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Twenty-Second Judicial District

February 11, 2025

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Re: *Upper Crooked River Conservationists, et al. v. Oregon Water Resources
Department, et al.*
Crook Co. Circuit Court Case No. 23CV46779

AMENDED OPINION LETTER

Dear Counsel:

This matter came before the Court on December 9, 2024, for a hearing on a Petitioner's Upper Crooked River Conservationists (UCRC) and Shotgun Creek Ranch LLC., (Shotgun Creek) Motion for Partial Summary Judgment on their first claim for relief. In addition, a hearing on Respondent's Oregon Water Resources Department (OWRD) and Water Resource's Commission (WRC) Motion and Intervenor/ Respondent's WaterWatch of Oregon (WaterWatch) Cross Motions for Summary Judgment of Petitioner's first and second claims for relief. The Court heard argument from the parties and the Court took the matter under advisement. The Court having reviewed the filings and considered argument from all parties makes the following findings and conclusions of law.

Verified Correct Copy of Original 2/11/2025.



A First Amended Complaint was filed on February 28, 2024, by Petitioners, UCRC and Shotgun Creek alleging two claims for relief under the Oregon Administrative Act (APA) to challenge a permitting decision. The first claim for relief alleges in summary that the OWRD granted an unlawful instream water right outside of their statutory authority in violation of the law. The second claim for relief alleges in summary that OWRD issued a water right permit failing to follow the required statutory procedures and consider the public interest issues raised and processed in Application S-89128 using an expedited process without consideration of any public interest issues in a contested hearing in violation of the law.

On April 22, 2024, Petitioners, UCRC and Shotgun Creek filed a Motion for Partial Summary Judgment against Respondent, addressing the first claim for relief, on the grounds that there are no genuine issues of material fact, rather the issue is solely one of law and they are entitled to judgment as a matter of law. The Petitioners request the Court enter a judgment in favor of Petitioners as a matter of law. Petitioners argue that their alternative second claim for relief is moot if the Court concludes that OWRD committed an error in approving the permit under the first claim for relief. Alternatively, even if the Court denies Petitioner's Motion for Partial Summary Judgment on the first claim for relief, Petitioners argue in response to OWRD and WaterWatch's Motions for Summary Judgment on the second claim for relief, that OWRD still committed error when it summarily dismissed public interest comments and proceeded to use an expedited permitting program entitling requesting Respondent's Motion for Summary Judgment on claim 2 be denied.

On September 10, 2024, Respondents OWRD and WRC filed a Motion for Summary Judgment and a Response to Petitioner's Motion for Partial Summary Judgment. Respondents argue that the Bureau of Reclamation's (Bureau) Application S-89128 did not request an instream water right and the Final Order did not approve an instream water right, rather it was an application for the right to use stored water for a beneficial use. The Court should grant summary judgment for Respondents on the first claim for relief and affirm the Final Order. Further that Respondents are entitled to summary judgment on claim 2 because OWRD acted within its authorized discretion in determining that no public interest issues were raised in the public comments and again requesting that the Court affirm the Final Order.

On September 20, 2024, Intervenor-Respondent WaterWatch filed a Cross Motion for Summary Judgment and a Response to Petitioner's Motion for Partial Summary Judgment. WaterWatch argues that OWRD did not violate the law when it granted an ordinary secondary water right to the Bureau to use water stored in the Prineville Reservoir for downstream fish and wildlife purposes and the Court grant WaterWatch's Cross Motion for Summary Judgment on the first claim for relief. WaterWatch argues that they are entitled to summary judgment on the second claim for relief as well arguing that OWRD did not err in determining that no public interest issues were identified in the Bureau's application for a secondary water right and OWRD correctly processed the application using the expedited process set out in ORS 537.147.

All parties agree that the relevant material facts in this matter are undisputed.

Addressing the Motion for Summary Judgment, summary judgment is appropriate “...if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law...”. ORCP 47(C). Once the moving party meets this burden, the opposing party must produce *prima facie* evidence sufficient to demonstrate there are genuine issues of material fact in dispute on any issue for which it has the burden of proof at trial. See e.g., McKinley v. State Dept. of Motor Vehicles, 179 Or App 350, 357-58 (2002). The court must evaluate the record in the case at bar and view it in “... a manner most favorable to the adverse party...” If the court concludes that no objectively reasonable juror could return a verdict for the adverse party, then summary judgment is proper. ORCP 47(C); Jones v. General Motors Corp., 325 Or 404, 420 (1997). In deciding a Motion for Summary Judgment, the court must view the evidence in a light most favorable to the party opposing the motion. If there is a genuine issue of material fact, summary judgment must be denied.

I have had the opportunity to review the pleadings in their entirety, supporting declarations, the relevant statutes and case law relied upon by the parties as cited authority and taken time to consider the matter and arguments raised by the parties. I will not reiterate arguments in their entirety rather I will summarize them for the purpose of analysis. In addition, Plaintiffs requested special findings of fact and conclusions of law – noting, however, “that the only findings of fact required for the motion are undisputed, and the issue of solely one of law,” so the findings of fact will include the court’s analysis of the legal issues and conclusions of law.

First Claim for Relief

The question before the Court as it relates to the First Claim for Relief is whether the OWRD granted an unlawful instream water right outside of their statutory authority in violation of the law as alleged by Petitioners.

Petitioners argue that the Bureau’s application S-89128¹ was a request for an instream water right which is governed in Oregon under the 1987 Instream Water Rights Act. The OWRD processed the application as a private water right following the incorrect process and erring in granting a water right to an entity not entitled to apply for or hold such right. ORS 537.332-.360. The Bureau’s application expressly requested an instream water right.² OWRD’s Final Order and Permit clearly authorize an instream water right. The Application proposes to release water from the Prineville Reservoir for instream fish and wildlife use and the Application uses the term instream use no less than six times and the Permit grants such instream use of water within the natural stream channel of the Crooked River from Prineville Reservoir to Lake Billy Chinook.³ OWRD processed the Application under ORS 537.147, which authorizes any person to appropriate private water rights from stored water. The Bureau did not request a private water right from stored water, they requested and were granted a public, instream use of water with the public benefit for the use of fish and wildlife meeting the statutory

¹ Liljefelt Dec. Ex. 1

² Id.

³ Id. Ex. 1 & 4

definition of an instream water right. ORS 537.332. Petitioner's challenge only the legality of the Application and Permit as it relates to the instream fish and wildlife use of 68,887 acres of water and not the 10,000 acres of out of stream use water designated for supplemental irrigation. Instream water rights may only be granted to one of three state agencies none of which is the Bureau. Petitioner's set forth that OWRD acted contrary to the Instream Water Rights Act as set forth in the text, context, and legislative history.

Respondent OWRD argues that Petitioner's claims are without merit because the Bureau applied for and was approved for, a secondary permit to use stored water for fish and wildlife use. OWRD argues that the Bureau applied for a right to use stored water for a beneficial use. ORS 537.147. Respondent argues that Petitioners have rewritten the definition of an instream water right and rely on language used in the Bureau's Application to support their premise that an instream water right was erroneously granted. Respondent relies on the facts in this case, setting forth that Petitioners' argument has no basis in Oregon Water Law.

Respondent WaterWatch argues that the Bureau's Application was nothing more than an ordinary secondary water right. OWRD regulations confirm that one way for a grantee (of stored water) to dedicate water to instream use is to obtain a secondary water right that allows for an instream use following release from storage. OAR 690-093-0110. This instream use is not an instream water right, this is a secondary water right held by the Bureau not OWRD and subject to the Instream Water Rights Act. The Bureau sought and OWRD issued a secondary water right to put stored water to a beneficial use, specifically fish and wildlife consistent with the purpose set out in the Bureau's Storage Certificate. The fact that the water is to be used for an instream purpose and that fact that the purpose benefits the public, does not mean that the Instream Water Rights Act applies.⁴

In this case, the parties disagree as to whether the Bureau's Application and OWRD's Final Order relate to an instream water right governed by the Instream Water Rights Act or a permit request to use stored water. Starting with the definition of "instream water right" means a water right held in trust by the Water Resource Department for the benefit of the people of the State of Oregon to maintain water instream use for public use. ORS 537.332. In this case, the Bureau holds a certificate of storage, last amended in 2014 the Crooked River Collaborative Water Security and Jobs Act of 2014 (Crooked River Act), Pub. L. No. 113-244 (2014).⁵ The Bureau has a fully vested water right. Under the Instream Water Rights Act, only three Oregon agencies may apply for an instream water right. ORS 537.336. If approved, the Water Resource Commission (WRC) shall issue a certificate with the OWRD as trustee for the people of Oregon. ORS 537.341. This meets the statutory definition of instream water right. The Court is not persuaded by Petitioner's argument that the Bureau's Permit S-55394⁶ is a new instream water right. In this case, the Bureau applied for a permit to use stored water, water they hold in storage in the Prineville Reservoir as set forth by the Crooked River Act. The Bureau's Application follows the process set forth in ORS 537.147 and is consistent with a request for a secondary use.

⁴ Missel Dec. Ex. 6 and 7.

⁵ Liljefelt Dec. Ex. 6.

⁶ Liljefelt Dec. Ex 4.

Secondary use conforms with the use allowed under the primary certificate granted to the Bureau. All parties agree that “beneficial use is the basis, the measure and the limit of all rights to the use of water in this state.” ORS 540.610. This case is not unique in Oregon, wildlife and fish have been considered beneficial uses and secondary water rights to use stored water have been granted for instream use. *Bridge Creek Ranch, LLC v. OWRD*, 329 Or App 568 (2023).⁷ The Bureau storage right was modified under the Crooked River Act requiring the Bureau to use water to benefit fish and wildlife and provide instream flows from the Prineville Reservoir downstream to Lake Billy Chinook. OWRD’s permit grants a secondary use consistent with the storage right granted to the Bureau. The Storage Certificate allows storage for downstream fish and wildlife use.⁸ Notably, Petitioners are not arguing that the Bureau’s secondary use of stored water for irrigation use falls under the Instream water Rights Act. They are arguing that use of stored water in-stream for the benefit of fish and wildlife invalidates the Permit under the law. The Court is not persuaded by Petitioner’s argument that the use of the terms “instream” or “beneficial use” triggers the Instream Water Rights Act. The Court finds that there is no *new* instream water right granted by OWRD Permit⁹ to the Bureau that would trigger the Instream Water Rights Act and application process set forth in ORS 537.332-360. OWRD processed Application S-89128¹⁰ as an application to put stored water to use consistent with Oregon law. ORS 537.147. That use is consistent with the priority water right granted to the Bureau. The Court is ruling that OWRD’s Final Order and Permit S-55394 dated September 15, 2023, is affirmed as it authorizes a permit to the Bureau to use stored water and was not issued in violation of the law with respect to the First Claim for Relief. ORS 183.484.

Therefore, the Court denies Petitioner’s Motion for Partial Summary Judgment and grants Respondents’ Cross Motions for Summary Judgment on the First Claim for Relief.

Second Claim for Relief

Petitioner’s Second Claim for Relief challenges the expedited process used by the OWRD finding that no public interest issues were raised in the public comments arguing public interest issues were raised without consideration and conducting a public interest review as required by ORS 537.153.

Respondent OWRD’s Motion for Summary Judgment argues that OWRD did not err in determining that no public interest issues were identified in relation to the Bureau’s Application and thus, correctly processed the Application using the expedited procedure set forth in ORS 537.147. WaterWatch adopts Respondent OWRD’s arguments and relies on their relevant arguments made during the Motion to Dismiss. OWRD argues that the determination of whether public interest issues were raised is within the sole discretion of the agency citing ORS 537.170(8) (...before issuing a final order, the director or commission...shall make the final determination of whether the proposed use...would impair or be detrimental to the public interest....).

⁷ See also, *Id.*

⁸ Ratcliffe Dec. Ex. 8 at 39-41.

⁹ Liljefelt Dec. Ex 4

¹⁰ Liljefelt Dec. Ex 1 and Ratcliffe Dec Ex. 8.

Respondent argues that OWRD acted within its discretion to continue with the expedited process and determining that no public interest issues were raised. OWRD officials thoroughly reviewed and discussed all the comments that the agency received, even seeking input from technicians with expertise in the basin.¹¹ Respondent sets forth that none of public comments provided a factual basis but simply recited language from ORS 537.170(8).

Petitioners' Response relies on ORS 537.147, that the department may only issue a water right permit "upon determining that no public interest issues as identified in ORS 537.170(8) have been raised through the public comments." Petitioners argue that multiple comments were submitted¹² raising or identifying the statutory public interest issues and the department engaged in a process determining whether those public comments were of a quality or weight as to deny moving the application out of the expedited process to the procedure set forth in ORS 537.153. ORS 537.147 does not give the department the discretion to evaluate the public interest issues raised, only that if public interest issues are identified, "then the department shall treat the application under this section as an application under ORS 537.150 and perform the public interest review required by ORS 537.153(2)." It is only in ORS 537.153 that involves the rebuttable presumption that may be overcome by the preponderance of evidence of specific public interest under ORS 537.170(8) would be impaired or detrimentally affected." ORS 537.147 does not grant the agency the discretion to determine whether any public interest issues would be impaired or detrimentally affected, only that if a public interest issue is raised through submitted comments, a review hearing shall be held.

In this case, the OWRD received comments¹³ after the public notice that refer to public interest issues outlined in ORS 537.170(8). It appears from the record that the OWRD went through the analysis as set forth in ORS 537.153 in making a determination that no public interest issues were raised even seeking input from technicians with expertise before determining that no public interest issues were raised triggering the public interest review required by ORS 537.153(2). OWRD did receive comments that purported to raise public interest issues and those were summarily disregarded by the agency without following the process set forth in ORS 537.150 and 537.153(2). It appears to this Court that OWRD went through the analysis required after a public review without conducting the public review. OWRD may certainly come to the same conclusion after public review however, the Court finds that the agency failed to comply with ORS 537.147(3) when public interest issues were raised during the comment period. In a time when transparency is vital for trust in public agencies and for issues involving water rights in particular, the public has the right to be heard when they raise public interest issues, then the agency may use their discretion and go through the analysis of whether the secondary use by the Bureau would impair or be detrimental to a public interest. ORS 537.153.

¹¹ Ratcliffe Dec. paragraphs 35-45.

¹² Liljefelt Supp. Dec. Ex 4.

¹³ Id.

The Court is denying Respondent OWRD and WaterWatch's Motions for Summary Judgment on the Second Claim for Relief.

I am directing that Respondent OWRD prepare an order consistent with the ruling on the Motions. A status hearing was held on February 10, 2025, and the parties correctly identified an error on the Court's Opinion letter dated 2-10-25. I have amended the opinion letter further clarifying and correcting the Court's findings and conclusions. I appreciate the parties work on this case on behalf of their clients.

The Second Claim for Relief remains pending. Based upon the evidence presented for the Respondent's Motions for Summary Judgment, unless the parties request an evidentiary trial with additional evidence, the Court having considered the record of the case thus far, intends to Remand the Final Order back to OWRD for the limited purpose to perform the public interest review required by ORS 537.147(3) and ORS 537.153(2). The Court finds based on the record of the case thus far, that the agency exercise of discretion outside the range of discretion and in violation of a statutory provision. ORS 183.484(8). I will defer to the parties how they would like to proceed and am happy to consider any further evidence before making a final determination.

Very truly yours,



Annette C. Hillman
Circuit Court Judge

ACH/jm