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Noble v. Dep't of Fish & Wildlife, 326 P.3d 589 (Or. 2014)

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duty of the administrative officers, prior to issuing closing notices, to determine whether or not a usable amount of water can be delivered. In this case, the evidence showed that the Department did not conduct a futile call analysis because the Niobrara is a “wet river.” The Court held that the Department is entitled to deference in this area, and the Department’s determination that it conducted futile call analyses where appropriate was supported by competent evidence.

Accordingly, the Court upheld the Department’s determination that administration of the Niobrara was proper and that NPPD had not abandoned or statutorily forfeited its appropriations in whole or in part.

In dissent, Justice Connolly argued that the Niobrara has too many appropriations and that the Department’s method of administration is fundamentally flawed. Connolly noted that, based on recorded historical flows, the Department would be able to shut down junior appropriators about ninety-seven percent of the time from July to January, and almost eighty-seven percent of the time from February to June. He argued that to permit NPPD to shut down these junior appropriators in 2007, after not having done so for sixty years, would be unjust and contrary to the nature of its permits.

Connolly also argued that NPPD forfeited the right to demand 550 cfs under its 1942 appropriation. NPPD’s 1942 appropriation had a limitation in it allowing for water to be denied during times of scarcity. Connolly noted that since 1942 the Department had approved over four hundred new surface appropriations. NPPD failed to object to the majority of the applications, despite its knowledge that the river was over appropriated and despite the conditional clause contained in its permit. Accordingly, Connolly argued that NPPD’s acquiescence to the Department’s activities should have constituted a forfeiture of its right to demand the 550 cfs under the 1942 appropriation.

Victoria Hambley

OREGON

Noble v. Dep’t of Fish & Wildlife, 326 P.3d 589 (Or. 2014) (holding that the Department of Fish and Wildlife implausibly interpreted the fish passage rule, which requires that fishways provide fish passage at all flows within the design streamflow range, and erroneously decided that it was unnecessary to calculate the design streamflow range for channel-spanning fishways).

Property owners (“Petitioners”) expended significant resources improving fish habitat on their portion of a stream feeding into Beaver Creek, which historically supported cutthroat trout and other migratory fish. Petitioners challenged the Oregon Department of Fish and Wildlife’s (“ODFW”) approval of “channel-spanning fishways” associated with two dams downstream from their property. The dams at issue, constructed long ago without any water rights or permits, obstructed the stream, creating small ponds. The dam owners later obtained permits through the state Water Resources Department (“WRD”), allowing them to store up to one acre-foot of water during certain months of the year. The permits required that the owners (i) pass all live flow outside of the defined storage season; (ii) not appropriate water for any out-of-reservoir uses, or for the maintenance of water levels or freshwater conditions; and (iii) install

outlet pipes to evacuate water to satisfy prior downstream water rights. Additionally, the permits required the dam owners to provide adequate fish passage as ODFW deemed necessary.

The dam owners, having committed to providing year-round fish passage, installed channel-spanning fishways, which ODFW subsequently approved. Channel-spanning fishways provide fish passage only when water is moving over the top of the dam. Petitioners sought reconsideration of ODFW's fishway approvals.

Oregon Revised Statutes section 509.585(2) prohibits the construction or maintenance of any artificial obstruction across "waters of [the] state that are inhabited, or historically inhabited, by native migratory fish without providing passage" for those fish. Oregon Administrative Rule 635-412-0035(2)(a) ("Rule") requires that such fishways provide fish passage at all flows within the design streamflow range, meaning the entire range of flows within the obstructed stream, except the highest and lowest five percent. However, ODFW did not calculate the stream's "design flow range," or determine when fish passage was required prior to approving the fishways. ODFW determined that it was unnecessary to calculate a design flow range because the fishways used the entire flow of the stream and provided fish passage whenever water flowed past the dam. The Petitioners argued that this approach did not account for water leaving the ponds as a result of evaporation, seepage, or the evacuation of water through the outlet pipes. ODFW argued that those waters were not in the stream and, thus, could not be considered "streamflow."

After a hearing, the administrative law judge determined that ODFW complied with all applicable statutes and rules in approving the fishways. ODFW affirmed the administrative law judge's conclusion and issued a final order announcing that "fish passage is required 'year-round' only where there is adequate flow to allow migration through the fishways." Further, the agency concluded that "streamflow" meant only that water which passed over the dams and did not include water lost to evaporation, seepage, or evacuation.

Upon judicial review, the Oregon Court of Appeals determined that ODFW plausibly interpreted the terms "year-round fish passage" and "streamflow," rejected the Petitioners' argument that ODFW's interpretations were inconsistent with Oregon Revised Statutes section 509.585(2), and affirmed ODFW's final order. The Supreme Court of Oregon ("Court") accepted the Petitioners' petition for review to consider ODFW's interpretation and application of its own rules.

As the Court recited, to resolve the drafters' intent and interpret an administrative rule the Court considers the text of the rule and the rule's regulatory and statutory context. According significant deference to the agency's interpretation, the Court must affirm the agency's interpretations if it constitutes a "plausible" reading of the rule.

The Court began its analysis by interpreting the meaning of the Rule, which requires that fishways "provide fish passage at all flows within the design streamflow range." The Court first addressed ODFW's assertion that the definition of "design streamflow range" limits the agency's calculation of streamflows to the period that native migratory fish require fish passage. Because the dam

operators in this case chose to provide year-round fish passage, the Court concluded that a determination as to when fish passage was required was irrelevant.

The Court then addressed Petitioners' argument that dam owners must provide "year-round fish passage" at all flows in the stream—not just in the fishway—falling within the design streamflow range. ODFW construed the phrase "year-round fish passage" to mean only that the channel-spanning fishway structure must always be "on," making fish passage available whenever there is enough water flowing over the dam, within the fishway, to allow for fish migration. ODFW asserted that channel-spanning fishways provide fish passage "as a matter of law" whenever sufficient streamflow exists for fish to migrate. However, the Court observed that the Rule was adopted with traditional diversion-style fishways in mind, as opposed to channel-spanning fishways, and determined that the phrase "year-round fish passage" must have a meaning that was plausible within that context. Traditional fishways were not always "on" but operated as a result of purposeful diversion of water into the fishway. Thus, the Court determined that when ODFW adopted the rule it intended "year-round fish passage" to mean fish passage throughout the year whenever the flow "within the stream" falls within the "design streamflow range."

After resolving the proper meaning of "year-round fish passage," the Court turned its attention to ODFW's interpretation of the term "streamflow." ODFW had not promulgated a definition of the term "streamflow," but had defined the terms "stream" and "channel," both of which contemplate waters moving within a defined bed. ODFW argued that, in the case of channel-spanning fishways, the "stream" is the water that flows over the dam. This does not include water stored behind the dam that later evaporates, or water that is released downstream through outlet pipes, because these waters do not move within a defined bed. In evaluating the plausibility of ODFW's interpretation, the Court looked to the Rule's context and contemplated the mandate, set forth in Oregon Administrative Rule 635-412-0020(1), that "[n]o person shall construct or maintain any artificial obstruction across any waters of this state that are inhabited, or were historically inhabited, by native migratory fish without providing passage for native migratory fish." The Court also considered Oregon Administrative Rule 635-412-0005(18), which provides that the fish passage that Oregon Administrative Rule 635-412-0020(1) requires is passage that meets the biological and life cycle needs of historically present native migratory fish.

The Court determined that, under ODFW's interpretation, where "streamflows" would only include water flowing over the dam, the necessity for providing fish passage would turn only on the height of the dam and the configuration of outlet pipes, and not by the biological needs of the fish. Applying ODFW's definition, a high dam would meet the requirements of the fish passage rule if all outflow passed through the outlet pipes and no water passed over the dam at all. The Court found that ODFW's interpretation of "streamflows" conflicted with the requirement that operators provide fish passage that meets the biological and life cycle needs of fish and, therefore, that ODFW's interpretation was implausible. Recognizing that ODFW might argue that its approach to "design streamflow range" requirements differed for large dams with fish ladders, the Court noted that ODFW was free to engage in proper rulemaking procedures to issue different rules for various categories of dams and fishways. However, until it did so, the agency was bound by the promulgated rules.

The Court next considered ODFW's argument that conflicting statutory obligations necessitated its interpretation. ODFW argued that its interpretation struck a balance between its obligation under the fish passage statute and its obligation to protect the right of property owners to maintain small ponds on their property, even where dams, which might interfere with fish passage, created those ponds. The Court noted that the statutes to which ODFW referred created such rights only if they did not injure other water rights or existing fish resources. Further, the Court determined that, since the right of property owners to maintain small ponds did not conflict with the requirement that such artificial obstructions provide fish passage, these statutes did not create conflicting statutory obligations.

Lastly, the Court considered ODFW's contention that, because the legislature delegated to WRD the authority to control the existence and design of dams, ODFW must accept the existence and configuration of any WRD-permitted dam. ODFW argued that it had no authority to regulate when water flows through the dam's outlet pipes, and therefore it must consider that water unavailable for fish passage and base its fish passage requirements on only the "streamflow" that passes over the dam. The Court, unpersuaded by this argument, pointed out that ODFW really has "no control over any aspect of streamflow," and determined that this did not relieve the agency of its duty to require dam owners to provide fish passage within a "design streamflow range."

Accordingly, the Court concluded that ODFW implausibly interpreted the Rule. And because ODFW relied upon this interpretation as the basis for its determination not to calculate the design streamflow range, the Court held that the agency's determination was erroneous. The Court reversed the decisions of the Court of Appeals and ODFW and remanded the case to ODFW to determine the design streamflow range and determine whether the fishways in question provide passage at all flows within that range during the period that ODFW determines fish passage is required.

Holly Taylor