MUNICIPAL WATER RIGHTS
RECENT RULINGS IN WASHINGTON & OREGON

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INTRODUCTION

Three recent decisions out of Oregon and Washington courts address the special circumstances confronting municipal water providers. The law of prior appropriation, which governs water use in all the Western states, generally requires prompt application of water to beneficial use upon issuance of a permit. At that point, a certificate is issued evidencing the vested water right. The water right holder is then expected to make continual use of the water — at least once during a five-year period — or risk forfeiture for non-use (known as “relinquishment” in Washington state). Different rules apply to municipalities; municipalities in this context refers both to cities and special districts.

The processes for acquiring, developing, and maintaining municipal water rights reflect public water providers’ special needs. Under what commentators call the Growing Communities Doctrine, legislatures and courts have recognized that local water authorities must plan for future population growth. That means that water providers apply for more water than they presently need so as to ensure an adequate supply at such time as the sufficient numbers of ratepayers emerge to justify and pay for the construction work.

In Oregon, the most recent manifestation of the Growing Communities Doctrine is a 2005 law that created a whole new process for local water providers needing an extension of time to develop their water systems. HB 3038 (2005), codified as ORS 537.230. In Washington State, a 2003 law rewrote the rules applying to municipal water right holders to protect public investment in water supplies. Municipal Water Law, HB 1338 (2003), codified as RCW 90.03.015 et seq. Two recent Oregon cases cast a shadow over the legislature’s nod to Growing Communities, whereas the Washington Supreme Court has parted the clouds for public water rights in that state.

OREGON CASES

Oregon law provides that the Oregon Water Resources Department (Department) must consider the persistence of fish species prior to issuing a permit extension. The relevant statute states the Department may “order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit” if the Department finds that “the undeveloped portion of the permit is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law.” ORS 537.230(2).

Two recent opinions issued by the Oregon Court of Appeals address the Department’s interpretation and application of fish persistence requirements. The first of these cases, involving the City of Cottage Grove, retroactively applied the fish persistence conditions back to the previous extension in 1999, despite the fact that the municipality had completed development of its water system. This outcome exposes the city to potential curtailment of its water rights and unbudgeted additional public expense, raising concerns for local water providers across the state. Further, the court took the extraordinary action of vacating the certificate issued to the city.
The second case, involving a group of municipal water providers on the Clackamas River, addresses the adequacy of fish persistence conditions, and may be less impactful to the broader water using community. The issue was whether the Department adequately explained how the conditions it imposed are protective of fish over the long-term.

**Cottage Grove Fish Persistence**

In December 2013, the Oregon Court of Appeals issued an opinion in *WaterWatch of Oregon v. Water Resources Dept.*, holding that the Department was required to consider whether conditions were necessary to maintain fish populations based on the quantity of undeveloped water that existed at the time the last valid permit extension expired, regardless of whether a municipality had diverted its full water right in the interim. 259 Or App 717, 313 P.3d 330 (2013) (review improvidently granted in 355 Or 317, 327 P.3d 1167 (2014), decision aff’d). The Department and the applicant had argued that fish persistence requirements applied to the “undeveloped portion” as of the new extension.

The case involved a challenge to a 2010 “Certificate of Water Rights” issued to the City of Cottage Grove (“City”). The City’s original permit was issued in 1974 and required complete diversion of 6.2 cubic feet per second (cfs) of water by October 1980. The City applied for and received extensions until October 1999 to complete its water treatment plant. The City continued development of its water system, and by 2007 the City completed its water treatment plant; in July 2008 the City successfully diverted all 6.2 cfs allocated under its permit. In 2009, the City reopened its 2007 application for extension of time, a prerequisite to certificating the water right. The Department approved the extension application, and immediately after, approved the City’s certificate.

Petitioners appealed the approval of the extension. One of the City’s arguments was that the issuance of the certificate rendered the extension challenge moot, as the certificate is “conclusive proof” of the water right. See ORS 537.250 and 537.270. The court rejected this argument, reasoning that “if the city had not been granted an extension of time, it would not have been able to perfect its water right under the permit, and, consequently, the department could not lawfully have issued a water-right certificate to the city.” 259 Or App at 728, 313 P.3d at 337.

Turning to the validity of the extension, the court determined that the Department had failed to consider whether, as of the date of the last properly issued extension in 1999, the undeveloped portion of the permit was conditioned to maintain the persistence of fish species. The City argued that because it had already developed and used its full water right at the time the Department granted the extension, there was no “undeveloped water” to consider that would be subject to fish persistence requirements. The court disagreed and instead remanded the case to the Department to assess whether the permit was conditioned to ensure the City’s use of its undeveloped water, as quantified in 1999, would maintain fish species populations.

As noted above, this case has significant implications for municipal water providers beyond Cottage Grove. Prior to enactment of the 2005 municipal extension law, the Department went through a long period of policy development, during which it asked municipal permittees to refrain from filing extension applications. Most water providers, however, continued development of their water systems to ensure their ability to meet demand. Consequently, these water systems were developed without benefit of official extensions.

Retroactive application of fish persistence requirements may mean that these water providers do not hold the full amount water rights they assumed they have, as conditions on extension now reach back to the last granted extension. This could result in curtailment of the water right and additional unbudgeted expenses to address such retroactive fish persistence conditions. This outcome is contrary to the Department’s reading of the statute, the expectations of municipal water providers and, we submit, to legislative intent.

**Clackamas River Water Providers: Long-Term Viability**

The following year, in December 2014, the Oregon Court of Appeals issued an opinion in *WaterWatch of Oregon v. Department of Water Resources*, 268 Or. App 717 (Dec 31, 2014). Here, the court found that the Department had not adequately explained why conditions included in three municipal water permits would ensure fish persistence on the lower 3.1 miles of the Clackamas River.

In this case, the Department’s final orders provided for the following conditions: the orders identified stream flows necessary to maintain fish persistence; the orders required an annual meeting to determine whether stream flows should be augmented with water releases from an upstream lake; and the orders required curtailment of the diversion of undeveloped water between September and June in proportion to the amount by which the recommended flows were not met.
The court first agreed the Department had correctly interpreted the fish persistence provision as requiring the Department to condition the use of undeveloped water to ensure the long-term viability of fish populations, and not short-term effects to individual fish. The court did not agree, however, that the Department’s conclusions, as articulated in the final orders, regarding fish persistence requirements were supported by the record. The court found that the Department had failed to “connect the dots” on why short-term water flow shortfalls would not adversely impact long-term fish persistence. In other words, the Department’s orders did not define how long the “short-term” would last; nor did the Department explain how long-term flow objectives would be met.

The court took further issue with fact that the conditions did not relate to the use of the undeveloped water but rather contemplated any flow shortfalls would be augmented with the release of stored water from an upstream lake. Ultimately, the court reversed all three final orders and returned the case to the Department for further review.

It may be that the Clackamas holding does not have broad implications for other municipal water right holders. The court seemed to invite the Department to look again at the record and better explain what it means by “short-term” and what the Department expects to happen to ensure long-term fish persistence flows. An extensive record was developed in the contested case hearings over the Clackamas extensions, and it may be that record evidence is available to fully support and better elucidate the original Department decisions.

WASHINGTON CASE

Cornelius v. WSU

In contrast to the Oregon cases, the Washington Supreme Court’s recent opinion in Cornelius v. Washington State University, broadly affirmed the rights of municipal water rights holders. Slip Opinion, No 8817-3, 2015 WL 594309 (Wash, Feb. 12, 2015). In Cornelius, the Washington Supreme Court (Supreme Court) considered whether Washington State University’s (WSU’s) water rights were protected from relinquishment despite WSU’s non-use of those rights. [Editor’s Note: many western states use the word “forfeiture” in non-use situations, whereas Washington uses “relinquishment”]. To understand the decision, it is important to note that in Washington, “…since 1967, our statutory scheme has treated water rights claimed for municipal water supply purposes as immune from statutory relinquishment, while nonmunicipal water rights may be relinquished through nonuse. LAWS OF 1967, ch. 233, § 18 (codified as RCW 90.14.180); cf LAWS OF 1967, ch. 233, § 14 (codified as RCW 90.14.140(2)(d)).” 2015 WL 594309 at *9. In a twenty-seven page opinion (with a twenty-seven page dissent), the Supreme Court reaffirmed the constitutionality of the 2003 Municipal Water Law (MWL), which recognized as in good standing, municipal water rights certificates issued prior to September 9, 2003. RCW 90.03.330(3).

The statutes further protected permit holders by defining “municipal water supply purposes” to ensure that the practical reality of the water purpose was recognized above the purpose that had been identified in the original certificate or permit. RCW 90.03.015(4). “When requested by a municipal water supplier or when processing a change or amendment to the right, the department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in RCW 90.03.015, are correctly identified as being for municipal water supply purposes.” RCW 90.03.560.

Cornelius involved a challenge to changes in WSU’s water certificate. WSU had sought to amend its water certificate so that the certificate conformed to WSU’s actual water use as municipal water rights. WSU held seven separate groundwater rights for use on its Pullman Campus. Documents representing WSU’s water rights had assigned the water rights to particular wells, and, at various times, WSU has drawn water from eight wells. In recent years, WSU had consolidated its water system, “shifting almost all of its groundwater pumping from older wells to two newer wells drawing from the same aquifer” but had not applied for a change in its water rights certificate. 2015 WL 594309 at *3. WSU’s certificates and permits primarily identified the purposes as “municipal,” but two permits issued by the Washington Department of Ecology (Ecology) identified the purpose as “domestic.” After consideration of the status of WSU’s certificates, Ecology approved all but one of WSU’s requested amendments.

A junior water user in the same groundwater system appealed Ecology’s approval of WSU’s change application. On review, the Supreme Court considered ten questions certified from the Court of Appeals. The Supreme Court’s opinion affirmed its prior holding in Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P3d 1220 (2010), in which the Supreme Court found the MWL constitutional. With the passage of the MWL, the Washington Legislature had sought to clarify the status of municipal water rights in Washington. It did so by confirming that municipal water certificates issued prior to September 9, 2003, were in good standing and not relinquished, and by providing a definition of “municipal water supply purposes” that would control the classification of the water right.

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The junior water user asserted several bases for appeal but most were predicated on the argument that WSU’s certificates identified the purpose of the water rights as for domestic use. Therefore, the junior user argued, the water rights were not municipal and were subject to relinquishment for non-use. The Court rejected this argument and instead reaffirmed that whether a water use is classified as municipal is not dependent on the purpose identified in the certificate, but rather, on whether the actual water use meets the definition of municipal purpose in the MWL. As the Court recognized, “[I]t makes no sense to say that in 1962 and 1963, Ecology issued WSU the right to pump over 971 million gallons of water per year but never intended WSU to use that water for municipal purposes.” 2015 WL 594309 at *7. Uses that meet the MWL definition of municipal purposes are therefore protected from relinquishment by non-use.

The Court also reaffirmed the constitutionality of the MWL’s provision recognizing that municipal rights issued prior to September 9, 2003, are in good standing. In so holding, the Court affirmed Ecology’s use of a streamlined process that did not require the applicant to show year-to-year actual use of water prior to approving an extension application. The Court recognized that because the permit is not subject to relinquishment, a showing of actual use is immaterial to the validity of the permit. The Court went on to reject the remainder of the junior user’s claims and affirmed Ecology’s approval of WSU’s application.

**CONCLUSION**

The Growing Communities Doctrine deserves full expression by our legislatures and courts. Important differences exist between municipal and other water users, in that municipalities are almost never in a position to complete full build-out of their water systems when they apply for a permit, as they lack the immediate need and ratepayer support. Still, the core mission for every municipal provider is to secure a safe, adequate, and reliable water supply to meet current and future demand. By its nature, then, municipal water supply planning dictates identification and locking up of water supplies to meet projected needs years or decades into the future.

This most fundamental of public services, then, calls for flexibility by our policy makers in approaching municipal water rights. In Washington State, the Legislature helpfully defined municipal water supply purposes, irrespective of the type of entity or the use shown in the original certificate, which was affirmed by the Supreme Court in *Cornelius*. In Oregon, however, better clarity evidently is needed to ensure that those communities that developed their water supply systems in good faith — pending revisions to state extensions policy — can realize the benefit of their public investment.

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**COTTAGE GROVE CASE AT**: www.publications.ojd.state.or.us/docs/A147071.pdf

**CLACKAMAS RIVER WATER PROVIDERS CASE AT**: www.publications.ojd.state.or.us/docs/A148870.pdf


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