

By Brian Sheets and Laura Schroeder

*M. Oregon*<sup>1</sup>

## 1. Judicial Developments

In December of 2013, the Oregon Court of Appeals decided *WaterWatch of Or., Inc. v. Water Res. Dep't.*<sup>2</sup> The City of Cottage Grove developed its water supply under a municipal water permit from a Willamette River diversion. After several extensions, the City's permit expired in 1999, but the City continued to develop its water supply. In 2007, the City applied for an extension to develop its authorized, permitted water volume. In January 2008, the City requested the Oregon Water Resources Department ("OWRD") place its extension application on administrative hold, used the water to the full extent authorized under the permit during the administrative hold, and requested prospectively that the administrative hold to be taken off the extension application in August 2008.

WaterWatch of Oregon protested the extension application, and OWRD held a contested case hearing that resulted in granting the extension. In October of 2010, and within the time allowed for a petition for judicial review of the order on the extension, the City applied for a water right certificate, and OWRD issued a water right certificate. WaterWatch did not challenge the issued certificate.

WaterWatch petitioned for judicial review of OWRD's order granting the extension, stating OWRD erroneously interpreted ORS 537.230(2), should not have granted the extension, and therefore, the issuance of a water right certificate was in error.<sup>3</sup> The Court of Appeals agreed, reversing OWRD's order granting the certificate. The Court of Appeals held OWRD failed to condition the extension with fish-protection and water conservation plan requirements,<sup>4</sup> and remanded the extension order to OWRD. The Court held that "[t]he text, context, and legislative history of ORS 537.230(2) indicate that the 'undeveloped portion of the permit' is to be measured by reference to the maximum rate of water applied to beneficial use before the expiration of the development deadline in the permit or last-issued extension."<sup>5</sup>

In making its decision, the Court rejected OWRD and the City's mootness arguments following the certificate issuance holding that the Court's ability to review an

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<sup>1</sup> Laura A. Schroeder, the co-author, is the owner of Schroeder Law Offices, P.C., and is licensed to practice law in Oregon, Washington, Nevada, and Idaho. Co-authored by Brian R. Sheets, licensed in Oregon. This report lists highlights in the area of Oregon Water Law for the year 2014, but is not a comprehensive or exhaustive report of all legal changes. Nothing in this report shall be intended to be legal advice by the co-authors or the American Bar Association.

<sup>2</sup> *WaterWatch of Or., Inc. v. Water Res. Dep't.*, 259 Or. App. 717 (2013), <http://www.publications.ojd.state.or.us/docs/A147071.pdf>.

<sup>3</sup> See also *City of Damascus v. Brown*, 266 Or. App. 417 (2014), <http://www.publications.ojd.state.or.us/docs/A156920.pdf> (adopting the reasoning of *WaterWatch*) ("if the city had not been granted the extension, then the city would not have been able to perfect its water right, and the department would not have been able to lawfully issue the certificate to the city. Thus, if the department's extension order was unlawful, then the department's order issuing the certificate was unlawful as well.").

<sup>4</sup> See OR. REV. STAT. § 537.230(2)(b) and (c).

<sup>5</sup> *WaterWatch of Or., Inc.*, 259 Or. App. at 742.

extension order following a water right certificate issuance was not rendered moot because “the certificate was predicated on the legality of the extension order, and petitioner had no practical ability to seek judicial review of the certificate.”<sup>6</sup>

OWRD and Cottage Grove appealed to the Oregon Supreme Court, the Court granted review,<sup>7</sup> and heard oral arguments in October of 2014.

In *Barkers Five, LLC v. Land Conservation & Dev. Comm’n*,<sup>8</sup> the Oregon Court of Appeals reversed the Land Conservation and Development Commission’s (“LCDC”) designation of urban and rural reserves for expansion of the Urban Growth Boundary in the Portland metropolitan area. Among 22 petitioners seeking judicial review of LCDC’s order designating rural reserves, 1000 Friends of Oregon claimed that Washington County had improperly used an agricultural study that focused only on irrigable lands, and therefore erroneously applied an alternative land-use ranking system contrary to the statutory factors requiring analysis of “suitable soils and available water where needed,” in ORS 195.141(3)(c). The Oregon Court of Appeals agreed, stating “[t]he county’s singular focus on irrigation effectively read the words ‘where needed’ out of the statute and was contrary to the principles reflected in . . . the meaning of ORS 195.141(3)(c).”<sup>9</sup> The Court remanded the rural reserves designation to LCDC to consider the reserves designations in Washington County as a whole with additional consideration of water availability, not limited to irrigable land.

The Oregon Court of Appeals reversed and remanded the trial court’s dismissal of a lawsuit brought by two minors and their guardians against Oregon Governor John Kitzhaber in *Chernaik v. Kitzhaber*.<sup>10</sup> The petitioners requested a declaration that the State has fiduciary duties to protect atmospheric, water, and other natural resources from climate change impairment as public trust resources. The petitioners sought a declaration that:

the atmosphere . . . water resources, navigable waters, submerged and submersible lands, islands, shorelands, coastal areas, wildlife, and fish are trust resources, and that the State of Oregon, as a trustee, has a fiduciary obligation to protect these assets as commonly shared public trust resources from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians.<sup>11</sup>

The trial court dismissed the suit on justiciability grounds, finding that the claims were political questions, and that granting the relief sought would violate the separation of powers principles by creating a new duty on the State. The Court of Appeals disagreed, stating that the merits had not been addressed under the Uniform Declaratory Judgments Act as to whether the State owes fiduciary duties to protect water resources, *inter alia*, as public trust resources from the effects of climate change, and remanded the case to the trial court to decide the merits of the claims.

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<sup>6</sup> *Id.* at 732.

<sup>7</sup> *Waterwatch of Or., Inc. v. Water Res. Dep’t*, 355 Or. 317 (2014) (unpublished).

<sup>8</sup> *Barkers Five, LLC v. Land Conservation & Dev. Comm’n*, 261 Or. App. 259 (2014), <http://www.publications.ojd.state.or.us/docs/A152351.pdf>.

<sup>9</sup> *Id.* at 331.

<sup>10</sup> *Chernaik v. Kitzhaber*, 263 Or. App. 463 (2014), <http://www.publications.ojd.state.or.us/docs/A151856.pdf>.

<sup>11</sup> *Id.* at 468.

In *Noble v. Or. Water Res. Dep't*,<sup>12</sup> the petitioners sought judicial review of OWRD's grant of a reservoir water permit under ORS 537.409, and challenged OWRD's interpretation of the "significant detrimental impact" review standard for existing fisheries resources. The reservoir owner submitted an application for a pond constructed sometime before 1975, and requested the permit be processed under an exemption in ORS 537.409 that allows for expedited review for qualifying small reservoirs constructed prior to 1995. OWRD processed the permit under the exemption, issued a final order with a finding of no significant detrimental impact to existing fisheries, and conditioned the permit on winter use with installation of state-approved fish screening and bypass structures. The petitioner, a downstream landowner, submitted comments during the public interest review period that stated existing fisheries would be impacted and the permit would injure existing water rights. After OWRD issued the permit, the petitioner filed a petition for judicial review in Circuit Court, and the trial court affirmed OWRD's order granting the permit.

In the Court of Appeals, the petitioners asserted the review standard should be "no potential detrimental impact."<sup>13</sup> The Court disagreed, stating that *significant* detrimental impact applied, and that the legislative history supported the expedited permitting process for pre-existing reservoirs, with a stricter *procedure* for post-1995 reservoirs, rather than a more restrictive *standard* of review. The Court affirmed OWRD's order granting the permit, found substantial evidence supported OWRD's decision, and the permit did not injure existing water rights.

## 2. Administrative Developments

In March of 2014, the Governor declared an emergency drought in Harney, Klamath, Lake, and Malheur Counties in [Executive Order No. 14-01](#), which tasked OWRD "to coordinate and provide assistance and regulation for the affected counties as it determines is necessary in accordance with ORS 536.700 to 536.780."<sup>14</sup> OWRD initiated rulemaking, and promulgated [OAR 690-022-0020 to 0030](#) in May of 2014 that granted surface water diversions a "temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date."<sup>15</sup>

OWRD initiated rulemaking again in July 2014, modifying prior rules that applied to surface water diversions, to include all groundwater and surface water sources, giving preference to human consumption and stockwatering in Klamath County.<sup>16</sup> OWRD held a second public hearing in August of 2014 after limited public participation in the July rulemaking hearing. The Oregon Water Resources Commission adopted the preference rules in September 2014 that self-repeal on December 31, 2014.<sup>17</sup>

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<sup>12</sup> *Noble v. Or. Water Res. Dep't*, 264 Or. App. 110 (2014), <http://www.publications.ojd.state.or.us/docs/A148021.pdf>.

<sup>13</sup> *Id.* at 118.

<sup>14</sup> Executive Order No. 14-01, [http://www.oregon.gov/gov/docs/executive\\_orders/eo\\_14\\_01.pdf](http://www.oregon.gov/gov/docs/executive_orders/eo_14_01.pdf).

<sup>15</sup> Vol. 53 No. 5 Or. Bull. 237–38, (May 1, 2014), [http://arcweb.sos.state.or.us/doc/rules/bulletin/May2014\\_Bulletin.pdf](http://arcweb.sos.state.or.us/doc/rules/bulletin/May2014_Bulletin.pdf).

<sup>16</sup> Vol. 53 No. 7 Or. Bull. 20, (July 1, 2014), [http://arcweb.sos.state.or.us/doc/rules/bulletin/July\\_2014\\_Bulletin.pdf](http://arcweb.sos.state.or.us/doc/rules/bulletin/July_2014_Bulletin.pdf)

<sup>17</sup> Vol. 53 No. 9 Or. Bull. 23 (Sep. 1, 2014), [http://arcweb.sos.state.or.us/doc/rules/bulletin/September2014\\_Bulletin.pdf](http://arcweb.sos.state.or.us/doc/rules/bulletin/September2014_Bulletin.pdf); OAR 690-

OWRD is developing administrative rules in Chapter 690-325 that implement [ORS 537.225](#),<sup>18</sup> that allow a full or partial assignment of a water permit to subsequent landowners, when previously, the permit was not able to be split for development by separate landowners.<sup>19</sup> The rules establish procedural requirements used by OWRD for landowners holding permits for “irrigation, nursery, temperature control, stock watering or agricultural use, to assign all or part of the water right permit and to issue a replacement permit to reflect an assignment from the current permit holder to one or more additional permit holders.”<sup>20</sup>

[2013 Senate Bill 839](#) created a \$10.2 million funding source for qualifying water storage projects.<sup>21</sup> Section 19 required OWRD to form a Seasonally Varying Flows Task Force to determine minimum stream flow requirement methodologies, with the methodologies to be implemented by rule prior January 1, 2015. The Task Force convened in August of 2014,<sup>22</sup> and will “act as an advisory body on the functional needs of watersheds for seasonally varying flows and the financial feasibility of new water storage projects.”<sup>23</sup>

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022-0020 (2014),

[http://arcweb.sos.state.or.us/pages/rules/oars\\_600/oar\\_690/690\\_022.html](http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_690/690_022.html).

<sup>18</sup>OR. REV STAT. § 537.225 (2013),

[https://www.oregonlegislature.gov/bills\\_laws/ors/ors537.html](https://www.oregonlegislature.gov/bills_laws/ors/ors537.html).

<sup>19</sup>Vol. 53 No. 10 Or. Bull. 16 (Oct. 1, 2014),

[http://arcweb.sos.state.or.us/doc/rules/bulletin/October2014\\_Bulletin.pdf](http://arcweb.sos.state.or.us/doc/rules/bulletin/October2014_Bulletin.pdf).

<sup>20</sup> *Id.*

<sup>21</sup> S.B. 839, 77th Leg. Reg. Sess. (Or. 2013),

[http://www.oregon.gov/owrd/docs/SB839/SB839\\_Enrolled.pdf](http://www.oregon.gov/owrd/docs/SB839/SB839_Enrolled.pdf).

<sup>22</sup> Meeting Minutes: SB 839 Kick-Off: Joint Meeting of The Governance Task Force and Seasonally Varying Flows Task Force (Aug. 15, 2014), *available at*

[http://www.oregon.gov/owrd/docs/SB839/2014\\_08\\_15\\_Joint\\_TF\\_Minutes\\_Final.pdf](http://www.oregon.gov/owrd/docs/SB839/2014_08_15_Joint_TF_Minutes_Final.pdf).

<sup>23</sup>Thomas J. Paul, *SB 839 (2013) Update*, OR. WATER RES. DEP’T (July 1, 2014),

*available at*

[http://www.oregon.gov/owrd/docs/SB839/2014\\_07\\_01\\_TF\\_Report\\_to\\_Legislature.pdf](http://www.oregon.gov/owrd/docs/SB839/2014_07_01_TF_Report_to_Legislature.pdf).