



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

December 1, 2008

Juno Pandian
Manager
Well Construction and Compliance Section
Water Resources Department
725 NE Summer Street, Suite A
Salem, OR 97301

Re: Exempt ground water use for a commercial purpose
DOJ File No.: 690302 GN0836-06

Dear Ms. Pandian:

You have asked whether irrigation is an allowed component of the "commercial purpose" exemption provided in ORS 537.545(1)(f) – the statute governing exempt ground water uses. The short answer is use of exempt ground water for a "commercial purpose" does not include use of water for irrigation.

In Oregon, ground water is comprehensively permitted and regulated such that "[n]o person or public agency shall use or attempt to use any ground water, construct or attempt to construct any well or other means of developing and securing ground water or operate or permit the operation of any well owned or controlled by such person or public agency" except in compliance with Oregon statutes governing the appropriation of ground water.¹ Further, "[e]xcept for those uses exempted under ORS 537.545, the use of ground water for any purpose, without a permit * * * or registration * * * is an unlawful appropriation of ground water."² Exempt ground water uses are as stated in ORS 537.545 which refers to the exemption of ground water for "commercial purpose" as follows:

No registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate is required for the use of ground water for * * * [a]ny single industrial or *commercial purpose* in an amount not exceeding 5,000 gallons a day.

ORS 537.545(1)(f) (emphasis added).

¹ ORS 537.535(1).

² ORS 537.535(2).

To determine whether irrigation is a component of a single “commercial purpose” we must ascertain the intent of the legislature as that intent is expressed in statute.³ A court begins its analysis of a statute with the text and context of the statute itself.⁴ In this case, the text does not define “commercial purpose” nor is this term defined elsewhere in the statute or related statutes. As such, looking at the text, the court will assume that words of common usage will be given their “plain, natural and ordinary meaning.”⁵ The ordinary meaning of a word is presumed to be as stated in the dictionary.⁶ The definition of “commercial” is very broad – meaning “occupied or engaged in commerce * * * having profit as the primary aim.”⁷ Though the word “commerce” refers to “the exchange of buying and selling of commodities,” as opposed to the production of commercial commodities, excluding the concept of producing commodities from the word “commercial” would seem an over limitation of the term “commercial.” In conclusion, the dictionary definition of “commercial” is so broad as to be unhelpful in discerning whether “commercial” purposes may be interpreted as including the production or irrigation of commercial crops or commodities.

The court’s analysis of a statute, however, will not end with a purely textual analysis as a statute must be considered in context.⁸ The context of ORS 537.545(1) establishes that “commercial purpose” does not include exempt ground water use for irrigation.

Context includes other provisions of the same statute.⁹ In this case, other provisions of ORS 537.545 describe three specific instances where exempt ground water may be used to water or apply water to land.¹⁰ First, the statute allows “watering” of any lawn or “noncommercial garden” not exceeding one-half acre in area.¹¹ Second, the statute allows “watering” of lawns, grounds and fields not exceeding ten acres in area “of schools located within a critical ground water area.”¹² Third, the statute allows “land application” of effluent and reused ground water under limited conditions.¹³ Because the statute prescribes those specific instances where exempt ground water may be used to water land, it appears that the legislature intended to limit permissible watering or land application only to the specific instances described explicitly in the text.¹⁴ Thus, the text of ORS 537.545(1)(b) allows watering of “non commercial gardens” and distinguishes and prohibits the watering of “commercial gardens” by negative implication.¹⁵ If the legislature had intended to allow watering of all gardens under one-half acre, whether commercial or not, then it would have referred simply to the watering of “gardens.”¹⁶ Further, if

³ *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993).

⁴ *PGE*, 317 Or at 610.

⁵ 317 Or at 611.

⁶ *Massee and Massee*, 328 Or 195, 202, 920 P2d 1203 (1999).

⁷ *Webster’s Third New International Dictionary* (unabridged ed. 2003).

⁸ 317 Or at 611.

⁹ *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508, 98 P3d 1116 (2004).

¹⁰ ORS 537.545(1).

¹¹ ORS 537.545(1)(b).

¹² ORS 537.545(1)(c).

¹³ ORS 537.545(1)(g).

¹⁴ ORS 174.010 (in construing statutes “the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted”)

¹⁵ *Id.*

¹⁶ *Id.*

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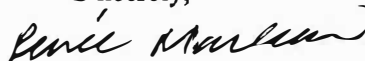
one interprets "commercial purpose" to implicitly allow other commercially-related irrigation then such interpretation directly conflicts with the rest of the statute by rendering the specific references to permissible irrigation as unnecessary and therefore meaningless.¹⁷

In construing legislative intent, a court will also view the statute at issue in the context of other preexisting statutes.¹⁸ Referring to other statutes that describe types of beneficial uses of water, it is clear that the legislature consistently refers to "irrigation" when it intends to use the word "irrigation" rather than implying that irrigation is a latent component of other water uses.¹⁹ Instead, the legislature consistently differentiates irrigation from other types of water use including industrial use or domestic use.²⁰ Likewise, if the legislature had intended for irrigation to be a component of "commercial purpose" it would have so stated.²¹

In conclusion, we believe a court would likely find that "commercial purpose" as provided in ORS 537.545(1)(f) does not include water use for irrigation.

Please do not hesitate to let me know if I may be of further assistance in this matter.

Sincerely,



Renee Moulun
Senior Assistant Attorney General
Natural Resources Section

RM1:ml/JUSTICE-#1049297-V1-OWRD_EXEMPT_GROUND_WATER_FOR_COMMERCIAL_PURPOSE

¹⁷ *Id.* (Where there are several provisions or particulars in a statute the court will construe the statute so as to give effect to all.)

¹⁸ *Fisher Broadcasting Inc. v. Dept. of Rev.*, 321 Or 341, 351, 898 P2d 1333 (1995); *City of Salem v. Salisbury*, 168 Or App 14, 25, 5 P3d 1131 (2000), *rev den*, 331 Or 633 (2001).

¹⁹ See e.g., ORS 537.545(1)(g)(A) (describing when exempt reused water may be used for irrigation); ORS 537.605 (statute governing ground water registrations states that if ground water is to be used for "irrigation purposes" then the registration must include a description of the irrigated lands); ORS 537.615(2)(f) (ground water permit applications for irrigation use must specify a description of the lands to be irrigated and the number of acres to be irrigated).

²⁰ ORS 536.300.

²¹ ORS 174.010.