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## Waterwatch of Or. Inc. v. Water Res. Comm'n, 112 P.3d 443 (Or. Ct. App. 2005)

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mary judgment for the Landowners on the basis that the 1903 conveyance from Kraemer included the disputed area west of Ocean Avenue.

The Stevens appealed to the Oregon Court of Appeals. On appeal, the only issue the court considered was whether the Landowners' title extended west, past Ocean Avenue and into the disputed area. Before evaluating the case on its merits, the court established the Landowners' specific burden of proof. Citing previous Oregon Supreme Court cases, the court held that for the Landowners to secure a judgment quieting title, they must prevail on the strength of their own title, and not on the weaknesses of the Stevens title.

The court then evaluated the 1903 deed from Kraemer and found that it conveyed only specific lots within the plat of the subdivision located east of Ocean Avenue and retained for Kraemer the area west of Ocean Avenue, including the disputed land. The court then turned to an analogous Oregon Supreme Court case, and found that where a street separated platted lots from the waterfront, a conveyance of lots and street blocks located across the street from the waterfront, there was no implied conveyance of the land between the conveyed street and the waterfront. Rather, such a conveyance indicated the owner's intent to reserve the waterfront property to the grantor.

Applying that reasoning to the facts, the court found that Kraemer conveyed only specific platted parcels that were all located east of Ocean Avenue. The court explained that when a street separates platted lots from waterfront property, Kraemer's conveyance by designating lots and blocks of parcels located across the street from the waterfront did not convey the waterfront or any of its appurtenant rights. Rather, his conveyance "by lots and blocks" indicated Kraemer's intent to reserve the shoreline for himself.

The court reasoned that Kraemer's conveyance specifically identified the blocks and lots conveyed in the deed, and was silent as to the parcel west of Ocean Avenue. As such, the court found that the disputed parcel belonged to the original grantor and his successors in interest.

The court found that the Landowners' ownership of the lots extended no further on the west than Ocean Avenue, and did not extend to any portion between the road and the high tide line. Therefore, the court held that the trial court erred in granting summary judgment for the Landowners and reversed the decision of the lower court.

*Brandon Saxon*

**Waterwatch of Or. Inc. v. Water Res. Comm'n, 112 P.3d 443 (Or. Ct. App. 2005)** (holding administrative rules that allow water users to moderate rather than maintain the free-flowing nature of the scenic waterways in the Deschutes Basin invalid because Oregon statutes require that appropriated stream flows be fully replaced, not moderated, to lessen the environmental impact of appropriation).

Waterwatch of Oregon Incorporated and individual flyfisherman (collectively "Waterwatch") challenged the validity of two sets of Water Resources Commission ("Commission") rules in the Court of Appeals of Oregon. The first set of administrative rules amended the Deschutes Basin water management program by permitting the appropriation of groundwater in the basin and establishing mitigation requirements. The second set of administrative rules provided for the creation of a mitigation bank and mitigation credits system in the basin.

Waterwatch argued that the Commission exceeded its statutory authority when it created the rules because 1) the rules do not comply with Or. Rev. Stat. § 390.835 (2004), 2) the rules overallocate surface waters in the basin, and 3) the Commission violated its public trust responsibility. The court considered Waterwatch's first argument sufficient to hold the rules invalid.

Section 390.835 requires that "the free-flowing character of these [scenic] waters shall be maintained in quantities necessary for recreation, fish and wildlife uses." The court adopted the purpose and meaning of the statute described in *Diack v. City of Portland*. The *Diack* court held the operative part of the statute is the requirement that waters be 'maintained' in sufficient quantities for recreation, fish and wildlife uses. This requirement created a standard that the Commission must apply. The court further stated that the term "free-flowing" is purely descriptive and does not create a separate statutory standard that the Commission may follow. Accordingly, the Commission is required to determine the level of water necessary to maintain the free-flowing character of scenic waterways. Once the level is determined, any appropriation beyond that level which measurably reduces the flow must be fully mitigated. Thus, for an administrative rule to comply with section 390.835, the rule must require full mitigation of appropriated groundwater.

Since the administrative rules created by the Commission only required that mitigation "moderate" the effect of groundwater use, the court held the administrative rules invalid. The court held moderation differs from maintenance because moderation does not require full replacement of stream flows.

*Thomas Jantunen*