

OREGON

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I.

The Oregon System of Water Rights.

A.

Overview.

Oregon's current water law regime is based on the prior appropriation doctrine, but some historical riparian rights are recognized as well. The state has a comprehensive water code, originally enacted in 1909, and currently codified in chapters 536 through 558 of the Oregon Revised Statutes. The laws are administered by the Water Resources Department (WRD) and its Director, under the policy direction of the seven-member citizen Water Resources Commission (WRC), appointed by the Governor from the state's major river basins. Or. Rev. Stat. § 536.022. The code covers both groundwater and surface water and requires permits for all water appropriations unless specifically exempted. A detailed review of the state's water law can be found in JANET NEUMAN, OREGON WATER LAW: A COMPREHENSIVE TREATISE ON THE LAW OF WATER AND WATER RIGHTS IN OREGON (2011) ("OREGON WATER LAW").

B.

Brief History.

Prior to enactment of its water code in 1909, Oregon recognized both riparian and appropriative rights. *See generally* OREGON WATER LAW, at 10-17; Wells A. Hutchins, *The Common-Law Riparian Doctrine in Oregon: Legislative and Judicial Modification*, 36 Or. L. Rev. 193 (1957); *see also* *Lewis v. McClure*, 8 Or. 273 (1880) (recognizing that prior appropriation was a valid means of obtaining water rights and that the rights of riparians acquiring public domain land would be subject to the rights of earlier appropriators). Over time, Oregon moved clearly in the direction of prior appropriation. This sequential recognition of riparian and appropriative rights is sometimes called "the Oregon doctrine" to distinguish it from "the California doctrine" (both types of rights continuing to be recognized) and "the Colorado doctrine" (riparian rights never recognized). *See supra* Treatise § 8.02(a), (b) and (c), and OREGON WATER LAW, at 10-21.

The effect of early legislation and court decisions is that riparian rights can now only be claimed to the extent that riparian owners were using water beneficially before (or soon after)

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passage of the 1909 Water Code. Hutchins, *supra* at 216-20; see also *In re Water Rights of Hood River*, 114 Or. 112, 181, 227 P. 1065 (1924). The code itself abolished unused riparian rights (now in Or. Rev. Stat. § 539.010), and the law's constitutionality was upheld in *In re Willow Creek*, 74 Or. 592, 144 P. 505 (1914), 74 Or. 655, 146 P. 475 (1915). * * *

Furthermore, pre-code riparian rights were required to be "registered" with WRD by December 31, 1992, so that they may be adjudicated and fully converted into permitted rights, as discussed further below. Or. Rev. Stat. § 539.240.

* * *

Oregon law historically treated groundwater and surface water separately. Underground streams flowing in a defined, ascertainable channel were originally governed by the same riparian rules applied to surface watercourses. *Shively v. Hume*, 10 Or. 76 (1881). Any waters not proven to flow in a definite subterranean channel were presumed to be "percolating" waters subject to the overlying owner's use regardless of the effect on other water users. *Taylor v. Welch*, 6 Or. 198 (1876). Later cases imposed a reasonableness requirement on groundwater use, however. *Hayes v. Adams*, 109 Or. 51, 218 P. 933 (1923). In 1927, the legislature made a permit the only method to acquire a right to use groundwater east of the Cascade Mountains (the arid part of the state). 1927 Or. Laws ch. 410. The statute protected existing beneficial use of groundwater as vested rights. In 1933, the permit requirement was "clarified" and narrowed to apply only to waters in underground streams, not to percolating waters. 1933 Or. Laws ch. 263. In 1955, a statewide groundwater code was enacted to govern all future uses of underground waters, including what had previously been classified as percolating water. Now Or. Rev. Stat. §§ 537.505 to .796. For the most part, surface and groundwater management are now integrated into the same permit system, with some remaining differences discussed below.

C.

Obtaining a Water Right.

1.

Permits Required/Exceptions.

Oregon statute proclaims that "[a]ll water within the state from all sources of water supply belongs to the public." Or. Rev. Stat. § 537.110. Use of either surface water or groundwater (with some exceptions noted below) requires a permit from WRD. Or. Rev. Stat. §§ 537.130, 537.535. [See generally *supra* Treatise ch. 15.] WRD performs a water availability analysis before granting permits. The Department also attempts to manage groundwater and surface water conjunctively whenever the two sources are hydrologically related, see Or. Admin. R. 690-009-0030-0050, and Oregon statutes also discourage groundwater overdraft. Or. Rev. Stat. § 537.525; see also *Doherty v. Oregon Dep't of Water Res.*, 308 Or. 543, 783 P.2d 519 (1989) (upholding WRD's efforts to reduce overdraft), and *Waterwatch of Or. v. Oregon Water Res. Dep't*, 120 Or. App. 366, 852 P.2d 902 (1993) (WRD may reduce overdraft gradually, and does not have a duty to curtail it immediately to annual recharge levels).

* * *

Exceptions to the permit requirement for groundwater include, among others, stockwatering, domestic uses up to 15,000 gallons per day, lawn watering up to half an acre, and small industrial or commercial uses up to 5,000 gallons per day. Or. Rev. Stat. § 537.545. While a groundwater permit is required to initiate use of groundwater, it is not necessary to have a water permit before drilling a well. Well drilling is separately regulated under Or. Rev. Stat. §§ 537.747 - .796 and associated administrative rules. *See Ashland Drilling, Inc. v. Jackson County*, 168 Or. App. 624, 4 P.3d 748 (2000) (state law preempts certain types of local ordinances pertaining to well drilling). Spring or seepage waters that arise on and remain on a user's property without flowing into a natural water course do not require a permit to be used by the owner of the land. Or. Rev. Stat. § 537.800; *Fitzstephens v. Watson*, 218 Or. 185, 194-95, 344 P.2d 221 (1959). *See also Norden v. State of Oregon*, 329 Or. 641, 996 P.2d 958 (2000) (upholding a decision of the WRD, as based upon substantial evidence, that a permit was required to use the waters of a spring because, if not diverted, it would flow off the property, although the issue before the Supreme Court primarily concerned an administrative law question of the proper record for review).



Exceptions to the permit requirement for surface waters include, among other things, certain uses of "reclaimed" water (treated municipal water), fire fighting, use of water for salmon and trout enhancement projects, and removal of water from a surface mine. Or. Rev. Stat. §§ 537.132, .141, .142. Although most exempt uses carry a valid right of use equivalent to certificated water rights, *e.g.*, Or. Rev. Stat. § 537.545(2), proof of priority date and continuous beneficial use may be difficult without the documentation provided by a permit.



2.

Uses.

Beneficial use is the basis, the measure, and the limit of all rights to the use of water in Oregon. Or. Rev. Stat. § 540.610(1). [*See generally supra* Treatise § 12.02(c)(2).] Domestic, municipal, irrigation, power development, industrial, mining, recreation, fish and wildlife uses, and pollution abatement are all declared to be beneficial uses of water. Or. Rev. Stat. § 536.300. This list is illustrative, not exclusive, however. *See Benz v. Water Res. Comm'n*, 94 Or. App. 73, 764 P.2d 594 (1988) (flushing fields with surface water after irrigation season to remove boron left by groundwater is a beneficial use). A water right may be sought for any beneficial use, unless the proposed source has been withdrawn from further appropriation or has been classified by the WRC for more limited uses or quantities of use. *See, e.g.*, withdrawals for scenic waterfalls and municipal supplies in Or. Rev. Stat. § 538. The WRC has adopted basin plans and regulations covering most surface waters and some groundwaters, which may further limit or prioritize uses. Or. Admin. R. 690-500 to 690-520. Oregon law has no explicit use "preferences" for one use over another despite Or. Rev. Stat. § 540.140, which states that in times of shortage, domestic purposes have first preference and agricultural purposes second call over all other uses. In *Phillips v. Gardner*, 2 Or. App. 423, 469 P.2d 42 (1970), the Court of Appeals declared that the preferences established in § 540.140 were superseded by the adoption of the 1909 prior appropriation code. Oregon does not have a statutorily set "duty" of water, although water rights certificates may contain specific duties. Water rights in Oregon have been treated as perpetual, so long as exercised continuously, Or. Rev. Stat. § 537.250(3), except for certain categories of time-limited rights, such as hydroelectric rights, Or. Rev. Stat. § 543.260.

3.

Permit Process.



Once an application has been officially accepted for filing and as long as all additional information requested is submitted within the time specified by the WRD, the application will receive a tentative priority date based on its original filing date. Or. Admin. R. 690-310-0070; WRD provides notice of completed permit requests to a mailing list, as provided by administrative rule. Or. Admin. R. 690-310-0090. Comments may be filed within 30 days.

WRD staff perform both a "technical review" (to see if water is available and if the use conforms with certain specified requirements) and a broader public interest review. Or. Admin. R. 690-310-0080 to -0140. Both the statute and the rule enumerate many factors which will be considered in conducting the public interest review. Or. Rev. Stat. §§ 536.310, 537.170, Or. Admin. R. 690-310-110 to -140. WRD must adequately explain the basis for its public interest analysis, and cannot simply refer to the statutory language. *Diack v. City of Portland*, 306 Or. 287, 301, 759 P.2d 1070 (1988). The WRD may grant a permit if it finds that all the statutory and administrative rule requirements are met. If the staff finds that the application is not in the public interest, the WRD may impose permit conditions or project modifications. Or. Admin. R. 690-310-0120, -0140. After the WRD has issued a proposed final order, any person may protest the proposed order; the Director may either issue a final order or schedule a contested case hearing. Or. Admin. R. 690-310-150 to -170.

Hearings follow the requirements set out for contested cases in the Oregon Administrative Procedures Act (APA), Or. Rev. Stat. §§ 183.413 to 183.470, as supplemented by Or. Admin. R. 690-002. At the completion of a contested case proceeding, the WRC will review the findings and recommended order of the hearings officer and make a determination on the permit. Judicial review of a final Department order or WRC determination is available in the Court of Appeals pursuant to Or. Rev. Stat. § 183.482 or in Circuit Court, Or. Rev. Stat. § 183.484, depending on whether or not a contested case took place.



A 1998 state court of appeals opinion noted that "[t]he water rights application process described in ORS chapter 537 is not a thing of beauty and is complex in the extreme."

Nevertheless, the court held that the statutes were sufficiently clear to preclude judicial review of an issue associated with a final WRD order when the challenger had failed to raise the issue first with the Department either by a protest or request for hearing. *Lentz v. State of Oregon Water Res. Dep't*, 154 Or. App. 217, 962 P.2d 41 (1998).



Perfection of Water Rights, Survey and Certification.

Even assuming all administrative and judicial review has been concluded, the issued permit still does not represent a final perfected and vested water right. *Green v. Wheeler*, 254 Or. 424, 458 P.2d 938 (1969). In order to perfect the right, the water must be put to beneficial use. A permit allows the recipient to develop the water use under specified conditions and limitations. Prior to 1999, the statute required permit holders to begin construction within one year; however, the 1999 legislature eliminated that requirement. The WRD is instead directed to put the time requirement into permits. See Or. Rev. Stat. § 537.230. The user must proceed with due diligence to perfect the right within the time set by the permit, not to exceed five years (twenty years for municipalities), or as extended for good cause. See Or. Rev. Stat. § 537.230.



Once the user has completed any necessary construction and has begun actually applying the water to the intended beneficial use, the water use must be "surveyed" by a certified water right examiner. Or. Rev. Stat. § 537.230(4). The survey must show the point of diversion, the amount of water being used, and a description and map of the land to which it is being applied.

Or. Admin. R. 690-014-100 to -170. A 1997 amendment exempted small reservoir owners from the requirement to use a certified water rights examiner to prove and map water use, allowing instead an affidavit of use and a map prepared according to WRC standards. Or. Rev. Stat. § 537.409. WRD will review and possibly field-check the survey. Or. Rev. Stat. §§ 537.250, 537.799. If the survey is found to be accurate and in compliance with the terms of the permit, then WRD will issue a *water rights certificate*. Or. Rev. Stat. §§ 537.250, 537.799. The certificate represents the vested, perfected water right with a priority date of the time the original permit application was filed. Or. Rev. Stat. § 537.150(2). If the permitted right is not perfected as required, the permit may be canceled, after following specified procedures. Or. Rev. Stat. §§ 537.230, 537.260, and 537.410-.450; Or. Admin. R. 690-320-0020. Certificated water rights can also be cancelled for non-use or for violation of their terms. Or. Rev. Stat. §§ 540.610-540.670; Or. Admin. R. 690-017-005 -0900.



Water rights are considered appurtenant to the land described in the certificate. Or. Rev. Stat. § 540.510(1). However, there is no requirement to record water rights in the county deed records, and only the WRD has a complete record of water rights certificates. WRD often has a backlog of permit applications pending review for certification purposes; thus a thorough search must be made to determine the extent of water rights on any given parcel of land. Or. Rev. Stat. § 537.330 does require disclosure of the existence of water rights certificates, permits, or transfer approval orders by anyone selling land that includes any surface water irrigation rights.

Although Oregon water rights have an appurtenancy requirement, the legislature has loosened the requirement for several categories of users. The appurtenancy requirement for municipal water suppliers has been relaxed. Or. Rev. Stat. § 540.510(3)(a). Irrigation districts are allowed to "re-map" to reflect actual areas of use instead of earlier permitted areas. See Or. Rev. Stat. §§ 537.250, 537.252, 540.510, 540.520, 540.570 - .580, 541.331, 541.333. However, even if a district could use the remapping process to change its area of use, it still needed a valid state water right of some sort to begin with (either a permit or a final certificate), and it still had to satisfy Bureau of Reclamation requirements if the water being used was federally developed water. An irrigation district sued the state over the state's attempts to terminate the district's water use. The state believed the district had neither a valid state right nor a valid federal contract for

the land in question, but the district attempted to enjoin the state from cutting off water deliveries, maintaining that the state was estopped from objecting to the water use because of long-term acquiescence and affirmative representations that the use was allowed or could be "fixed" at the time of the final proof survey. The trial court found in the district's favor, ordering the state to revoke its orders against the district. On appeal, the Oregon Court of Appeals and then the Oregon Supreme Court partially reversed and partially affirmed, but did so on procedural grounds concerning an untimely challenge to the decision, without reaching the merits of the estoppel argument. *Teel Irrigation Dist. v. Water Res. Dep't & Water Res. Comm'n*, 135 Or. App. 16, 898 P.2d 1344 (1995), quoting *this survey, id.* at 1347, 323 Or. 663, 919 P.2d 1172 (1996).

5.

Transferring a Water Right Upon Sale of Land.

Since a water right is appurtenant to the land described therein, the right automatically transfers to the new landowner upon sale of the land, unless the water rights are reserved by the seller. *Beisell v. Wood*, 182 Or. 66, 185 P.2d 570 (1947). [See generally *supra* Treatise § 14.04(d)(3).] See also *Lescher v. Strid*, 165 Or. App. 34, 996 P.2d 988 (2000) (allowing rescission of a contract for sale of land as to mutual mistake of fact and innocent misrepresentation of fact concerning the existence of appurtenant water rights). A permit does not automatically transfer, however, and an assignment of a permit must be filed with WRD in order for it to bind anyone other than the parties. Or. Rev. Stat. § 537.220.

6.

Other Changes to a Water Right.

Effecting other changes in a water right, other than simply transferring the certificate along with the sale of land, requires WRD's prior approval, including changes in amount or type of use, point of diversion or return flow, or place of use. Or. Rev. Stat. §§ 540.510, 540.520; Or. Admin. R. 690-380. WRD will give public notice of any requested changes, and other parties may protest the change. Or. Rev. Stat. § 540.520, Or. Admin. R. 690-380-4000 to -4200. The request will be reviewed under a "no injury" standard; i.e., it will only be allowed if there will be no injury to existing water rights. Or. Rev. Stat. § 540.530; Or. Admin. R. 690-380-5000 to -5050. [See generally *supra* Treatise § 14.04(c).] If the change is approved, the new right completely terminates and substitutes for the old right, Or. Admin. R. 690-380-5110. If the new use is for less water, the right to the "surplus" water is lost. Or. Admin. R. 690-380-6010.



In the past few years, some Oregon irrigation districts have been involved in disputes with landowners in their districts about whether the district or the landowner has authority to make decisions pertaining to the water rights, such as seeking changes to the terms of the water rights through a transfer proceeding. The Oregon Supreme Court recently decided one such dispute in *Fort Vannoy Irrigation Dist. v. Water Res. Comm'n*, 345 Or. 56, 188 P.3d 277 (2008). An individual landowner had requested to change the points of diversion for two water rights. The rights had been issued in the district's name but were appurtenant to the owner's land. The WRD agreed that the landowner was authorized to request the transfer under Or. Rev. Stat. § 540.510(1), finding that the landowner was the "holder" of the water right as the statute used that term because of the appurtenancy element. The Court of Appeals and the Supreme Court

both disagreed with the agency. At the risk of oversimplifying a somewhat complex statutory interpretation decision in which the Supreme Court engaged in an extended discussion about the complexities of water rights ownership within an irrigation district, the Court essentially held that the district had the authority to request changes to the right because it was the owner of record on the water rights certificate. *See also Klamath Irrigation District v. U.S.*, 348 Or. 15, 227 P.3d 1145 (2010) (discussing the various possible relationships between individual landowners, irrigation districts, and the Bureau of Reclamation).

7.

Loss of Rights: Forfeiture, Cancellation, Abandonment, Prescription.

A water right, or a portion thereof, may be lost by non-use. Or. Rev. Stat. § 540.610 provides that failure to use the water for a period of five successive years creates a rebuttable presumption of forfeiture. In order to defeat the presumption and retain the water right, the user must show one or more of the circumstances listed in Or. Rev. Stat. § 540.610(2)(a)-(n). These include, among others, such circumstances as being prevented from use by economic hardship, withdrawing the land from use under a federal agricultural reserve program, unavailability or surplus of water, nonuse while a transfer application is pending, nonuse due to substitution of reclaimed water, and using less water to accomplish a beneficial use, as long as the user is ready, willing, and able to use the full amount.

Forfeiture is not automatic, however. WRD must initiate cancellation proceedings and follow specific procedures in Or. Rev. Stat. §§ 540.631 - .670 and Or. Admin. R. 690, Div. 17, to terminate the water right effectively. There is, effectively, a 15-year statute of limitations on a cancellation proceeding; if WRD waits more than 15 years after the end of the five-year non-use period to begin cancellation, the user can use that delay itself to rebut the presumption of forfeiture. Or. Rev. Stat. § 540.610(2)(f). [*See generally supra* Treatise § 17.03(b).] *See also* Or. Rev. Stat. § 536.050, which allows water rights holders who successfully rebut a claim of forfeiture to obtain a refund of all or a portion of their protest fees.

In a 1998 case, the Oregon Court of Appeals held that a water right will not be forfeited under Or. Rev. Stat. § 540.610 when a water user uses water from the designated source and for the designated purposes, but from an unauthorized point of diversion, for the statutory forfeiture period. *Russell-Smith v. Water Res. Dep't*, 152 Or. App. 88, 952 P.2d 104 (1998). A 1999 decision by the same court upheld a Water Resources Department finding of forfeiture upon evidence that the water user was relying on subirrigation rather than artificial application of water through controlled ditches. *Staats v. Newman*, 164 Or. App. 18, 988 P.2d 439 (1999).



In 2003, the Oregon Court of Appeals held that an attempt to cancel water rights based on forfeiture was untimely when the issue was raised after a transfer proceeding had been completed concerning the challenged rights. *Kerivan v. Water Res. Comm'n*, 188 Or. App. 491, 71 P.3d 659 (2003). In 1999, certain water right holders requested the WRD to commence cancellation proceedings to cancel water rights, senior to their own, based on alleged facts suggesting nonuse for a period of at least five years. WRD refused to initiate forfeiture proceedings because the water right certificates that petitioners sought to have cancelled had already been cancelled in connection with water right transfers in 1998 and 1999, prior to the cancellation request. The challengers then filed a petition and complaint in circuit court seeking a judgment to compel WRD to proceed with the cancellation. The trial court dismissed and the petitioners appealed the

dismissal. The court held that (1) the text and context of the transfer statutes would have allowed the challengers to raise the forfeiture issue during the transfer proceedings, and (2) their failure to bring the forfeiture claim during the transfer proceedings precluded them from raising it after the transfer had been completed and new water rights certificates had been issued. The newly issued water rights certificates constituted conclusive evidence of the priority and extent of the appropriation therein. Therefore the five-year forfeiture clock starts anew from the date of issuance of the new certificate. The fact that the transfers were to instream water rights did not change this result, as those rights have the same legal status under Oregon law as any other certificated water right.

Oregon applies the statutory forfeiture period even to pre-code rights, in contrast to some other states. *See Crandall v. Water Res. Dep't*, 290 Or. 771, 626 P.2d 877 (1981); *compare U.S. v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1493 (9th Cir. 1992) (applying Nevada law); *see generally* Janet C. Neuman and Keith Hirokawa, *How Good is an Old Water Right? The Application of Statutory Forfeiture Provisions to Pre-Code Water Rights*, 4 U. Den. Water L. Rev. 1 (2000).

Water rights may also be lost by common-law abandonment if a water user relinquishes or ceases use with intent to abandon. *See Clark, supra* at 152; *see also* Or. Rev. Stat. § 540.621. [*See generally supra* Treatise § 17.03(a).] Although historically rights also could be lost by prescription, no case law exists deciding directly whether such possibility survived the enactment of the 1909 Water Code. OREGON WATER LAW, at 107-08. [*See generally supra* Treatise § 17.03(c).] (Clark also noted that prescription should not occur under the Code because the forfeiture period would run before the longer prescriptive period could run. Clark, *supra* at 156.)

D.

Special Water Rights and Reviews.

1.

Instream Water Rights.

Oregon law recognizes instream water rights. An instream right is defined as “a water right held in trust by the [WRD] for the benefit of the people of the State of Oregon to maintain water in-stream for public use.” Or. Rev. Stat. § 537.332. [*See generally supra* Treatise § 13.05(a).]

Since 1987, the law has provided that three agencies—the Departments of Fish and Wildlife, Environmental Quality, and Parks and Recreation—may request WRD to issue instream water rights to support wildlife and fish habitat, water quality and recreational uses. Or. Rev. Stat. § 537.336. Individuals may also convert vested water rights to instream rights. Or. Rev. Stat. § 537.348. Prior to 1987, an Oregon statute provided for establishment of “minimum perennial streamflows” on certain streams, as a mechanism for protecting streams from over-appropriation. These minimum perennial streamflows have now been almost entirely converted to instream water rights, with priority dates of the date the minimum flow was established. Or. Admin. R. 690-077-0054. Minimum flow requirements also exist for wild and scenic rivers pursuant to the

case of *Diack v. City of Portland*, 306 Or. 287, 759 P.2d 1070 (1988) (state wild and scenic river statutes restrict diversions from streams flowing into designated waterways in order to protect the statutorily-declared highest and best uses of recreation, fish and wildlife, though some diversions are now allowed by statute. Or. Rev. Stat. § 390.835). [See generally *supra* Treatise § 13.05(b).] New groundwater withdrawals are exempt from the restrictions of the scenic waterways law, unless WRD can find direct, measurable interference with surface flows. Recreational placer mining is also allowed in scenic waterways. Or. Rev. Stat. § 390.835.

Since 2001, Oregon law has authorized “split season” leasing for instream purposes, to allow a water right to be used consumptively for part of the year and leased instream at other times. See Or. Rev. Stat. § 537.348. The process of establishing an instream right is set forth in Or. Admin. R. 690, Div. 77. Once a water rights certificate has been issued, the instream right is equivalent to any other vested water right.

2.

Conserved Water.

Oregon law also contains a unique provision designed to encourage water conservation. Or. Rev. Stat. §§ 537.455 to .500. Prior to the 1993 legislative session, technical difficulties limited the conservation statute’s implementation, but the statute was amended to encourage its use. A water user can submit proposals to improve the efficiency of current water use, thereby making available “conserved” water. If the technical requirements of the statute can be met (proof of real water savings, no injury to existing rights, etc.), a user can obtain rights to use or sell a portion of the saved water; a portion also reverts to the state. Or. Rev. Stat. §§ 537.455 to .500.



3.

Hydroelectric and Heap-Leach Mining Projects.

Water rights for hydroelectric and heap-leach mining projects involve extensive special procedures. Or. Rev. Stat. §§ 543, 543A and Or. Admin. R. 690, Divs. 51 to 53 govern a comprehensive review process for hydroelectric projects, including project reauthorizations or decommissioning. The statute specifies procedures for a coordinated state and public review of any projects requiring state water rights, and outlines procedures for coordinating with the federal government when a federal license is also involved. Oregon law also provides a coordinated, comprehensive process for review of heap-leach mining proposals. Or. Rev. Stat. §§ 517.952 *et seq.* Division 78 of the Department’s rules govern permits for chemical process mining.

4.

Out of Basin Diversions.

Appropriations to use water outside the water basin of origin are considered of significant impact and also receive special review. Or. Rev. Stat. §§ 537.801 to .870; Or. Admin. R. 690, Div. 12. [See generally *supra* Treatise § 14.04(d)(2).]

5.

Municipalities.

Many provisions of Oregon water law protect municipal water supplies, or exempt municipalities from specific provisions that would otherwise apply, such as forfeiture laws. *E.g.*, Or. Rev. Stat. § 538.420 (reserving certain waterbodies for the exclusive use of the City of Portland); Or. Rev. Stat. § 540.610(2) (exemption from forfeiture). A 1998 state court of appeals case held that the City of Eugene did not have statutory authority simply to declare by city ordinance that property located outside of its municipal boundaries was compelled to connect to the city's sewage disposal system. A county ordinance could compel such a connection, but would require notice, hearings, and findings. *City of Eugene v. Nalven*, 152 Or. App. 720, 955 P.2d 263, *rev. den.*, 327 Or. 431, 966 P.2d 221 (1998). The 1999 and 2003 legislatures expanded Public Utility Commission authority to include some oversight of wastewater service companies and water supply systems, including the ability to grant exclusive service areas. *See* Or. Rev. Stat. chs. 757 and 758.



In 2004, the Court of Appeals held that municipalities were subject to the requirement in Or. Rev. Stat. § 537.230(1) to complete construction within five years of permit approval, but the legislature then amended the statute to give municipalities 20 years. *WaterWatch of Oregon, Inc. v. Water Res. Comm'n*, 193 Or. App 87, 88 P.3d 327 (2004) *vacated* *WaterWatch of Oregon, Inc. v. Water Res. Comm'n*, 339 Or. 275, 119 P.3d 221 (2005). *See* Or. Rev. Stat. § 537.230 (providing municipalities 20 years to perfect their water rights).

E.

Enforcement.

The state's water laws are enforced by WRD with a statewide staff of watermasters located in field offices. Or. Rev. Stat. §§ 540.010 *et seq.* In times of water shortage, or to address other interference with water use, water rights holders may "call" their water right through the watermaster. The watermaster will then shut down use by junior rights holders. Statutory enforcement powers include civil penalty authority, criminal sanctions and normal civil remedies, including injunctive relief. Or. Rev. Stat. §§ 536.900, 540.990, 540.750; Or. Admin. R. 690-225; OREGON WATER LAW, at 159-76. [*See generally supra* Treatise § 17.05.] Oregon follows the futile call doctrine. Or. Admin. R. 690-250-020(1).

F.

Pre-1909 Water Rights and Adjudications.

As noted, Oregon has had a statutory prior appropriation permit system since 1909. However, prior to 1909, the state recognized riparian rights as well, and appropriative surface rights obtained by actual use without the benefit of permits. Groundwater rights were not comprehensively managed until 1955. Current law thus includes a mechanism for sorting out what rights existed "pre-Code." These provisions are found in Or. Rev. Stat. ch. 539 and in Or. Admin. R. ch. 690, Div. 28, for surface water, and Or. Rev. Stat. § 537 for groundwater.

All claims for pre-1909 surface rights were to be filed with the WRD by December 31, 1992. Or. Rev. Stat. § 539.240. Claims not registered are forfeited. *But see United States v. Oregon Water Res. Dep't*, 774 F. Supp. 1568 (D. Or. 1991) *aff'd sub nom. U.S. v. State of Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert. denied sub. nom. Klamath Tribe v. Oregon*, 516 U.S. 943 (1995) (federal claims will not be lost by nonregistration). Groundwater claims were to be registered by May 29, 1962. Or. Rev. Stat. § 537.605(6). The WRD is in the process of conducting adjudications to confirm the existence of pre-1909 rights and place them in relative priority with later-acquired rights. Approximately 70% of the state has been adjudicated for surface water (mostly east of the Cascades), but only one groundwater basin has been adjudicated. The adjudication statute provides for initial evaluation and determination of facts by the Water Resources Director, with that determination being submitted to the circuit court for a final decree of rights. [See generally *supra* Treatise ch. 16.]

* * *

The 1999 legislature directed the Water Resources Department to develop a process to allow for changes in the terms of use of unadjudicated, pre-code water rights. See Or. Rev. Stat. § 539.240. Rights perfected through the permit process and through adjudication are of equal stature; permitted rights do not need to be readjudicated in the proceedings described above. Or. Rev. Stat. § 537.270.

G.

Federal Reserved Rights in Oregon.

Federal agencies and Indian tribes have been successful in establishing claims to federal reserved rights in the Klamath basin. *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979), *aff'd*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied sub nom. Oregon v. U.S.*, 467 U.S. 1252 (1984) (declaring federal and tribal reserved water rights, but deferring quantification and administration issues to the state adjudication proceedings) (still in process in 2011, as noted above). [See generally *supra* Treatise ch. 37; see also *supra* Michael C. Blumm, *Columbia River Basin*, Treatise pt. XI, subpt. A (River Basin Surveys).]

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II.

State Ownership of Submerged and Submersible Lands.

Oregon's determinations of navigability and assertion of ownership to submerged and submersible lands have caused considerable controversy for many years. See, e.g., *Northwest Steelheaders Ass'n., Inc., v. Simantel*, 199 Or. App. 471, 112 P.3d 383, *rev. denied* 339 Or. 407, 122 P.3d 65 (2005), *cert. denied sub nom. Grover v. Northwest Steelheaders*, 547 U.S. 1003 (2006) (affirming a finding of navigability for a segment of the John Day river in a case arising out of a conflict between a fisherman and a landowner). The legislature has mandated that ownership is only to be asserted in prescribed circumstances and by following statutory procedures. Or. Rev. Stat. §§ 274.040 to .043. The 2003 legislature also addressed leasing on state-owned submerged and submersible lands, directing that the Division of State Lands must grant permission to use such lands in conjunction with a water right permit for domestic or irrigation use. See Or. Rev. Stat. § 274.040.

* * *

Pertaining to tidelands ownership, see *Bonnett v. Division of State Lands*, 151 Or. App. 143, 949 P.2d 735 (1997) (the state is the owner of new land formed by accretion next to an individual's oceanfront lot, because the accretion started on state-owned tidelands and grew toward shore rather than accreting directly onto plaintiff's land).

III.

Drainage.

Oregon applies a modified Civil Law Rule to the removal or drainage of unwanted surface water. A landowner has the right to turn or expel surface water onto the land of an adjacent owner without liability for damages, so long as there is prudent regard for the interests of the adjacent owner. *Rehfuss v. Weeks*, 93 Or. 25, 32, 182 P. 137, 139 (1919). Some acceleration of the otherwise natural surface flow is permissible. *Garbarino v. Van Cleave*, 214 Or. 554, 561, 330 P.2d 28, 32 (1958). Oregon courts have read the general rule to mean that an upper user cannot (1) collect surface flows, thus concentrating the water, before discharge onto a lower user, *Harbison v. City of Hillsboro*, 103 Or. 257, 204 P. 613 (1922), (2) discharge at a place where the water would otherwise not naturally flow, *Rehfuss, supra*; or (3) otherwise increase the natural flow of a watercourse to the detriment of a lower user, *Levene v. City of Salem*, 191 Or. 182, 229 P.2d 255 (1951). *But see Sells v. Nickerson*, 76 Or. App. 686, 711 P.2d 171 (1985) (suggesting that at least in an urban context, drainage issues would be determined under tort principles rather than property law). [See generally *supra* Treatise §§ 10.03, 59.02(b).]

Consistent with the above, a downstream owner may be liable to the upstream owner for altering or blocking the course of ordinary floodwaters so as to turn them back onto the upstream owner's land. *Wellman v. Kelley*, 197 Or. 553, 252 P.2d 816 (1953). For application to adjacent owners, see *Wimmer v. Compton*, 277 Or. 313, 560 P. 2d 626 (1977). A dam owner may acquire a prescriptive right to flood an upper owner's land, however. *Arrien v. Levanger*, 263 Or. 363, 502 P.2d 573 (1972).

IV.

Water Pollution.

The Oregon Department of Environmental Quality (DEQ) has primary administrative responsibility for state regulation of discharges into Oregon waters, air, and soil. A five member citizen board, the Environmental Quality Commission (EQC), has policy and rule-making authority to guide the DEQ. Or. Rev. Stat. §§ 468.010 to .030. The EQC sets effluent limitations and enforces various aspects of the Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977 and the Water Quality Act of 1987. 33 U.S.C. §§ 1251 to 1387 (1988); Or. Rev. Stat. §§ 468B.030 and .035. [See generally *supra* Treatise chs. 53, 54.]

A permit is required for virtually all waste discharges into the waters of the state. Or. Rev. Stat. § 468B. The federal Environmental Protection Agency has delegated to DEQ the authority and responsibility for administering the national pollutant discharge elimination system (NPDES) permit system. See 40 C.F.R. pt. 123. [See generally *supra* Treatise § 53.03.] An NPDES permit is required if discharge is from a point source into navigable waters of the state. Or. Admin. R.

340-045-0015(2). Discharges into other waters of the state require water pollution control facilities (WPCF) permits in accordance with Or. Admin. R. 340-045-0030. The 1997 legislature authorized the DEQ to exempt *de minimis* discharges from permit requirements by rule. Since 2001, the permitting authority for regulating discharges from confined animal feeding lot operations has resided with the state's Department of Agriculture rather than with DEQ. Or. Rev. Stat. § 468B.217.

DEQ has adopted a plan for water quality management that consists primarily of minimum standards affecting water quality in individual basins and that governs permit review for projects proposed in those basins. *See* Or. Admin. R. 340-41. Permits generally are not required for diffuse or "nonpoint" sources such as agricultural or urban runoff. However, the agency has entered into cooperative management plans with other units of government to control nonpoint pollution. DEQ sets total maximum daily load standards for streams on which water quality standards for one or more pollutants are not being met (water quality limited segments). Once maximum daily loads have been set, maximum allowable contributions will be allocated to point and nonpoint sources; these allocations will govern future permitting decisions.

DEQ regulates sewage treatment facilities and subsurface and other on-site sewage disposal systems. Or. Rev. Stat. § 468B.055. The agency also administers a comprehensive groundwater quality management program, described at Or. Rev. Stat. §§ 468B.150 to .190. DEQ and EQC water pollution enforcement powers do not preclude private actions for abatement of public or private nuisances. Or. Rev. Stat. § 468.100(4); *Smejkal v. Empire Lite-Rock, Inc.*, 274 Or. 571, 547 P.2d 1363 (1976). [*See generally supra* Treatise § 52.05(b) & ch. 57.]

DEQ is the agency responsible for Clean Water Act § 401 certifications that proposed federal actions comply with applicable water quality standards. Or. Rev. Stat. § 468B.035. Regarding § 401 certification of hydroelectric projects, *see* Or. Rev. Stat. § 468B.040, 045 and .046; *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986). [*See generally supra* Treatise § 54.05(b).]

The Corps of Engineers, Portland District, manages the Clean Water Act § 404 permit program for disposal of dredge or fill material into navigable waters in Oregon. 33 U.S.C. § 1344(a). [*See generally supra* Treatise § 61.03(c).] The Department of State Lands (DSL) manages and enforces the permit program under which Oregon regulates fills or removals of more than 50 cubic yards of material in any Oregon waters. Or. Rev. Stat. §§ 196.795 to .910. Oregon gives special protection to wetlands through wetland inventory requirements, wetland conservation plans, and a wetland mitigation banking program. Or. Rev. Stat. §§ 196.600 to .692. [*See generally supra* Treatise § 13.05(c).]



In *Oregon Natural Desert Ass'n v. Thomas*, the federal district court in Oregon held that pollutants from grazing activities on Forest Service land were included in federally-permitted "discharges" requiring state certification of compliance with water quality standards under section 401 of the Clean Water Act, even though these are non-point sources rather than point sources. 940 F. Supp. 1534 (D. Or. 1996). However, the Ninth Circuit reversed, holding the certification requirement inapplicable to nonpoint sources. *Oregon Natural Desert Ass'n v. Dombek*, 172 F.3d 1092 (9th Cir. 1998). Another Oregon federal district court held that the Clean Water Act's NPDES provisions do not apply to discharges to groundwater, even if the groundwater and surface water are hydrologically connected. *Umatilla Water Quality Protective Ass'n v. Smith Frozen Foods*, 962 F. Supp. 1312 (D. Or. 1997).

In *Environmental Quality Comm'n v. City of Coos Bay*, the state court of appeals considered the penalties available when a pipe ruptured between the Coos Bay water treatment plant and its sewage lagoon, sending thousands of gallons of partially treated sewage sludge into tidal wetlands. The court held that since the City had an NPDES permit for the facility, it could only be charged with violating the terms of its permit and committing a discharge that violated water quality standards, and not with discharging without a permit. 171 Or. App. 106, 14 P.3d 649 (2000). In *Northwest Env'tl. Def. Center v. Blue Heron Paper Co.*, a federal court interpreting a provision of state law (part of the delegated authority under the federal Clean Water Act) held that there is no private right of action to enforce Or. Rev. Stat. § 468B.025(1)(b), which prohibits discharges that violate water quality standards, and that only DEQ has enforcement authority for such violations. 2000 U.S. Dist. LEXIS 17848 (D. Or.). The same plaintiff encountered difficulty in another case, where it had sued the Corps of Engineers and private defendants in a citizen suit under the Clean Water Act and the Rivers and Harbors Act over alleged violations of Corps dredge and fill permits. A federal court held that the Clean Water Act citizen suit provisions related to NPDES permits, and could not be used to sue private defendants about dredge and fill permits issued under other statutory authority. The court further held that the action against the Corps was barred by sovereign immunity. *Northwest Env'tl. Def. Center v. U.S. Army Corps of Eng'rs*, 118 F. Supp. 2d 1115 (D. Or. 2000).

The Ninth Circuit Court of Appeals decided in a recent case that irrigation canals are "waters of the United States" under the Clean Water Act, and therefore that putting a toxic chemical into the canals constituted a discharge of a pollutant requiring an NPDES permit. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). The suit was brought as a citizens suit by two Oregon environmental groups to challenge the district's application of a herbicide to the canals to control weeds and vegetation; the herbicide was also toxic to fish and wildlife. The district argued that the suit was barred because it was based on wholly past violations, that it did not need a permit because the herbicide was applied according to the label's instructions (which EPA had approved under FIFRA and which did not mention any permit requirement), that applying a chemical for the beneficial purpose of weed control did not constitute discharging a pollutant, and that the canals were not waters of the United States. The court found against the district on all of these issues and remanded the case to the district court for proceedings on damages and injunctive relief.



V.

Water Law Research.

There is no provision in the Oregon Constitution regarding appropriation of water for private use, although Article XI-D does declare the state's rights over water and sites for water power development. Therefore, research on a water law question in Oregon should begin with review of current statutes, associated case annotations, and administrative rules. In addition to the basic water code governing water allocation and water institutions, found in Or. Rev. Stat. chs. 536 *et seq.*, relevant statutory provisions are found in chs. 196 (fills in state waters); 390 (state scenic waterways); and 468B (water pollution). The pertinent statutes are available online or from the Water Resources Department in Salem, [725 Summer St. NE., Ste. A, Salem, Or. 97301; (503) 986-0900, www.oregon.gov/OWRD], the Department of Environmental Quality, [811 S.W. 6th Avenue, Portland 97204; (503) 229-5696; www.oregon.gov/DEQ], the Department of State Lands, [775 Summer St. NE, Wte. 100, Salem, Or. 97301; (503) 986-5200, www.oregon.gov/DSL], and the Corps of Engineers, [333 SW First Avenue, Portland, Or. 97204; (503) 808-5150; www.nwp.usace.army.mil]. A general site for researching Oregon statutory law can be found on the state legislature's website, at <http://www.leg.state.or.us/ors>.

Administrative rules promulgated by WRD are found in Chapter 690 of the Oregon Administrative Rules. Oregon administrative rules are published by the Secretary of State and are available in most law libraries. However, there may be delay before new or amended rules are officially published and distributed. Counsel should always check with WRD or other appropriate state agency to obtain current rules and to learn of any pending rule changes. The Secretary of State's office also publishes the Oregon Blue Book, an excellent source of general information about the state and its government.

Agency action generally is governed by the Oregon Administrative Procedure Act, Or. Rev. Stat. §§ 183.310 to .690. The Attorney General's Administrative Law Manual and Uniform and Model Rules of Procedure Under the APA, regularly updated by the Oregon Department of Justice, (503) 378-5555, is an invaluable guide.

OREGON WATER LAW: A COMPREHENSIVE TREATISE ON THE LAW OF WATER AND WATER RIGHTS IN OREGON, by the author of this chapter, and Chapin D. Clark, Survey of Oregon's Water Laws (Oregon Law Institute, 1983) contain the most exhaustive treatment of Oregon water law. The Clark Survey was originally published in 1974 and updated in 1983, and it is invaluable for general historical orientation.

