

# Recent Developments in Water Rights Administration

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DEFINING SUCCESS TOGETHER



## Introduction

- Growing Communities Doctrine
  - Law of prior appropriation requires putting water to beneficial use ASAP and then using continuously
  - Muni water providers have special needs—must plan for future population growth
    - Apply for more than needed now to lock up long-term water supply
    - Develop system as demand and rate-payer base support





## Introduction

- Expressions of Growing Communities Doctrine
  - No forfeiture for non-use
  - Latitude in showing diligence and good cause for extensions
  - Oregon extensions legislation (2005)
  - Washington Municipal Water Law (2003)
- Oregon cases cast shadow
- Washington case reaffirming



## Water Rights Extensions

- 1987 DOJ opinion on extensions, rulemakings put hold on extension requests
- Coos Bay – North Bend Water Board case
- HB 3038 (2005)
  - Cities are different from other water users
  - New extensions up to 20 years + extensions
  - Earlier extensions grandfathered
  - Diligence/good cause clarified to include water planning, not actual construction





## Water Rights Extensions

- HB 3038 (cont.)
  - Water use beyond previous maximum upon approval of Water Management & Conservation Plan
  - Fish persistence condition—first extension only
    - “undeveloped portion of the permit is conditioned”
    - Based on “existing data and upon the advice” of ODFW
  - Codified as ORS 537.230





## Cottage Grove Extension

- *WaterWatch v. WRD*
  - Ct. of App., 2013; rev. improvidently granted, aff'd. by S. Ct. 2014
- While WRD developed policy, munis continued development
- Measure “undeveloped portion” from date new extension granted, or previous extension?
- Does certificate moot case?



## Cottage Grove Extension

- Original permit 1974, diversion 6.2 cfs by 1980
- Extensions granted every 5 years until 1999
  - Moratorium on extensions pending WRD policy
  - Most munis like CG continued development
- Treatment plant completed 2007, diversion of full 6.2 cfs by 2008
- Extension granted under HB 3038
  - WRD found no “undeveloped portion,” so no “fish persistence” conditions
  - WRD issued certificate



## Cottage Grove Extension

- Court of Appeals held “undeveloped portion” relates back to last extension—1999
  - Vacated certificate as based on faulty extension
  - Remanded back to WRD
- Broad implications
  - Water rights devalued as may be subject to curtailment for fish
  - May add unbudgeted cost to water development





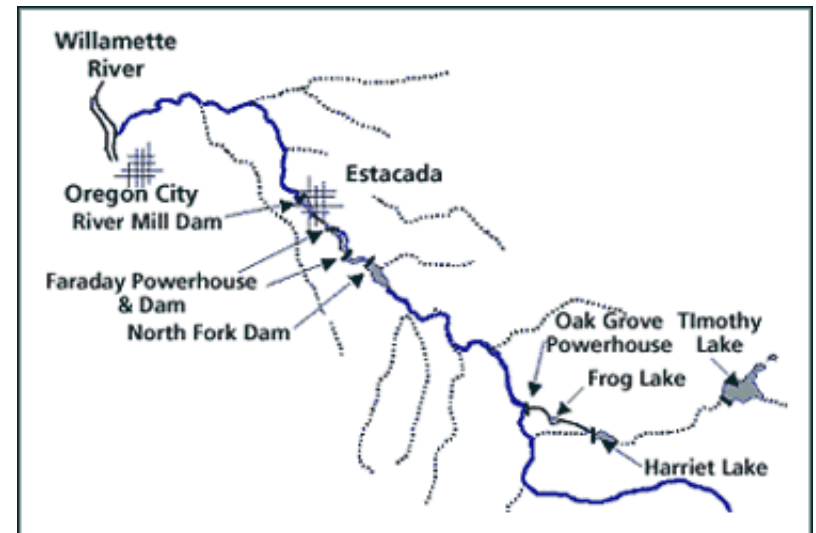
## Clackamas Extension





## Clackamas Extensions

- *WaterWatch v. WRD*  
(Ct. of App. 2014)
  - Group of water providers on Clackamas River
  - Fish persistence case, but not about undeveloped portion
  - Issue: whether WRD conditions adequate to maintain fish persistence

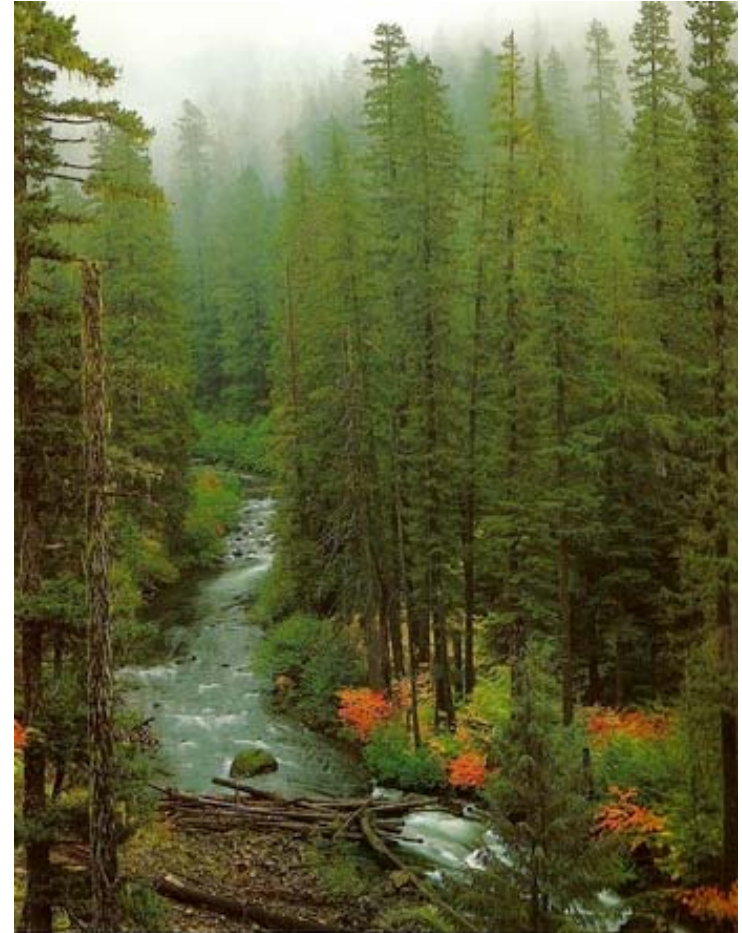






## Clackamas Extensions

- WRD imposed fish persistence conditions:
  - Minimum flows
  - Annual meetings to evaluate whether flow augmentation needed from Timothy Lake
  - Curtailment between Sept and June if needed to maintain flows





## Clackamas Extensions

- Court held WRD failed to connect dots
  - WRD, on advice of ODFW, set long-term minimum flows, but ok if not met in short-term
  - How long is “short-term”?
  - How will long-term flow needs be met?
  - Condition for release of stored water not related to use of undeveloped portion
  - Remanded back to WRD



## Clackamas Extensions

- Implications narrower than Cottage Grove
  - Record extensive, WRD and ODFW need only explain rationale better in new condition
  - Court rejected all other WW arguments
    - Court affirmed fish persistence means long-term viability of populations, not short-term effects on habitat or individuals
    - Affirmed WRD *must* to base its findings on ODFW advice
    - No procedural error for ALJ to rely on ODFW advice and not look behind



*Cornelius v. WSU*





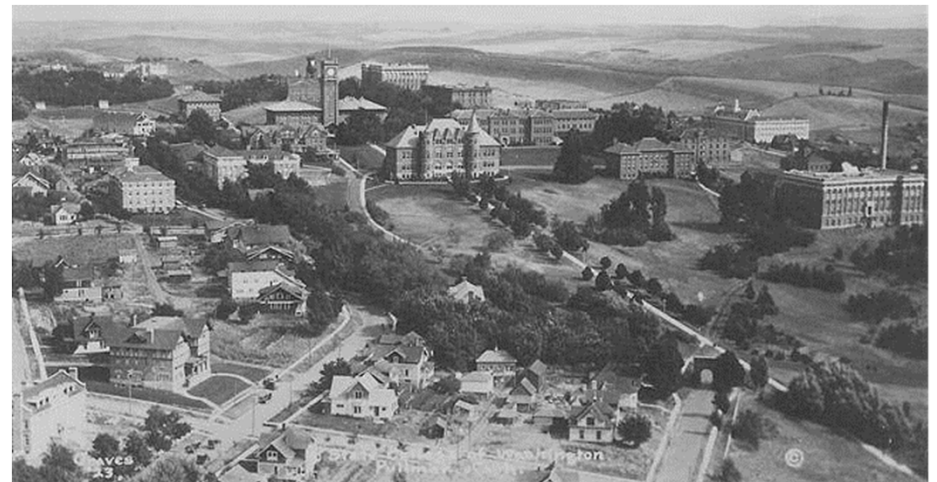
## *Cornelius v. WSU*

- Wash. Supreme Court (2015)
- WSU held several groundwater certificates for Pullman Campus
  - Some for “domestic,” some “municipal” purposes, no functional difference
  - Reduced number of wells used, but same amount used
  - Some “domestic” wells not used,
  - Applied to amend certificates to reflect actual points of appropriation



## *Cornelius v. WSU*

- Junior water right holder argued that certificates designated “domestic” use subject to relinquishment for non-use
- Court refused to put form before substance
  - 2003 MWL defined “municipal water supply purposes”
  - Clear WSU met definition, makes no difference what certificate says







## *Cornelius v. WSU*

- Court reaffirmed constitutionality of 2003 Municipal Water Law
  - Muni rights issued before 9/9/03 in good standing
  - Ecology policy upheld to not require year-to-year showing of actual use before muni extensions
  - Recognizes that muni water rights not subject to loss for non-use



## Conclusion

- Growing Communities Doctrine calls for flexibility for muni water providers
- Washington legislature helped with a clear definition of muni purposes, irrespective of type of public water utility
  - Supreme Court gave retroactive effect
- Better clarity needed for Oregon munis in extensions context
  - Court of Appeals retroactive application of fish persistence conditions harmful



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