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Harrington v. Water Res. Dep't, 171 P.3d 1001 (Or. Ct. App. 2007)

Kurt Kropp

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and therefore, did not negate it. The Court rejected Stennis' argument that Section 3-35-1.1 required the City's ordinance to track the language of the statute. Interpreting the plain language of the statute, the Court held that Section 3-35-1.1 allowed municipalities to regulate domestic wells by ordinance, and did not place any further restrictions on the language of those ordinances. Since the 1999 Ordinance was less restrictive than Section 3-35-1.1, the Court held that the City's ordinance remained in effect despite the Legislature's enactment of the statute.

The Court noted, however, that an issue of material fact remained as to whether the City had filed its 1999 Ordinance with the State Engineer, as required by Section 3-35-1.1. If the City had not done so before Stennis filed her application, it would be unable to enforce the ordinance against her. Accordingly, the Court remanded the case to the district court for further fact-finding.

Ryan Malarky

OREGON

Harrington v. Water Res. Dep't, 171 P.3d 1001 (Or. Ct. App. 2007) (holding that the state water resources agency did not need to issue a final order denying reconsideration because denial occurred under operation of law, and that a challenge of the state agency action was available only through judicial review, not declaratory judgment).

Gary A. Harrington ("Harrington") owned property within the Big Butte Creek watershed. On his property, he used impoundments to capture diffuse surface waters, which are waters from rain or melting snows flowing over land and not part of a defined watercourse. In 2002, Harrington applied to the Oregon Water Resources Department ("Department") for permits to appropriate the diffuse surface waters running over his property. The three applications concerned permits for two existing impoundments and a planned third. In March 2003, the Department issued final orders approving applications for the two existing impoundments. However, on May 12, 2003, it issued new final orders that denied the applications and withdrew the original orders. The Department concurrently denied and issued a final order on the third application. The Department denied the applications based on a 1925 Oregon statute that authorized only the City of Medford ("City") to use and benefit from waters within Big Butte Creek, subject to pre-existing water rights. According to the Department, diffuse surface waters fell under the purview of the statute.

On June 25, 2003, Harrington timely filed a request for reconsideration with the Department. The Department responded on March 19, 2004, stating that it had not reconsidered the orders. The response letter did not state it was a final order, nor did it mention anything about appeal rights. On May 13, 2004, Harrington sought judicial re-

view of the March 19, 2004 letter and sought a judicial order to compel the Department to issue a final order.

On April 1 and 6, 2004, the regional watermaster posted notices on Harrington's property. The notices stated Harrington was illegally storing water in his impoundments and required him to keep the headgates open. Harrington sought judicial review of these orders on May 28, 2004, and amended the complaint in August 2005, asking for a declaratory judgment against the City and the Medford Water Commission. In the declaratory judgment claim, he sought a ruling that the Department lacked jurisdiction over diffuse surface waters within Big Butte Creek.

The district court granted summary judgment in favor of the Department and the City and dismissed both cases. Harrington appealed both cases to the Oregon Court of Appeals.

The court first held that under operation of law, the Department did not need to issue a final order on a request for reconsideration. The court pointed to Oregon Revised Statute section 183.484(2), which stated that unless an agency otherwise acts, the state will deem a petition for rehearing or reconsideration denied sixty days after petitioner filed it. The statute added that the petitioner had sixty days after the denial date to file for judicial review. Under the statute, the Department's inaction denied Harrington's request for reconsideration on August 25, 2003, sixty days after Harrington's June 25, 2003 petition for reconsideration. The Department had no duty to take any other action. In addition, Harrington relinquished his right to judicial review by failing to act by October 24, 2003, sixty days after the statutory denial date. The date of Harrington's May 13, 2004 letter fell far outside his allotted sixty-day window.

Consistent with the first holding, the court also denied Harrington's claims of inadequate notice requirements on the March 19, 2004 letter. Although Oregon Revised Statute section 536.075(1) required final orders to contain notice of a petitioner's right to judicial review, the court found the statute inapplicable to the letter at issue. As denial of Harrington's request for reconsideration occurred by operation of law, the Department had no duty to issue a final order at all, much less one with statutory notice requirements.

Lastly, the court held that the trial court did not have jurisdiction over the declaratory judgment claims. The court explained that when judicial review under the Administrative Procedure Act ("APA") is available, such review is the only method a petitioner may use to challenge an agency's action. Because the APA governed the issue at hand, Harrington could seek relief only through judicial review, not through declaratory judgment.

The court affirmed the trial court decisions.

Kurt Kropp