

## Prevent a flood of project surprises

Determine water needs early in the development process to avoid possible pitfalls later



### LEGAL EASE

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How does water law figure into development planning? In my 34 years as a water and environmental lawyer involved in developments large and small, in urban and rural settings, water supply concerns are often after-

thoughts. However, the time to consider water supply issues is during the early planning stage, because lead times to work through potential water problems can be significant. If water rights are part of the deal and important to the development, they can be verified as valid and intact through a water rights audit.

For example, I have been involved in high-tech fabrication plant projects where unaddressed water questions derailed the project or caused a lot of last-minute and expensive scurrying. Golf course and resort developments obviously require water, but I have seen assumptions about potential sources proved false. No developer or lender likes surprises that slow the process or add cost, and such hurdles can be avoided with attention at the front end.

Oregon land-use law requires local governments to adopt comprehensive plans that identify lands available for development – and the infrastructure necessary to support development – over a 20-year planning horizon. One of the key elements of needed infrastructure is an adequate water supply. Municipal water providers are charged with anticipating possible growth to ensure the existence of sufficient water, whether for increased commercial and residential densities or new industry.

It is no accident that Hillsboro has attracted major high-tech development, because it had land and a plentiful supply of high-quality water. Developers with projects within an urban growth boundary should verify there is an adequate, secure and reliable water supply system to serve the new development.

Land-use and water-resource laws are not neatly integrated with each other, which could lead to conflict between public expectations and sustainable development. Concepts of comprehensive local land-use planning are relatively recent, and some people laud Oregon's land-use planning system as particularly progressive. However, our water law is a 19th century construct not designed with large urban populations and industrial development in mind.

Water law in Oregon, as in other western states, is not based on sharing among riparian owners. That is the law in England and the United States east of the Mississippi River, where water is plentiful. In the arid West, different rules apply. The law of prior appropriation came to define how scarce water would be allocated. The first party to take physical control of water from a stream or aquifer and then put it to beneficial use is first in line and may exclude later comers. This rule often is referred to as

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“first in time, first in right.”

Water rights are protectable real property interests that continue in perpetuity so long as the water is put to beneficial use. They run with the land, but may be separated from the land through an administrative process. Water rights differ from land rights in that the right is for use, not possession; the water belongs to the people of Oregon, but rights to its use may be obtained. Five years of non-use, however, may lead to forfeiture of the right.

One result of this system is that the oldest water rights in Oregon are held by agricultural interests, leaving limited options for growing communities to meet water demand. Another is that the system encourages making maximum use of the water so as to ensure the right is preserved.

In Oregon, virtually all surface water has been appropriated, and new water rights are hard to come by. The same is true for ground water in many parts of the state. A major complexity to new water supply development is the effect on fish. Endangered species occupy most Oregon waterways, which by law must be protected by maintaining sufficient flows and good water quality. In addition, many streams are subject to “instream” water rights held in trust by the state for fish habitat, recreation and water quality.

The scarcity of new water rights places a premium on market-based solutions. Water rights may be purchased and the use transferred to a new purpose, place of use and point of diversion through an administrative process. Most municipal water providers are continuously looking to secure adequate supplies from alternate sources, and if someone has a project within the municipal service area, it is almost always better to work directly with the city or water district.

If municipal water is not available, then the potential for acquiring old agricultural water rights should be explored. Another option is treated wastewater, which is widely used to irrigate landscaping and amenities.

Water supply problems are almost always solvable. They just need to be addressed early in the development process.

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