

## Oregon State Bar Sustainable Future Section

Photo: J. Michael Mattingly

# The Long View

## Is Western Water Law Sustainable?

By Martha Pagel



On the one hand, it is a challenge to argue the sustainability of an arcane legal doctrine that allocates the state's precious water resources based on the concept of first come, first served. I could say "I give" and cut this commentary short. On the other hand, it is fair to say that over the past three decades, Oregon has stepped forward by making customized changes to the 150-year-old system of prior appropriation, setting the stage for an approach to water management that will be practical, efficient and sustainable well into this 21st century. We simply have no alternative but to try to fit the square peg of prior appropriation into the round hole of changing public needs, expectations, and legal demands—and in doing so, we make the case for sustainability.

Oregon, like other Western states, adopted the doctrine of "prior appropriation" as the legal foundation for water allocation. The system emerged as a practical tool to foster European settlement of the arid West by allowing water users to essentially stake a claim to use water from any available surface water source. By completing the fairly simple process of posting notice of the intent to use water, diverting the water from its natural source for use on fields or in towns, and putting the water to "beneficial use" (such as for irrigation, domestic, industrial or municipal use), the water user could secure a property right to continue the water use indefinitely. Early on, courts confirmed that water is an attribute of real property the rights to which run with the land so long as the water is put to beneficial use. Even today, the only way the state can terminate a vested water right is by showing in a contested case hearing that the water user has failed to make beneficial use for a period of five or more consecutive years.

Under this system, the vested right allowed the most senior water right holder for a given source to make full use of the authorized amount of water before any more junior users could take water from the same source. This basic concept of first in time, first in right holds strong today with no obligation imposed on senior users to share during times of drought or shortages and, in many cases, with no protections for in-stream flow needs.

The system was designed to encourage settlement and development and it worked well. Many key streams and rivers in Eastern Oregon can quite literally run dry in summer months as a

result of irrigation and other diversions that were established 100 years ago or longer. Although Oregon's first comprehensive water code was enacted in 1909, it was not until a major legislative overhaul in 1955 that the statutes first protected public in-stream flow uses such as recreation and fish habitat. A series of other major changes in the 1980s provided the tool of establishing an "in-stream water right" to afford them similar priority-based.

Increasing reliance on groundwater over the past fifty years has created further complications and pressures as we learn more about the complexities of hydraulic connectivity between groundwater and surface water. Additional legal and practical water management questions are arising as Oregon begins to quantify and recognize federally reserved water rights claimed by Indian tribes—water rights determined by the courts to have a priority date of "time immemorial" to reflect aboriginal uses in place long before European settlement. As evidenced by recent action in the Klamath Basin, once quantified through a state adjudicatory process, tribal rights will trump all other existing water rights in any given area.

The water law system is further stressed by the overlay of federal regulatory requirements under the Endangered Species Act and the Clean Water Act. With increasing understanding of the connection between flow and temperature, there is a potential for regulation of water rights to avoid "take" of federally listed species or to ensure compliance with water quality standards.

In response to these challenges, Oregon's version of prior appropriation continues to evolve. Over the past thirty years the law has changed dramatically. As a result, Oregon's process of reviewing applications for new water uses now includes strong protections for in-stream flow and fish habitat. Consideration of fish screening and passage is required when existing diversions are changed, and the law includes tools and incentives for restoring in-stream flow through in-stream leases, transfers and conservation.

In addition, voluntary reallocation of existing water rights will provide a key source of supply for future growth and help to meet the legal obligations of federally reserved rights and federal regulations. In some cases, such transactions will be driven by market forces, with willing sellers and buyers. In other cases, the "voluntary" reallocation will be spurred by legal obligations and achieved through settlement agreements.

Transactional tools include "transfers", both temporary and permanent and for in-stream and out-of-stream uses, conservation incen-