Oregon Year in Review: 2010[1]

1. Legislative

a. House Bill 3602

The Oregon Legislature passed HB 3602 during the 2010 special session of the legislature. The effective date of the bill is March 18, 2010. The bill is codified in Chapter 63 Oregon Laws 2010.[2] The bill is set to sunset on January 2, 2018.

The bill lays out the circumstances under which a hydroelectric project license may be transferred to Umatilla County: 1) the project is located in the Umatilla Basin; 2) the transfer is to Umatilla County; 3) the transfer is through foreclosure of a tax lien; and 4) the transfer occurred on or before January 1, 2010. The license and any associate water rights terminate when: 1) the county ceases to use the project for hydroelectric power generation; 2) two years pass, unless the County has transferred the license and property to another party; or 3) if a new owner fails to comply with applicable requirements listed in the bill.

The requirements for transfer of a license are as follows: 1) any associated water rights are subordinate in priority to in-stream water rights for which a certificate is issued before the effective date of the Act; and 2) prior to the new owner's operation, the Water Resources Department "shall" modify conditions of the license to require an implementation plan for fish passage and fish screening. Additionally, the law provides for limited circumstances under which the license is not subject to termination for failure to put water to beneficial use. Finally, if a water right is included in the license, and the license is terminated for failure to make beneficial use of water, then the Water Resources Department "shall" convert the water right into an in-stream water right.

b. House Bill 3617

The Oregon Legislature passed HB 3617 during the 2010 special session of the legislature. The effective date of the bill is March 10, 2010. The bill is codified in Chapter 41 Oregon Laws 2010.[3]

The bill allows certain existing special districts, including water districts and domestic water supply corporations, in areas that become incorporated to continue to provide services if continuation is proposed by petitioners in a petition for incorporation that is subsequently approved by voters in the incorporation election. Otherwise, the special district dissolves and the incorporated city succeeds to all the assets, liabilities, obligations and functions of the former special district. A city may also extinguish a special district at any time after incorporation if an ordinance is adopted to such an effect after a public hearing is held.

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[1]Laura A. Schroeder, Schroeder Law Offices, P.C., the author, wishes to acknowledge the assistance of Sarah R. Liljefelt in preparing this report. The report strives to list the most notable judicial decisions issued in the area of water law for the year 2010. The report's administrative section is limited to rulemaking. It does not include final orders issued in 2010 by the OWRD.

[2] The full text of House Bill 3602 is available at: http://www.leg.state.or.us/10ssorlaws/0063.htm, last visited November 30, 2010.

[3] The full text of House Bill 3617 is available at: http://www.leg.state.or.us/10ssorlaws/0041.htm, last visited November 30, 2010.

2. Judicial

a. Klamath Litigation Update

In 2001, the Bureau of Reclamation terminated water delivery to landowners and irrigation districts in the Klamath River Basin due to drought conditions. The affected landowners and irrigation district brought suit, alleging the government committed a Fifth Amendment takings of private property, or alternatively that the government breached its contractual duty to deliver the water. The U.S. Court of Federal Claims granted summary judgment for the government, and the plaintiffs appealed.[4]

On appeal, the court found that the case involved complex issues of Oregon state law, and certified questions to the Oregon Supreme Court.[5] The Oregon Supreme Court's decision was issued on March 11, 2010, clarifying property interests in water, and laying out a test for whether property interests in water appropriated by another grant standing to bring suit for a Fifth Amendment taking.[6]

In this case, the Bureau of Reclamation held uncontested legal title to the water rights at issue. The plaintiffs argued, however, that they held equitable or beneficial interests in the water rights, an injury to which was sufficient to confer standing to assert a takings claim.[7] The Oregon Supreme Court agreed for the reasons stated below.

In 1905 the Oregon State Legislature passed implementing legislation for the Reclamation Act, which created a procedure for the federal government to appropriate water from the state and construct irrigation works.[8] Under the legislation the federal government is the appropriator and holds legal title to the water rights.[9] The Oregon Supreme Court, reading the Oregon legislation in light of the Reclamation Act, held that the federal government appropriated water for the benefit of the water users.[10] The court stated, "Oregon has recognized and continues to recognize that persons who put water to beneficial use can acquire an equitable or beneficial property interest in a water right to which someone else holds legal title."[11]

As recognized recently in *Fort Vannoy Irrigation District v. Water Resources Commission*,[12] rights to water may be split so that one party holds legal title for the benefit of another.[13] The party who puts the water to beneficial use may acquire an equitable interest in the water.[14] In *Fort Vannoy* a trust relationship between the irrigation district and landowner was established by statute. *Klamath Irrigation District* affirmed the holding in *Fort Vannoy*, and expanded the trust concept further, holding that a trust

[4] Klamath Irrigation District v. United States, 75 Fed.Cl. 677 (2007).

[5] *Klamath Irrigation District*, 532 F.3d 1376 (2008).

[6] *Klamath Irrigation District*, 348 Or. 15 (2010).

[7] *Klamath Irrigation District*, 348 Or. at 20.

[8] *Id*. at 34-35.

[9] *Id*. at 36-37.

[10] *Id*. at 39.

[11] *Id*. at 44.

[12] Fort Vannoy Irrigation District v. Water Resources Commission, 345 Or. 56 (2008).

[13] *Id*. at 69.

[14] *Id*. at 80.

relationship may arise from the nature of the relationship between the parties, and that such a relationship existed between the Bureau of Reclamation and the water users.[15]

To acquire an equitable or beneficial property interest in the water, the water user must meet a three-pronged test: 1) the water right must be appurtenant to the land; 2) the relationship between the parties is that of trustee and beneficiary; and 3) contractual agreements do not redefine or alter the trustee-beneficiary relationship.[16] In *Klamath Irrigation District* the plaintiffs satisfied the first two prongs of the test: in Oregon water becomes appurtenant to the place of use, and a trustee-beneficiary relationship existed between the parties.[17] The court did not, however, decide the ultimate issue because the court did not have all the contractual agreements before it.[18]

Finally, the court determined that because the plaintiffs only asserted an equitable or beneficial property interest in the water rights, they were not "claimants" who had to appear in the Klamath Basin adjudication to maintain their rights.[19] The plaintiffs take water under the Bureau's appropriation, so the Bureau is the essential party to the river adjudication.[20]

b. Runoff & Clean Water Act Permitting Requirements

The Clean Water Act ("CWA") prohibits the discharge of pollutants from a point source into the navigable waters of the United States without an NPDES permit. The Act defines a "point source" as "any discernible, confined and discrete conveyance."[21] Natural runoff is not a point source, and does not require a permit.

Agricultural runoff is exempt by the Act from the permit requirement, even if the runoff is collected into ditches or channels before being returned to a navigable water source. The EPA has consistently held that storm-water runoff from logging roads should be treated similarly to agricultural runoff. Since 1976 the EPA has distinguished between discharges from silviculture (forestry and logging) activities that are a direct result of controlled water use by a person (point source) and those that are the result of natural runoff (non-point source). Thus, it has been the practice that natural runoff from silviculture activities did not require a permit, even if the runoff was collected into discernible channels before discharge.

On August 17, 2010, the Ninth Circuit handed down a decision that invalidated the EPA's policy of exempting from the CWA's permitting requirement natural runoff from silviculture activities, if it is collected or controlled before discharge.[22] In *Northwest Environmental Defense Center v. Brown*, the Court held that the prior silviculure policy was inconsistent with the text of the CWA because the CWA requires permitting for the discharge of pollutants from point sources, and distinguishes between point and non-point sources based on the method of discharge into the body of water, not based on the initial cause of the discharge.[23] Because the defendants in this case, the Oregon State Forester, members of the Oregon Board of Forestry, and various timber companies, channeled

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[15] *Klamath Irrigation District*, 348 Or. at 43-45, 50.

[16] *Id*. at 47-52.

[17] *Id*. at 47-50.

[18] *Id*. at 50-52.

[19] *Id*. at 52-57.

[20] *Id*.

[21] 33 U.S.C. §1362(14).

[22] Northwest Environmental Defense Center v. Brown, 617 F.3d 1176 (2010).

[23] *Id*. at 1189-91.

storm-water runoff into ditches and pipes before discharge into forest streams and rivers, the Court held that these discharges constituted point source pollution, which requires NPDES permitting.[24]

c. Standing to Review Orders in Other than Contested Cases

Oregon Revised Statutes, Chapter 537 lays out the procedure for appropriating water. A person wishing to appropriate water must apply for a permit from the Oregon Water Resources Department ("OWRD").[25] OWRD will conduct internal review of the application, and will then give public notice and seek comments on the application.[26] "[A]ny person interested in the application" may submit written comments,[27] and the OWRD will then issue a final order.[28] Any person opposing the final order may request a contested case hearing to challenge the order.[29] Additionally, a person wishing to alter a permit must also submit an application to the OWRD, who then publishes notice of the proposed change.[30] Unlike new appropriation applications, there is no provision for requesting a contested case to challenge the OWRD's final order. However, "[a]ny party affected by a final order other than contested case issued by the Water Resources Commission or Water Resources Department may appeal the order to the Circuit Court of Marion County or to the circuit court of the county in which all or part of the property affected by the order is situated."[31]

On August 11, 2010, the Oregon Court of Appeals issued a ruling in *Pete's Mountain Homeowners Association v. Oregon Water Resources Department* that addressed the differences between challenges to applications for new appropriations, in which "any person" may bring a challenge, versus applications to change existing water rights, in which "any party affected" may bring a challenge.[32]

In *Pete's Mountain*, a water company submitted an application to OWRD to expand the place of use under its water right. A homeowners association and individual landowners filed a petition for judicial review, and the water company intervened and moved to dismiss for lack of standing, arguing that the petitioners were not "parties" under the applicable statute.[33] The trial court dismissed, but the Court of Appeals reversed and remanded. The Appellate Court determined, after statutory analysis and construction, that the common meaning of "party," i.e. a person who initiates judicial review, is the appropriate definition in this context, rather than requiring a "party" to be a part of a former legal proceeding.[34] The Court remanded for determination of whether petitioners were "affected," and to resume review of the OWRD's order.[35]

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[24] *Id*. at 1196-97.

[25] Oregon Revised Statutes ("ORS") § 537.130.

[26] ORS § 537.150(6).

[27] ORS § 537.150(7).

[28] ORS § 537.153(1).

[29] ORS § 537.153(8).

[30] ORS § 537.211.

[31] ORS § 536.075.

[32] Pete's Mountain Homeowners Association v. Oregon Water Resources Department, 236 Or.App. 507 (2010) ("Pete's Mountain").

[33] *Id*. at 510.

[34] *Id*. at 522-23.

[35] *Id*. at 523.

d. Easements over Public Land for Water Delivery

In *City of Baker City, Oregon v. United States*,[36] Baker City brought suit against the United States Forest Service, Department of Agriculture, Department of the Interior, Bureau of Land Management ("United States") and various private land owners in Baker County for declaratory judgment and quiet title to rights-of-way across lands owned by defendants. Baker City holds state water rights, and, for delivery purposes, the City claimed the right to travel over federal and private lands based on the Mining Act of 1866, express easements prior to conveyance of parcels to the federal government, the "savings provision" of the Federal Land Policy and Management Act, prescriptive easements against owners prior to conveyance of parcels to the federal government, other state and federal right-of-way acts, and various state and federal cases interpreting those provisions.[37]

The trial is ongoing in Oregon Federal District Court. As of the date this article was written, the District Court has granted partial summary judgment in favor of Baker City for rights-of-way over 87 parcels of land, and has granted summary judgment in favor of Baker City as to the scope (width of the right-of-way) for 15 of those parcels. Although this case is ongoing, it is instructive on many issues related to statutory and customary rights-of-way permitted for water delivery across private and federal lands.

e. Municipal Storm Water Permits and Water Quality Standards

In *Tualatin Riverkeepers v. Oregon Department of Environmental Quality*,[38] environmental organizations sought judicial review of municipal storm water permits issued by the Department of Environmental Quality ("DEQ"), alleging the permits violated water quality standards set pursuant to the Clean Water Act. The trial court granted summary judgment in favor of the DEQ, and the Oregon Court of Appeals affirmed, stating that although the permits did not include specific numeric limitations on pollutants and wasteload allocations, such an inclusion was not required.[39]

The Clean Water Act requires regulation of certain storm water discharges.[40] Oregon Administrative Rule 340-045-0015(2) states: "Without first obtaining an NPDES permit, a person may not discharge into navigable waters pollutants from a point source or storm water subject to permit requirements in 40 CFR § 122.26 or § 122.33, including storm water from large, medium, and regulated small municipal separate storm sewer systems[.]" Thus, DEQ issues permits to municipal entities for a large proportion of storm water discharges.

The issue in this case was that the permits issued by DEQ did not specify wasteload allocations in numeric form. Instead, the permits set benchmarks and required compliance with best management practices. Generally, the Oregon Court of Appeals held: 1) the requirement that NPDES permits set "effluent limitations" is satisfied by

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[36] City of Baker City, Oregon v. United States, 2010 WL 1406526 (D.Or., April 5, 2010); City of Baker City, Oregon v. United States 2010 WL 2365852 (D.Or., June 11, 2010).

[37] *Id*.

[38] Tualatin Riverkeepers v. Oregon Department of Environmental Quality, 235 Or.App. 132 (2010).

[39] *Id*.

[40] *Id*. at 135-36.

broad restrictions, including best management practices requirements;[41] 2) permits for the discharge of municipal storm water do not need to incorporate provisions requiring compliance with state water quality standards, and the DEQ may allow violations by permit;[42] and 3) the DEQ has broad discretion in both deciding how to meet water quality standards and in issuing NPDES permits.[43]

2. Administrative

a. Oregon Water Resources Department

Pursuant to Senate Bill 788 (Chapter 819 Oregon Laws 2009), OAR 690-220 was amended to charge dam owners annual fees based on the dam's hazard rating, as determined by the Oregon Water Resources Department.[44] The rules were filed with the Secretary of State on December 7, 2009, and the effective date was January 1, 2010.

OAR 690-382 was promulgated to implant Senate Bill 788's (Chapter 819 Oregon Laws 2009) revision of fees related to applications requesting modification of groundwater registrations. The rules lay out the process for application for modification, including how to apply and the materials required.[45] The rules were filed with the Secretary of State on December 8, 2009, and the effective date was December 15, 2009.

OAR 690-340-0030 was amended to comply with statutory fees associated with applications to the Oregon Water Resources Department requesting a limited license for the use of water for Aquifer Storage and Recovery testing purposes, Artificial Groundwater recharge purposes, and all other limited license filings. The rule was filed with the Secretary of State on December 8, 2009, and the effective date was December 15, 2009.

Pursuant to House Bill 3494 (Chapter 669 Oregon Laws 2005), OAR 690-522 was adopted to restrict the amount of new groundwater that can be approved in the Deschutes Ground Water Study area to 200 cubic feet per second.[46] The rules were adopted in conjunction with the Deschutes Basin Mitigation Bank and Mitigation Credit Rules. The rules also adjust how the Oregon Water Resources Department counts appropriations under the existing appropriation "cap." The rules were filed with the Secretary of State on June 9, 2010, with effect taking place the same day.

b. Oregon Department of Environmental Quality

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[41] *Id*. at 141.

[42] *Id*. at 140, 145.

[43] *Id*. at 142, 148.

[44] The updated rule may be viewed in the Oregon Bulletin (January 1, 2010), *available at*: http://arcweb.sos.state.or.us/rules/0110_Bulletin/0110_ch690_bulletin.html, last viewed on November 30, 2010.

[45] *Id*.

[46] The updated rule may be viewed in the Oregon Bulletin (January 1, 2010), *available at*: http://arcweb.sos.state.or.us/rules/0710_Bulletin/0710_ch690_bulletin.html, last viewed on November 30, 2010.

OAR 340-045-0033, which adopted general permits for compliance with the NPDES program under the Clean Water Act,[47] was amended. The rule allows general permits to be superseded by a DEQ order or by the Director of the DEQ. The rule also removes certain general permits from the section which are expired. Others will be superseded by order in the future.

OAR 340-054 amended the DEQ's Clean Water State Revolving Fund loan program to establish a green project financial reserve and to allow retrospective subsidization. The rule revisions allow the DEQ to set aside 20% of its annual CWSRF capitalization grant as a reserve to fund qualifying green projects and provide principal forgiveness to qualifying loans.[48] The rules were amended on a temporary basis and filed with the Secretary of State on May 4, 2010, and were effective from that date until October 29, 2010. Permanent amendments were filed on October 27, 2010 and became effective on the same day.[49]

Pursuant to Senate Bill 737, adopted in the 2007 session of the Oregon State Legislature, OAR 340-045-0100 was adopted to establish levels of persistent pollutants in municipal wastewater that trigger the requirement for municipal permittees to prepare reduction plans if exceeded.[50] The rule was filed with the Secretary of State on July 6, 2010 and became effective on the same date.

OAR 340-045-0075 and OAR 340-071-0140 were amended to increase water quality permit fees. The amended rules increase fees for all NPDES and WPCF permits by 3% to address increased water quality permit program costs.[51] The amended rules were filed with the Secretary of State on August 27, 2010 and became effective on September 1, 2010.

c. Oregon Department of Fish & Wildlife

In order to implement HB 2220 and HB 2583, enacted by the Oregon State Legislature in 2009, OAR 635-059-0000, 635-059-0010, and 635-059-0050 were adopted to define "aquatic invasive species," related to the inspection of commercial and recreational watercraft for the purpose of preventing and reporting aquatic invasive

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[47] The updated rule may be viewed in the Oregon Bulletin (March 1, 2010), *available at*: http://arcweb.sos.state.or.us/rules/0310_Bulletin/0310_ch340_bulletin.html, last viewed on November 30, 2010.

[48] The updated rule may be viewed in the Oregon Bulletin (June 1, 2010), *available at*: http://arcweb.sos.state.or.us/rules/0610_Bulletin/0610_ch340_bulletin.html, last viewed on December 2, 2010.

[49] The permanent version of the updated rule may be viewed at: http://arcweb.sos.state.or.us/rules/1210_Bulletin/1210_ch340_bulletin.html, last viewed on December 2, 2010.

[50] The updated rule may be viewed in the Oregon Bulletin (August 1, 2010), *available at*: http://arcweb.sos.state.or.us/rules/0810_Bulletin/0810_ch340_bulletin.html, last viewed on December 2, 2010.

[51] The amended rule may be viewed in the Oregon Bulletin (October 1, 2010), *available at*: http://arcweb.sos.state.or.us/rules/1010_Bulletin/1010_ch340_bulletin.html, last viewed on December 2, 2010.

species.[52] The rules were filed with the Secretary of State on January 12, 2010 and became effective on the same date.

d. Oregon Department of State Lands

Under OAR Chapter 141, the Division 085 rules were amended to reflect statutory changes made during the 2009 Oregon Legislative Session (HB 2155 and HB 2156). The rules state the general policy for removal and fill activities, jurisdiction by type of water, exemptions for certain activities, fees, application requirements, the review process and more.[53] The rules were filed with the Secretary of State on December 15, 2009 and became effective on January 1, 2010.

OARs 141-142-0010 through 0040 were adopted pursuant to law requiring state agencies to implement recommendations from the Ocean Policy Advisory Council on marine reserves by adopting rules to study, monitor, evaluate and enforce a pilot rick marine reserve at Otter Rock and Redfish Rocks.[54] The rules describe what the Department of State Lands may authorize within areas designated as a marine reserve. The rules affect permits for dredging and filling activities. The rules were filed with the Secretary of State on December 15, 2009 and became effective on the same date.

On April 23, 2010 the Department of State Lands announced an indefinite suspension of rulemaking regarding waterway authorizations. The Agency announced: "'We believe we need more time to listen and respond to the public's issues and concerns relating to the waterway authorization process,' said Louise Solliday, Department director.[55] The current administrative rules governing the uses of waterways are still in effect.

[52] The adopted rules may be viewed in the Oregon Bulletin (February 1, 2010), *available at*: http://arcweb.sos.state.or.us/rules/0210_Bulletin/0210_ch635_bulletin.html, last viewed on December 2, 2010.

[53] The rules may be viewed in the Oregon Bulletin (January 1, 2010), *available at*: http://arcweb.sos.state.or.us/rules/0110_Bulletin/0110_ch141_bulletin.html, last viewed on December 2, 2010.

[54] *Id*.

[55] Newsroom, Department of State Lands, *available at*: http://www.oregon.gov/DSL/news/pr1012_wwrules_suspend.shtml, last visited December 3, 2010.