

Has The Court of Appeals Rendered Municipal Water Rights an Endangered Species?

By Richard M. Glick*

In *WaterWatch of Oregon, Inc. v. Water Resources Commission, Water Resources Department and Coos Bay North Bend Water Board*, 193 Or App 87, 88 P3d 327, review allowed_OR_(2004), the Court of Appeals rendered a decision with broader implications for Oregon communities than perhaps was intended. In that case, the Coos Bay North Bend Water Board (CBNB) applied for a water right permit, and the court held that the Water Resources Department (WRD) and Water Resources Commission (WRC) erred in issuing the permit because actual physical construction of the project would not occur within five years of issuance of the permit.¹

Although the CBNB involved a new application, there are many municipal water right permits for which development was approved by the WRD, but for which physical construction was not commenced within five years of the permits. While these permits have been granted extensions of time over the years, the CBNB case raises questions about whether they were properly granted in the first place. If the courts find they were not, many Oregon communities could find themselves without adequate water supplies to meet future demand.²

The case involves an application to appropriate water from Tenmile Creek in Coos

County, filed by CBNB in March 1990. WRD issued a Proposed Final Order in December 1997, which was protested by WaterWatch and others. Issues included potential environmental effects of the Project, interference with instream water rights and the need for the water. After lengthy contested case proceedings, the Water Resources Commission approved issuance of a permit to CBNB. The protestants then sought judicial review. Following the Court of Appeals decision, the WRD, WRC and CBNB filed petitions for review before the Oregon Supreme Court, which were granted. The League of Oregon Cities, Special Districts Association of Oregon, Oregon Association of Water Utilities and the Oregon Water Resources Congress have applied for and been accepted to participate in the case as *amici curiae*.

ORS 537.230(1) provides in relevant part:

The construction of any proposed irrigation or other work shall be prosecuted with reasonable diligence and be completed within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval.

While the court did not concern itself with the specific public interest findings of the WRD and WRC, it was disturbed that physi-

cal construction of the Tenmile Project would not commence within five years of the permit. The record indicated that during the first five years, water quality and other environmental investigations would occur, along with preliminary work toward satisfying federal regulatory permit requirements. It was understood by the WRC, and included in its findings, that no actual physical construction would even begin during the five years. The court concluded that this does not meet the statutory requirements for an extension:

Based on the [WRC's] findings, during the statutory period, CBNB intends to collect only water quality and flow data and construction of diversion works will not begin. As a matter of law, those findings do not demonstrate that, on issuance of the permit, CBNB will exercise reasonable diligence in the construction of diversion works. Consequently, the [WRC] erred as a matter of law by granting a permit where the requirements of ORS 537.230(1) will not be satisfied. OR APP 87 (emphasis original).

At first glance, the Court of Appeals' opinion appears to present a straightforward issue of statutory interpretation; however,

Continued on page 10

much more is at stake in this case. The court, with little analysis, defined "construction" as follows:

Further, the text of ORS 537.230(1) provides that "[t]he construction of any proposed irrigation or other work shall be prosecuted with reasonable diligence and be completed within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval." (Emphasis added.) "Construction" refers to "the act of putting parts together to form a complete integrated object." *Webster's Third New Int'l Dictionary* 489 (unabridged ed 1993). Here, based on the commission's findings, construction of diversion works will not be completed as required by the statute nor will any construction of those works even begin within the statutory time period or the time period included as a condition of the permit. *Id.*, at p. 11.

The court's decision misapprehends the complicated and lengthy process of developing a municipal water supply. Even accepting the dictionary definition of "construction," the process typically includes many years of "putting parts together" that do not necessarily equate to physical assembly of building materials, but are nonetheless integral to project development. Moreover, those pieces in that process are often driven by other statutory and common law requirements. These include planning, financing, engineering, design, environmental studies, permits from federal, state and local governments, and other mandatory, nondiscretionary steps.

Municipal water utilities are obligated to provide a water supply to their residents, as well as to commercial and industrial users. They must be able to meet the current demand, have resources for emergency needs, and anticipate and provide for future uses.³ Municipal Water Utilities are constantly planning and updating their infrastructure, which commonly includes development of surface water sources, ground water well fields and storage facilities. A long lead time is required for such developments, due to their size, complexity and expense.

Like other western states, Oregon has adopted the Doctrine of Prior Appropriation (ORS Chapter 537), the centerpiece of which is that the earliest water appropriator may block others from taking water in times of shortage. Municipal water utilities are faced with a dilemma: In trying to plan responsibly for expected population growth, they must file for their water rights early to secure the priority date; yet they cannot build the water

works until many intermediary steps are completed and they can be assured of enough ratepayer-residents to help pay for the development.

The statutory scheme to allocate water recognizes the unique needs of municipalities in securing a long term water supply for their citizens. A municipality's responsibility to provide water has been an integral part of Oregon's water law since 1913 when the rights of all cities and towns to acquire water rights "for all reasonable and usual municipal purposes and for such future reasonable and usual municipal purposes as may be reasonably anticipated by reason of growth of population" was "expressly confirmed." Or Laws 1913, ch 279. The legislature has recognized the special concerns of municipalities throughout current statutes. For example, ORS 537.190(2) provides for the approval of municipal applications to the exclusion of all subsequent appropriators if the exigencies of the case demand. ORS 537.260 exempts a municipality from cancellation of a permit when it fails to complete appropriation. ORS 537.211(6) allows a permit to issue without requiring a municipal applicant to provide evidence of an easement to non-owned land. ORS 537.248 allows a permit to issue for a municipal supply reservoir before engineering plans and specifications are submitted. ORS 540.610(2)(a) exempts municipal water rights from forfeiture for nonuse. ORS 540.610(4) perhaps best exemplifies the legislature's recognition of the need for municipalities to secure long-term, stable water rights:

The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.

The legislative intent is consistent with the Growing Communities Doctrine, a doctrine implied in Oregon water law. Briefly, the Growing Communities Doctrine recognizes a preference for municipal water rights in states following the system of prior appropriation. Under this doctrine, municipalities are given more leeway than private developers to allow gradual development of public water supplies to meet future needs. Courts in several western states, with statutory schemes similar to Oregon, have recognized this

doctrine.⁴ In Oregon, the long-standing statutory preferences that the legislature gives municipal water suppliers and the WRD's practice of allowing municipalities greater flexibility in the development of water rights demonstrates this doctrine's presence in Oregon law. While no case has yet expressly recognized the doctrine, Oregon's statutory scheme supports it and affirms the legislature's intent to provide the needed certainty to support long-term public investments in water supply infrastructure to meet growing populations.

There are many Oregon municipalities and special districts holding water right permits for projects that have not yet been physically constructed. The WRD has granted innumerable extensions of time beyond the initial five-year construction period upon a showing of good cause.⁵ However, if the Court of Appeals is correct in its interpretation of "construction" under ORS 537.230, and physical construction must have commenced within five years of the permit, then the future water supplies relied on by these communities are at risk of failure. The CBNB case calls in to question the validity of these prior extensions and may block future extensions of old water rights that cities have long counted on to be available for development when needed. As in the case of the CBNB, years of planning, millions of dollars of public funds, and the attempts to satisfy other legal requirements would all be for naught.

In water supply development "construction" is not a single event, but a process. Each step in that process comprises "the act of putting parts together to form a complete integrated object," which is consistent with the Webster's Dictionary definition cited by the Court of Appeals, properly understood. Municipal water utilities across the state will be anxiously waiting to see whether the Supreme Court accepts the case and how it is resolved.

Footnotes:

* **Richard M. Glick** is a partner in the Portland office of Davis Wright Tremaine, where he is chair of the Natural Resources Practice Group. His practice emphasizes water and environmental law.

1 See, casenote in *Outlook*, Summer 2004, p. 15.

2 Most of the court's opinion is concerned with WaterWatch's standing to challenge the CBNB project and the applicability of timeliness requirements to municipalities. However, this article will focus on the court's

Are Municipal Water Rights an

- conclusions on the meaning of "construction" in the context of municipal water supply development.
- 3 Municipal Water Utilities are required by law to conduct comprehensive planning to assure a long-term supply of buildable land and necessary infrastructure. See, ORS 197.175, ORS 195.020, ORS 197.296, Goal 11 (OAR 660 Division 11) and Goal 14 (OAR 660 Division 21).
 - 4 See, for example, *City and County of Denver v. Sheriff*, 96 P2d 836 (Colo 1939); *State ex rel. State Engineer v. Crider*, 431 P2d 45 (NM 1967); *Holt v. City of Cheyenne*, 137 P 876 (Wyo 1914).
 - 5 Such extensions are pursuant to ORS 537.230(2): "Except as provided in ORS 537.240 or 537.248, the department, for good cause shown, shall order and allow an extension of time, including an extension beyond the five-year limit established in subsection (1) of this section within which irrigation or other works shall be completed or the right perfected. In determining the extension, the department shall give due weight to the considerations described under ORS 539.010 (5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right."

WaterWatch of Oregon v. Water Resources Commission

By John DeVoe, Esq.*

In April 2004, WaterWatch prevailed in a case involving municipal speculation in water on Tenmile Creek on the Oregon Coast. *WaterWatch of Oregon v. Water Resources Commission*, 197 Or App 87 (2004), review allowed __ Or __ (2004).

To obtain a water right, a user must apply for an appropriation permit. To issue a permit, the state must find the proposed use in "the public interest," (ORS 537.153(2)) based on several factors, including instream values. The application date becomes the user's priority date, subject to an important requirement: the permit holder must com-

plete construction of diversion works and put the water to beneficial use within five years (ORS 537.230(1)), subject to extensions the state can grant.

Municipal water suppliers have long contended they are exempt from this five year requirement. The state has agreed in practice. Recently, the state adopted rules allowing extensions of up to 50 years or more for municipal suppliers to complete diversion works that are required by statute to be completed in five years. (OAR 690-315-0010 *et. seq.*) As a result, municipal suppliers often apply for permits and long-term extension

requests with no intent (or ability) to use the water. This warped permitting system allowed municipalities to obtain priorities that were meant to arise only from actual use. It also allowed municipalities using old permits to circumvent a public interest analysis when the water is actually put to use.

In 1990, the Coos Bay North Bend Water Board (CBNB) applied for a permit to take 38 cubic feet per second (25 million gallons per day) of water from Tenmile Creek. Tenmile Creek has flows ranging from 18 cfs in September to 377 cfs in January. Formerly a great coho salmon river, Tenmile Creek

Environmental & Natural Resources

9

still supports steelhead and searun cutthroat trout while providing habitat for the threatened Western snowy plover by scouring beach grass away from bare sand nesting areas.

Although the industrial interests that prompted the application located elsewhere, CBNB pursued the permit for "long range" planning and to secure water before endangered species habitat restoration efforts made it more difficult to obtain new water rights. WaterWatch protested the application. The contested case hearing demonstrated that CBNB had no intention of putting any water to use under the permit within the five-year statutory time limit. CBNB admitted this. The Water Resources Commission (WRC)

agreed to issue a permit for 23.2 cfs. WaterWatch appealed.

In April, 2004, the Oregon Court of Appeals held that the five-year rule applies to municipal applicants. Accordingly, the WRC erred as a matter of law in determining that issuance of the permit was in the public interest. If an applicant will not complete or pursue construction of the diversion works with reasonable diligence within five years, the permit should not be issued.

This result implicates many often speculative attempts to secure large volumes of water from sensitive streams and rivers across Oregon and confirms that the current status quo is unacceptable. A legislative

"end-run" around the CBNB case will not solve the problem. Oregon's world-class rivers, restored salmon stocks and growth can co-exist, but only if the stakeholders have the vision and the political will to implement rational, long-term municipal water supply planning that respects the significant investments Oregonians have made in restoration of our rivers and fisheries.

This case is set for oral argument on January 7, 2005 before the Oregon Supreme Court.

Footnote:

* John DeVoe, Esq., is the Executive Director of WaterWatch of Oregon.