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Hale v. Water Res. Dep't, 55 P.3d 497 (Or. Ct. App. 2002)

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Thus, the court enjoined them from such delivery of water without written consent of Port and awarded damages. The judgment additionally gave Port exclusive right to operate the water delivery system providing Port did not interfere with the Ayletts' right to uninterrupted use of the system on Section 21. The trial court also stated Port had the right to charge the Ayletts actual costs of future use of the irrigation system for delivery of water to Section 21.

On appeal to the Oregon Court of Appeals, the Ayletts made two arguments concerning the ruling: (1) that the relief granted went beyond the relief sought and the additional terms were erroneous in light of Port's assurances that those issues were not before the court and would be litigated at a later date if necessary; and (2) that the trial court erred as a matter of law because previous 1993 litigation established the Ayletts' right to operate the irrigation system. The court here agreed with the Ayletts' first argument and thus did not address the second. The court likened the Ayletts' case to *Ellison v. Watson* where the relief erroneously granted by the court concerned subject matter that was not only not the grounds for litigation but was specifically disavowed by the party seeking relief. Port argues that the present case is distinguishable from *Ellison* because the relief at issue in the instant case was "logically connected" to the relief requested. The court rejected the connection argument because it failed to see a connection between the Ayletts' rights to irrigate Sections 27 and 28 and the amount that Port could charge defendant to irrigate Section 21.

Therefore, the court reversed the trial court's ruling on the issue of additional relief and remanded for entry of an amended judgment. The court otherwise affirmed the judgment.

Gerritt James Koser

Hale v. Water Res. Dep't, 55 P.3d 497 (Or. Ct. App. 2002) (holding that lack of continuity regarding beneficial use barred plaintiffs from receiving a permit to use river water for irrigation).

In 1965, the Water Resources Department ("Department") created Permit 30789 ("Permit"), allowing for the Stanfield Irrigation District, including Robert Hoskins and Ralph and Albert Seibel, to divert water from the Umatilla River for irrigation. The Department would grant a permit if the parties, within the district, applying could establish that they were putting water to beneficial use. At the final application deadline—December 31, 1988—the Department determined whether the district was using the water beneficially by conducting a survey. Hoskins and the Seibels, owners of two adjacent sections of land, both sought permits. The Seibel brothers were attempting to irrigate both the land they owned as well as the neighboring section they leased from Hoskins. The irrigation began in the early 1970s but ceased in the early 1980s due to one of the brothers' illness. At this time, the

brothers advised other irrigators in the region of their intention to discontinue their Permit. In 1989, the Department made its final determination of proof for those asserting Permit rights and determined that neither Hoskins' nor the Seibel brothers' used the water beneficially.

The Seibel brothers sold their section of property to Rick Hale in 1991. In 1997, Hale and Hoskins requested a hearing to argue that since the two sections had been put to beneficial use for some duration in the past, the Department's 1989 cancellation of their Permit rights was in error. The hearing officer disagreed, and affirmed the 1989 finding made by the Department, stating that "continuity" was implicit in the definition of beneficial use. Hoskins and Hale appealed to the Oregon Court of Appeals.

At issue was the definition of a "perfected" water right within the context of the Department's 1989 decision. Hoskins and Hale argued that "perfection" was a term of art that could refer to a single incident where water was briefly put to beneficial use. The Department argued whether a right had been "perfected" was left solely to the Department's discretion. The Court of Appeals held that where an agency's interpretation of law is at issue, the standard of review depends on whether the term in question is an exact term, an inexact term, or a delegative term. Here, the court labeled "perfected" a delegative term, meaning it expressed "incomplete legislative meaning that the agency is authorized to complete." Thus, the Department had the authority to define "perfected" as it saw fit.

The court's second responsibility was to review the Department's decision to deny Hoskins' and Hale's Permits to determine whether it was within the "range of discretion allowed by the general policy of the statute." The Oregon Supreme Court has held that continuity is implicitly contained within the meaning of "beneficial use." Also, Oregon law provides that where there is a gap of five successive years between beneficial uses, "there is a rebuttable presumption of forfeiture of all or part of the water right." Finally, the Water Rights Act explicitly states that for the Department to grant a permit, appropriation alone does not suffice; there must also be a beneficial use in effect when the Department makes its final determination. Having determined that continuity of beneficial use was a fundamental policy of the Water Rights Act, the court held the 1989 determination within the range of discretion allowed by the Water Rights Act.

Hoskins' and Hale's finally argued that, even if the Department's interpretation of "perfected" was appropriate, the court should require the Department to express this definition as an administrative rule. On this issue, the court held that rulemaking was not required in the absence of express statutory text to the contrary. Because there was no such statutory language in this case, the court did not require the Department express their definition as an administrative rule.

Michael Sheehan