

Oregon State Bar Sustainable Future Section

The Long View

Western Water Law and Sustainability

By John DeVoe

Strip away the bells and whistles, and western water law is, at bottom, a rule of capture. Get there first, stretch a dam or tarp across the stream, build a ditch, or if you came later, drill the deepest well, install the largest pump, and get a preferential electrical tariff if you can. The law is antiquated in many ways – and not just in a horse and buggy sense. Western water law institutionalizes technology and many practices that are no different than those practiced in ancient Sumeria over 5000 years ago. Western water law creates what can be perpetual private entitlements to public water resources at no price for the water itself, a massive direct subsidy and arguably one of the largest giveaways in the Western world.

To be fair, sustainability was never a primary purpose of the early development of this body of law. Much of the law was created before society became concerned with the depletion of resources, though there were early warnings from people like John Wesley Powell and Elwood Mead, who noted that irrigation based on a rule of capture and without careful measurement “leads farmers to substitute water for cultivation and to injure their lands and exhaust streams by wasteful and careless methods.”¹ Mead successfully introduced the idea to the Wyoming constitution that water is public property.² He also encouraged the development of state agencies to administer water through permitting and adjudication. Though these concepts and practices are typical across the West, despite state bureaucracy and water regulation, western water law has generally contained “laissez – faire policy in the extreme; public resources were thrown open to virtually unfettered private exploitation.”³

Is western water law sustainable? Consider the perspective of fish. “Salmon are now extinct in almost 40% of the rivers in which they historically spawned in Oregon, Washington, Idaho and California. The salmon populations in 44% of the remaining streams are at risk. Research in the 1990s revealed that of the 214 at-risk native, naturally spawning runs of Pacific salmon, steelhead and sea run cutthroat trout in Oregon, Washington, Idaho and California, 101 were at high risk of extinction, 58 were at moderate risk and 54 were of special concern. Research also found that at least 106 major stocks had already become extinct.”⁴ We are in the midst of a truly massive impoverishment and extinction of Pacific salmon at the southern end of their range. While western water law is certainly not the only cause for the alarming declines, the body of law certainly bears a significant share of responsibility for the plight of these and many other species.

The lack of sustainability in western water law is nothing new. In 1955, when Oregon had issued approximately 25,000 water rights, the House Water Resources Committee reported to the Legislature that “permits have

been issued for more water than minimum flows will provide on most of Oregon’s streams.”⁵ Despite official recognition that it might be time to apply the brakes, the state proceeded to step on the gas and quadrupled the

number of rights issued. Today, the Oregon Water Resources Department (WRD) has issued almost 100,000 surface and groundwater rights and continues to approve more. (This number does not include the quarter million “exempt wells” across the state.) Many rivers and streams (and aquifers) across Oregon (and the West) are severely “over-appropriated.” This means that the state has given away permits for more water than actually exists in many of our rivers and streams, particularly during the drier parts of the year.

Now, add climate change to the mix. Climate change will intensify many of the streamflow and water management challenges resulting from western water law: low streamflows, poor water management, depletion of groundwater systems, excessive water temperatures, loss of natural water storage and loss of aquatic habitat. The changing hydrological patterns caused by climate change will severely test the adaptability of western water law. But there may be a silver lining. Climate change will magnify the critical need for improved water management, aggressive water conservation, increased efficiencies in the delivery and use of water, and the protection and restoration of in-stream flows. The resiliency of freshwater aquatic habitat and water systems in the West depend, in large part, on the actions we begin to take now. Whether western water law is up to the task is an open question, though the early returns are not particularly promising.

Possible Solutions

The 1987 Instream Water Rights Act⁶ provides legal protection for healthy streamflows in designated waterways. Although this law now provides some protection for about 1,500 river and stream reaches, older water rights still have a higher priority for water, and many streams and rivers lack even this basic form of flow protection. While the Instream Water Rights Act and other visionary laws such as the Conserved Water Act⁷ create important tools to restore water instream through transfers and water conservation projects, restoration has not



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kept pace with new water appropriations. Oregon has not invested the financial resources or the political will necessary to pursue these transfers on a large scale.

While instream transfers are no doubt helpful, other common sense steps are needed. We must stop over-appropriating streams and aquifers. We must make decisions based on data and science. We must stop issuing groundwater rights amid uncertainty about the sustainable yield of aquifers and without understanding hydraulic connectivity with nearby surface waters.⁸ We must do a much better job measuring and managing water.⁹ Beyond these basic measures, we need to begin to address water issues as problems of demand rather than as problems of supply. As a corollary, we need to make better use of what we have. This will require better data and greater investment in efficiency, management and conservation. We also need a price signal for water. As long as water is free, there will be less incentive to conserve water and use it sustainably. Though these and other solutions exist, the fundamental principles of western water law are notoriously resistant to change. As the old saying goes “progress comes to this ditch one funeral at a time.” However, change will indeed be necessary if we are to meet “the needs of the present without [further] compromising the ability of future generations [and species] to meet their own needs.”¹⁰



End Notes:

¹Elwood Mead, *Irrigation Institutions*, MacMillan Company, New York 1903 at 100-101.

² This concept is also found in Oregon law see, ORS 537.110 “All water within the state from all sources of water supply belongs to the public.”

³ Charles Wilkinson, *Crossing the Next Meridian*, Island Press, 1992 at 240.

⁴ Jim Lichatowich, *Salmon Without Rivers*, Island Press, 1999 at 204, discussing the report Pacific Salmon at the Crossroads.

⁵ Report of the House Water Resources Committee to the 48th Oregon Legislative Assembly, 1955 at III and 29.

⁶ ORS 537.332 et. seq.

⁷ ORS 537.455 et. seq. See also ORS 543A.305, allowing for conversion of certain hydroelectric water rights to instream water rights.

⁸ The WRD continues to do this despite the Umatilla experience, where excessive permitting of groundwater use resulted in mining of groundwater up to 21,000 years old and drawdowns of aquifers up to 500 feet.

⁹ More than half the water diverted in Oregon is not measured and is not subject to a measurement condition. Sources – September 19, 2006 and March 22, 2007 responses of OWRD to questions posed by Rep. Jackie Dingfelder and Sen. Doug Whitsett to the Oregon Water Resources Department. See also, March 8, 2007 updates to Oregon Water Resources Department Strategic Measurement Plan available on line at http://egov.oregon.gov/OWRD/mgmt_measure.shtml

¹⁰ World Commission on Environment & Development (Brundtland Commission), *Our Common Future* 43 (1987).

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