



Control and Appropriation of Water Under Oregon Law

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Historical Background

Water law in the United States evolved from its English common law origins into a unique system grounded on the principle of prior appropriation – or first-in-time is first-in-right. This legal system exists within the larger debate concerning the right of an individual to control a public resource: Is water a commodity or a community resource? In truth, water in the United States is treated neither as a commodity nor as community property. Water has multiple characteristics, both economic and public. Perhaps the most important characteristics of American water law are the two basic rules of water ownership. First, all water belongs to the state and is held in trust for the people as a whole. Second, individuals can receive a “property” right to the use of a designated amount of water.

Doctrine of Prior Appropriation

Where water supplies were abundant, as was the case until very recently in the eastern United States, the principle of riparian rights generally met society’s needs. However, where demands for water far exceeded the available supply, as was the case in the western, arid portions of the United States, the law of riparian rights could not resolve conflicts over water. It became apparent, as occupation and development expanded west of the hundredth meridian, a new rule was needed. The common law in the west quickly gravitated towards protection of economic development. Thus was born the doctrine of prior appropriation – first-in-time is first-in right.

As we enter the 21st century, every state in the west has adopted the prior appropriation doctrine as its basic law of water rights. Water is allocated according to a priority system wherein the first user’s full right is protected before the second appropriator receives any of his or her share – and so on down the priority list. As might be expected, many policy makers and legal scholars describe the doctrine of prior appropriation as a misguided attempt to foster rampant economic development at the expense of the environment. Nevertheless, it is the prevailing law in the states of the western United States and, as water supplies have become restricted in the eastern states, it is becoming the law in those states as well.

Introduction to Oregon Water Law

As is the case in most western states, Oregon statutory law provides that “all water within the state from all sources of water supply belongs to the public.” All such water is subject to appropriation for beneficial use. Once appropriated under the provisions of the state’s water code, the right to use the water continues in the owner so long as the water is applied to a beneficial use under and in accordance with the terms of the certificate of water right, subject only to loss by non-use. Except for certain defined exempt uses and uses that vested prior to enactment of the state’s water code, any person intending to acquire a water right must make application to the Oregon Water Resources Department.

In addition to the various state water right systems, certain authority

to use and control water arises under federal law. This authority includes the power of the federal government to set aside (reserve) land from the public domain for particular purposes (e.g., national forests, national parks, Indian reservations, military bases, etc.); to develop projects for irrigation, flood control and hydroelectric power generation; to manage rivers and lakes for protection of threatened or endangered aquatic species; and to protect navigation.

Oregon Water Law Statutes

Notwithstanding the very modest riparian-like rule concerning use of water from a spring under ORS 537.800, Oregon water law is governed by the doctrine of prior appropriation. Oregon’s appropriation procedure is set out in Oregon Revised Statutes (ORS) Chapters 536 through 541. Other ORS chapters address matters related to water resource surveys, river basin project development and interstate compacts, hydroelectric power projects, water use organizations, and weather modification.

The basic statutory provisions of Oregon’s appropriation doctrine are:

1. Water resource administration - ORS 536;
2. Appropriation - ORS 537;
3. Withdrawal of waters from appropriation - ORS 538;
4. Determination of pre-1909 vested and federal reserved water rights - ORS 539;
5. Distribution and transfer of rights - ORS 540; and
6. Miscellaneous provisions - ORS 541.

Water use policy is set by the legislature and is implemented by a seven-member Water Resources Commission (Commission) appointed by the Governor. Certain administrative responsibilities are delegated both by statute and by regulation to the Director of the Water Resources Department (WRD).

Since February 24, 1909, the right to appropriate water in Oregon has been governed by the provisions of ORS 537.110 through 270. Municipalities have certain special appropriative rights pursuant to ORS 537.282 through 299. Any use of water which began prior to February 24, 1909, is deemed to be a vested water right subject to quantification in an adjudication proceeding. (Such water rights are generally identified as “pre-1909 vested rights.”)

Groundwater Appropriation in Oregon

Groundwater is declared to be part of the public waters of the state, and except in limited circumstances, must be appropriated through the application/permit/certificate process. Uses of groundwater for (1) stockwatering, (2) watering any lawn or noncommercial garden not exceeding one-half acre in size, (3) certain school grounds and fields, (4) single or group domestic uses not exceeding 15,000 gallons per day, (5) down-hole heat exchanges, and (6) single industrial or commercial uses not exceeding 5,000 gallons per day are exempt and, as such, do not need to secure a water-use permit.

Pursuant to ORS Chapters 536 and 537, the Commission has promulgated administrative rules governing the use of ground water “... where the ground water is hydrologically connected to, and the use interferes with, surface water.”

These rules establish criteria to guide the WRD in making determinations where use of ground water has the potential to cause substantial interference with surface water supplies. Whenever the WRD determines that use of water from a ground water source (aquifer) has the potential to cause substantial interference with a surface water supply, the WRD will control ground water appropriations in a manner similar to or compatible with the controls on the affected surface water source.

In effect, Oregon regulates surface water and ground water conjunctively. If use of ground water from an aquifer is determined to have the potential for substantial interference with an adjacent surface water source, the two sources will be managed conjunctively to prevent depletion or over-appropriation of either source. In practice, where the adjacent surface water source is already over-appropriated – as is the case in most of Oregon’s streams and rivers during the summer months – the WRD will find that water is not available and thus the new ground water application will not be approved.

The WRD and United States Geological Survey (USGS) completed a ground water hydrology investigation of the upper Deschutes Basin in 2001.¹ The study found that there is a hydrologic connection between the ground water in the basin and its surface rivers and streams. Based upon this study, the WRD determined that use of ground water anywhere in the study area will have the potential for interference with surface water streams and rivers of the basin.² In order to provide for additional ground water development in the Deschutes Basin, the WRD developed a program wherein new ground water uses could be allowed if a comparable amount of surface

water use was discontinued. (See below for a discussion of the Deschutes Ground Water Mitigation Program.)

Water Right Transfer / Forfeiture / Conveyance Agreements

The place of use of a water right is termed the right’s appurtenancy; that is, a water right is said to be appurtenant to the place of use identified in the certificate. A water-right holder wishing to change the point of diversion, place of use or the nature of the use of a right must submit a transfer application to the WRD. Unless the WRD finds that the transfer would injure an existing water right, the transfer must be approved.

A water right may be voluntarily abandoned by the owner of the right. In addition, if water is not beneficially used in accordance with the terms of the certificate for five consecutive years, it is presumed forfeited. The presumption of forfeiture for five-years’ non-use is rebuttable under certain circumstances.

The holder of a surface water right may give, sell or lease the right for conversion to an instream water right. A consumptive water right converted to an instream right shall retain its priority date. Conversions of consumptive rights to instream rights must comply with the statutory provisions dealing with such change (transfer) as described above.

The WRD recently developed guidelines to allow the holder of a water right to sever the ownership of a water right from the ownership of the underlying appurtenant land. Pursuant to these guidelines, the holder of the right can sell the water right and retain the land using a document called a “water right con-

veyance agreement.” A properly executed conveyance agreement can be used to sell a water right and convey a landowner’s interest in the right. The water right, even though owned by a separate party, remains appurtenant to the underlying land until the grantee under the conveyance agreement elects to complete the WRD process to transfer the right to a new place of use and/or a new use.³

Water Use Administration

Oregon water use is administered by a state-wide watermaster corps. Watermasters are authorized to control the distribution of all surface and ground waters of the state. Distribution is according to "water rights of record," including water rights set out in completed permits, certificates and court decrees. Each water right is regulated in accordance with the principles described in the doctrine of prior appropriation based upon the priority date of the right. This doctrine specifies that the most senior right (first in time) receives its entire share of water before the next priority-date right is served, and so on down the priority list. In times of shortage, the most junior right is the first to be regulated (shut off).

Deschutes Ground Water Mitigation Program

The rapid agricultural, municipal and resort development in the Deschutes Basin has resulted in an immense demand for water. The environmental impact of this demand caused an over-appropriation of the streams and rivers of the basin and has resulted in closure of the basin to new surface water appropriations. As is the case all over the Western United States, when surface water sources are no longer available, developers and cities look to ground water for growth. In 2001, the United States Geological Survey, in cooperation with the

Oregon Water Resources Department and other local entities, published a report on the “Ground-Water Hydrology of the Upper Deschutes Basin.”⁴ The USGS report determined that ground water in the Upper Deschutes Basin is hydraulically connected to the basin’s streams and rivers. In effect, the Report finds that the use of ground water in the central Deschutes Basin can be expected to diminish surface flows. Thus, since the new uses of ground water can be expected to invade the already over-appropriated surface waters of the Basin, the ground water of the Basin is, in effect, also withdrawn from further appropriation.

In mid-2001, the Oregon Legislature authorized the Water Resources Commission to establish a system wherein an individual could mitigate a new ground water withdrawal by abandoning an equal amount of existing surface water use. The Commission promulgated regulations to implement a mitigation obligation/credit system to allow new ground water development so long as an equal amount of water was left as in-stream flow. In 2005, the legislature enacted House Bill 3494 affirming the mitigation system established by the Commission.

Under the WRD Deschutes Ground Water Mitigation Program,⁵ an individual seeking a new ground water right must find an existing surface water use that can be retired. The existing surface water right is cancelled, and the water that was previously consumed is allowed to flow in-stream to “mitigate” for the new ground water withdrawal. The WRD has developed standards to evaluate the volume of water that would become available for in-stream flow by retirement of a specified amount of surface irrigated acreage.⁶ When an individual makes application for a new ground water right, the WRD calculates the

mitigation obligation of the new use. The applicant is then required to secure mitigation credits to meet the obligation. To facilitate exchanges of existing surface water uses for new ground water withdrawals, the WRD has chartered the “Deschutes Water Exchange Mitigation Bank.” The Bank can acquire, and “bank” mitigation credits for use by cities and developers at such time as they need to initiate a new ground water appropriation.

Footnotes:

1. U.S. Geological Survey, Water-Resources Investigations Report 00-4162.
2. OAR 690-505-0600.
3. The WRD recognizes a number of types of “conveyance agreements” for sale of water rights (e.g., quit claim deed, bargain and sale deed, bill of sale, etc.). The most important criteria of a water right conveyance agreement is that it meet local government recording requirements; that is, it must be recordable in the real property records of the county wherein the appurtenant land is located.
4. U.S. Geological Survey, Water-Resources Investigations Report 00-4162.
5. See OAR 690-505-0600 to 0630.
6. See Mitigation Water Determinations for Ground Water Mitigation Projects in the Deschutes Ground Water Study Area (WRD September 9, 2003)

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