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Inside this Brief

- **Prior Appropriation Doctrine**
- **What is a Water Right?**
- **Adjudication**
- **New Water Rights**
- **Recent Legislation**
- **Staff and Agency Contacts**

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Background Brief on...

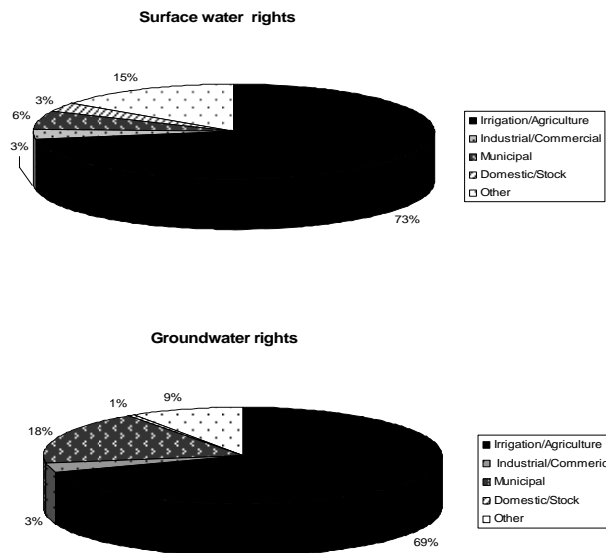
Water Rights

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Prior Appropriation Doctrine

Water is allocated in Oregon under the doctrine of prior appropriation – familiar as “first in time, first in right.” Any person who appropriates water for a beneficial use earlier in time has a superior claim during periods in which there is insufficient water to satisfy all rights. The 1909 water code codified two water right principles. First, all water within the state belongs to the public. Second, subject to prior rights existing at the time of passage (February 1909), waters of the state may be appropriated for beneficial use under permit by the Water Resources Department (WRD). Similar water rights for the use of ground water were established in 1927 for eastern Oregon and in 1955 for western Oregon. Many small uses of ground water are exempt from the permit requirements. Oregon law pertaining to water appropriation is found in ORS Chapters 537 and 540.

Estimated Use of Out of Stream Water Rights of Record
as of August 2006



What is a Water Right?

Since all waters of the state are owned by the public, a water right is the right to use water for a beneficial purpose. Beneficial use is the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and best interests of the people of Oregon. Examples of types of beneficial uses include irrigation,

fish and aquatic life, industrial and municipal uses, recreation, storage, and pollution control.

In 1987, the Oregon Legislature added instream water rights as a beneficial use to support instream flows, fish propagation, and wildlife habitat. Since passage of the legislation, about 1,400 instream water rights have been established. Of these instream rights, about 550 resulted from converting previously established minimum perennial stream flows.

A water right is connected to the land where it is used. The water right specifies the quantity of water, point of diversion, place of use, type of use, season of use, and priority date. A water right may be transferred from one place to another, the point of diversion may be changed, and the type of use allowed under the right may be changed by applying to the WRD. The transfer will be approved if the Department determines that the modification can be made without injury to other water rights or enlargement of the original right.

Adjudication

Adjudication is the process by which pre-1909 vested water rights are quantified and documented through an adjudication procedure in circuit court. Approximately 67% of the state has been adjudicated. The only general adjudication presently underway is in the Klamath, which has been ongoing since 1975. To date, 91% of contests and 79% of the contested claims in the Klamath have been resolved.

The 1995 Oregon Ground Water Act required existing water users to register their use in anticipation of a ground water adjudication. However, the Department has not yet initiated adjudication of these claims.

New Water Rights

New water rights are created through a request to the WRD. With the exception for small reservoirs and uses of stored water, proposed water uses are generally approved if they are consistent with the following criteria:

- 1) water is available from the source,
- 2) the use will not injure senior water rights,
- 3) the use conforms with applicable basin plans, and
- 4) the use complies with rules of the Water Resources Commission.

Surface water availability for a new right is determined by the 80 percent exceedance factor. Water may continue to be appropriated as long as, with the proposed appropriation, there is sufficient water to meet expected demands from all consumptive and instream water rights at least 80 percent of the time during each of the months of proposed use. For ground water uses, the combined water right appropriation must not exceed the average annual recharge to a ground water source or result in the further depletion of over-appropriated and hydraulically connected surface waters.

Designated beneficial uses are specific to a water body. The classified uses of water established in basin programs indicate the uses for which new permits may be issued such as irrigation, instream flows, industrial, municipal uses and flood control.

Recent Legislation

House Bill 2123 (2005) modified statutes related to water rights in three ways: 1) allows surface water to ground water transfers where the ground water use will affect the surface water similarly; 2) directs promulgation of rules to process requests to modify the place of use, type of use, or point of appropriation for pre-1955 ground water uses; and 3) removes sunset on the consent to injury provision for point of diversion transfers.

House Bill 3038 (2005) established a statutory timeline of 20 years to commence and complete construction for new surface water and ground water permits for municipal use.

House Bill 3494 (2005) clarified that Deschutes Basin ground water mitigation rules adopted by the Water Resources Commission satisfy the requirements under the Scenic Waterway Act, the Instream Water Rights Act, and Ground Water Act. The rules are set to be repealed in January 2014. The measure requires a report to the Legislature on the implementation and operation of the Deschutes ground water mitigation and mitigation bank programs by January 2009.

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