LPRO: LEGISLATIVE POLICY AND RESEARCH OFFICE

WATER MANAGEMENT

BACKGROUND BRIEF

PRIOR APPROPRIATION DOCTRINE

Water is allocated in Oregon under the Prior Appropriation Doctrine – often expressed as "first in time, first in right." This means the first person to obtain a water right on a stream is the last to be shut off in times of low streamflows. In water-short times, the water right holder with the oldest priority date (generally the date of application to use water) can demand the water specified in their water right regardless of the needs of junior users.

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The 1909 water code codified two water right principles: first, all water within the state belongs to the public; and second, waters of the state may be appropriated for beneficial use under a permit issued by the Water Resources Department **(WRD)**. Permits for the use of groundwater were first required in 1927 for eastern Oregon and in 1955 for western Oregon. Certain small uses of surface and groundwater are exempt from permit requirements; although groundwater users must comply with well construction standards, pay a recording fee, and submit well information as required by the WRD. Oregon law pertaining to water appropriation is found in ORS chapters 537 and 540.

The Oregon Water Resources Commission **(WRC)** is a seven-member body appointed by the Governor subject to confirmation by the state Senate. One member is appointed from each of the five regional river basin management areas, and two at-large members are appointed, one from east of and one from west of the Cascades. The Commission sets water policy for the state and oversees the WRD.

WHAT IS A WATER RIGHT?

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, wildlife, industrial, municipal, recreation, hydropower, and pollution control.

A water right is connected – or "appurtenant" – to the land where it is used. A 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 WRD determines that the modification can be made without injury to other water rights or enlargement of the original right.

In 1987, the legislature added instream water rights as a beneficial use to support instream flows for fish and wildlife, recreation, and pollution abatement. Since passage of the legislation, more than 1,600 instream water rights have been established. Of these instream rights, approximately 500 resulted from converting previously established minimum perennial streamflows. Oregon has more than 320 current in-stream leases, instream transfers, allocations of conserved water, and hydroelectric conversions that restore about 1,800 cubic feet per second **(cfs)** of streamflow.

NEW WATER RIGHTS

New water rights are created through an application to the WRD. Proposed water uses are generally approved if they are consistent with the following criteria:

- Water is available from the source;
- The use will not injure senior water rights;
- The use conforms with applicable basin plans; and
- The use complies with rules of the Water Resources Commission.

Water availability for a new surface right is determined by an 80 percent exceedance factor. This means that water may be appropriated from a water body if, 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 month of the proposed use. For groundwater, the combined appropriations must not exceed the average annual recharge to a groundwater 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, fish life, industrial, and municipal uses.

ADJUDICATION

Adjudication is the process by which pre-1909 vested water rights are quantified and documented through an administrative and judicial procedure. The most recent adjudication was in the Klamath Basin, which began in 1975. The first phase was the review and determination of claims by the WRD, including the hearing of contests to claims and the issuance of proposed orders by administrative law judges. With the WRD's issuance of the Adjudicator's Findings of Fact and Final Order of Determination on March 7, 2013, this phase of the process was complete.

The second phase of the process is the review of the Final Order of Determination by the courts. Adjudication claimants or contestants who dispute WRD's determination of their claims or contests may file exceptions with the Klamath County Circuit Court. The Court then reviews these exceptions and will ultimately issue a water rights decree affirming or modifying the Final Order of Determination. The Department can issue water right certificates in accordance with the decree once it is issued by the court.

Senate Bill 206 (2015) allows "determined claims" – those water rights determined and established in an order known as the Klamath Basin Adjudication Corrected Partial Order of Determination – to be temporarily transferred or leased instream for up to five years. An application may not be approved if the determined claim has been stayed by a court judgment, if the application proposes to move the point of diversion upstream, or if its approval would cause enlargement or injury to another water right claim. Senate Bill 206 expires January 2, 2026.

The 1955 Oregon Groundwater Act required existing water users to register their use in anticipation of a groundwater adjudication. The WRD has completed one such adjudication on the southern coast and has not yet initiated adjudication in the rest of the state.

WATER SUPPLY AND MANAGEMENT

During non-winter months, surface waters in most of Oregon are fully appropriated by existing out-of-stream and instream uses. Groundwater resources are showing signs of overuse and are becoming unstable. In some locations in the state, groundwater aquifers are no longer capable of sustaining additional development. Conflicts between instream and out-of-stream needs, exacerbated by listings of aquatic species under the federal Endangered Species Act, have also become increasingly divisive and expensive to resolve.

In 2009, the legislature enacted House Bill 3369 directing the WRD, in cooperation with the Departments of Environmental Quality and Fish and Wildlife, to develop a state integrated water resources strategy and to review and update the strategy every five years, providing policy and funding recommendations as appropriate. The first strategy was adopted by the WRC in August 2012 and the second – Oregon's 2017 Integrated Water Resources Strategy – was adopted in December 2017. The 2017 strategy recommends that the state conduct local "place-based" water resources planning and invest in the evaluation and implementation of water resources projects. Together these elements are known as the "Water Resources Development Program." This program includes three components enacted by the legislature over the past decade to help address the state's water needs:

Feasibility Studies. In 2008, the legislature enacted Senate Bill 1069, directing the WRD to set up a statewide grant program to help communities pay for feasibility studies for water conservation, reuse, and storage projects. These feasibility studies are required as a first step in the construction of new water supply projects to meet instream and out-of-stream water needs. This Water Conservation, Reuse, and Storage Grant Program was appropriated $2.5 million to award in grant funds in the 2017-2019 biennium.

Water Project Grants and Loans. In 2013, the legislature passed Senate Bill 839 establishing a Water Supply Development Account to provide grants and loans for water resource projects that have economic, environmental, and community benefits. To date, the Commission has awarded 13 grants totaling approximately $15.1 million to a variety of water supply projects. Project funding requests have greatly exceeded available funding in each cycle. In 2013 and 2014, the legislature authorized $14 million in lottery revenue bond funding. In 2016, 37 applications sought nearly $51 million and nine projects were funded for a total of $8.9 million. An additional $15 million was appropriated by the legislature for the 2017-2019 biennium when 32 applications were submitted for a total of $34 million; the Commission awarded funding to the top four projects totaling $6.2 million which left $13.8 million for the 2018-2019 cycle. In 2018, another 19 applications have been submitted requesting nearly $16 million; funding awards will be made in November 2018.

The legislature has also directly appropriated funding to basin studies and projects through the Water Supply Development Account.

Place-Based Planning. In 2015, Senate Bill 266 authorized the WRD to issue grants to support local, place-based, integrated water resource planning to help communities identify solutions to their current and future instream and out-of-stream water needs. The legislature provided $750,000 for grants to support place-

based planning pilots in a select number of areas. In February 2016, four grant awards were approved.

FUTURE WATER AVAILABILITY

Future water supply and demand are central to any discussion about water management in Oregon. In 2015, record-low snowpack and record-high temperatures resulted in drought declarations in 25 of Oregon's 36 counties. As a result, streamflows hit record-lows to near-record lows in many parts of the state, reducing supplies for irrigation and leading some cities to implement water use restrictions. In response to this situation, Governor Brown issued Executive Order 15-09 in July 2015 directing state agencies to prepare for climate change and plan for long-term resilience to drought. The goal stated in the Executive Order is to reduce non-essential water consumption by 15 percent or more on average across all state-owned facilities on or before December 21, 2020. A second progress report on this effort was submitted to the Governor in July 2017.

In December 2015, the WRD released an updated statewide water demand forecast which included estimates of water demand for agriculture, municipal, and industrial uses by 2050. The report anticipates that increases in population and changes in rainfall, snowpack, and growing seasons will likely lead to increased demand from agricultural, commercial, residential, and industrial water users. This could result in Oregon needing an additional 1.3 million acre-feet of water annually, nearly 424 billion gallons, just to meet out-of-stream demands in 2050.

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