

E – O U T L O O K

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

Year 2010

Environmental & Natural Resources Law Section

Issue 1 - April

OREGON STATE BAR

Editor's Note: In this issue, Laura Maffei of Schwabe Williamson & Wyatt PC summarizes a recent decision in the *Klamath Irrigation District* litigation, critical to water law issues in the State of Oregon. Ms. Maffei's practice includes Clean Water Act permitting and litigation, hazardous waste remediation, and assistance with environmental aspects of real estate and business transactions. She can be reached at 503-796-2953 or lmaffei@schwabe.com.

We have reproduced the entire article below. For those you prefer to view it in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

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KLAMATH IRRIGATION DISTRICT et al. v. UNITED STATE OF AMERICA et al.,

2010 Ore. LEXIS 111 (March 11, 2010)

The Oregon Supreme Court recently weighed in on the multi-year fight over water rights in the Klamath Basin. By certifying three questions posed by the United States Court of Appeals for the Federal Circuit, the Oregon Supreme Court has responded to long-standing ambiguities in Oregon's water law.

Background

The questions surrounding ownership interests in Klamath Basin water have more or less been broken into two pieces: the Klamath Adjudication, a state administrative process in which the rights to the use of water are being determined; and a federal court case in which Klamath Basin water users have sued the United States to protect the users' equitable or beneficial property interests in the water. The *Klamath Irrigation District* case involves the latter.

Klamath Irrigation District arose from events in 2001 when drought conditions in the Klamath Basin led the United States to withhold water from irrigators in favor of protected species in the basin. The United States Bureau of Reclamation has long managed water in the Klamath Basin as part of the Klamath Project, a reclamation project authorized by Oregon statute in 1905. Irrigators in the Klamath Basin had historically been given sufficient water for their purposes, even in relatively dry years, but the drought predicted for 2001 was severe enough that the United States cut off all water to irrigators.

Irrigation districts and individual water users sued the United States, claiming a constitutional taking of their rights to the Klamath Project water, as well as breach of contract. Because the Klamath Adjudication was already under way as the sole means for determining legal right to the use of the water, the plaintiff water users proceeded in federal court under the theory that their equitable or beneficial property rights had been taken. The U.S. Court of Federal Claims sided with the United States, finding: (1) the water users did not have a property right in their contracts with the United States that would be subject to a takings claim; (2) other, individual water rights with a later priority date held by some irrigators were not “taken” by the United States when it denied water; and (3) the United States had a sovereign right to deny water to the users.

Questions Certified to Oregon Supreme Court

The water users appealed to the U.S. Court of Appeals for the Federal Circuit. In order for the Court of Appeals to rule on the takings claim, however, it must determine whether there is an equitable or beneficial property right in the water. The Court of Appeals found that it could not make this determination without deciding complex issues of Oregon water law. The Court of Appeals therefore certified three questions to the Oregon Supreme Court. The questions are based on the 1905 Oregon statute authorizing the Klamath Project, Oregon’s 1909 Water Code, and common law interpretation of Oregon water law. The questions certified were:

- (1) Whether the 1905 Oregon statute precludes water users from obtaining an equitable or beneficial property interest in the water;
- (2) Whether the water users actually have an equitable or beneficial property interest in the water; and
- (3) Whether the water users were required to make a claim in the Klamath Adjudication to preserve their interest in the water.

To answer these questions, the Oregon Supreme Court had to delve into statutes and court opinions more than 100 years old. In the end, the Oregon Supreme Court found the following.

- **The 1905 statute does not preclude the water users from claiming an equitable interest in the water**

In coming to this conclusion, the Oregon Supreme Court reviewed the many ways under Oregon law in which the right to use water may be held by an appropriator separately from the beneficial or equitable property interest that a user has in the water itself. The court concluded that, in the context of other statutes and decisions of the time, the Oregon legislature did not intend to prevent water users from having a beneficial or equitable property interest in the water when it passed the 1905 statute.

- **An equitable or beneficial property interest in the water cannot be proven solely by past beneficial use of the water – other factors such as contract terms are necessary to determine whether the water users have an established property interest in the water**

In analyzing this question, the court relied on previous decisions in which it determined that a

water user cannot gain a property interest in water that is appropriated by another person merely by putting the water to beneficial use. Beneficial use is necessary to showing a property interest, but not in itself a sufficient condition. In addition to beneficial use, the relationship between the user and appropriator – and any contracts they enter into – must be analyzed to determine how the parties view their property interests in the water and whether the parties have already agreed how those property interests will be held. The court noted that it did not have the complete agreements between the United States and the water users and therefore could not fully analyze whether the water users had indeed obtained an equitable or beneficial property interest in the water. It appears that decision will be made by the U.S. Court of Appeals, as guided by the Oregon Supreme Court's opinion.

- **The water users were not required to make a claim in the Klamath Adjudication process in order to pursue their takings claim against the United States**

This question arose because the United States argued that the water users lost their property interest in the water by failing to make a claim as part of the Klamath Adjudication. The Oregon Supreme Court determined that the adjudication process only addresses the rights to water among appropriators. Adjudication does not consider the relative rights between appropriators and those who use the water derivatively, such as those claiming in equity or under contracts. Because of this, the water users were not required to appear in the adjudication to preserve their equitable property interest in the water and can continue to pursue their takings claim against the United States.

Conclusion – What's Next

The final determination of water rights among appropriators and users in the Klamath Basin is still incomplete. Although the Oregon Supreme Court has ruled on important substantive issues, the water users' takings claim must still be heard and decided upon by the United States Court of Appeals. That decision may still be years away.

E-Outlook April 2010

If you would like to contribute or have comments, please contact the E-Outlook Editor, Patrick Rowe, at prowe@sussmanshank.com or (503) 241-1651.