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Editor's Note: In this issue Sarah Liljefelt of Schroeder Law Offices analyzes the Oregon Water Resources Department's new permitting process for alternative reservoir water right permits, which was prompted by a January 2011 state court decision.

We have reproduced the entire article below. Any opinions expressed in this article are those of the author alone. For those who prefer to view this article in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

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Deborah Noble and David Hillison v. Oregon Water Resources Department
Clackamas County Circuit Court, Case No. CV-10-01-0159 (General Judgment entered January 25, 2011)

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Summary

The Oregon Department of Water Resources (“OWRD”) was recently forced to change the application procedure for the issuance of small (“alternative”) reservoir permits. The new process places additional burdens on the applicant prior to submission of the permit application.

Background

On November 9, 2009, OWRD issued Robert Lytle a permit to store 1.0 acre-foot of water in a small (“alternative”) reservoir. Two residents challenged the issuance of Mr. Lytle’s permit based on various legal grounds. The residents brought suit in Clackamas County Circuit Court pursuant to the Administrative Procedure Act (ORS 183.484) to challenge OWRD’s final order in other than a contested case granting the permit. *See Deborah Noble and David Hillison v. Oregon Water Resources Department*, CV-10-01-0159 (General Judgment entered January 25, 2011).

The legal provision at issue was ORS 537.409, which governs the permitting process for alternative reservoirs. Subsection (1) of the statute states:

In lieu of the process set forth in ORS 537.140 to 537.211 for applying for a water right permit, an owner of a reservoir may submit an application to the Water Resources Department to issue a water right permit under ORS 537.211 or a certificate under ORS 537.250 according to the process set forth in this section if the reservoir:

- a) Has storage capacity of less than 9.2 acre-feet or a dam or impoundment structure less than 10 feet in height;
- b) Does not injure any existing water right;
- c) Does not pose a significant detrimental impact to existing fishery resources as determined on the basis of information submitted by the State Department of Fish and Wildlife; and
- d) Is not prohibited under ORS 390.835.

Prior to the conclusion of this case, OWRD required applicants to submit an application requesting information about the applicant, the location and source of the water to be impounded, the intended use of the water, property ownership, environmental impacts and land uses. OWRD was not, however, requiring applicants to submit information related to ORS 537.409(b), (c), or (d) with the application. Rather, OWRD would consult with the local watermaster, the Oregon Department of Environmental Quality, and the Oregon Department of Fish and Wildlife as part of the application approval process to obtain that information.

The residents brought suit claiming, in part, that the Lytle application did not meet the statutory requirements of ORS 537.409(1), and thus the OWRD decision to grant Mr. Lytle's alternative reservoir permit was improper.

Legal Decision & Aftermath

Clackamas County Circuit Court Judge Susie L. Norby agreed with the residents, reversing OWRD's final order and remanding the case to OWRD for further action on the Lytle application consistent with the ruling. Judge Norby held that ORS 537.409 creates a precondition to submitting an application for an alternative reservoir permit and that OWRD had been treating the statute as an end goal. The Court held that the burden should be placed on the applicant to produce the required evidence rather than on state agencies.

In response to the Court's decision, OWRD developed a new permitting process for alternative reservoir permits. As part of the new application process, the applicant must set up meetings with their local planning department, their local watermaster, and the Oregon Department of Fish and Wildlife to sign off on their proposed reservoir project prior to submitting the application to OWRD. As a result of this decision, the applicant must do the leg-work prior to application submission rather than OWRD completing the conferral during the application review process.

Conclusion

The main consequence of the judicial decision will be to place a heavier burden on applicants. However, this new process also presents the opportunity for applicants to become more involved in the planning, watermaster, and ODFW decisions regarding approval or rejection of the proposed project. It may also mean that the "easy" process for these applications envisioned by

the legislature is by the wayside and additional work is created for water lawyers since each agency decision on the application will likely result in a final order that may be contested and reviewable.

OWRD's implementation of the judicial decision delayed alternative reservoir permitting for about six months (until late July of 2011). It looks as though alternative reservoir permitting is once again underway per the new application process.

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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.