

Oregon

WATER RIGHTS FACT SHEET

August 15, 2001

Water Rights System:

Although Oregon's water rights system is based primarily on the doctrine of prior appropriation, remnants of riparian water rights still exist. Oregon can therefore be said to have a dual system of water rights. Riparian rights exist because until the enactment of Oregon's water code in 1909, the state recognized riparian water rights, and a few vestiges of these rights still remain. Water uses that were established prior to 1909, have not been abandoned or forfeited, and are verified and quantified through an adjudication process in the circuit court, are said to be vested rights.

The dominant system in Oregon, however, is prior appropriation or "first in time - first in right". Under Oregon law, all water is publicly owned and users must obtain a permit from the Water Resources Department to use water from any source. The four fundamental provisions of Oregon's water code are:

- * Beneficial purpose without waste - Surface or groundwater may be legally diverted for use only if it is for a beneficial purpose without waste.
- * Priority - The water right priority date determines who gets water in a time of shortage. The more senior the water right, the longer water is available in a time of shortage.
- * Appurtenancy - A water right is attached to the land where use was established. If the land is sold, the water right goes with the land to the new owner.
- * Must be used - Once established, a water right must be used as provided in the water right at least once every five years. With some exceptions established in the law, after five years of non-use, the right is considered forfeited and is subject to cancellation.

Oregon has established basin programs in which all the land area, surface water bodies, aquifers, and tributaries that drain into a major river are managed together. This basin program includes water use "classifications" that describe the types of new water right applications that may be considered by the Water Resources Department. The Water Resources Commission (Commission) has adopted basin programs for all but two of the state's 20 major river basins. Within a basin, action by the state legislature or administrative procedures by the Commission can close an area to new appropriations. These restrictions on new uses from streams and aquifers are adopted to assure sustained supplies for existing water users and to protect important natural resources. Except in the case of "Critical Groundwater Areas" (see below), these restrictions do not affect existing water uses.

Oregon's water laws are contained in Oregon Revised Statutes , Chapters 536 through 541 and can be found at: <http://www.leg.state.or.us/ors/home.html>

Responsible Agency:

Water use in Oregon (both surface and groundwater) is administered by the Water Resources Department which is responsible for implementing Oregon's water policy. This general water policy is set by the seven-member Water Resources Commission which is appointed by the Governor. The Commission also acts as the board of directors for the department.

Application Process:

The development of a new surface or groundwater right in Oregon requires the submission of a permit application to the Water Resources Department (**certain uses are "exempt uses"see Appendix One**). Upon receipt of an application, the Water Resources Department reviews the application and verifies its completeness. Once completion is verified, the application is given a tentative priority date and then reviewed according to statutory criteria. Public notice of the application is then given and a proposed final order is prepared and distributed for public comment. A protest period is then open for the next forty-five days. If a protest is filed, it must be accompanied by a \$200 protest fee. If a protest is filed against the application, the director of the Water Resources Department may or may not hold a hearing before making a final determination. The applicant has the right to protest the proposed final order, in which case the director is required to hold a hearing. Following a hearing, a proposed order is issued by the hearings officer. final orders are issued by the director of the Water Resources Department. An appeal of the final order goes to the Water Resources Commission.

When a Final Order is issued, development of the water must be initiated within one year. Deadlines for completion of the development are further specified on the permit, but generally must be completed within five years. Upon completion of the development (or "proving up" the water use), a final proof survey is submitted to the Water Resources Department. This involves having a certified water rights examiner (CWRE) conduct a survey and prepare a map and claim of beneficial use. Assuming all conditions of the permit have been met, a certificate of water right is granted. The types of applications that can be filed in Oregon can be seen in Appendix Two.

Assuming there are no complications with a water right application it takes a minimum of 190 days to obtain a final order or a water right permit. The time frame to obtain a certificate of water right depends upon the work involved in "proving up" the water use.

Point of Diversion and Change of Use Procedures:

A point of diversion is required for consumptive uses of water, but not when establishing instream flows. Changes in the point of diversion, point of appropriation, place of use, and nature of use can be done, but must have approval from the Water Resources Department. If an applicant wants to change one of these specifications on the permit, a transfer application must be filed with the department. Both temporary and permanent transfers are allowed.

In order to approve a permanent transfer application, the department must determine that the proposed change will not injure other water rights. The public is offered a chance to comment and protest if an existing water right would be injured. Only protests which claim injury to another water right can be accepted. The department may attach conditions to an approval order to eliminate potential injury to other water rights. Once the transfer application is approved, the permittee must submit proof of completion of the change, at which time a new certificate is issued which confirms the modified water right.

Temporary transfers are allowed for a change in the place of use and may not exceed a period of five years. The application for a temporary transfer is the same as for a permanent transfer except that the proof of completion is not as rigorous.

State Recognized Beneficial Uses:

Recognized beneficial uses of water in Oregon include:

Aquatic Life Commercial Domestic Fire Protection Fish Groundwater Recharge Industrial Instream Flow	Irrigation Mining Municipal Pollution Abatement Power Recreation Uses Wildlife
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Groundwater:

Groundwater in Oregon is declared to be part of the public waters of the state and must be appropriated by the application/ permit/ certificate process described above. Due to the basin program, groundwater and surface water are managed conjunctively within basins. Applications for groundwater use are examined for their interference with existing wells as well as surface water claims. The permit process is not required for certain uses of groundwater (see Appendix One).

In order to regulate the use of groundwater (besides the regulation on new appropriations which results from the basin program), the Water Resources Commission may declare certain areas as "Critical Groundwater Areas". The law in Oregon requires that when pumping of groundwater exceeds the long-term natural replenishment of the aquifer, the Water Resources Commission must declare the source a Critical Groundwater Area and restrict water use. The purpose of this designation is to prevent excessive decline in groundwater levels and to stop quality degradation. Within Critical Groundwater Areas, certain users of water have preference over other users, regardless of established water right priority dates. There are currently six Critical Groundwater Areas in Oregon: The Dalles in Wasco County; Cooper Mountain - Bull Mountain southwest of Beaverton and Tigard; Butter Creek; Ordnance, and Stage Gulch.

Water Rights:

A water right in Oregon can be held by any legal entity. In other words, a water right can be held by an individual, group of individuals, organization, corporation, government agency, etc. Although the name on a water right can be any entity, a water right in Oregon is specific to the place of use. The owner of the land to which the water right is attached has the authority to make decisions and modifications concerning the water right.

Water rights in Oregon can be transferred from one owner to another. There are two types of transfers allowed in Oregon: permanent and temporary. The approval process for a transfer application is that same as described above for a change in use or change in point of diversion. The transfer of water rights can occur through the buying and selling of rights. Oregon law states, however, that a profit cannot be made from the sale of a water right; the sale can only recover the costs incurred regarding the operation and sale of the water right. This provision, however, is not strictly enforced.

Water rights in Oregon can be lost through abandonment or forfeiture. Abandonment is voluntary by the owner, where as forfeiture occurs through five consecutive years of non-use. Once a water right has been unused for five or more years, it is subject to cancellation. Cancellation requires a legal proceeding to determine whether or not the period of non-use has occurred. A water right is subject to cancellation even if the property owner begins to use the water again after a period of non-use. This is true even if the current owner did not own the property when use was

discontinued. However, if more than 15 years have passed since the period of non-use, the water right is not subject to cancellation under the law.

Adjudications:

General adjudications in Oregon are used to determine all pre-1909 and federal reserved water rights. The general adjudication of a river basin is initiated by the local circuit court or the director of the Water Resources Department. In order to claim a right during adjudication, a "proof of claim" must be filed with the department. Claims are reviewed and may be contested. The department issues an order of determination, and the circuit court reviews the order and affirms or modifies it. The final judgement by the circuit court is called a decree. The decree is the final determination of all pre-1909 and federal reserved water rights in that river basin. Individual certificates are then issued to water claimants according to the terms of the decree.

Ongoing Adjudications:

Pre-1909 rights have been adjudicated in approximately two-thirds of Oregon. Adjudication proceedings have been completed for most of the major stream systems in eastern and southern Oregon and a few of the larger tributaries to the Willamette River. A major adjudication proceeding involving federal agencies and the Klamath Tribe is underway in the Klamath Basin.

Instream Flows:

Instream flows in Oregon can be acquired through new appropriation or through transfers. Oregon was one of the first western states to recognize instream flow as a beneficial use. In 1915, the legislature prohibited the appropriation of creeks that form waterfalls in the Columbia River Gorge. In 1955, they expanded their instream flow program by adopting minimum stream flows to support aquatic life, minimize pollution, and maintain recreational opportunities. These minimum flows were administrative rules and were not full water rights. In 1983, amendments were adopted that authorized the Department of Fish and Wildlife, the Department of Environmental Quality, and the Department of Parks and Recreation to apply for minimum instream flow rights. In 1987, and again in 1993, further amendments were made to the water code strengthening instream flow rights, allowing for transfers, and allowing for the use of water markets to acquire instream flow rights.

Currently, only the Departments of Fish and Wildlife, Environmental Quality, and Parks and Recreation may apply for new appropriations for water for instream flow. Although these Departments apply for instream flow rights, the rights are not issued to the agencies, but are held in trust by the Water Resources Department. Instream flow rights can also be established through water right transfers (either permanent or temporary). Oregon water law allows any entity (public or private) to purchase, lease, or receive as a gift any water right for instream use. The converted rights, however, must be held in trust by the Water Resources Department.

Recognized Beneficial Uses for Instream Flow:

Instream flow rights must be held in trust by the Water Resources Department for "public use". Public uses include recreation, conservation, fish and wildlife maintenance and habitat, other ecological values, pollution abatement, and navigation.

Holdership of Instream Flow Water Rights:

The Oregon Water Resources Department is the only entity that may hold instream flow rights. The Departments of Fish and Wildlife, Environmental Quality, and Parks and Recreation can request new appropriations of instream flow rights. Individuals and other entities may acquire existing rights and take responsibility for changing the use to instream flow, but then they must turn the right over to the department to be held in trust.

Quantification Requirements and Procedures:

In Oregon, the amount of water reserved for an instream water right cannot exceed the amount needed to provide increased public benefits. When natural stream flows are the source for meeting instream water rights, the amount allowed for the water right cannot exceed the estimated average natural flow. Applications to establish instream water rights must include the requested amount by month and year in cubic feet per second or acre-feet, a description of the technical data, and methods used to determine the requested amounts.

All the required procedures for establishing an instream flow right can be found in Oregon Administrative Rules, Chapter 690, Division 77.

Federal Reserved Water Rights:

Adjudication proceedings are used to determine the water rights for federal reservations of land including Indian reservations. Legislation passed in 1987 and amended in 1993, allows the director of the department to act on behalf of the State of Oregon to negotiate settlements for Federal reserved water rights. These negotiations allow the director to include claimants, state and federal agencies, other water users, and public interest groups in discussions to resolve and quantify the use of water on federal and Indian reservations.

BLM Specific Information:

The requirement under Oregon state law that a certified water rights examiner (CWRE) conduct a survey and prepare a map and claim of beneficial use has been somewhat problematic for the BLM. The BLM has a large number of water rights claims and therefore has a backlog of water rights filings. It has been a priority to have districts eliminate their backlog, but funding has often hindered this. There are several employees in the Oregon State Office Cadastral Survey branch who are CWREs. In the past, the State Office Soil, Water and Air program provided funding to the Cadastral Survey branch. This funding covered the expenses of having these BLM CWREs travel to the districts to assist them with their water rights workload. Unfortunately, budget restrictions have reduced the amount of funding available. The need for CWREs now exceeds what the State Office can provide and thus the remaining CWRE need is passed to the district. Some districts have invested in training their own CWREs. Others have not, and these districts must contract with a local engineering firm to obtain CWRE services. In the latter case, the expense can be high which means that fewer water rights applications get filed.

Water applicants in Oregon must have the necessary right-of-way approval from the BLM prior to approval by the State. The applicant must provide proof that an easement or other authorization exists for a water right application on land that is not owned by the applicant.

The BLM is required to pay filing fees, the amounts for which depend on the type of application.

When the BLM seeks to obtain a water right for use on BLM land, the applicant must first determine if the proposed use qualifies as a federal reserved right. If it qualifies as a federal reserved right, the applicant should determine if the purpose of the reservation would be best served through the assertion of the federal reserved right. If the assertion is the best way to obtain a right, the applicant must follow a certain set of requirements depending upon whether or not the area has been adjudicated. If a federal reserved right cannot be asserted, or if the purpose would be more effectively served through the state application process, the applicant must follow a different set of requirements. The decision criteria and list of requirements for obtaining water for BLM purposes in Oregon are outlined in Appendix Five.

Adjudications in Oregon have not given the the BLM the opportunity to assert federal reserved water rights for wilderness areas. Another situation facing the BLM is that many of the basins in

Oregon have already been adjudicated for pre-1909 water rights (back in the 60s-70s). In those adjudications, federal reserved water rights were not addressed. Therefore, federal reserved water rights exist in these basins that have not been quantified and asserted and they will not be unless the state initiates a new adjudication or the federal government brings suit against the state to have its claims quantified. The BLM is currently participating in the Klamath adjudication in Oregon.

To date, the BLM has worked well with the state of Oregon. However, recent tensions in the Upper Klamath Basin over water issues (a partial denial of the BLM's instream flow claim for the Upper Klamath River in the Klamath Basin Adjudication) and a recent bill in the Oregon Legislature (HB 3343) could signal change. House Bill (HB) 3343 attempted to prohibit the Oregon Water Resources Department from granting a water right or other control over waters of the state to the federal government, United Nations or other entity acting on behalf of the federal government or the United Nations. This prohibition would retroactively affect applications submitted by the BLM and other Federal agencies that have not received a permit from the state before the effective date of the measure. The Vale District would be particularly affected, as it has hundreds of such applications pending permit. The bill was referred to the House Water and Environment Committee on March 13, 2001. Public hearings were held March 16, 2001 and May 18, 2001. The bill, which was introduced at the request of the Oregon Cattlemen's Association, died in committee. Another potential issue surrounds the measurement of water use and water use reporting. HB 3623, recently introduced, would have required all water users to measure the amount of water withdrawn or stored. Oregon water law currently requires that annual water use reports be submitted for all reservoirs and large dams (those over 9.2 acre feet or over 10 feet in height). These are to be monitored monthly, and the use is to be reported by month for the year. The current approach being used by the BLM is to submit this type of information to the Water Resources Department as a matter of comity. Districts vary in their adherence to this requirement; some only submit a blank water use form. The BLM has thousands of water developments on the public lands in Oregon; therefore, the cost of installing measuring devices and recording measurements would be prohibitive. This bill did not pass this legislative session. If it had, the Oregon State Office BLM would likely have sought to obtain a waiver of this requirement or would have consulted with legal counsel about having to submit this information.

Official Contact:

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<http://www.wrd.state.or.us>

Appendix One: Permit Application "Exempt Uses"

Uses of Surface Water that do not Require a Permit

1. Natural Springs - A landowner's use of a spring which, under natural conditions, does not form a natural channel and flow off the property where it originates at any time of the year.
2. Stockwatering - Where stock drink directly from a surface water source and there is no diversion or other modification to the source. Also, use of water for stockwatering from a permitted reservoir to a tank or trough, and under certain conditions, use of water piped from a surface source to an off-stream livestock watering tank or trough.
3. Salmon - Egg incubation projects under the Salmon and Trout Enhancement Program (STEP) are exempt. Also, water used for fish screens, fishways, and bypass structures.

4. Fire Control - The withdraw of water for use in, or training of, emergency fire fighting.
5. Forest Management - Certain activities such as slash burning and mixing pesticides. To be eligible, a user must notify the department and the Oregon Department of Fish and Wildlife and must comply with any restrictions imposed by the department relating to the source of water that may be used.
6. Land Management Practices - Where water use is not the primary intended activity.
7. Rainwater - Collection and use of rainwater from an impervious surface (like parking lot or a building's roof).

Uses of Groundwater that do not Require a Permit

1. Stockwatering
2. Lawn watering or noncommercial gardening of less than one-half acre
3. Limited school ground uses
4. Single or group domestic uses not exceeding 15,000 gallons
5. Down-hole hear exchanges
6. Single industrial or commercial uses not exceeding 5000 gallons per day

Appendix Two: Types of Applications

Water Right Application Forms:

- * Application for Surface Water Permits
- * Application for Ground Water Permits
- * Application to Store Water

Supplemental Application Forms:

- * Land Use Form
- * Irrigation (Form I)
- * Commercial/Industrial (Form Q)
- * Mining Use (Form R)
- * Municipal/Quasi-Municipal Water Use (Form M)
- * Reclaimed Water Use Registration Form
- * Water Right Transfer Application

Other Forms:

- * Application for Allocation of Conserved Water
- * Instream Lease Agreement
- * Application for Limited Water Use License