Hills Ground Water Limited Area and Petes Mountain Area, and are intended to protect the resource and allow easier collection of ground water data.

#### ii. Well Alterations

In November 2008, the Commission adopted rules intended to clarify what types of activities constitute a “well alteration.” To perform “well alterations” a well contractor license is required.<sup>13</sup> The rules also clarified that the water supply well constructor who undertook well alteration activities would only be responsible for the alteration work performed.<sup>14</sup> The new rules will take effect once filed with the Secretary of State and published.

#### iii. Water Conservation, Reuse, and Storage Grant Program

The grant program rules<sup>15</sup> were newly adopted in entirety in 2008. The Commission adopted rules to administer the planning studies grant program established under Senate Bill 1069.<sup>16</sup> These rules establish procedures for the Department to accept and consider proposals for funding under the provisions of Senate Bill 1069. The rules include provisions that establish reporting requirements for grants awarded,<sup>17</sup> provide for public comment before the award of grants and payment of direct services,<sup>18</sup> and implement the priorities of the grant program.<sup>19</sup>

### 3. Legislative

Senate Bill 1069. The Oregon Legislature passed SB 1069 during a 2008 special session. SB 1069 directs the Oregon Water Resources Department to establish a grant program to pay the qualifying costs of planning studies performed to evaluate the feasibility of developing a water conservation, reuse or storage project. The Department is also charge to conduct a recovery assessment of the Umatilla Basin regional aquifer and establish a mitigation bank. SB 1069 established a water conservation, reuse and

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<sup>10</sup>OR. ADMIN. R. § 690-200.

<sup>11</sup>OR. ADMIN. R. § 690-210.

<sup>12</sup>OR. ADMIN. R. § 690-215.

<sup>13</sup> OR. ADMIN. R. § 690-215-0006(1).

<sup>14</sup> OR. ADMIN. R. § 690-215-0006(3).

<sup>15</sup> OR. ADMIN. R. § 690-600.

<sup>16</sup>SB 1069 is discussed *infra*.

<sup>17</sup>OR. ADMIN. R. § 690-600-0040.

<sup>18</sup>OR. ADMIN. R. § 690-600-0060.

<sup>19</sup>OR. ADMIN. R. § 690-600-0030.

storage investment fund from which the Department is authorized to award up to \$500,000 grants for each project selected for funding.<sup>20</sup> The Department may consider funding projects varying from water needs analysis to hydrological refill and analysis of environmental harm or impacts, among other things.<sup>21</sup> The Commission adopted rules<sup>22</sup> establishing the grant program were adopted and became effective June 6, 2008.

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<sup>20</sup>SB 1069, Sec. 1(3); OR. ADMIN. R. § 690-600-0020(2).

<sup>21</sup>SB 1069 Sec. 2(1)(a – m); OR. ADMIN. R. § 690-600-0050(1)(a-m).

<sup>22</sup>OR. ADMIN. R. § 690-600.