

Oregon Year in Review: 2009¹

1. Legislative

On August 4, 2009, Governor Kulongoski signed into law House Bill 3369 directing the Oregon Water Resources Department (“OWRD”) to “develop a statewide, integrated water resources strategy [“IWRS”] in consultation with the Departments of Environmental Quality and Fish and Wildlife.”² The IWRS vision statement, aims to “bring various sectors and interests together to work toward the common purpose of maintaining healthy water resources to meet the needs of Oregonians and Oregon’s environment for generations to come.”³ IWRS recognizes that an integrated approach is needed to fully consider the myriad of challenges facing Oregon’s water supply such as climate change, population growth and land use pressures, endangered species protection, a declining water table, and surface waters approaching full allocation.⁴ To assess these challenges, the plan seeks to address water quality, quantity and the ecological needs of aquatic systems in Oregon.⁵

The IWRS states that “[t]he intention is *not* to overhaul Oregon water law as it relates to quantity and quality.”⁶ However, this intention is qualified to some extent as OWRD notes that “[i]f, during the process, statutory modifications are needed to achieve the objectives of the strategy, the Department will forward recommendations to the Legislature as part of its 2012 report.”⁷ IWRS is a five phase project that should produce the first IWRS in late 2012.⁸

In July 2009, Governor Kulongoski signed into law Senate Bill 76 which directs the Public Utility Commission to set rates allowing PacifiCorp to recover on Oregon’s share of any undepreciated investment remaining on the Klamath dams slated for removal under the Klamath Agreement in Principle.⁹ Subsequently, on September 30, 2009, Interior Secretary Ken Salazar announced that a Draft Agreement had been reached on

¹Laura A. Schroeder, Schroeder Law Offices, P.C., the author, wishes to acknowledge the assistance of Brent L. Keith in preparing this report. The report strives to list all the judicial decisions issued in the area of water law for the year 2009. The report’s administrative section is limited to rulemaking. It does not include final orders issued in 2009 by the OWRD.

²Oregon’s Integrated Water Resources Strategy: September 23, 2009 Briefer, http://www1.wrd.state.or.us/pdfs/9_23_2009_Briefer.pdf (last visited Dec. 7, 2009). *See generally* 2009 Or. Laws Ch. 907.

³*Id.*

⁴*Id.*

⁵*Id.*

⁶*Id.* (emphasis original).

⁷*Id.*

⁸Oregon’s Integrated Water Resources Strategy – Process Overview, http://www1.wrd.state.or.us/pdfs/11_19_09_Process_Design.pdf (last visited Dec. 7, 2009). Phase I, Setting the Stage (August 2009 through December 2009); Phase II, Identifying Water Resource Needs (January 2010 through August 2010); Phase III, Developing a Water Resource Framework and Toolbox (September 2010 through December 2011); Phase IV, Producing Oregon’s 1st Integrated Water Resources Strategy (January 2012 through December 2012); Phase V, Implementation and Evaluation (2012 and beyond). *Id.*

⁹2009 Or. Laws Ch. 690.

the removal of four hydroelectric dams on the Klamath River.¹⁰ The negotiating parties have yet to give the agreement their final approval.

A series of bills related to funding for OWRD passed in 2009. Senate Bill 5551 codified previous staff cuts and program reductions made in response to budget shortfalls.¹¹ House Bills 2231¹² and 2232¹³ addressed fees for well inspection and geotechnical hole reports, respectively. Senate Bill 788 adjusted fees to increase recovery of costs by OWRD associated with various customer transactions.¹⁴

2. Judicial

In January of 2009 the Oregon Supreme Court issued an order accepting three certified questions of state law from the United States Court of Appeals for the Federal Circuit.¹⁵ The Federal Circuit asked the Oregon Supreme Court to consider the following questions:

1. Assuming that Klamath Basin water for the Klamath Recreation Project 'may be deemed to have been appropriated by the United States' pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?
2. In light of the statute, do the landowners who receive water from the Klamath Basin Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States, and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable interest in the water right acquired by the United States?
3. With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon state law recognize any property interest, whether legal or equitable, in the use of the Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?¹⁶

The Oregon Supreme Court held oral argument on the Certified Questions at the Klamath Union High School in Klamath Falls, Oregon on May 13, 2009.¹⁷ An opinion is expected from the Court at any time; however no opinion was issued as of this writing.

¹⁰Draft Agreement on Klamath Dam Removal Proposal, http://www.doi.gov/news/09_News_Releases/093009.html (last visited Dec. 7, 2009).

¹¹2009 Or. Laws Ch. 741.

¹²2009 Or. Laws Ch. 766.

¹³2009 Or. Laws Ch. 767.

¹⁴2009 Or. Laws Ch. 819.

¹⁵*Klamath Irrigation Dist. v. United States*, 202 P.3d 159 (Or. 2009).

¹⁶*Id.* at 162 (quoting *Klamath Irrigation Dist. v. United States*, 532 F.3d 1376, 1377-78 (Fed. Cir. 2008)).

¹⁷Supreme Court in Klamath: State high court hears arguments, answers questions, http://www.heraldandnews.com/articles/2009/05/14/top_story/doc4a0bb8f7402d0273433113.txt (last visited Nov. 23, 2009).

In *Gienger v. Department of State Lands*,¹⁸ the Oregon Court of Appeals affirmed the final order of the Oregon Department of State Lands (“the Department”) finding “that petitioner had violated ORS 196.810 by removing material from the bed and banks of a waterway known as Golf Course Creek without a permit.”¹⁹ The case arose after the petitioner removed some 50 cubic yards of material from a portion of Golf Course Creek that had backed up onto his property after the Tillamook County Creamery began to discharge effluent into a marsh adjacent to petitioners land, causing the level of Golf Course Creek to rise some two and one half feet and resulting in the water back up.

The Department’s final order adopted the Administrative Law Judge’s (“the ALJ’s”) findings of fact and “added one historical fact that had not been included in the proposed order”²⁰ In adding the historical fact, the Department concluded that “Golf Course Creek has retained its character as a natural waterway beginning in the foothills and flowing to the Wilson River”²¹ and that such a finding was supported by a preponderance of the evidence.²² The petitioner also challenged the final order’s determination that Golf Course Creek was not a drainage ditch which may be subject to exemptions from the permitting requirements of ORS 196.810.²³ Although Golf Course Creek had been channelized and petitioner installed an underground tile drainage system in the fields surrounding the creek, the court relied on the Department’s regulations to determine that Golf Course Creek “maintains its essential character as a natural stream.”²⁴

Finally, the court addressed petitioner’s assignments of error relating to the permit exemptions for converted wetlands and prior converted cropland.²⁵ The court noted that it is undisputed that petitioner’s fields qualify as a “converted wetland” however, the court further noted that petitioner did not remove materials from the fields, but rather directly from the banks of the creek.²⁶ As such, the court determined that any “activities on converted wetlands do[] not extend to the work petitioner conducted on the banks of the stream itself.”²⁷

¹⁸214 P.3d 75 (Or. Ct. App. 2009).

¹⁹*Id.* at 76.

²⁰*Id.* at 78.

²¹*Id.* at 79.

²²*Id.* The court points to testimony received from Oregon Department of Fish and Wildlife and the Department of State Lands concerning the headwaters and terminus of Golf Course Creek in reaching the conclusion that “Golf Course Creek has retained its character as a natural waterway beginning in the foothills and flowing to the Wilson River” *Id.*

²³*Id.*

²⁴*Id.* at 80. Citing OAR 141-085-0010(139) (July 10, 2003) and opining that “to be a drainage ditch as opposed to a natural waterway, the creek would need to have been excavated and designed to remove water rather than being naturally created. Under those definitions, even a channelized stream is a natural waterway as opposed to a drainage ditch.” *Id.*

²⁵*Id.* at 80. Referring to ORS 196.905(3) and ORS 196.905(4), respectively.

²⁶*Id.*

²⁷*Id.* at 81, citing *Bridgeview Vineyards, Inc. v. State Land Board*, 154 P.3d 734, *rev. den.*, 174 P.3d 1016 (2007) (explaining how the ORS 196.905(3) exemption applies to activities on converted wetlands and concluding that the creek at issue was not a converted wetland on which normal farming activities were conducted).

3. Administrative

On November 23, 2009 the rule promulgated by OWRD on “Exempt Groundwater Use Recording Requirements,” found in Chapter 690, Division 190 of the Oregon Administrative Rules, took effect.²⁸ The rule applies to owners of land who complete a well after July 22, 2009 for an exempt purpose allowed under ORS 537.545.²⁹ Fees collected on the required recording under this rule will be used by OWRD for continuing groundwater studies and enforcement.³⁰

²⁸Oregon Administrative Rules: Exempt Groundwater use Recording Requirements, http://www1.wrd.state.or.us/files/Publications/Notices/new_oars/OAR%20Ch%20690%20Div%20190.pdf (last visited Dec. 9, 2009).

²⁹*Id.*

³⁰*Id.*