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## ***WaterWatch of Oregon v. Water Resources Department ("Cottage Grove Case")***

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On December 11, 2013, the Oregon Court of Appeals issued a ruling interpreting the amended ORS 537.230(2) conditions. ORS 537.230(2) prescribes conditions for the Oregon Water Resources Department ("the Department") to grant municipal permit extensions to complete construction and apply water to beneficial use in order to perfect water use rights. In this case, the City of Cottage Grove ("the City") sought an extension, but then completed construction and application of water to beneficial use before the extension was granted. Based upon the language of the statute, the Department issued the extension without the ORS 537.230(2) conditions, and WaterWatch sought judicial review. The Oregon Court of Appeals reversed and remanded the Department's final order.

### Background

In Oregon, water is a public resource and persons may obtain the right to beneficially use water by applying to the Department for a water use permit. Once issued, the permit constitutes a license to develop a certain amount of water from a specific water source and apply that water to the identified place of use. Conditions are imposed in water use permits, including deadlines to complete construction of works and apply water to beneficial use. If the permittee cannot meet the deadlines, they may apply to the Department for extensions of time. Once water has been applied to the

beneficial use as allowed in the permit, the Department issues a water right certificate, indicating that the water use is “perfected” and developed into a constitutionally protected real property interest.

Prior to 2005, ORS 537.230 provided that permittees had five years to begin and complete construction of water use infrastructure. In 1997, the Department issued a Proposed Final Order approving an application submitted by the Coos Bay North Bend Water Board that did not contemplate completion of water use infrastructure until potentially 2050. WaterWatch sought judicial review in the case *WaterWatch of Oregon v. Water Resources Commission*, 193 Or.App. 87 (2004). On judicial review, the Oregon Court of Appeals held that the five-year limitation applied to municipal water use permits, and it was an error for the Department to issue the Proposed Final Order and permit without requiring construction to begin within five years’ time.

In 2005, in response to the 2004 opinion, the Oregon State Legislature amended ORS 537.230 by passage of HB 3038, which provides that municipal permittees shall have up to 20 years to commence and complete construction of the proposed water use infrastructure. The current version of ORS 537.230 provides in part:

- (1) Except for a holder of a permit for municipal use, the holder of a water right permit shall prosecute the construction of any proposed irrigation or other work with reasonable diligence and complete the construction within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval.
- (2) The holder of a permit for municipal use shall commence and complete the construction of any proposed works within 20 years from the date on which a permit for municipal use is issued under ORS 537.211. The construction must proceed with reasonable diligence and be completed within the time specified in the permit, not to exceed 20 years. However, 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 under the following conditions:
  - (a) The holder shows good cause. 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;

- (b) The extension of time is conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use before the extension only upon approval by the department of a water management and conservation plan; and
- (c) For the first extension issued after June 29, 2005, for a permit for municipal use issued before November 2, 1998, 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. The department shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife. An existing fish protection agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is conclusive for purposes of the finding.

Thus, ORS 537.230 currently provides that municipal permittees may take up to 20 years to commence and complete construction of water use infrastructure, and extensions may be granted if certain conditions are imposed.

#### *The Cottage Grove Case*

In the *Cottage Grove Case*, 2013 WL 6498547, 2013 Ore. App. LEXIS 1463 (December 11, 2013), the ORS 537.230(2)(b) and (c) conditions were tested. The City of Cottage Grove was issued a permit in 1977 to divert up to 6.2 cubic feet per second (“cfs”) of water for municipal use. Under its permit, the City was required to complete construction by October 1, 1979 and apply water to beneficial use by October 1, 1980. Between 1977 and 1999, the City obtained multiple extensions from the Department, but the last extension expired on October 1, 1999.

In 2007, the City completed an enlargement of its water treatment plant and thereafter applied for an extension of time to complete construction and apply water to beneficial use. Next, the City placed its application on administrative hold while it diverted 6.2 cfs of water into the treatment plant to apply water to beneficial use. In 2008, the City requested that the Department remove the administrative hold and continue processing its extension application with the additional information about completing application of water to beneficial use.

The Department issued a Proposed Final Order (“PFO”) to grant the extension of time from October 1, 1999 to October 1, 2013, but did not impose the conditions from ORS 537.230(2)(b) and (c): that 1) a water management and conservation plan be approved, or 2) that the use maintain the persistence of certain fish species. WaterWatch filed a protest and a contested case was held before the Oregon Office of Administrative Hearings. The administrative law judge’s proposed order affirmed the Department’s PFO, and the Department issued a Final Order adopting the ALJ’s proposed order. Thereafter, the Department issued a water right certificate to the City.

WaterWatch sought judicial review in the Oregon Court of Appeals. The Court considered two issues:

- 1) Whether the action was moot since a water right certificate had been issued; and
- 2) Whether the Department was required to condition approval of the extension upon the conditions in ORS 537.230 (b) and (c).

First, the Department and City argued that WaterWatch’s action was rendered moot by the issuance of the water right certificate. Those parties cited ORS 537.250(3) (providing that the rights to use water set forth in certificates are only subject to loss by nonuse or failure to continue to qualify as a municipal applicant for the purposes of a hydroelectric water use right) and ORS 537.270 (providing that water right certificates not contested and cancelled within three months of issuance are “conclusive evidence of the priority and extent of the appropriation therein described”). The parties also argued that WaterWatch did not challenge the issuance of the water right certificate, therefore the certificate could not now be revoked, and the extension dispute was rendered moot.

The Court of Appeals disagreed, holding that the Department’s authority to issue the certificate depends upon the validity of its order granting the extension of time. Therefore, if WaterWatch prevailed, the Final Order approving the extension and the certificate would both be unlawful. Further, the Court found that because the Department was not required to publish notice of the issuance of the certificate, and only parties to the certificate receive notice from the Department, WaterWatch did not have an adequate avenue to challenge the issuance of the certificate.

Second, the merits of the suit involved statutory interpretation of ORS 537.230(2). The statute provides that a municipal permit extension may be granted upon certain conditions. First, the permit holder must show good cause. Second, an extension must be “conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use before the extension only upon approval by the department

of a water management and conservation plan.” The term “beyond the maximum rate diverted for beneficial use before the extension” was in dispute. Finally, the Department must “find[] that the undeveloped portion of the permit is conditioned to maintain...the persistence of fish species...” The term “undeveloped portion of the permit” was also in dispute.

The Department adopted a rule defining “undeveloped portion of the permit” to mean “the portion of the permit that is the difference between the maximum rate, or duty if applicable, specified in the permit and the maximum rate, or duty if applicable, diverted for beneficial use before the extension.” OAR 690-315-0010(g). The Department took the position that there was no undeveloped portion of the permit because the City diverted the full amount of water under the permit before the extension was granted, and therefore the conditions stated in ORS 537.230(2)(b) and (c) did not apply.

WaterWatch, on the other hand, argued that the undeveloped portion of the permit before the extension must be measured at the expiration of the deadline to complete construction and apply water to beneficial use, or the deadline from the last granted extension. The Court agreed, although commenting, “this is a close case.”

The Court outlined the legislative history leading to the ORS 537.230 amendment, and concluded that the statutory amendment represented a compromise between environmental interests and municipal needs to engage in staged water development. The Court ruled for WaterWatch, holding that the undeveloped portion of the permit before extension must be measured at the time specified in the permit or last extension. Otherwise, municipalities could avoid the ORS 537.230(2) conditions by developing additional amounts of water before applying for extensions.

The Oregon Court of Appeals ruled that the Department’s failure to condition the permit extension on ORS 537.230(2)(b) and (c) was inconsistent with the statute. The Court reversed and remanded the Final Order for the Department to vacate the water right certificate and reconsider the permit extension in line with the Court’s decision.

## Conclusion

The *Cottage Grove Case* is the first in a number of municipal extension judicial review cases. The statutory interpretation will affect numerous municipal entities throughout the State of Oregon, and require municipalities to implement water conservation management plans and protect the persistence of certain fish species when conducting staged water development that requires extensions of time. This will make staged development of water resources for municipal uses more challenging. It is

currently unknown whether the Department or the City will seek review before the Oregon Supreme Court.

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If you would like to contribute to E-Outlook or have any comments, please contact the E-Outlook Editor, Sarah Liljefelt, at [s.liljefelt@water-law.com](mailto:s.liljefelt@water-law.com) or (503) 281-4100.