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Recent Environmental Cases and Rules

Environmental & Natural Resources Section — Oregon State Bar
Chris Thomas, Editor — July 2020

Editor's Note: This issue contains selected summaries of judicial opinions and administrative developments between January and June 2020.

A special thank you to our talented contributors for their summaries: Sara Ghafouri of the American Forest Resource Council; Mick Harris and Jeanette Schuster of Tonkon Torp LLP; Lizzy Pennock of Lewis & Clark Law School; Stacey Detwiler of Rogue Riverkeeper; Brodia Minter of Klamath Siskiyou Wildlands Center; Eric Christensen, David Weber & Megan Withroder of Beveridge & Diamond PC; Lindsay Thane & David Stearns of Schwabe, Williamson & Wyatt; and Matthew D. Query of Yockim Carollo LLP.

If you are interested in summarizing cases or rules, please contact the editor.

Chris Thomas, cthomas@thefreshwatertrust.org

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Supreme Court

1. ***United States Forest Serv. v. Cowpasture River Pres. Ass'n*,** Nos. 18-1584, 18–1587, __ U.S. __, 140 S. Ct. 1837 (June 15, 2020). *Author*: Sara Ghafouri of the American Forest Resource Council.

Petitioner Atlantic Coast Pipeline, LLC ("Atlantic") filed an application with the Federal Energy Regulatory Commission ("FERC") to construct an approximately 604-mile natural gas pipeline from West Virginia to North Carolina along a proposed route that would traverse 16 miles of land within the George Washington National Forest. 2020 WL 3146692, *2. To construct the pipeline, Atlantic secured a special use permit from the United States Forest Service to obtain a right-of-way for a 0.1-mile segment of pipe some 600 feet below a portion of the Appalachian National Scenic Trail ("Appalachian Trail"), which crosses parts of the George Washington National Forest. *Id.*

Respondents Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia filed a petition for review in the Fourth Circuit, contending that the issuance of the special use permit for the right-of-way under the Appalachian Trail violated the Mineral Leasing Act ("Leasing Act"), 30 U.S.C. § 181 *et seq*., the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*., the National Forest Management Act, 16 U.S.C. § 1604, and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. *Id*., at *3. Atlantic intervened in the suit. *Id*.

In 2018, the Fourth Circuit vacated the special use permit, reasoning that the Leasing Act did not empower the Forest Service to grant the right-of-way because the Appalachian Trail fell within the jurisdiction of the National Park System, when the Secretary of the Interior delegated its authority over the Appalachian Trail's administration to the National Park Service. *Id.*

The Leasing Act enables the Secretary of the Interior to grant pipeline rights-of-way through "'public lands, including the forest reserves,'" and "Congress amended the Leasing Act in 1973 to provide that not only the Secretary of the Interior but also any 'appropriate agency head' may grant '[r]ights-of-way through any Federal lands . . . for pipeline purposes." *Id*., at *4 (quoting Pub. L. 93–153, 87 Stat. 576; 30 U.S.C. § 185(a)). The term "Federal lands" is defined to include "all lands owned by the United States, *except lands in the National Park System*, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." 30 U.S.C. § 185(b) (emphasis added).

The National Trails System Act ("Trails Act") establishes national scenic and national historic trails. 16 U.S.C. § 1244(a). The Appalachian Trail was one of the first two trails created under the Act, 16 U.S.C. § 1244(a)(1) and, under the Trails Act, "shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture." *Id.* The Trails Act empowers the Secretary of the Interior to establish the location and width of the Appalachian Trail by entering into "rights-of-way" agreements with other federal agencies. 16 U.S.C. §§ 1246(a)(2), (d), (e). The Trails Act also contains a provision stating that "[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." 16 U.S.C. § 1246(a)(1)(A).

The question before the Supreme Court was whether the Leasing Act enables the Forest Service to grant rights-of-way permitting for a pipeline through lands traversed by the Appalachian Trail within national forests. The case was argued on February 24, 2020, and the Supreme Court opinion, written by Justice Thomas, was issued on June 15, 2020. Justice Sotomayor dissented and was joined by Justice Kagan.

The Supreme Court focused on the distinction between the lands that the Appalachian Trail traverses versus the trail itself because, in the majority's view, it is the "lands" that are the object of the relevant statutes. *Id.* The court noted "it is undisputed that the Forest Service has jurisdiction over the 'Federal lands' within the George Washington National Forest" and thus the relevant inquiry is "whether these lands within the forest have been removed from the Forest Service's jurisdiction and placed under the Park Service's control because the Trail crosses them." *Id*., at *4.

The Supreme Court held that the lands that crossed the Appalachian Trail remained under the Forest Service's jurisdiction and, therefore, continued to be "Federal lands" subject to the grant of a pipeline right-of-way under the Leasing Act. *Id.* The court reasoned that the right-of-way agreement the Forest Service entered into with the National Park Service for the Appalachian Trail did not convert "Federal lands" into lands within the National Park System. *Id.* The court explained that "[w]hen applied to a private or state property owner, 'right-of-way' would carry its ordinary meaning of a limited right to enjoy another's land. Nothing in the statute suggests that the term adopts a more expansive meaning when the right is granted to a federal agency." *Id*., at *5. Thus, based on basic property law principle, the court determined the Trails Act did not divest the Forest Service of jurisdiction over lands the Appalachian Trail crosses. *Id*., at *6.

The Supreme Court also determined that the various duties outlined in the Trails Act reinforce the interpretation that the underlying lands remain within the jurisdiction of the Forest Service. *Id*., at *7 (noting that although the National Park Service is the responsible agency to provide for the maintenance of the Trail, it is the Forest Service that perform the necessary physical work). The court noted that if Congress wanted to transfer lands from one agency to another, it would have used unequivocal and direct language: "The fact that Congress chose to speak in terms of rights-of-way in the Trails Act, rather than in terms of land transfers, reinforces the conclusion that the Park Service has a limited role over only the Trail, not the lands that the Trail crosses." *Id*.

2. ***Atlantic Richfield Co. v. Christian*****,** 140 S. Ct. 1335 (Apr. 20, 2020).
Author: Mick Harris of Tonkon Torp LLP.[1]

In April, the U.S. Supreme Court published their opinion in Atlantic Richfield v. Christian, further tangling the rules of engagement in the fight between residential property owners and industrial polluters.

Atlantic Richfield centers on the Anaconda Smelter, a copper ore smelter in Montana. The Atlantic Richfield Company (ARCO) owned the smelter, whose operations produced pollution significant enough to qualify it as a federal "Superfund" site in 1983. Since the smelter ceased operations in 1980, the Environmental Protection Agency (EPA) has spent close to $50 million

[1] Mick graduated *cum laude* from Willamette University College of Law in 2019 and is now an associate in Tonkon Torp's Business Department. This summary initially appeared in the Ear to the Ground Blog.

dollars cleaning up the site. As a result, class-action litigation commenced between residential property owners and ARCO with the case ending up before the Montana Supreme Court.

The plaintiffs argued that the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) required ARCO to fund clean-up efforts on residential properties and the Montana Supreme Court agreed. In response, ARCO appealed, claiming that state courts lacked jurisdiction over the case, as a portion of the claims challenged a CERCLA remedy and CERCLA was a federal law. ARCO also argued that residential landowners themselves should qualify as potentially responsible parties (or PRPs) and, as such, require approval from the EPA before pursuing remedial actions.

To understand how a residential landowner could be considered a PRP, it is important to understand that CERCLA defines an entity as a PRP if:

1. Hazardous wastes are present at a facility,
2. There is a release (or a possibility of a release) of these hazardous substances,
3. Response costs have been or will be incurred, and
4. The defendant is a liable party.

If these elements are met, then an entity may be considered a PRP and could be on the line for the cost of cleanup and other costs resulting from pollution and contamination. PRPs must also receive EPA approval for plans related to remediation efforts.

After considering the arguments, the Supreme Court held on a 7-2 vote that (1) Montana courts had jurisdiction to hear the claims; and (2) landowners were indeed PRPs because the pollution was on their property and this met the definition of "hazardous waste present at a facility." In other words, the residential properties were, themselves, "facilities" under CERCLA. This ruling appears to be based largely on the Court's inclination to maintain CERCLA's comprehensive, strict-liability scheme, but it is likely to muddy the waters further regarding how courts interpret CERCLA while complicating the interplay between state and federal courts as they consider efforts to address polluted Superfund sites.

Ninth Circuit

1. ***Bark v. United States Forest Serv.,*** 958 F.3d 865 (9th Cir. May 4, 2020).
   Author: Lizzy Pennock of Lewis & Clark Law School.

Plaintiff-Appellants Bark et al. ("Bark") appealed a grant of summary judgment in favor of Defendant-Appellee, the U.S. Forest Service ("Forest Service") and Intervenor-Defendant-Appellee, High Cascade, Inc. Bark contended that the Forest Service's Environmental Assessment ("EA"), which resulted in a Finding of No Significant Impact ("FONSI"), failed to properly analyze the environmental impacts of, or potential alternatives to, the Crystal Clear Restoration Project ("Project") in Mt. Hood National Forest. In an Opinion and Order, the Ninth Circuit on de novo review reversed the district court's judgment, and on remand required the Forest Service to complete an Environmental Impact Statement ("EIS").

The court concluded that the Forest Service violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, because the Forest Service's decision not to prepare an EIS was arbitrary and capricious for two independent reasons. The court did not reach Bark's claim under the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*, "because the findings in the EIS could prompt the [Forest Service] to change the scope of the Project or the methods it plans to use."

NEPA requires agencies to base a conclusion that a project has no significant effects "on a consideration of the relevant factors, and [to] provide[] a convincing statement of reasons to explain why a project's impacts are insignificant." An agency must consider both the "context and intensity of the possible effects," 40 C.F.R. § 1508.27, including whether the effects of a project are highly controversial, *id.* at (b)(4), highly uncertain, *id.* at (b)(5), and "whether the action is related to other actions with individually insignificant but cumulatively significant impacts." *Id.* at (b)(7).

First, the court concluded that "the effects of the Project are highly controversial and uncertain." Bark presented extensive scientific evidence that the Forest Service's proposed logging would not achieve the stated primary purpose of the Project to "reduce the risk of wildfires and promote safe fire-suppression activities." The Forest Service proposed "variable density thinning" in the entire Project area, which included several thousand acres of mature and old growth forest, however, Bark's evidence provided "numerous expert sources concluding that thinning activities do not improve fire outcomes." The EA "did not engage with the substantial body of research cited by the Appellants," but rather provided "general conclusions" that the proposed treatments would have "no negative effects." Thus, the Forest Service's conclusions that the Project would achieve its purpose were highly controversial and uncertain, creating a "substantial dispute" about the Project's effects. In the Ninth Circuit, "[w]hen one factor alone raises substantial questions about whether an agency action will have a significant environmental effect, an EIS is warranted." Therefore, Forest Service's decision to forego an EIS was arbitrary and capricious.

Second, the Ninth Circuit found that the Forest Service "failed to identify and meaningfully analyze the cumulative impacts of the project." The EA's cumulative impacts analysis was insufficient because it merely listed other projects, but gave no information about them nor referenced them in the analysis; There were no "specific factual findings that would allow for informed decision-making." The Forest Service relied on "conclusory statements" that no direct or indirect effects would cumulate from other projects, even though "Appellants pointed out at least three other recent or future timber projects in their comments responding to the EA." In addition, the EA "limited its [cumulative impacts] analysis to only the Project area and a 1.2-mile buffer surrounding it," and "[s]uch a small buffer zone fails to distinguish the EA's cumulative impact analysis from an analysis of the direct effects of the Project." Again, the court found that Bark's comments in response to the EA created substantial questions that the Forest Service failed to address, rendering the decision to forgo an EIS arbitrary and capricious.

Oregon State Court

1. ***Citizens for Responsible Dev. in Dalles v. Wal-Mart Stores*, Inc.,** 366 Or. 272, 461 P.3d 956 (Ap. 16, 2020). Author: Stacey Detwiler of Rogue Riverkeeper.

In this case the Oregon Supreme Court upheld the Court of Appeals decision that Oregon Department of State Lands ("DSL") erred in issuing a permit to Walmart to fill in wetlands to build a new store in the Dalles. 295 Or App 310, 321, 433 P3d 364 (2018). At issue in this case is the question of how DSL is required to consider "public need" for a project in its removal-fill permit determination. Although the Oregon Supreme Court affirms the Court of Appeals decision and remands the case to DSL, the Court disagrees with the Court of Appeals interpretation that DSL is required to make a finding of fact of public need before issuing a removal-fill permit. *Citizens for Responsible Dev. in Dalles v. Wal-Mart Stores* (2020) at 285. Instead, the Court states that an "inconclusive" finding of "public need" does not preclude DSL from issuing a permit, as long as the agency provides substantial evidence to support either a determination that there is no "interference" with the paramount policy of the state to preserve its waters for navigation, fishing, and recreation or a determination that the "interference" is not "unreasonable." *Id.* at 291. In this case, DSL's order did not satisfy either component, and therefore the Court affirmed the Court of Appeals decision.

STATUTORY FRAMEWORK

Under Oregon statute, any person who plans to "remove or fill" material within "waters of the state" must obtain a permit from Oregon DSL. *See* ORS 196.795-990. The Director of DSL may issue a removal-fill permit if the director determines that the project "(a) [i]s consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 (Definitions for ORS 196.600 to 196.655) to 196.905 (Applicability); and (b) [w]ould not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation." ORS 196.825. In determining whether to issue the permit, the director "shall consider" nine different factors, including "[t]he public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal." ORS 196.825(3)(a).

The question of how DSL is required to assess these factors to issue a permit, and more specifically the evaluation of "public need," was addressed by the Oregon Supreme Court in *Morse v. Oregon Division of State Lands*, 590 P2d 709 (1979). In *Morse*, DSL issued a permit to the City of North Bend to fill 32 acres of Coos Bay estuary to make an extended runway for the city's municipal airport. The Court addressed the requirement that DSL "shall consider" whether the proposed project "unreasonably interferes" with the "paramount policy of this state," specifically the preservation of waters for navigation, fishing, and public recreation. *See* ORS 196.825. In *Morse*, the Oregon Supreme Court held that DSL lacked statutory authority to issue the removal-fill permit because DSL failed to find that the "public need" outweighed the harm to navigation, fishing, and public recreation in the impacted waters. *Morse* at 209.

As a result of *Morse*, the Oregon Legislature enacted several changes to the removal-fill statute in 1979. Of most relevance to the Court's holding in this case are the changes to codify *Morse's* finding that DSL may issue a permit for a removal-fill project that interferes with the paramount policy of the state to preserve waters for navigation, fishing, and public recreation as long as that

interference is not "unreasonable." *Citizens for Responsible Dev. in Dalles v. Wal-Mart Stores* (2020) at 281. Additionally, the Legislature added "public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal" as one of the factors that DSL "shall consider" in its permit determination. *Id.*

PROCEDURAL HISTORY

After DSL granted a removal-fill permit to Walmart to fill in some of the approximately nine acres of wetlands on the site of a proposed new store in the Dalles, Citizens for Responsible Development ("CFRD") appealed the permit decision. *Id.* at 288. CFRD argued that DSL failed to find that there was public need for the project, and therefore they lacked the authority to issue the permit. The Court of Appeals agreed that DSL must do more than "consider" public need and that the statute requires DSL to make an affirmative finding of public need before DSL has the authority to issue a removal-fill permit. *Citizens for Resp. Devel. in The Dalles v. Walmart* (2018) at 321. The Court of Appeals held that DSL erred in issuing the permit because DSL found that it was "inconclusive" whether or not the project would meet a "public need." *Id.* at 311. DSL petitioned the Oregon Supreme Court for review, which affirmed the Court of Appeals decision to remand the case to DSL. However, the Court in this case disagrees with the Court of Appeals premise that the statute requires a finding of public need before DSL can issue a removal-fill permit.

LEGAL ANALYSIS & CONCLUSIONS

In this case, the Court addressed how DSL is required to consider the "public need" for a project in its determination of "unreasonable interference" with the paramount policy of the state to preserve its waters for navigation, fishing, and recreation. *See* ORS 196.825. Although the Court affirms the Court of Appeals decision and remands to DSL, it does not support the Court of Appeals determination that an affirmative finding of "public need" is required for issuance of a removal-fill permit. Instead, the Court clarifies that, even if there is an "inconclusive" finding of "public need," DSL may issue a removal-fill permit if DSL determines that the interference is not "unreasonable" because it is outweighed by public need or other public benefit factors. *Id*.

The Court finds that in order for DSL to make a determination that the project will not unreasonably interfere with the paramount policy of the state, therefore allowing issuance of the permit, DSL can either: 1) determine that the project will not "interfere" with the paramount policy of the state or 2) determine that the interference is not "unreasonable" because it is outweighed by public need or other public benefit factors. *See* ORS 196.825. Applying the facts in this case, the Court first determined that DSL's order does not directly address the question of "interference." *Id.* at 289. Second, the Court states that the "inconclusive" finding of "public need" in this case does not preclude issuance of the permit if the "interference" is not "unreasonable." *Id.* at 290. However, in this case, DSL found that all of the public benefit categories were "inconclusive" regarding "public need," "the social, economic, or other public benefits that may result from the proposed project," and "whether the public would suffer 'economic loss' from forgoing the retail facility for which the fill was proposed." *Id*. Therefore, DSL did not make any findings on the public-benefit side of the scale to determine whether the project will "not unreasonably interfere." *See* ORS 196.825(1)(b). As a result, the Court affirmed the Court of Appeals decision that DSL's decision must be reversed and remanded. *Id.* at 291.

2. ***Friends of the Columbia Gorge v. Energy Facility Siting Council***, 366 Or. 78, 456 P.3d 635 (Jan. 16, 2020). *Author:* Brodia Minter of Klamath Siskiyou Wildlands Center.

The present case interprets the temporary rules made by the Energy Facility Sitting Council ("the Council") on how to process request for amendments ("RFAs") after the decision in *Friends of Columbia Gorge v. Energy Fac. Siting Coun.*, 365 Or. 371 446 P.3d 53 (2019). *Friends* held that the Council failed to substantially comply with a procedural requirement when amending its processing rules for RFAs to site certificates, invalidating the rules, known as the "2018 rules".

The court issued the *Friends* decision on August 1, 2019. That decision, however, was not immediately effective. Instead, under the relevant Oregon Rule of Appellate Procedure, the decision could become effective only when the court issued the appellate judgment in the case. Because of an unresolved dispute over attorney fees, the court still has not issued the appellate judgment in that case. In response to that decision the Council then adopted, effective on August 22, 2019, the temporary rules governing the processing of RFAs at issue in this case.

Petitioners in this case contend the temporary rules developed by the Council are invalid. Petitioners first argue that the Council failed to prepare a statement of its findings justifying the use of temporary rules. Petitioners also maintain that the Council's rules exceeded the 180-day limit on temporary rules or that the temporary rules improperly operate retroactively. Petitioners ask the court to invalidate all the 2019 temporary rules because, according to petitioners, the Council failed to comply with ORS 183.335(5)(a), which requires an agency adopting temporary rules to prepare "[a] statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice." ORS 183.335(5)(a). The Council prepared a statement describing its grounds for finding serious prejudice but Petitioners maintain that this statement is inadequate.

Petitioners argue that as a result of the *Friends* decision invalidating the 2018 rules, that the 2017 rules were once again in effect. Petitioners maintain that under the 2017 rules site certificates would expire for two certificate holders with pending RFAs, requiring them to start the application process from the beginning. The remaining four certificate holders with pending RFAs would have to start the process over under the 2017 rules.

The Council interprets the repercussions of the *Friends* holding differently. The Council reads the *Friends* decision to mean it was possible that there would be no rules governing review of RFAs. The Council then provides a list of harms relating to each site certificate applicant and foreseeable harm to potential applicants if the 2017 rules as read by Petitioners were effective after the *Friends* ruling.

The standard in which the court can review the sufficiency of Council's statement of serious prejudice is found in legislative history. A court may review a statement of serious prejudice to ensure it is sufficiently detailed or specific, but the court is not limited to these grounds alone. The statute enables judicial review of an agency's finding of serious prejudice as a check on the agency because temporary rulemaking does not include public participation. The legislature intended for public participation to be central to the administrative rulemaking process. Thus, by requiring an agency both to find that its failure to act promptly will result in serious prejudice and to provide the details supporting that finding, the statute ensures that courts may review those findings and prevent agencies from needlessly excluding the public from rulemaking.

Petitioners contend that the Council's findings fail to support its determination that prompt action was needed to avoid serious prejudice. They also contend that the financial interests identified by the Council are insufficient and that, in any event, the Council could have protected those financial interests by waiting to adopt the 2019 temporary rules as permanent rules after going through the normal notice and comment period. Petitioners maintained that invalidating the 2018 rules would revive the 2017 rules, causing the expiration of two projects' site certificates. Those site certificates did not expire under the 2018 rules, because those rules stayed expiration if the certificate holder had a pending RFA. But the 2017 rules did not include a similar stay provision so, according to petitioners, if the 2017 rules became effective, those two site certificates would expire and they would have to restart the application process.

In its statement of serious prejudice, the Council identified those two projects and stated that requiring them to start over with the costly and time-consuming application process would jeopardize both. Thus, petitioners' position gave the Council a reason to adopt the 2019 temporary rules promptly—before this court issued the appellate judgement and the 2018 rules became invalid. If the Council adopted the 2019 temporary rules before the 2018 rules became invalid, then the Council could avoid the possibility that the 2017 rules would be revived and could maintain the stays on expiration that might otherwise be lifted

The court held that the Council acted promptly to avoid the serious prejudice that would result if petitioners were correct in that understanding, concluding that the Council's statement of serious prejudice is sufficient. The court also rejected a challenge to the applicability provision, in which petitioners maintain that the provision "reaches back in time—all the way back to October 24, 2017—to expressly apply the 2019 rules to all applications submitted on or after that 2017 date." If OAR 345-027-0311(1) has been effective since October 24, 2017, then it would exceed the 180-day limit on temporary rules. The court held that the effective date for the applicability provision is August 22, 2019, when the Council adopted that provision. The applicability provision was not effective before then.

3. ***WaterWatch of Oregon v. Water Resources Dep't***, 304 Or. App. 617 (Or. Ct. App. June 10, 2020). *Author:* Eric Christensen of Beveridge & Diamond PC.[2]

Drawing on the long history of Oregon water rights, the Oregon Court of Appeals on June 10, 2020, issued an opinion in *WaterWatch of Oregon v. Water Resources Department* that carries significant implications for hydroelectric projects as well as for water rights more generally. Taken at face value, the case turns on an apparently technical dispute about how to interpret two Oregon water statutes, ORS 543A.305 and ORS 537.348. The implications of the case, however, are far broader, underscoring the importance of water rights for hydroelectric projects, both as a legal prerequisite for operating a hydroelectric project and as an asset that remains after a project is decommissioned.

BACKGROUND

Oregon has long recognized hydroelectric power production as a valid use of the state's water resources. Currently, the state allows the owner of a hydroelectric project to obtain a permit to

[2] Beveridge & Diamond's Water, Natural Resources and Renewable Energy practice groups support and enable successful renewable energy projects, including hydroelectric projects, and other projects requiring rights to use and discharge water and wastewater. For more information, please contact the author.

use the water for production of power for the term of the project's federal license, which generally run for 40 to 50 years. The *WaterWatch* appeal addresses what happens at the end of this term, when the water is no longer used for hydroelectric production.

The answer turns on two relatively recent additions to the Oregon water statutes. The first, ORS 543A.305, was enacted in 1999, as a wave of federal hydroelectric power licenses issued in the first half of the twentieth century were expiring. The statute provides that "[f]ive years after the use of water under a hydroelectric water right ceases," that water automatically converts to a permanent in-stream flow right held in trust for the public.

In-stream flow rights, intended to protect aquatic species and habitats, were also recognized by the second Oregon statute on which the case turned, ORS 537.348, enacted in 1987. That statute authorizes the Oregon Department of Water Resources (DWR) to purchase, lease or accept donations of existing water rights for instream flows. Those rights must then be certificated and are treated the same as any other water right, with senior rights taking priority over junior rights. Water rights transferred under the statute retain the priority date of the original water right, so may have a very high priority if older water rights are transferred.

The dispute over application of these statutes arose from water rights associated with a small hydroelectric project, originally constructed in about 1905, on Rock Creek, a tributary the Powder River in Eastern Oregon. Oregon adopted a system of water rights based on prior appropriation – the familiar "first in time, first in right" system that now governs nearly all water rights in the Western states – in 1909, and in 1923, the DWR issued a water rights certificate to the project owner, Eastern Oregon Light & Power Co.

Following adoption of the Federal Power Act, which established a system of federal licensing for hydroelectric projects, the project was licensed in 1946 for a period of 50 years. The project was subsequently acquired by the Oregon Trail Electric Cooperative. In 1995, the Cooperative determined that the project was no longer economic and elected to decommission it rather than seek renewal of the federal license from the Federal Energy Regulatory Commission. Four years later, in 2000, the Cooperative leased the water rights associated with the project to DWR for five years, and the lease was subsequently renewed several times. Warm Springs Hydro, LLC, acquired the land and other rights associated with the hydro project and, in 2015, obtained a five-year extension of the lease for in-stream flows from DWR.

THE COURT OF APPEALS DECISION

Concerned that Warms Springs Hydro intends to reconstruct a hydroelectric project after the current water lease expires in December 2020, WaterWatch sued. It argued that, under ORS 543A.305, the water rights associated with the hydroelectric project automatically converted to a permanent instream flow in 2000, five years after the water right ceased being used for hydroelectric production in 1995. If this reading prevailed, the conversion of the water right to an instream flow held in public trust by the DWR would preclude the use of the original water right for any new hydroelectric project.

The DWR, joined by Warm Springs Hydro, on the other hand, argued that ORS 543A.305 requires only a "use" of the water right, and does not require the water right to be used for hydroelectric production to prevent it from being converted to a permanent instream flow.

Because DWR's leases of instream flow rights from water rights holders are recognized as a valid "use" of water under ORS 537.348, that "use" continued from the time DWR initially leased the instream flows from the Oregon Trail Cooperative in 2000 and continued with each subsequent renewal of the lease, including the current lease with Warm Springs Hydro. Under this reading, ORS 534A.305 would result in a conversion of the water right to a permanent instream flow only after expiration of the instream flow leases, which would not occur until 2025, assuming the water right is not either re-leased or used for a new hydroelectric project.

Relying on Oregon water law precedents that recognize water "use" as a term of art that includes both consumptive uses like irrigation and non-consumptive uses like hydroelectric production, the Court of Appeals concluded that the term "use of water" in ORS 534A.305 includes all "uses" of water that are recognized as valid under Oregon law. DWR leases of water rights for instream flows are recognized as a valid "use" of water ORS 537.348. Accordingly, the Court concluded, the DWR leases of the water rights for instream flows constitute a valid "use" under the statute, and prevented the water right from being converted to a permanent instream flow by operation of ORS 534A.305.

IMPLICATIONS OF THE DECISION

The decision demonstrates the importance of water rights to hydroelectric power producers, especially in the Western United States, where prior appropriation doctrine prevails. As a result of successfully defending its decision, Warm Springs Hydro retains a water right with a priority date of 1905, likely among the most senior water rights in the Powder River basin. If it had lost the decision, to move forward with a new hydroelectric project, it would have to obtain a new water right. If a new water right could be obtained at all – and new water rights are severely restricted in many Western watersheds that are consider at or beyond their capacity for new appropriations – it would be junior to every other water right in the basin, making it subject to restriction whenever necessary to meet the needs of senior rights holders. These limitations on water use could have serious repercussions for the economic viability of any new project.

In addition, the case demonstrates the potential value of water rights associated with hydroelectric projects, especially older projects, and the wisdom of taking steps to preserve those rights when an old project is decommissioned. In short, hydroelectric owners need to consider water rights at every stage of a project's life, from initial licensing through decommissioning.

4. ***Friends of Yamhill County. v. Yamhill County***, 301 Or. App. 726 (Ct. App. Jan. 15, 2020). *Author*: Matthew D. Query of Yockim Carollo LLP.

This Oregon Court of Appeals opinion represents one of the most recent reviews of the latitude of permissible uses on land zoned for exclusive farm use ("EFU"). The Friends of Yamhill County ("Petitioners") sought review of a final order issued by the Land Use Board of Appeals' ("LUBA") pertaining to Yamhill County's ("Respondent") approval of a permit to conduct beer-tasting events on EFU land.

The operative statute at issue in this case is ORS 215.283(4)(d), which grants authority to a county to authorize certain "agri-tourism or other commercial events or activities" if they are "incidental and subordinate to existing commercial farm use of the tract and are necessary to support the commercial farm uses or the commercial agricultural enterprises in the area." The

property at issue is a hazelnut orchard and a brewery operation—Wolves and People Farmhouse Brewery ("Brewery")—which includes a brewery and tasting room with outside seating authorized by a conditional use permit approved by Yamhill County in 2014. In 2017 Yamhill County approved the Brewery's application for a separate permit to hold up to 18 commercial events a year on the property pursuant to Yamhill County Zoning Ordinance ("YCZO") 1013.01(A)(4)(a), which mirrors the operative statute from ORS Chapter 215. In 2018 the Brewery applied for a renewal of the permit, seeking authorization to host up to 18, 72-hour events per year for beer tastings. The application has three (3) primary elements:

1) describe the existing commercial farm use of the property;
2) explain how the proposed events are incidental and subordinate to the existing commercial farm use; and
3) explain how the events are necessary to support the commercial farm uses or commercial agricultural enterprises in the area.

The County approved the permit renewal, and Petitioners appealed to LUBA alleging the County erred on two grounds. First, Petitioners argued the County erred in determining the proposed events to be "necessary to support" the commercial farm uses and agricultural enterprises in the area. Second, Petitioners argued the County erred in its analysis of whether the events were "incidental and subordinate to" the agricultural use of the Brewery's property. LUBA agreed with Petitioners first argument, but rejected Petitioners' second argument, prompting Petitioners' appeal. Accordingly, the application element most at issue in this case is number (2), particularly the issue of whether or to what extent the beer-tasting events (subject to the 2018 permit renewal) are actually "incidental and subordinate to" the existing farm use on the Brewery's property.

LUBA's determination on this issue agreed with the reasoning advanced by the Brewery and the Respondent, and, in pertinent part, is summarized by the following excerpt from the decision:

> "the county determined that the number of days of commercial events compared to the number of days of commercial farming activity on the property demonstrate that the commercial events are 'incidental and subordinate' to the commercial farming activities on the property because the commercial activities are 'less important or less dominant.' That conclusion is consistent with the plain meanings of the phrase 'incidental and subordinate.'"

The Court of Appeals began its review of this portion of LUBA's decision by reviewing the text of ORS 215.283(4)(d) to determine the effect of the phrase "incidental and subordinate." Given the lack of a statutory definition, the Court ruled that this phrase carries a well-established history in light of treatises and legal dictionaries. In light of the applicable history, as well as pertinent LUBA and appellate case law, the Court ultimately ruled that "the phrase 'incidental and subordinate to' means more than that the accessory use occurs less frequently than the primary use." Id. at 735. Indeed, the Court rules that the history of use of this term supports "a conclusion about predominant use in light of many relevant factors, including the nature, intensity, and economic value of the respective uses." Id. The Court also reviewed the relevant legislative history, and cited testimony from the chair of the workgroup on the bill that became ORS 215.283(4) which identified "incidental and subordinate use" to refer to "a relatively small, side type of activity[,]" which "cannot dominate the use." Id. at 737.

In light of the statutory context and legislative history, the Court ultimately concluded that the statutory context of ORS 215.283(4)(d) strongly suggests the legislature intended "for counties to engage in a similar comparison of the nature, intensity, and economic value of the proposed agri-tourism events and the existing commercial farm use of a property, rather than relying solely on the frequency of the respective activities." Id. at 736. As such, Petitioners' appeal prevailed, and the County decision was reversed and remanded to LUBA.

5. ***Brooks v. Byler***, Marion County Circuit Court Case No. 19CV27798, Order Granting Petitioners' Motion for Partial Summary Judgment (Mar. 10, 2020).
   Authors: Lindsay Thane & David Stearns of Schwabe, Williamson & Wyatt.

In *Brooks v. Byler et al.*, Marion County Circuit Court Case No. 19CV27798, the Marion County Circuit Court rebuked the Oregon Water Resources Department's (OWRD) attempt to regulate groundwater users based on OWRD's blanket determination that all wells within 500 feet of surface water in the Upper Klamath Basin can be shut off in favor of senior surface water rights. Although this decision concerns a rule that only applies in the Upper Klamath Basin, the court's reasoning could impose significant limits on OWRD's authority to regulate groundwater use by rule throughout Oregon.

The appeal arose out of OWRD's attempt to curtail the use of wells under OAR 690-025-0040(6), which purports to give OWRD the authority in the Upper Klamath Basin to "regulate wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights whenever a valid call for surface water is made and the Department is regulating in accordance with the users' existing rights of record." The petitioners challenged OWRD's order on the basis that OWRD lacked the statutory authority to promulgate OAR 690-025-0040, and that the rule deprived them of their water rights without due process.

The court found OWRD's action impermissible on both grounds advanced by the petitioners. First, the court found that ORS 537.525(9)—which reads, "Whenever … impairment of or interference with existing rights to appropriate surface water … exists or impends, controlled use of the groundwater concerned be authorized and imposed … by the commission under the police power of the state"—was merely a policy statement, and not a legislative delegation of authority to enact whatever rules OWRD believes to further the legislature's goals. The closest that the legislature had come to authorizing the type of rule that OWRD had promulgated in OAR 690-025-0040 were the critical groundwater statutes, ORS 537.730 *et seq*. The court found that OAR 690-025-0040 was in substance a critical groundwater area designation, but that OWRD had not followed the only process the legislature had provided to make such designations as set forth in ORS 537.730. The court therefore ruled that OWRD's failure to follow the necessary protocols for designating a critical groundwater area was sufficient to invalidate the application of OAR 690-025-0040 to the petitioners.

The court's analysis under the Due Process Clause of the 14th Amendment has potentially more far-ranging implications to OWRD's authority. The court found that junior groundwater rights cannot be regulated in favor of senior surface water rights on the basis of area-wide findings made in a rulemaking proceeding, where the junior holders had no opportunity to put on evidence and cross-examine the government's witnesses. Critically, the court ruled that a water right holder's ability to challenge the validity of an administrative rule falls short of Due Process

requirements due to the deferential standard of review applicable to rule challenges, namely, whether a "limited kind of record from a rulemaking proceeding" contains substantial evidence to support the agency's rule. This logic could substantially limit OWRD's ability to adopt rules similar to OAR 690-025-0040 in which OWRD asserts the right to regulate wells based on blanket determinations of hydraulic connectivity between entire classes of wells and surface water bodies, and could instead require individual findings and the opportunity for adjudicatory proceedings for each well that OWRD seeks to regulate.

According to reports, OWRD is not planning to appeal the court's ruling, meaning the Court of Appeals will not have the opportunity to settle the questions raised by this case soon.

Administrative & Executive

1. ***Department of Justice Memorandum Regarding Supplemental Environmental Projects*** (March 12, 2020).[3] *Author*: Jeanette Schuster of Tonkon Torp LLP.

In a March 12, 2020 memorandum from Jeffrey Bossert Clark, Assistant Attorney General ("AAG") of the U.S. Department of Justice ("DOJ") Environment and Natural Resources Division ("ENRD") titled "Supplemental Environmental Projects ("SEPs") in Civil Settlements with Private Defendants," DOJ ended its long-standing policy of allowing the use of supplemental environmental projects ("SEPs") to offset monetary penalties assessed by the U.S. Environmental Protection Agency ("EPA") and other agencies for violations of environmental laws. This memo goes in tandem with AAG Clark's August 21, 2019 memorandum banning the use of SEPs in settlements with state and local governments. [Memo at page 9] Consequently, as of March 12, 2020, all use of SEPs in consent decrees and judicial compromise settlements must cease no matter whether the party agreeing to implement the SEPs is a state or local government or private party. The change in policy applies to current and future cases, but not to SEPs that are already being implemented or settlement agreements or consent decrees that have already been approved by DOJ. [Memo at page 2, FN 5]

DOJ's about-face is significant because most environmental enforcement actions are resolved through settlement agreements and consent decrees, and EPA has been using SEPs since about 1980s. [Memo at page 5-6]. A SEP is "an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action. SEPs are projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws." EPA 2015 SEP Policy 2015 Update at 1.[4] Monetary penalties due to EPA can be offset by a certain percentage by a payment to fund an approved SEP, generally not to exceed 80 percent of the penalty.

In his 19-page memo, AAG Clark provides a detailed analysis of the legal reasons behind the decision, arguing essentially that SEPs take money out of the U.S. Treasury and thereby violate the spirit, if not the letter, of the Miscellaneous Receipts Act, which is intended to protect

[3] The memorandum is available in full here: https://www.justice.gov/enrd/page/file/1257901/download.
[4] Available at www.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy.

Congress' constitutional power of the purse, as well as the Antideficiency Act, which prohibits government officials from expending funds (or incurring financial obligations) in excess of appropriations. [Memo at page 11]. In addition, AAG Clark analyzed EPA's SEP policy and rejected the bases on which EPA supports SEPs, leaving EPA little, if any, opportunity to modify its SEP policy to conform to DOJ's new policy.

The March 2020 memo also fully withdraws and supersedes DOJ's January 9, 2018 memo titled "Settlement Payments to Third Parties in ENRD Cases" that provided guidance concerning DOJ's third-party payment prohibition in ENRD cases. However, DOJ's August 21, 2019 memo, prohibiting the use of SEPs in settlements with state and local governments, remains in effect [Memo at page 9, 18]

Mr. Clark states that he will next review the use of SEP-like devices in the criminal context.

2. ***Executive Order 20-04: Directing State Agencies to Take Actions to Reduce and Regulate Greenhouse Gas Emissions*** (March 12, 2020).[5] *Authors*: Eric Christensen, David Weber & Megan Withroder of Beveridge & Diamond PC.

Capping a dramatic but ineffective legislative session, Oregon Governor Kate Brown on March 10, 2020, issued Executive Order No. 20-04, which sets in motion potentially far-reaching administrative actions aimed at drastically reducing Oregon's greenhouse gas (GHG) emissions over the next three decades. The Executive Order launches rulemaking proceedings for every Oregon agency with jurisdiction over GHG-related matters with the aim of reducing Oregon's GHG emissions to 80 percent below 1990 levels by 2050.

BACKGROUND: GHG LEGISLATION & ATTEMPTS TO ENACT CAP-AND-TRADE

In recent sessions, Oregon has adopted several major bills seeking to reduce GHG emissions. These include, for example, a phase-out of coal-fired electricity, the Clean Fuels Program (Oregon's version of the low-carbon fuel standard for motor fuels), legislation aimed at accelerating the adoption of electric vehicles, and legislation establishing a renewable natural gas portfolio standard. Oregon environmental advocates viewed economy-wide cap-and-trade legislation, which would impose a declining cap on GHG emissions and an emissions-credit trading system, as the capstone to these efforts. In both 2019 and 2020, Governor Brown introduced cap-and-trade legislation as a major item on her legislative agenda. Although the legislation appeared poised to pass in both sessions, aided by the tailwind of Democratic super-majorities in both legislative houses, the legislation was thwarted in both sessions by Republican legislators who walked out to deny a legislative quorum rather than see the legislation passed.

EXECUTIVE ORDER NO. 20-04: A SUMMARY

Less than a week after the 2020 legislature adjourned without passing cap-and-trade legislation, Governor Brown issued Executive Order No. 20-04, which is aimed at creating a GHG program that exercises executive authority to the fullest extent permitted by existing legislation. The core mandate of the Executive Order is a GHG emissions reduction goal which aims to reduce Oregon's GHG emissions to 45 percent below 1990 levels by 2035, and to 80 percent below 1990 levels by 2050. These goals are borrowed from Oregon legislation setting the state's GHG

[5] The Executive Order is available in full here: https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf

reduction goals, although that legislation is clear that it creates no independent regulatory authority to achieve the goals.

The Executive Order applies to sixteen Oregon agencies, notably including the Public Utility Commission, the Department of Energy, the Department of Environmental Quality, the Department of Transportation, and a range of agencies with responsibility for natural resources, including the Department of Forestry, the Department of Fish & Wildlife, and the Department of Agriculture.

The Executive Order directs all of these agencies to "exercise any and all authority and discretion" to achieve the order's GHG reduction goals, and to "prioritize and expedite" action on GHG reductions "to the full extent allowed by law." Each agency is required to report to the Governor on proposed actions by May 15, 2020. The Executive Order also includes a number of mandates aimed at specific agencies.

Department of Environmental Quality (DEQ): DEQ is directed to amend the Clean Fuel Standard to achieve a GHG reduction for motor fuels of 20 percent below 2015 levels by 2030 and 25 percent below 2015 levels by 2035. By comparison, the Clean Fuel Standard adopted by the Oregon legislature in 2009 requires a reduction of 10% below 2015 levels by 2025. The Executive Order also directs the DEQ to develop a method for utilities to aggregate clean fuel credits to advance Oregon's established electric transportation goals.

DEQ is also assigned two potentially far-reaching tasks. First, it is directed to set caps and reduce GHG emissions from large stationary sources. Second, it is directed to regulate methane emissions from landfills consistent with "the most stringent standards" adopted in surrounding states. Finally, DEQ is directed to create a program to reduce food wastes and associated GHG emissions, with the goal of reducing food waste 50 percent by 2030. DEQ is required to submit a report to the Governor with a timeline for addressing these directives by May 15, 2020, with the goal of finalizing rules by January 1, 2022.

Oregon Public Utilities Commission (OPUC): While reaffirming the political independence of the OPUC, the Executive Order nonetheless directs the OPUC to incorporate six policy goals into its decision-making. These include two aimed at advancing decarbonization of the utility sector, two requiring the OPUC to address utility vulnerabilities to wildfire, one to encourage electrification of transportation consistent with Senate Bill 1044 (2019), and one requiring the OPUC and Oregon Housing and Community Services to address energy burdens and environmental justice issues.

Department of Business Services Building Codes Division (BCD): The BCD is directed to adopt building efficiency goals for new construction by 2030 that represent at least a 60% reduction in building energy use over 2006 levels. The BCD is also directed to compile a report documenting progress towards this goal in the code updates planned for 2023, 2026, and 2029, and to develop metrics for measuring that progress.

Oregon Department of Energy (ODOE): ODOE is directed to establish energy efficiency standards for ten different electrical appliances, ranging from portable spas to commercial dishwashers, by September 1, 2020. The standards are to match the most stringent among West

Coast jurisdictions and are to be updated periodically so that they continue to match the most stringent standards among those jurisdictions.

Department of Administrative Services (DAS): The DAS, which provides auditing, financial, and acquisition services to Oregon's state agencies, is directed to develop a model program for state agencies to acquire zero-emission vehicles as well as to support the "rapid conversion" of the state's fleet to zero-emission vehicles and to expand charging infrastructure for public buildings. DAS is also directed to identify options for GHG reduction goals to be integrated into state contracting programs, and to provide a report to the Governor by September 15, 2020, detailing these options.

Transportation Directives: Oregon agencies involved in transportation (the Oregon Transportation Commission, Oregon Department of Transportation (ODOT), the Land Conservation and Development Commission, and ODOE) are directed to incorporate the GHG reduction goals set forth in the Executive Order into implementation of Oregon's Statewide Transportation Strategy, with regular progress reports to be delivered to the Governor. In addition, the ODOT is directed to conduct a study of infrastructure needs for the electrification of Oregon's transportation system, with an emphasis on rural areas. ODOT is also directed to develop a process for evaluating the GHG emissions impacts of transportation projects as part of its regular planning processes. ODOT is ordered to provide a report to the Governor on both the transportation electrification and GHG evaluation process by June 30, 2021.

Oregon Health Authority (OHA): The Executive Order requires the OHA to deliver a report on the health impacts of climate change in Oregon by September 1, 2020, with particular emphasis on low-income and rural communities, as well as Native American tribes. The OHA is also directed to study the mental health impacts of climate change and wildfire threats on Oregon's youth, to be completed by June 30, 2021. Finally, OHA is directed, in conjunction with the Oregon Occupational Safety and Health Administration, to develop a proposal for workplace safety standards to protect employees from excessive heat and wildfire smoke. The proposal is to be delivered no later than June 30, 2021.

Global Warming Commission (GWC): The GWC must submit a proposal to the Governor by June 30, 2021, to establish state goals for carbon sequestration and storage in Oregon's forest lands, wetlands, agricultural lands, and other lands with potential to store carbon. The GWC is also to provide progress reports on the state's progress toward achieving the carbon reduction goals set forth in the Executive Order.

EXECUTIVE ORDER NO. 20-04: IMPLICATIONS

The Executive Order sets in motion a lengthy list of administrative actions that could have profound implications for Oregon industries. Because the Executive Order sets short deadlines for reporting and for initiating rulemaking processes, the next two to three years are likely to be marked by a flurry of intense activity at the agencies subject to the Order.

Actions taken after the close of the legislative session leave little doubt about the seriousness of the Governor's actions. Shortly after the legislature adjourned, the Oregon Legislative Emergency Board, a legislative body created to address emergency situations arising when the legislature is not in session, acted to address a number of fiscal issues that were not addressed in

the regular session. The Board included an appropriation of $5 million to the DEQ, which is intended to fund ten new positions created to draft rules for GHG emissions reductions.

Because DEQ has responsibility for what is likely to prove the most consequential of the Executive Order's many directives, the new appropriation should help alleviate resource constraints that might otherwise inhibit the achievement of the Governor's goals. For example, the Executive Order requires DEQ and other relevant agencies to submit a preliminary report to the Governor by May 15, 2020, regarding program options to cap and reduce emissions from large stationary sources, transportation fuels, and other liquid and gaseous fuels that can commence no later than January 1, 2022. It is likely that the program will include caps similar to those included in the failed cap-and-trade legislation, although it is unclear whether the emissions trading program included in the cap-and-trade bill will be part of the administrative rulemaking. For industry stakeholders, a key consideration of future carbon-related regulations will be whether or not such rules preempt local ordinances addressing carbon emissions. Further, because the Executive Order followed in the wake of failed legislation, and relies on existing statutory authorities, we anticipate extensive litigation regarding the extent to which the Executive Order, and the resulting administrative actions, exceed legislative authority.

In addition, the Executive Order is likely to produce new legislation that would be considered in future sessions of the Oregon Legislature. For example, the GWC report on carbon sequestration and storage may generate legislation that would be of great consequence for Oregon's forestry and agriculture sectors.

In short, Executive Order 20-04 is likely to be one of the most consequential actions undertaken in Oregon to address climate change. As such, it bears careful scrutiny from anyone with significant interests in the Pacific Northwest.