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Editor's Note: In this issue, Jay Beattie of Lindsay, Hart, Neil & Weigler summarizes a recent Oregon Court of Appeals decision addressing who may appeal from an Oregon Water Resources Department order granting an amendment to an existing water right permit. Mr. Beattie is a partner in the Lindsay, Hart, Neil & Weigler law firm who specializes in liability defense and civil appeals. He may be reached at 503-226-7677 or jbeattie@lindsayhart.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/>.

E-Outlook Editor

Patrick Rowe

prowe@sussmanshank.com

SUMMARY: *Pete's Mountain Homeowners Association v. Oregon Water Resources Department*

In a water rights case, the Oregon Court of Appeals held that the term "party" used in ORS 536.075(1) (describing who may appeal from an order of the Oregon Water Resources Department (OWRD) in other than a contested case) included those persons who were affected by a final order allowing the amendment of an existing water right permit even if those persons were not formally recognized as parties in the underlying permit amendment process. *Pete's Mountain Homeowners Association v. Oregon Water Resources Department*, ___ Or App ___, ___ P3d ___ (A138923 (August 11, 2010)).

Background

The Pete's Mountain area of Clackamas County is located in the eastern portion of the Sherwood-Dammasch-Wilsonville "ground water limited area." It is a sparsely populated area where many residents obtain their domestic water from private groundwater wells. The Pete's Mountain Water Company ("Water Co.") draws groundwater from the same declining water-table and serves residents in the Pete's Mountain area that are not on private wells.

In 2004, the Water Co. filed an application with the OWRD to amend its water right permit to substantially enlarge its service area or "place of use." The Pete's Mountain Homeowner's Association ("Association") filed comments and objected to the amendment because it would impair the existing water rights of its individual members and would interfere with the mission of the Association to protect the limited ground water resources in the Pete's Mountain area. The Association did not intervene in the underlying permit amendment process

or otherwise obtain formal party status because there was no statutory or administrative mechanism for doing so.

The OWRD issued a final order granting the amendment, and the Association and certain individual members sought review of that order in the circuit court pursuant to ORS 536.075(1). That statute provides in part that any “party affected by” an OWRD order in other than a contested cases may seek review in the appropriate circuit court. The Water Co. intervened in the circuit court action and moved to dismiss the petition because the Association and the individual members were not “parties” to the permit amendment process and did not have standing to request judicial review. The circuit court agreed and dismissed the petition for review.

Holding of the Court of Appeals

The Oregon Court of Appeals applied the usual *PGE v. BOLI* framework for determining the meaning of undefined statutory terms and agreed with the Water Co. that the term “party” used in ORS 536.075(1) *could be* construed as meaning a formal party to the OWRD proceeding, *i.e.* the Water Co. and the Department. However, the court further concluded that in light of the plain language of the statute and its legislative history, the term “party” could also be construed as meaning a “persons” -- and that any person affected by the amendment of a water right permit has standing to appeal under ORS 536.075(1).

Confronted with two plausible meanings for the term “party,” the court resorted to canons of construction: the “absurd results” cannon and the “avoidance cannon.” The court concluded that it would be absurd to construe the term “party” as meaning persons who had been formally recognized as parties to the permit amendment proceeding because there was no statutory or administrative mechanism for interested persons to obtain party status.

Under the avoidance cannon, if there is even a “tenable argument that one [construction] would render the statute unconstitutional, [the court] generally favors the other construction.” The court concluded that construing the term “party” to preclude judicial review by petitioners such as the individual Association members could result in the deprivation of vested water rights without due process of law.

Applying these two canons of construction, the court concluded that the circuit court erred in dismissing the petition for judicial review on the grounds that the Association and individual members were not “parties” within the meaning of ORS 536.071(1). Because the petition was dismissed at the pleading phase, the court did not determine as a matter of fact whether the Association or its individual members were “affected” by the final order of the OWRD approving the expansion of the Water Co.’s service area.

Conclusion

The Oregon Court of Appeals addressed a very narrow issue of who may appeal from an OWRD order granting an amendment to an existing water right permit. The court’s definition of “party” is specific to ORS 536.071(1) and does not expand the class of persons who may appeal from an order in a *contested case* such as the initial issuance of a water right permit. The opinion

grants important rights to persons who may be affected by the amendment of an existing water right permit, but perhaps more importantly, it recognizes the significance of canons of construction in the *PGE v. BOLI* analysis of undefined statutory terms.

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If you would like to contribute or have comments, please contact the E-Outlook Editor, Patrick Rowe, at prowe@sussmanshank.com or (503) 243-1651.