

# The Long View

## 2016 Sustainable Law Office Leadership Award: Transportation Challenge

The Sustainable Future Section (“SFS”) reminds interested law offices that in 2016 SFS will recognize the Oregon law office that demonstrates the greatest improvement in reducing its transportation carbon footprint by promoting alternative methods of transportation for law office employee, and contractor commutes.

To apply for the Law Office Transportation Challenge Award a law office must submit by October 7, 2016 a one-page application describing how the law office has endeavored to incentivize reduced single motor vehicle commute to and from the office. Applications may have attachments not included in the one-page maximum, and applications including metrics demonstrating improvement will receive preferential treatment. Applications must include applicant contact information and also name and signature of the office’s managing partner or person in a similar supervisory role with a declaration that such person has read and agrees with the application contents. Email application to [OSBSustainableFuture@gmail.com](mailto:OSBSustainableFuture@gmail.com) by October 7, 2016.

**Submit a one-page  
Award Application  
by October 7, 2016**

Previously, the Award has highlighted offices that have adopted broad-based sustainability initiatives, and offices that have implemented innovative practices to increase sustainability. SFS recognizes that the use of conventional transportation can be one of the largest contributors to an office’s overall carbon footprint, and that transportation is the second

and greatest source of greenhouse gas emissions after electricity generation.

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Other firms have demonstrated that transportation is a significant component of sustainability in their law office. Some examples of these firms and practices include the following:

In 2008 **Schwabe Williamson and Wyatt** set a goal to establish employee commuting initiatives. This firm offered a carpool matching resource on the firm's intranet, subsidized up to 50% of a monthly pass for public transportation, provided shower facilities and lockers for bicyclers, provided a Toyota Prius on site, and maintained a Zipcar membership for workday transportation. A firmwide survey revealed that 66% of Schwabe employees in Oregon and Washington commute to work by taking public transportation, carpooling, bicycling, or walking.

In 2010 at the **Ater Wynne** firm no one got free parking. Everyone got a public transportation subsidy. Zipcars were made available for attorneys and staff alike. Bike commuters had access to secure bike lockers and showers.

In 2012, the **Markowitz Herbold** firm initiated a grant program, the Saves to be Green Scholarship Fund, to foster sustainability behaviors of employees throughout the firm. The Fund has encouraged employees to bike in all seasons by reimbursing one employee for bike fenders and another for biking rain gear. Also, Markowitz Herbold has participated in the annual BTA Bike Challenge for the past several years.

In 2012 **Stoel Rives** cyclists could store bicycles in a secure bike facility and had access to a shower and locker room facility. The firm also actively encouraged alternative transportation by offering a monthly incentive to every attorney or staff member who walks, runs, or bikes to work. Free TriMet passes were offered to all personnel. The firm also purchased car sharing memberships for free or low cost use and owned two loaner bicycles available to all personnel at all times.

In 2013, **Kell Alterman** offered flexible schedules so that attorneys and staff could avoid slow commutes due to heavy traffic and/or use sustainable transportation options. Some employees walked to work while others opted to ride TriMet's MAX light rail or the bus. For those who bike to work, Kell offers indoor bike parking. Once downtown, attorneys and staff walk to appointments and errands. For client meetings, some use car sharing services such as Zipcar, with whom the firm has a regularly-used membership, or Car2Go, a Smart Car borrowing system.

In 2013, **Tonkon Torp** provided commuter incentives to encourage employee use of mass transit, bicycling, carpooling, car sharing, and Zipcar. 42% of the firm's Portland-based attorneys and staff purchased monthly TriMet passes through the firm's subsidy program. As part of its office remodel in 2011, the firm installed bike lockers for the firm's bike commuters. In 2013 the firm

added a firm bicycle and helmet for check-out and use by employees.

**Henkels Law LLC** did not own a motor vehicle from 2012 through mid-2016, relying on bike, mass transit, carshare, and walking for all work commuting. The firm uses virtual tools such as gotomeeting and Skype for many distance communications.

Direct questions to [OSBSustainableFuture@gmail.com](mailto:OSBSustainableFuture@gmail.com).

## Program Announcement...watch for details!

Date, Time and Location to be announced soon! Watch your Inbox for details.

## Update on Atmospheric Trust Litigation

Two parallel cases are currently pending in Oregon courts—one state and one federal—alleging that the government has failed to protect public trust resources from impacts of climate change for future generations. Stay tuned for an announcement detailing the date, time, and place to come and hear lead attorneys from both cases talk about the youth plaintiffs, the key decision points, and the legal theory behind the Atmospheric Trust Litigation.

Twenty-one young people from across the United States have filed a landmark constitutional climate change lawsuit against the federal government in the U.S. District Court for the District of Oregon. Also acting as a plaintiff is world-renowned climate scientist Dr. James E. Hansen, serving as guardian for future generations and his granddaughter. The complaint asserts that, in causing climate change, the federal government has violated the youngest generation's constitutional rights to life, liberty, property, as well as failed to protect essential public trust resources. Julia Olsen of Our Children's Trust represents the plaintiffs in the federal case.

In state court, two Oregon youth and their mothers, represented by the Crag Law Center, successfully appealed a ruling dismissing their climate change lawsuit against Governor Kitzhaber and the State of Oregon for failing to protect essential natural resources, including the atmosphere, as required under the Public Trust Doctrine. The trial court ruled against the plaintiffs again on remand, and the case is on appeal for a second time. Chris Winter represents the Oregon plaintiffs.

## A Survey of Oregon Groups Taking a Grassroots Approach to Climate Change: Part Three

By Ann McQuesten

The following is the third and final in a series of brief profiles on grassroots organizations with a local presence that we have published in the *Long View* over the past year. Although we do not endorse any particular organization, we hope that this will be a useful resource for readers wishing to get involved in local organizations working in the area of climate change.

**Greenpeace** is one of the largest and most visible environmental nonprofit organizations, with operations worldwide targeting a variety of environmental initiatives. Its climate-related activism includes the promotion of clean energy solutions over continued exploitation of fossil fuels. Local Greenpeace members were recently involved in a protest aimed at stopping a Shell Oil ice-breaker ship from leaving Portland, with the ultimate goal of inhibiting oil drilling activities in the Arctic. <http://www.greenpeace.org/usa/>

**Rising Tide** is an international, all-volunteer, grassroots network organized to stop the extraction of fossil fuels and prevent the construction of new fossil fuel infrastructure through direct, nonviolent action. The Portland Chapter of Rising Tide focuses on fossil fuel exports, particularly the transport and distribution of oil by rail in the Pacific Northwest. Opportunities for involvement include workshops, volunteering, participating in various activities, and joining the Rising Tide collective. <https://portlandrisingtide.org/>

**Power Past Coal** is an alliance of more than 100 health, environmental, businesses, clean-energy, faith, and community groups working to stop coal export off the West Coast. Power Past Coal frequently engages with law and policy makers through letter writing campaigns, advertising, and direct advocacy to oppose coal exports and related actions that could cause damage to the environment and health of its stakeholders. <http://www.powerpastcoal.org/>

**Climate Action Coalition** is a coalition of groups taking action to prevent new fossil fuel facilities, including Portland Raging Grannies, PDX Bike Swarm, No KXL/Portland, Community for Earth at the First Unitarian Church, Portland Rising Tide, and 350PDX. The coalition

regularly organizes its constituents on initiatives of common interest, including, for example, demonstrating against a proposed propane export terminal at the Port of Portland in 2015. <http://www.climate-action-coalition.org/doku.php>

**Beyond Fossil Fuels**, a program of Eco-Faith Recovery, offers a venue to help cultivate spiritual practices to prepare participants for actions to stop fossil fuel exports. The organization aims to provide a comprehensive guide to working toward a carbon free future, including educational resources, corporate engagement strategies, and tips on how individuals can have an impact in their daily lives. <http://ucfunds.org/beyond-fossil-fuels/>

**The Center for Earth Leadership** trains and motivates Northwest citizens to assume a leadership role in forging a sustainable culture through a variety of programs. Among the Center's offerings is a training program put on in cooperation with 350PDX on becoming a Climate Agent of Change, in which participants learn strategies, skills, and tools to be an effective grassroots organizer in the climate movement. Additional information and instructions on how to apply can be found at <http://www.earthleaders.org/>.

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# Scenarios of Future Water Availability in the Willamette River Basin Driven by Climate Change, Economics and Population to the Year 2099

*Editor's Note: The Willamette Water 2100 (WW2100) project is a collaboration among Oregon State University, the University of Oregon, and Portland State University aimed at examining the hydrological, ecological, and human factors affecting water scarcity in the Willamette River Basin (WRB). Using the Envision platform, a modeling framework developed at OSU, the WW2100 team is exploring how climate change, population growth, and economic growth will alter the availability and the use of water in the WRB, with the following objectives: (1) identify and quantify the linkages and feedbacks among human, hydrologic, and ecologic dimensions of the water system; (2) make projections about where and when human activities and climate change will impact future water scarcities, and evaluate how biophysical and human system uncertainties affect those projections; (3) create "alternative scenarios" where one or more policy levers or other interventions have been introduced into the model, and evaluate how these affect future water scarcities (relative to the reference case scenario); and (4) develop transferable tools and methods for projecting water scarcities and modeling policy.*

*The following is an excerpt from WW2100's report of its findings:*

From its snowy headwaters in the Oregon Cascades to its green valley floor, the Willamette River Basin serves the water needs of 70% of Oregon's population, supplying ecosystems, and an economy that depend on its abundant water supplies throughout the year. Currently, the Willamette River Basin is a water-rich region, but with a warming climate and increasing socio-economic pressures that may not always be the case. As these pressures continue to impact the Willamette River Basin, we ask, "When and where will climate change and human activity create water scarcities in the Willamette River Basin?" This is the key question motivating the Willamette Water 2100 (WW2100) project.

## Overview

Like many places in the US West, the Willamette River Basin faces many water scarcity issues. These include declining snowpacks, stressed forests, increasing wildfires, projected urban growth, the need for irrigated agriculture, warming rivers, and endangered fish. Unlike many places in the West, however, our unique *WW2100 Envision* model, our engaged stakeholder community, and the fact that water is *not* yet a crisis here is letting us explore alternative future scenarios of

land and water use and policy implications—without the contentious debates we hear about elsewhere.

**"Aggregated over the course of a year, precipitation in the Willamette Basin far exceeds water demand. However, some sub-basins will experience seasonal water scarcity"**

The Willamette River Basin is a region of annual water abundance and seasonal shortages. Wet winters supply water to natural and built reservoirs that transfer water in the dry season from the mountains to the valley. We have modeled the basin as a complex coupled human-natural system using our modeling tool, *WW2100 Envision*, which quantifies the supply and demand for water spatially and temporally, identifying where climate change and human change may exert the greatest impacts in the future. Water scarcity can be understood in two broad ways: quantitative (e.g., the costs of storing and transporting water) and qualitative (e.g., the effectiveness of the institutions that govern water's use). Our modeling takes

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# Future Water Availability...

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into account the physical and biological factors influencing the water cycle, such as climate change and forest growth. It also addresses the human elements, such as population growth, water rights, and agricultural and irrigation decisions. We modeled these factors, their linkages, and feedbacks under a range of plausible future conditions.

One of the key findings from our project is that despite being a water-rich basin, we expect wide variation in the future scarcity of water across different seasons, locations, qualities (e.g., temperature), and uses. Aggregated over the course of a year, precipitation in the Willamette Basin far exceeds water demand. However, some sub-basins will experience seasonal water scarcity in some years. Agricultural and urban uses are relatively small in magnitude, comprising only about 1% of annual precipitation. Environmental streamflows and evapotranspiration are much greater than direct human uses, comprising about 48% of annual precipitation. With climate warming, snowpacks decline dramatically over the century (63-95%), forests become more fire prone, and shifts in vegetation type are common.

Impacts in the valley are more likely to be due to changes in the economics and demographics, as well as the institutions and infrastructure available (e.g., reservoirs, technologies, etc.) rather than the direct, yet substantial, impacts of climate change. The basin's population is expected to more than double by 2099, and this will lead to the expansion of cities and increased urban demand for water (i.e., residential, commercial, industrial). Even as irrigation needs may slightly increase due to climate change, irrigation withdrawals from surface water sources are likely to decline 5% over the 21st century, due to urban expansion onto farmland. Expansion of surface water irrigation is limited by the high infrastructure costs relative to land values. Despite these differing trends for urban and agricultural water use, future consumptive use of surface water for irrigation will remain high relative to consumptive use of surface water in urban areas. Climate warming may reduce the frequency that reservoirs are able to meet environmental flow targets, and warmer stream temperatures will reduce the likelihood of occurrence of native cold-water fish species in the Willamette River. The set of reservoirs comprising the Willamette Project is one of the primary mechanisms society has to mitigate future water scarcity for large parts of the basin. Based on several scenarios with varying trajectories of urban water demand, results suggest that cities in the valley will generally have access to adequate water supplies. During very dry years when water scarcity may affect agricultural and urban water users, there is substantial discretionary flexibility in our laws and policies to mitigate the effects of water scarcity. While the message may be reassuring in many respects, continued climate warming and human system changes are likely to have negative impacts on native cold-water fish in the Willamette River.

## Present-Day Water in the Willamette River Basin

The Willamette River Basin is a region of abundant water

with winter surpluses much greater than summer deficits.

Our seasonally wet/dry climate means that we depend on natural and built reservoirs to store winter precipitation. During the driest months of the year, these natural and built reservoirs become the "source" for much of the water in the system. Seasonal water storage in soil and groundwater far exceeds water storage in snowpacks or the Willamette Project reservoirs.

Annual agricultural and urban water uses are only about 1% of annual precipitation, whereas ecological water use far exceeds agricultural and urban uses.

Agricultural consumptive use of surface water is 5 times that of urban consumptive use of surface water (from in-basin sources).

## Future Water Scarcity in the Willamette River Basin

By modeling water supply and demand, inflow and outflow, natural storage, and built storage throughout the basin, *WW2100 Envision* provides a way to quantify the annual water cycle in the Willamette River Basin and helps identify where climate change, human change, as well as policy and governance, may exert the greatest impacts in the future.

## Future Water Scarcity in the Mountains

In the mountains, climate warming is the major driver of water scarcity.

Our modeling suggests that by 2100 snowpack will likely decline significantly and become limited to the highest elevations.

The combined effect of low snowpack and hotter/drier summers leads to a 200-900% increase in forest wildfires in our simulations. Impacts from wildfire will reduce mountain ecosystem water use.

In our simulations, fire opens up lands to transition to new forest types and reduces the availability of forestland for timber harvest.

## Future Water Scarcity in the Valley

Water scarcity in the valley will more likely be due to changes in economics and demographics, as well as the institutions and infrastructure available (e.g., reservoirs, technologies, etc.) rather than direct, yet substantial, impacts of climate change.

Agriculture: Irrigation withdrawals from surface water sources are likely to decline by about 5% over the 21st century, due to urban expansion onto farmland.

Urban: Providing water for a doubling of the basin's population will involve costly expansion of water supply infra-

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## New Partners in Sustainability



The Sustainable Future Section would like to recognize the following Partners in the Oregon State Bar Partners in Sustainability Program. These Oregon law offices have shown commitment to operating sustainably and provide valuable leadership to others as law offices throughout the State move toward office practices that conserve resources and reduce waste.

Law offices ready to become Partners can find information on the Program at: [www.osbsustainablefuturesection.org](http://www.osbsustainablefuturesection.org).

Any questions regarding the Program may be directed to [osbsustainablefuture@gmail.com](mailto:osbsustainablefuture@gmail.com).

Ater Wynne LLP

Davis Wright Tremaine LLP

Intelekia Law Group LLC

Legal Department of Beau Delicious! International LLC

dba Café Yumm

Markowitz Herbold PC

Bodyfelt Mount LLP

Henkels Law LLC

Kell Alterman Runstein LLP

Michelle Slater Law LLC

## Future Water Availability...

structure.

**Fish:** Climate warming will impact how often reservoirs meet environmental flow targets; warmer stream temperatures will negatively impact native cold-water fish species in the mainstem Willamette.

**Consumptive Water Use:** Future consumptive use of surface water for irrigation will remain high relative to consumptive use of surface water in urban areas; some subbasins will see a net reduction in consumptive use because of development of surface irrigated farmlands.

**Mitigation:** The set of reservoirs comprising the Willamette Project is one of the primary mechanisms society has to mitigate future water scarcity for large parts of the basin.

### Implications

Our simulations show significant climate change impacts in the mountains with losses of winter snowpack, large increases in wildfire, and shifts in vegetation type. Impacts in the valley are more likely to be due to changes in the economics and demographics, as well as the institutions and infrastructure available (e.g., reservoirs, technologies, etc.) rather than direct impacts of climate change. However, climate warming and land use change affect instream flows and stream temperature, both of which play a significant role in water management because of requirements for threatened and endangered fish.

As we examine scarcity in the Willamette River system, we can better address the causes and evaluate possible policy solutions if we fully understand the hydrology, the economics, and also the existing legal setting and institutions in which this scarcity arises. For example, if we see water

scarcity emerge in the basin based on releases from the federal reservoir system, we can examine the inherent discretionary authority and regulatory flexibility that exists within the law that governs the management and operation of the federal reservoir system. By looking at the legal frameworks that set parameters on the releases from the federal reservoirs, whether those arise from the statutory authority of the Army Corps of Engineers or the regulatory flexibility that exists in the application of the Endangered Species Act to reservoir operations, we can explore policy alternatives in the basin. State law can also be utilized in addressing scarcity. To provide just one example, we can examine what the impact would be if, as a legal matter, the unconverted instream flow rights were to be recognized and integrated into the system as instream flow rights.

Despite being an apparent water-rich basin, we expect wide variation in the future scarcity of water across different seasons, locations, qualities (e.g., temperature) and uses. Based on several scenarios with varying trajectories of urban water demand, results suggest that cities in the valley will generally have access to adequate water supplies. Even during dry years when water shortages may affect some agricultural and urban water users, the impacts can be significantly mitigated through the discretionary flexibility in our laws and policies that influence water allocation. While this message may be reassuring in many respects, continued climate warming and human system changes are likely to have negative impacts, including adverse impacts on native cold-water fish in parts of the Willamette River system.

More information on the WW2100 project is available at <http://water.oregonstate.edu/ww2100/>.

# Antitrust Law and Socially Responsible Business Collaboration

By Inara Scott

Businesses concerned about human rights, environmental degradation, and sustainability are increasingly looking to collaboration with other businesses, government agencies, and non-governmental organizations as a means of solving intractable problems. Even ardent competitors can benefit from sharing facilities, engaging in joint research and development, and developing environmental standards and certifications. Yet as any lawyer with passing familiarity with antitrust law knows, collaboration between and among competitors is fraught with potential liability.

Section one of the Sherman Antitrust Act (15 U.S.C. § 1) prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce,” leaving any agreement among businesses—even those motivated by positive social ends—vulnerable to challenge. The immensely broad language of the Sherman Act has created decades of tangled legal precedent attempting to discern and apply the original intent of the statute, which could arguably prohibit any and all contracts. Following the seminal case of *Standard Oil v. New Jersey*, however, most court opinions have focused on consumer welfare and economic efficiency as statutory bellweathers, prohibiting agreements that have the potential to “unduly diminish competition” or are “unreasonably restrictive of competitive conditions.” 221 U.S. 1 (1911).

In my article, “Antitrust and Socially Responsible Collaboration: A Chilling Combination?” (53 AM. BUS. L.J., 97 (2016)) I argue that overly restrictive interpretations of the Sherman Act, based on the century-old *Standard Oil* case (and its progeny), have had a chilling effect on creative collaborations that could benefit consumers, producers, workers, and the environment. I further argue that existing precedent should be reinterpreted or reexamined in light of the challenges of globalization, a lack of healthy and functioning markets (in some areas), and the overwhelming need for resource preservation. Perhaps most importantly, I argue that the assumption that restrictions on competition always have a negative impact on consumers must be challenged.

The chilling effect of existing antitrust precedent operates in two ways. First, existing precedent prohibits, on a *per se* basis, certain types of agreements, including price fixing and production quotas, without examination of the particular facts of the case. *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958). This rule makes it impossible for businesses to work in a collaborative manner on these types of agreements, even when those agreements might be necessary to ensure long-term access to goods and services. For example, businesses cannot agree to restrict the use and consumption of scarce resources (i.e., threatened stocks of fish or limited stands of old growth

lumber), or to pay farmers a minimum amount for commodities, even in markets that are plagued by corruption, government monopolies, or a lack of basic labor standards.

To put this in concrete terms, two neighboring timber farms cannot agree between them not to cut a stand of old growth trees to protect habitat for threatened species. Coffee buyers cannot agree among themselves to pay organic coffee farmers a minimum price for their coffee—and the farmers cannot agree to only sell at a minimum price—even though small farmers are often working in markets where they are at the mercy of monopolistic coffee roasters and corrupt governments, and cannot afford to use more sustainable farming practices without minimum price guarantees. Ironically, in coffee markets in particular, the monopolistic practices by governments and roasters have been documented in a phenomenon called the “coffee paradox,” where farmers produce increasing amounts of crops for lower prices at the same time consumers in the United States pay *higher* prices for their coffee beans. See, e.g., Hyunsoo Kang & P. Lynn Kennedy, *Empirical Evidences from a Coffee Paradox: An Export Supply/Price Asymmetry Approach*, 32 J. RURAL DEV. 107, 108–09 (2009), <http://purl.umn.edu/90687>.

The second way we see the chilling effect operate is in the types of legal agreements that are formed. Antitrust precedent does not necessarily prohibit collaborations by businesses to create standards, certifications, or codes of conduct. One example of such an arrangement is the Sustainable Apparel Coalition, a collaboration of organizations including Nike, Walmart, and Patagonia that seeks to “reduce the environmental and social impacts of apparel and footwear products around the world.” SUSTAINABLE APPAREL COALITION, <http://www.apparelcoalition.org/> (last visited Jun. 20, 2016). However, these arrangements can be challenged under a “rule of reason” approach if they appear to be unduly restrictive of competition or utilize disfavored practices such as group boycotts. Companies wary of antitrust liability therefore carefully construct standard setting agreements to avoid practices perceived as anti-competitive, and may as a result avoid the precise sorts of agreements that can have the greatest social benefit.

For example, consider the case of the Designated Supplier Program (“DSP”) of the Worker Rights Consortium (“WRC”). The WRC is an international labor rights organization that provides independent monitoring of labor conditions. *Mission*, WORKER RIGHTS CONSORTIUM, <http://workersrights.org/about/> (last visited Jun. 20, 2016). The DSP was an attempt by the WRC to create mandatory standards for licensee factories, including payment of a living wage to factory employees and a requirement that licensee factories permit employees freedom of association. *Id.* at 2–3;

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# Antitrust Law and Socially Responsible Business Collaboration *(continued)*

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see also *Designated Suppliers Program*, WORKER RIGHTS CONSORTIUM, <http://www.workersrights.org/dsp/> (last visited Jun. 20, 2016).


After warnings from the Department of Justice about a possible antitrust action, the WRC modified the DSP to ensure that the terms of the program would be individually considered and adopted by member organizations and that actions taken against non-compliant suppliers would be purely voluntary and not undertaken collectively by WRC members. Scott Nova & Ben Hensler, WRC Memo on Business Review Process for the Designated Suppliers Program, WORKER RIGHTS CONSORTIUM (Dec. 16, 2011), <http://www.workersrights.org/university/memo/121611.html>. Rather than a powerful, mandatory set of standards for participating entities, the DSP program was thus reduced to a voluntary set of conditions that could be inserted into individual contracts with minimal power in the market. Letter from Benjamin C. Hensler, Workers Rights Consortium, to Hon. Sharis A. Pozen, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice (Dec. 15, 2011), <http://www.justice.gov/atr/public/busreview/request-letters/302113.pdf>.

No single business—even giant multinational corporations like Walmart—can solve global problems on their own. Collaboration and collective action is essential, yet antitrust law may impede the most effective types of agreements. Popular opinion and common interpretations of the Sherman Act focus on competition as a means of protecting consumer welfare; I argue that given the challenges of globalization, a lack of healthy and functioning markets (in some areas), and the overwhelming

need for resource preservation, consumer welfare may be better served by allowing limited, closely monitored, collaborative efforts. Consumers do not benefit when commercial entities are forced by competitive pressures to exhaust available resources or drive species to extinction, nor do they benefit from the inability of commercial entities to set strong, collective labor standards in global markets where such standards may be lacking.

The flexible nature of antitrust policy allows for considerable room to make the kind of broad policy changes that would recognize these challenges. Just as current case law allows judges to look at the facts of some agreements to determine their impact on consumers, a more flexible antitrust policy could allow for socially responsible collaborations to proceed if the participants were able to demonstrate a benefit to consumers, a “market failure” defense for markets like those currently seen in the coffee commodity market, or a social benefit to workers or producers that does not create harmful impacts to consumers. Courts could also consider impacts of competitive practices on a broader scale or over a longer period of time; for example, rather than looking at short-term price increases, courts could consider that setting a minimum floor for sustainably produced coffee could make it more commercially practical, and could therefore increase availability and lower prices over time.

Unfettered competition does not always result in increased efficiency or improved consumer welfare. Where socially responsible collaboration can help remedy market failures or protect scarce resources, it should not be prohibited out of hand. Antitrust policies must remain vigilant gatekeepers but must also be flexible enough to let businesses use their power to make positive change.

 Inara Scott practiced law for over a decade before joining the faculty at Oregon State University. In private practice, Inara represented clients on matters including general corporate, environmental, and business law, before specializing in energy law and utility regulation. Inara's research at Oregon State centers on sustainable business, clean energy, the electric power system, and legal and policy implications of climate change.



# S.B. 1547: Transitioning from Coal to Clean Electricity

*By Dina Dubson Kelley, Chief Counsel,  
and Silvia Tanner, Staff Counsel  
Renewable Northwest*

Faced with the threat of climate change, Oregon chose to take bold action. On March 8, 2016, in front of a diverse group of children, Governor Kate Brown made history when she signed into law S.B. 1547, Oregon's Clean Electricity and Coal Transition Plan. The new law received bipartisan support at the legislature and sets firm deadlines for the state's large investor-owned utilities ("IOUs") to eliminate coal from Oregon rates and procure at least half of their electricity from renewable energy sources. The process that led to S.B. 1547 was also historic. The new law was the product of an unlikely collaboration among stakeholders often on opposite sides of issues, including IOUs, consumer advocates, and a diverse array of environmental organizations.

## Who We Are

Before we delve into the details of S.B. 1547, consider this the "full disclosure" section about Renewable Northwest. We are a non-profit, member-based organization that advocates for the expansion of environmentally responsible renewable energy resources in the Northwest through collaboration with government, industry, utilities, customers, and advocacy groups. Our membership is nearly as broad as the segments of the energy industry with which we collaborate, and includes renewable energy developers and manufacturers as well as consumer advocates, environmental groups, academic institutions, law firms, and other industry advisers. Renewable Northwest was actively involved in the negotiations that culminated in S.B. 1547; we supported its passage and are still basking in the glow of a 50% Renewable Portfolio Standard ("RPS") for Oregon's large IOUs coupled with the phase-out of coal from Oregon electric rates.

## How We Got Here

S.B. 1547 is most directly traceable to multi-party negotiations spurred by ballot measures filed with similar objectives, but the groundwork goes back even further. Aside from the ballot measures, S.B. 1547's closest antecedent was a 2015 "Coal to Clean" bill advanced by environmental advocates that would have required utilities to stop buying power from coal plants by 2025 and to replace that power with resources that are at least 90% cleaner. Due in part to utility opposition, that bill died in committee.

Following the failure of that bill, a group called Renew Oregon (consisting of the Oregon League of Conservation Voters, Climate Solutions, and the Oregon Environmental Council) advanced ballot measures with similar objectives. Together with the Sierra Club, the NW Energy Coalition, the Citizen's Utility Board of Oregon, and the Natural Resources Defense Council, our organization supported that effort. Polling conducted by Renew Oregon showed approximately seven in ten Oregonians supported the ballot measure. That degree of public support caught the utilities' attention and helped bring the various stakeholders together for a productive conversation on Oregon's clean energy future.

## Key Provisions of S.B. 1547

The two major components of S.B. 1547 are the phaseout of coal from Oregon electric rates and the increase in Oregon's RPS to 50% renewable energy by 2040. These provisions apply to Oregon's large IOUs, Pacific Power and Portland General Electric. Together, the two IOUs serve about 70% of Oregon's electricity needs. With respect to the coal phaseout, S.B. 1547 requires that the two IOUs not include any electricity from coal facilities in Oregon rates by 2030, with the possibility that the final facility will be out of Oregon rates by 2035 due to the unique ownership contract associated with that facility.

The second major component of S.B. 1547 is the RPS increase. Renewable Portfolio Standards generally require utilities to gradually increase the portion of their customers' energy needs served by renewable energy. Prior to the passage of S.B. 1547, Oregon's RPS required large utilities in the state to serve 25% of their customers' energy needs with eligible renewable energy resources by 2025. The new law includes a modest 2% increase to the 2025 requirement and stair-steps up from there as follows: 35% by 2030, 45% by 2035, and 50% by 2040.

The other notable RPS change is to the provisions regarding "banking" of Renewable Energy Certificates ("RECs"). RECs are created for every megawatt-hour of renewable electricity generated and are used to demonstrate compliance with Oregon's RPS. Before S.B. 1547, Oregon's RPS was unusual in that it allowed RECs to be banked indefinitely, a provision that has limited the amount of new renewables deployed. S.B. 1547 now allows IOUs to bank most new RECs for up to five years. However, there is an exception to the five-year banking rule intended to incentivize development of renewable energy resources that come online before January 1, 2023.

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## S.B. 1547: Transitioning from Coal *(continued)*

### Concerns that Preceded the Passage of S.B. 1547

A healthy amount of debate preceded the passage of S.B. 1547. Detractors argued that the bill was expensive, would not lead to greenhouse gas (“GHG”) reductions, and would not close any coal plants. *See Big, complicated and potentially expensive climate bills pass out of committee at Legislature*, The Oregonian, Feb. 12, 2016, available [here](#). It is true that neither S.B. 1547 nor any Oregon legislative action could close coal plants outside of state borders due to the Commerce Clause of the U.S. Constitution. Thus, other options were necessary to encourage utilities to make different resource decisions. As for the other concerns, utilities and advocates demonstrated to legislators that the bill would lead to significant GHG reductions at a modest cost. For example, PacifiCorp’s analysis showed the bill would result in an average annual cost increase of less than 1% through 2030. Importantly, the company’s analysis also showed that the levelized cost per megawatt-hour of new solar and wind resources would be lower than that of new gas resources. Analysis conducted by Flink Energy confirmed PacifiCorp’s estimated rate impact, and determined that the bill could in fact lead to cost savings. *See Estimated Rate Impacts: Coal Transition Plan Proposal, February (rev) 2016*, Flink Energy, available [here](#). Finally, in terms of GHG reductions, both utilities showed the bill would reduce their Oregon carbon emissions, putting them on track to meet the state’s GHG reduction goals.

### S.B. 1547’s Other Changes to the Energy Landscape

Other significant provisions of the Clean Electricity and Coal Transition Plan shaped the landscape of access to solar energy, energy efficiency, demand response, and vehicle electrification. For example, S.B. 1547 expanded Oregonians’ access to solar energy by laying the foundation for a program that will allow Oregon households and businesses served by IOUs to participate in community solar projects regardless of their ability to install solar panels on their rooftops. The new law also codified Oregon’s existing commitment to efficiency by requiring IOUs to pursue all cost-effective energy efficiency resources and demand response. Additionally, S.B. 1547 helps prepare the state for increased vehicle electrification by opening the door for

IOUs to be able to deploy electric vehicle charging infrastructure.

Several other less known sections of S.B. 1547 will also help shape the state’s energy future. These sections include the adoption of a mandate that, in its final form, should require Oregon’s largest IOUs to procure a percentage of their electricity from small-scale projects, as well as the application of certain RPS compliance rules that previously only applied to independent power producers that act as “electricity service suppliers.”

### Conclusion

S.B. 1547 is a landmark piece of legislation that puts Oregon at the forefront of climate change and renewable energy policy. Indeed, the Clean Electricity and Coal Transition Plan has been hailed as the most significant state-level legislative action on climate change taken in the United States since the historic Paris agreement was reached in December. S.B. 1547 is also a reflection of Oregonians’ values and their support for clean air and clean energy. However, as important a moment as the bill signing was, it does not represent the conclusion of our efforts. We have already turned our attention to the rulemaking phase underway at the Oregon Public Utility Commission to implement various sections of the law. There are a lot of details to fill in, and it will be important for interested stakeholders to participate to ensure that the rules help to meet S.B. 1547’s core objectives of emission reduction and clean energy proliferation. Success on the implementation phase will be key to delivering on the promise of a clean energy future for Oregonians.

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## The Long View

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