

Oregon Water Rights Basics

BY RICHARD M. GLICK

Securing a safe and reliable water supply is a priority concern for every Oregon community. Most cities in Oregon operate their own water systems, while others are served by various forms of water districts or contracts with other cities. Municipal and industrial water use constitutes just a fraction of the total amount of water withdrawn from streams or pumped from aquifers in comparison to irrigated agriculture, but efforts to acquire or expand municipal water supplies attract a lot of attention and sometimes controversy. The availability of new water rights is shrinking, while regulatory requirements expand.

Oregon water law, as in other Western states, follows the rule of Prior Appropriation, often described as “first in time is first in right.” Prior to enactment of the state’s water code in 1909, the common law was that whoever first diverts water out of a stream for a beneficial use can prevent later comers from interfering with that use. That is, the prior appropriator has a legal right to withdraw the full amount used under the original claim, even if it means junior appropriators are denied water. There is no sharing of shortages under the Wild West rule of prior appropriation.

WATER RIGHTS ADMINISTRATIVE PROCESS

New water rights follow a three-step process. First, an application is filed with the Oregon Water Resources Department (OWRD), and the date of the application establishes the priority date. That’s important because the entire water right process can take considerable time to complete. Second, if the OWRD finds that water is available for appropriation, and withdrawal would not “impair or be detrimental to the public interest,” then it issues a permit. The permit allows development of water works and initial use. Third, when construction is complete, the permittee files a Claim of Beneficial Use with OWRD that documents how the water is being used, which may differ from the rate of diversion or volume of water specified in the permit. The OWRD then issues a certificate, which is conclusive evidence of a fully vested water right.

As long as the certificate holder continues to use the water in accordance with the certificate, the right continues in perpetuity. Generally, certificated water rights may be forfeited for five consecutive years of non-use. However, municipal water rights are the exception and cannot be lost for non-use.

WATER RIGHTS ADMINISTRATIVE PROCESS

1. Application filed with OWRD
2. If water is available, OWRD issues a permit
3. Once construction is complete, a Claim of Beneficial Use is filed with OWRD by the permittee

That’s straightforward enough, what could possibly go wrong? Water rights permitting is a very public process. When the OWRD issues a proposed final order to issue a permit, the public has the right to file a protest, which could set off a trial-like “contested case” hearing process. For example, a protestant may claim that the new appropriation would deprive fish of needed flows or interfere with other water rights. Any dissatisfied party to the contested case is entitled to review by the Oregon Court of Appeals. From there, a party may petition the Oregon Supreme Court, but the court can decline to hear the case.

WATER RIGHT TRANSFERS

As the water system is developed, sometimes the permit holder finds that a change in permit conditions, such as the point of diversion, is necessary. That can be accomplished through a permit amendment. After the certificate is issued, however, the process is a bit more complicated. In that case, a “transfer” application must be filed, and the test is whether other water right holders may be “injured” by the change. An example is a change in point of diversion higher up in the watershed, which could mean withdrawals of water above someone else’s diversion. Like proposed final orders for permits, proposed transfers are also subject to protest and hearings.

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Water Rights

MUNICIPAL EXTENSIONS OF TIME

The time allowed for full development of municipal water rights has become a contentious issue. Generally, a new permit will include a date to commence and complete construction, usually within the first year. That date can be extended for five years for good cause. The problem is that cities must plan for long-term growth. The goal of most cities is to lock in a supply that will meet anticipated demand decades down the road. A city would then develop a system in increments when it was confident the demand would be there, along with the ratepayers to carry the debt service. This reality has created tension between the legal requirement of prompt development and responsible municipal planning.

For decades, the OWRD had simply issued successive five-year municipal extensions to avoid this problem. That practice was disallowed by the courts in 2004, and in 2005 the Legislature enacted special laws pertaining to municipal water right extensions. Under that statute, new municipal water permits would extend the initial development period to 20 years, with the possibility of additional extensions of time. Following a 2013 court decision, water right permits that have not been fully developed must go through a special process that includes the potential for limits on withdrawals under the permit to protect fish flows.

ALTERNATIVE APPROACHES TO WATER SUPPLIES

Acquiring new community water supplies is a challenge calling for creative solutions. Most Oregon streams are over-appropriated, meaning that there is no water available for future appropriations. Even where water is available, conditions imposed by the OWRD in new permits to protect fish flows can result in curtailment during a significant part of the year. Also, such water rights would be the junior-most in the stream and subject to senior rights.

An alternative used by some municipalities is to purchase existing water rights from farmers or other cities. Others pay farmers to improve irrigation efficiency, for example to install sprinklers to replace flood irrigation, or pipe to replace open canals. No doubt other innovative approaches to municipal water supply will emerge to meet the challenge.

There is no new water in the world, and competition for this scarce resource will only increase, especially as the effects of climate change are better understood. The League of Oregon Cities, working with other stakeholders, is working hard to ensure that the Legislature and the courts understand the imperative and support public water supplies. ■

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Resources for City Officials

The League has a large online library of publications, guides, FAQs and models available to assist public officials in carrying out their duties. All of these are available at www.orcities.org/publications/library.

- Guide to Executive Sessions
- Guide to Incorporation
- Guide to Local Government Regulation of Firearms in Oregon
- Guide to Local Regulation of Marijuana in Oregon
- Guide to Recruiting a City Administrator
- Guide to Recruiting a City Attorney
- Legal Guide to Collecting Transient Lodging Taxes in Oregon
- Telecommunications Toolkit
- Model Charter for Cities
- Model Department of Revenue Marijuana Tax Collection Agreement
- Model Policy for Public Contracting & Purchasing
- Model Resolution on Trade Promotion, Fact-Finding Missions & Economic Development Activities
- Model Rules of Procedure for Council Meetings
- Legal Guide to Handling Disruptive People in Public Places
- Measures 5 & 50: A Primer
- The Origins, Evolution & Future of Municipal Home Rule in Oregon
- Understanding Oregon's Unfunded Mandate Law
- FAQ on Emergency Procurements
- FAQ on Garrity Warnings
- FAQ on Initiatives & Referendums
- FAQ on Loudermill Rights
- FAQ on Notice Requirements for Public Meetings
- FAQ on Oaths of Office
- FAQ on Public Record Fees
- FAQ on President's Immigration Orders
- FAQ on Quasi-Judicial vs. Legislative Hearings
- FAQ on Restrictions on Political Campaigning by Public Employees
- FAQ on Right-of-Way Vacations
- FAQ on Surplus Property
- 2017 Legislative Bill Summary