

Understanding your right to irrigation water

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What are water rights?

Mark Twain once said whiskey is for drinking, water is for fighting over. Because we've fought over water rights from the beginning, our laws have evolved to allocate water and mediate disputes between users. At first, U.S. water laws were based on English common law principles.

(The "Glossary," page 4, explains some legal terms you should learn. They occur many times in discussions of water rights.)

Simplified, U.S. water laws are based on the concept of "reasonable use." *Reasonable* is a vague term that often requires a judge's decision. Generations of judges' decisions have shaped two key principles.

The riparian doctrine

This principle came first, and it applies east of the Mississippi River. It holds that owners of land along a stream or river can make reasonable use of the water on that land.

A user's riparian right to use water is legally limited if downstream users are

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deprived or if they claim a future intent to use water. The riparian doctrine works best when water supplies are usually adequate for all users.

The appropriative doctrine

As pioneers moved into the West, they found the water supplies inadequate for their needs—many properties had no flowing streams nearby. Mining needed water. For the first time, crops needed irrigation.

In response, miners and state legislatures developed the second principle, the appropriative doctrine: Water may be transported away from the stream, and first in time is first in right. The appropriative doctrine requires *beneficial use*. Irrigation is a beneficial use of water.

The user with the oldest right can demand all the available water from a source that can be used beneficially. These demands are subject to the terms of the water right, with no regard for the needs of any other user.

If there is water beyond the senior right holder's needs, the holder of the next oldest right can take as much of the surplus as necessary to satisfy his or her needs under that right—and so on down the line until there is no water available.

Junior right holders may get no water. This provision protects investments required to build irrigation structures.

Almost all of the water laws now in existence in the Western States have “grandfather clauses.” These give water rights to those who used the water before the passing of the new laws.

Courts must interpret

Under any doctrine, laws are usually written in general terms. Courts interpret the statutes, and judges who preside over future disputes will look at

these precedents and try to make consistent decisions. Precedents are often more important than a literal interpretation of the statute.

Most water laws are enacted by states. If water resources cross national or State boundaries, a treaty is reached between countries, or an agreement called a compact is reached between states. Compacts are like treaties and are ratified by the U.S. Congress.

The Federal Government has also claimed exemption from State water laws on federally owned lands. Several states and the U.S. are disputing these Federal reserve rights. Some Native American tribes, claiming water rights because of treaties that predate water laws, have filed lawsuits over them.

Administering water rights in Oregon

The only way to appropriate water for private beneficial use is to comply with the requirements of the Surface Water Code or the Ground Water Act. By statute, all waters within the State of Oregon belong to the public. The only exception is a natural spring that does not flow off the owner's property.

The water laws of Oregon follow the appropriative doctrine. However, the right to water is subject to water withdrawals, either by legislative action or an administrative order of the Water Resources Commission.

Oregon once used part of the riparian doctrine, but this no longer applies. The Oregon Supreme Court held that the 1909 Water Code abrogated the common-law riparian rule. Water beneficially used before the 1909 law became an appropriative right.

The basis for Oregon's system of water laws can be simplified to three statements:

1. Water must be beneficially used.
2. First in time is first in right.
3. A water right is an appurtenance to the property for which it was established.

There are some minor differences between the Surface Water Code (1909) and the Ground Water Act (1955). For the most part, they're similar in operation.

Water rights of record

To establish a right to use water, an appropriator must obtain a water right permit from the Water Resources Department and file an application that includes a description of the proposed appropriation of water, a map prepared by a certified water rights examiner showing the proposed use in relation to the U.S. Public Land Survey, and a legal description of the property involved.

Easements, rights of way, or ditch rights necessary to a proposed appropriation are not within the jurisdiction of the Water Resources Department. These are private matters between the landowners involved.

The water right permit is not actually a water *right*. Instead, it grants authority to take otherwise unused water and put it to beneficial use, only in the manner described in the permit.

Construction must begin, or necessary equipment must be purchased or installed, within 1 year from the date of permit issue. The intended use of water must be completed with reasonable diligence.

A right is established only when the appropriator uses water in the manner described in the permit. The appropriator is then issued a certificate indicating a *perfected* water right. A perfected water right is an appurtenance to the land where the right was established

and belongs to the legal owner of the real property.

The priority date of a water right is the date the appropriator filed the permit application with the Water Resources Department. The right does not guarantee water to be used in any manner desired. The right exists only for the amount of water the appropriator needs for the specific use on the land described in the water right certificate.

Under the appropriative doctrine, the water right authorizes diversion of water only to the extent that water is available.

Oregon law indicates domestic use has preference, then agricultural purposes, and all other uses follow. However, in conflicts between users with filed water rights, the filing date governs who gets priority for the available water. Only if the conflicting rights have the same priority date does the order of preference govern.

Surface water

The Surface Water Code, adopted in 1909, governs the appropriation of surface waters—rivers, lakes, streams, springs, waste waters, waters stored in reservoirs, and other surface sources.

The water code did not take away or impair any vested surface water right established before 1909. A claim to a vested pre-1909 right must be adjudicated to become a matter of record.

Adjudication involves several administrative steps by the Water Resources Department and concludes with a court decree. Rights have been adjudicated for most of the major stream systems in eastern and southern Oregon, for the Rogue in southwestern Oregon, and for some of the larger tributaries to the Willamette River.

The priority date for an adjudicated right is the initial date water was beneficially used.

The duty of water is the limit to a particular beneficial use in a defined area. Irrigation's duty of water is generally a flow rate of 1 cubic foot per second (cfs)/40 acres east of the Cascades and 1 cfs/80 acres west of Cascades. The total volume that an appropriator can use varies between 2½ and 5 acre-ft/acre per year.

Stored water

A right to natural flow of a stream does not include water stored during times of excess flows. If someone legally constructs a reservoir and stores winter flows, older natural flow rights on that stream system have no right to the stored water during the summer.

However, the operator of the reservoir must provide a means to bypass the natural flow through the reservoir to the prior rights below.

Ground water

The Ground Water Act, enacted in 1955, governs the appropriation of ground water. It repealed the Underground Water Law (in effect in eastern Oregon since 1927), and it provided for registration or adjudication of all claims for ground water used before its own enactment.

A permit similar to the one required for surface water must be filed with the Water Resources Department. A water permit is not necessary (and cannot be issued) for the following exempted uses:

1. watering stock;
2. watering any lawn or noncommercial garden less than ½ acre in area;
3. single or group domestic purposes not exceeding 15,000 gallons per day; or
4. any single industrial or commercial purpose not exceeding 5,000 gallons per day.

The duty of water for ground water does not limit the flow rate. The total volume that can be pumped is between 2½ and 4½ acre-ft/acre per year, depending on location around the State.

Critical ground water areas

When overuse causes an aquifer's water level to drop continuously, the Water Resources Department must declare the source to be a "critical ground water area." The administrative order defining the limits of the critical ground water area may also provide preference for some uses of water.

Forfeiture

A perfected water right remains valid as long as an appropriator continues beneficially using the appropriated water. Five consecutive years of nonuse can result in forfeiture of water rights. If an appropriator doesn't use any portion of a water right for a period of 5 or more years, that portion of the right is subject to forfeiture.

The right is still subject to forfeiture even if an appropriator resumes beneficial use after a period of 5 consecutive years of nonuse. The right reverts to the public as though the right had never existed.

Forfeiture of a water right is not automatic; it requires a legal proceeding to determine the facts unless the owner authorizes cancellation. The Water Resources Department starts a forfeiture proceeding usually when persons with firsthand knowledge are willing to testify.

Water right transfer

The Water Resources Department must approve any proposed change of a water right. Appropriators must file applications to change the use, the place of use, or the point of diversion of water.

The Water Resources Department must determine that the proposed change will not injure other water rights. The priority date is not affected when a perfected right is transferred.

Approval of a transfer application does not reinstate a water right subject to forfeiture. This is true even if all parties are unaware that the right is subject to forfeiture at the time of the transfer.

Watermasters

Watermasters, employees of the Water Resources Department, distribute the available water supply when appropriators request it. There are 19 watermaster districts to serve water users, oversee minimum stream-flow withdrawals, and collect hydrologic data.

To find out more about water rights or the location of your local watermaster office, write: Water Resources Department, 3850 Portland Rd. NE, Salem, OR 97310, or phone (503) 378-3739.

Glossary

abrogate. To do away with, nullify.

adjudicated. Decided by the court (in this case, the status of water rights dating before an enacted law).

appropriate. To take exclusive possession of.

appurtenance. A right attached to a property right and passing in possession with it.

aquifer. A water-bearing geologic stratum of permeable rock, sand, or gravel.

beneficial use. Irrigation, domestic use, municipal water supply, power, recreation, fish and wildlife protection, fire protection, industry, navigation, scenic attraction, and others.

diligence. Attention and care legally required of a person.

duty of water. Limit of beneficial use.

forfeiture. Losing the right because of error or negligence.

ground water. Water obtained through an artificial opening or an artificially altered natural opening into the earth.

perfect. To complete all the conditions contained in the permit.

precedent. An earlier occurrence of something similar that can serve as an example to justify a later action.

real property. Property in houses or land.

vested. A legal right to an existing economic privilege.

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Extension Service, Oregon State University, Corvallis, O.E. Smith, director. This publication was produced and distributed in furtherance of the Acts of Congress of May 8 and June 30, 1914. Extension work is a cooperative program of Oregon State University, the U.S. Department of Agriculture, and Oregon counties.

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