Oregon Appeals Court Confirms Water Rights for Hydroelectric Power

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Drawing on the long history of Oregon water rights, the Oregon Court of Appeals on June 10, 2020, issued an opinion in WaterWatch of Oregon v. Water Resources Department that carries significant implications for hydroelectric projects as well as for water rights more generally. Taken at face value, the case turns on an apparently technical dispute about how to interpret two Oregon water statutes, ORS 543A.305 and ORS 537.348. The implications of the case, however, are far broader, underscoring the importance of water rights for hydroelectric projects, both as a legal prerequisite for operating a hydroelectric project and as an asset that remains after a project is decommissioned.

Background

Oregon has long recognized hydroelectric power production as a valid use of the state’s water resources. Currently, the state allows the owner of a hydroelectric project to obtain a permit to use the water for production of power for the term of the project’s federal license, which generally runs for 40 to 50 years. The WaterWatch appeal addresses what happens at the end of this term, when the water is no longer used for hydroelectric production.

The answer turns on two relatively recent additions to the Oregon water statutes. The first, ORS 543A.305, was enacted in 1999, as a wave of federal hydroelectric power licenses issued in the first half of the twentieth century were
The statute provides "[f]ive years after the use of water under a hydroelectric water right ceases," that water automatically converts to a permanent in-stream flow right held in trust for the public.

In-stream flow rights, intended to protect aquatic species and habitats, were also recognized by the second Oregon statute on which the case turned, ORS 537.348, enacted in 1987. That statute authorizes the Oregon Department of Water Resources (DWR) to purchase, lease, or accept donations of existing water rights for in-stream flows. Those rights must then be certificated and are treated the same as any other water right, with senior rights taking priority over junior rights. Water rights transferred under the statute retain the priority date of the original water right, so may have a very high priority if older water rights are transferred.

The dispute over application of these statutes arose from water rights associated with a small hydroelectric project, originally constructed in about 1905, on Rock Creek, a tributary of the Powder River in Eastern Oregon. Oregon adopted a system of water rights based on prior appropriation – the familiar “first in time, first in right” system that now governs nearly all water rights in the Western states – in 1909, and in 1923, the DWR issued a water rights certificate to the project owner, Eastern Oregon Light & Power Co.

Following adoption of the Federal Power Act, which established a system of federal licensing for hydroelectric projects, the project was licensed in 1946 for a period of 50 years. The project was subsequently acquired by the Oregon Trail Electric Cooperative. In 1995, the Cooperative determined that the project was no longer economic and elected to decommission it rather than seek renewal of the federal license from the Federal Energy Regulatory Commission. Four years later, in 2000, the Cooperative leased the water rights associated with the project to DWR for five years, and the lease was subsequently renewed several times. Warm Springs Hydro, LLC, acquired the land and other rights associated with the hydro project and, in 2015, obtained a five-year extension of the lease for in-stream flows from DWR.

The Court of Appeals Decision

Concerned that Warm Springs Hydro intends to reconstruct a hydroelectric project after the current water lease expires in December 2020, WaterWatch sued. It argued that, under ORS 543A.305, the water rights associated with the hydroelectric project automatically converted to a permanent in-stream flow in 2000, five years after the water right ceased being used for hydroelectric production in 1995. If this reading prevailed, the conversion of the water right to an in-stream flow held in public trust by the DWR would preclude the use of the original water right for any new hydroelectric project.

The DWR, joined by Warm Springs Hydro, on the other hand, argued that ORS 543A.305 requires only a “use” of the water right, and does not require the water right to be used for hydroelectric production to prevent it from being converted to a permanent in-stream flow. Because DWR’s leases of in-stream flow rights from water rights holders are recognized as a valid “use” of water under ORS 537.348, that “use” continued from the time DWR initially leased the in-stream flows from the
Oregon Trail Cooperative in 2000 and was extended with each subsequent renewal of the lease, including the current lease with Warm Springs Hydro. Under this reading, ORS 534A.305 would result in a conversion of the water right to a permanent in-stream flow only after expiration of the in-stream flow leases, which would not occur until 2025, assuming the water right is neither re-leased or used for a new hydroelectric project.

Relying on Oregon water law precedents that recognize water “use” as a term of art that includes both consumptive uses like irrigation and non-consumptive uses like hydroelectric production, the Court of Appeals concluded that the term “use of water” in ORS 534A.305 includes all “uses” of water that are recognized as valid under Oregon law. DWR leases of water rights for in-stream flows are recognized as a valid “use” of water ORS 537.348. Accordingly, the Court concluded, the DWR leases of the water rights for in-stream flows constitute a valid “use” under the statute, and prevent the water right from being converted to a permanent in-stream flow by operation of ORS 534A.305.

**Implications of the Decision**

The decision demonstrates the importance of water rights to hydroelectric power producers, especially in the Western United States, where prior appropriation doctrine prevails. As a result of successfully defending its decision, Warm Springs Hydro retains a water right with a priority date of 1905, likely among the most senior water rights in the Powder River basin. If it had lost the decision, to move forward with a new hydroelectric project, it would have to obtain a new water right. If a new water right could be obtained at all – and new water rights are severely restricted in many Western watersheds that are considered at or beyond their capacity for new appropriations – it would be junior to every other water right in the basin, making it subject to restriction whenever necessary to meet the needs of senior rights holders. These limitations on water use could have serious repercussions for the economic viability of any new project.

In addition, the case demonstrates the potential value of water rights associated with hydroelectric projects, especially older projects, and the wisdom of taking steps to preserve those rights when an old project is decommissioned. In short, hydroelectric owners need to consider water rights at every stage of a project’s life, from initial licensing through decommissioning.

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