

The Law of the River: Integrating Law and Policy into Hydrologic Modeling Efforts in the Willamette River Basin

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A legal and policy framework exists for every river basin in the United States. Because of the way that water law and policy have evolved in the US, this framework involves a matrix of state and federal law that govern the choices policy makers, end users and agencies make. This “law of the river” provides the context in which decisions are made and not made. It also draws the boundaries within which decision makers believe they can operate. As a result, the “law of the river” can be interpreted as immovable or constant in the dynamics of a river basin and the policy choices that are faced. Often decision makers and stake holders claims definitiveness in terms of what the law can and cannot accomplish. The legal questions are often presented as well settled and resolved.

The “law of the river” however, is as dynamic and active as the river itself whether through the existing discretionary authority that the law has provided to those who are charged with implementing the law or ultimately through the democracy's ability to change law based on the desires and needs of the public.

This paper explore the fundamental structure of state and federal law as it relates to the Willamette River Basin in Oregon, but it is a familiar story in many basins in the United States. Part I describes the interdisciplinary research project that seeks to integrate law and policy change into a set of future hydrologic scenarios on a 100 year time scale for the Willamette Basin – the “Willamette Water 2100” project. Part II builds the framework for the law, both state and federal, and focuses on the particular pieces of those legal structures that are the most influential drivers of actual water use and management in the Willamette River. Part III identifies opportunities within this legal framework to affect future scenarios on the use and management of the Willamette River resource. In addition, this part explores the inherent discretion and flexibility within existing law to help frame the conversation about what kinds of reasonable future scenarios can be explored for the basin. Part IV provides a set of recommendations for future policy reform in the Willamette River Basin

Part I – A New Kind of Hydrologic Model – The Willamette Water 2100 Project

[Description of WW 2100 Project]

Part II – The Law of the Willamette River – Integrating State and Federal Law

Understanding the law of any river in the United State today requires one to grapple with the relationship between state and federal law. Water law is a creature of state law. At its most fundamental, water is a public resource and all water within the State of Oregon is managed and owned by the State. In addition, water is subject to principles of the public trust doctrine. In order to carry out its water management duties and its obligations to care for this public resource, each western state has adopted the system of prior appropriation to allocate rights to citizens to use surface waters. In addition, the vast majority of states, Oregon included, have adopted a regulatory framework, consistent with the Clean Water Act, to address water quality. The prior appropriation system of water rights is well known to those in the West based on its first-in-time first in right priority system and its principles of use-or-lose. This allocation model, as explained in more detail below forms the backbone of state law that governs the Willamette River Basin, as well as all river basins in Oregon and throughout the western US.

State law does not capture the full legal landscape for the Willamette River, or most rivers in the western US today. While state law is the appropriate starting point for understanding the law the river, the overlay and interrelationships with federal law must be included. In particular, for the Willamette River basin, the role of the Army Corps of Engineers and the creation of the Willamette River Project by Congress loom large in terms of the on the ground realities for management of the Willamette River system. In addition to the authority and discretion exercised by the Army Corps, the role of the Endangered Species Act sets much of the levels for non-consumptive use in the basin.

Congressional Authorization of the Willamette Project

After a series of devastating floods in the first part of the 20th century, Congress legislatively recognized that because floods upset the country's orderly processes, cause loss of life and property, and impair channels of commerce between the States, flood control is a proper activity of the Federal Government with cooperation of the States.¹ Congress made it the job of the Secretary of War and the Chief of Engineers to investigate and improve the nation's waterways in regards to flood control and "allied purposes."²

However, beyond recognizing flood control as a federal concern and appointing the officials from the War Department to investigate the situation, Congress didn't provide much instruction as to how to proceed. Instead it instructed the Secretary of War and Chief of Engineers to carry out their tasks under the following guideline; improve waterways for flood-control purposes in instances where the benefits will outweigh the costs and people's safety and security are at risk.³ Other than that, it was up to the War Department to figure out how best to address and manage flood risks in the nation's many susceptible areas. Any plans were to then be submitted to Congress for approval.

¹ Flood Control Act of 1936, 74th Congress, Sess. II, Chs. 651, 688, Sect. 1 (June 22, 1936).

² *Id.* at Sec. 2.

³ Flood Control Act of 1936, 74th Congress, Sess. II, Chs. 651, 688, Sect. 1 (June 22, 1936).

One of the waterways investigated by the Army Corps of Engineers was the Willamette River Basin. In the 1930s, the Corps produced a report on the basin's susceptibility to flooding. In this report the Corps included suggested plans for structurally safeguard the basin from future flooding. Upon review, Congress authorized the Corp's plans to safeguard the Willamette River Basin.⁴ First, in 1936, Congress authorized bank protection works at several localities in the Willamette Basin.⁵ Then in 1938, it approved the Corps' general comprehensive plan for flood control and navigation in the Willamette Basin, which consisted primarily of a plan to build a system of reservoirs along the tributaries of the Willamette River.⁶ Over the next several decades, the Army Corps built a series of thirteen dams on tributaries of the Willamette River as part of the Willamette Project.

In 1944, Congress made it the Secretary of War's duty to prescribe regulations for "the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes," and stated that "the operation of any such project shall be in accordance with such regulations."⁷ In other words, Congress gave the Secretary of War not only the power, but the duty, to create the rules and regulations by which federal flood-control and navigation projects must be operated. Again, this represents a broad grant of authority.

The Corps itself, states that it has "a high degree of operational flexibility in determining how to meet the authorized operating purposes." [While Congress originally authorized construction of the Willamette Project to protect against flooding and support navigation, today the Project is also authorized for irrigation, water quality, fish and wildlife enhancement, and recreation purposes.⁸]

In the Corps' Standard Operating Plan for the Willamette Project, the Corps states that, "In general, NWP has the responsibility for Willamette Basin system wide flood control, developing daily schedules, and coordinating requests for special operations with other agencies.

⁴ See US Army Corps of Engineers, *Community Planning Toolbox, WRDAs and Related Laws*, <http://planning.usace.army.mil/toolbox/guidance.cfm?Option=WRDALaw&Side=No&Type=River%20and%20Harbor%20Acts> (last visited 10.7.2013)

⁵ Flood Control Act of 1936, 74th Congress, Sess. II, Chs. 651, 688, Sect. 5 (June 22, 1936).

"...the following works of improvement, for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized to be prosecuted... under the discretion of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports and records hereinafter designated... WILLAMETTE RIVER. Construction of bank-protection works, with channel clearing on the Willamette River... in Oregon, for the reduction of flood heights and to prevent loss of land by erosion; special report in Office of the Chief of Engineers; estimated construction cost, \$2,430,000."

⁶ Flood Control Act of 1938, House Doc. 544, 75th Congress, Sess. III, Ch. 795, Sect. 2.

⁷ Flood Control Act of 1944, Public Law 534, 78th Congress, Chapter 665, 2nd Session, H.R. 4485, sect. 7. Codified at 33 USCA §709.

⁸ US Army Corps of Engineers – Portland District, *Willamette Valley – Operating the Reservoirs, Introducing the Rule Curve*, http://www.nwp.usace.army.mil/Portals/24/docs/pubs/WV_water_mgmt_FS_2011a.pdf, (last viewed 10.7.2013).

The operators are responsible for local flood control, meeting project operating criteria, schedule implementation, project emergencies and forwarding requests to NWP for special operations.”⁹

One such rule is the “rule curve.” The rule curve indicates the maximum elevation to which the Corps can fill a reservoir during various times during the year, with the exception of real-time flood operations.¹⁰ Congress neither created the rule curve nor instructed the Corps to operate by it. The rule curve is created by the Army Corps of Engineers and can be amended by the Corps without Congressional approval.

However, it should be noted that 33 U.S.C.A. 701b-8 states that, “[n]o project or any modification not authorized, of a project for flood control or rivers and harbors, shall be authorized by the Congress unless a report for such project or modification has been previously submitted by the Chief of Engineers, United States Army, in conformity with existing law.” While it is uncertain whether the amending of a rule curve requires a report to Congress for approval, a history of Congressional deference to the Corps in matters concerning flood control would suggest that obtaining Congressional approval would not be impossible. Thus, statements by the Army Corps of Engineers stating that the Corps does not have the authority to change the rule curve are likely either over exaggerated or wholly inaccurate.

In sum, Congress has granted the Army Corps of Engineers broad authority in how it investigates, constructs, and operates flood control projects, including the Willamette Project. Amending internally created rules such as the rule curve likely do not require Congressional approval. The Corps could likely make such changes if it so desired.

Endangered Species Act

The Endangered Species Act (“the ESA”) was enacted in 1973, offering the nation a federal program “whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”¹¹ Congress would accomplish these goals through “a comprehensive suit of affirmative mandates, strict prohibitions, strong recommendations, and limited exception.”¹² Such robust language reflects what the United States Supreme Court pinpointed as the ESA’s clear purpose: “to halt and reverse the trend toward species extinction, whatever the cost.”¹³

⁹ US Army Corps of Engineers – Portland District, *Willamette Basin Guide, Standard Operating Procedure (SOP) for Reservoir Control Center*.

¹⁰ US Army Corps of Engineers – Portland District, *Willamette Valley – Operating the Reservoirs, Introducing the Rule Curve*, http://www.nwp.usace.army.mil/Portals/24/docs/pubs/WV_water_mgmt_FS_2011a.pdf, (last viewed 10.7.2013).

¹¹ 16 U.S.C. § 1531(b) (2006).

¹² TONY A. SULLINS, *THE ENDANGERED SPECIES ACT 2* (Basic Practice Series, Am. Bar Ass’n, Section of Environment, Energy, & Res. 2001).

¹³ Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

The ESA has four major parts. Section 4 addresses which species and habitat the ESA protects.¹⁴ Section 9 prohibits activities that would affect listed species and habitats.¹⁵ Section 10 creates a permit system that allows for exceptions to the “take” prohibitions.¹⁶ Finally, Section 7 details how the federal government must conduct itself so as to advance the ESA’s conservation goals.¹⁷ The ESA also includes provisions that encourage federal-state cooperation and allow private citizens to aid the law’s purpose.

I. SECTION 4 – LISTING A SPECIES AS ENDANGERED OR THREATENED

Section 4 explains how species become listed as endangered or threatened under the ESA.¹⁸ Listing decision making is delegated to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (“the Service(s)").¹⁹ These decisions are made using the best scientific and commercial data available.²⁰ Commercial data is limited to details about the trade in a candidate species; otherwise, listings are not based on economic concerns.²¹ When listing a species as endangered or threatened, the Services generally must produce recovery plans for the species and report to Congress about that species’ progress toward recovery.²²

Besides listing species as endangered or threatened, the ESA seeks for listed species’ habitat to be protected.²³ Critical habitat is also designated according to the best available scientific and commercial data, but may also consider economic factors.²⁴ Critical habitat is not necessarily designated when a species is listed, but may be designated up to one year afterwards.²⁵ When considering an area as critical habitat, the Services must give special thought to the species’ essential needs, such as spawning sites, feeding sites, and water quality and quantity.²⁶

While Section 4 requires the Services to identify species for listing and territory for critical habitat, the ESA also authorizes private citizen to participate. Any interested person may petition the secretaries to list a species or designate critical habitat.²⁷

II. SECTION 9 – PROHIBITION OF TAKE

¹⁴ See § 1533.

¹⁵ See § 1538.

¹⁶ See § 1539.

¹⁷ See § 1536.

¹⁸ § 1533(a).

¹⁹ See, e.g., § 1533(a)(1) & (2); 50 C.F.R. § 402.01.

²⁰ 16 U.S.C. § 1533(b)(1)(A).

²¹ See H.R. Rep. No. 97-567, reprinted in 1982 U.S.C.C.A.N. 2807, 2820; H.R. Conf. Rep. No. 97-835, reprinted in 1982 U.S.C.C.A.N. 2860, 2861.

²² § 1533(f)(1) & (3).

²³ §§ 1532(5)(A); 1533(a)(3)(A).

²⁴ § 1533(b)(2); H.R. Rep. No. 97-567, reprinted in 1982 U.S.C.C.A.N. 2807, 2812.

²⁵ § 1533(b)(6)(C)(ii).

²⁶ 50 C.F.R. § 424.12(b).

²⁷ 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a) & (b).

Once listed, Section 9 rigorously protects a species against detrimental activities. Indeed, “[i]f the ESA is the ‘pit bull’ of environmental regulation, then Section 9 of the ESA is that pit bull’s longest and sharpest teeth.”²⁸ Such teeth are aimed at a broad range of activities that would “take” a listed species, like killing, hunting, and collecting a listed species.²⁹ Significantly disturbing a listed species’ natural behaviors, such as breeding, feeding, and sheltering, also qualifies as take.³⁰ This would include activities that are unrelated to a listed species, but still affect its habitat.³¹ One violation of the ESA take prohibition may cost up to \$25,000 in civil penalties, and up to \$50,000 and a year in prison for criminal penalties.³²

III. SECTION 10 – HABITAT CONSERVATION PLANNING FOR NON-FEDERAL PARTIES

To lessen the bite of Section 9, the ESA affords some limited take.³³ Take exceptions are allowed for scientific and conservation efforts, as well as other activities causing incidental take of small numbers of listed species.³⁴ To warrant an incidental take permit, an applicant must develop a habitat conservation plan.³⁵ Importantly, take exceptions are for incidental harms; consequently, permitted activities cannot endanger the species’ very survival.³⁶

IV. SECTION 7 – FEDERAL AGENCY CONSULTATION

Section 7 contains the procedural and substantive requirements that the federal government must follow to assist the ESA’s goals.³⁷ The procedural instructions establish a consultation process that federal agencies must apply to federal activities. These activities are reviewed to ensure that the substantive, conservation goals of the ESA are satisfied.

When Section 4 lists a species as endangered or threatened, the federal government must act to conserve it.³⁸ First, all federal agencies must adhere to specific programs to conserve listed species.³⁹ Second, the agencies must assure that their actions do not jeopardize or adversely affect: a listed species, designated critical habitat, a proposed species for listing, nor a

²⁸ SULLINS, 39 (internal citation omitted).

²⁹ 16 U.S.C. §§ 1532(19); 1538(a).

³⁰ 50 C.F.R. § 17.3.

³¹ See *Palila v. Haw. Dept. of Land & Res.*, 852 F.2d 1106, 1108-10 (9th Cir. 1988).

³² 16 U.S.C. § 1540(a) & (b).

³³ 16 U.S.C. § 1539(a).

³⁴ § 1539(a)(1).

³⁵ § 1539(a)(2); 50 C.F.R. § 17.3.

³⁶ H.R. Conf. Rep. No. 97-835, at 29, *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870 (“This provision establishes a procedure whereby those persons whose actions may affect endangered or threatened species may receive permits for the incidental taking of such species, provided the action will not jeopardize the continued existence of the species.”).

³⁷ Sullins, 60.

³⁸ 16 U.S.C. § 1531(c)(1).

³⁹ § 1536(a)(1).

proposed critical habitat.⁴⁰ Qualifying agency actions include all activities and programs “authorized, funded, or carried out” by an agency over which that agency has discretionary involvement or control.⁴¹ Such actions include an agency’s authority to grant permits and licenses to third parties.⁴²

The key to Section 7 is that agency actions must not jeopardize listed species or critical habitat. Agencies should assess jeopardy at the earliest possible opportunity.⁴³ First, agencies inquire whether a species or critical habitat is present within the action area.⁴⁴ Then, if a species or critical habitat is present, agencies may either draft a biological assessment or informally consult with one of the Services.⁴⁵ Either process assess whether the agency’s proposed action is likely to adversely affect listed species or critical habitat.⁴⁶ Should either process suggest that an adverse effect is likely, that Service will formally consult about the proposed action.

In formal consultation, the Service reviews the action’s cumulative effects upon the listed species and critical habitat.⁴⁷ From this review, the Service generates a biological opinion that states whether the action will cause jeopardy.⁴⁸ If jeopardy is likely, the Service may suggest reasonable and prudent alternatives that apply minor changes to the proposed action in order to avoid its adverse effects.⁴⁹ Should the action agency adopt a reasonable and prudent alternative, the proposed action may proceed.⁵⁰ If jeopardy is likely, but there are no reasonable and prudent alternatives, the action agency’s final option is to seek an exemption from the jeopardy prohibition.⁵¹ Similar to Section 10’s incidental take permits, the biological opinion may also include an incidental take statement.⁵² As under Section 10, incidental take statements are available if there is some harm to a listed species, but no jeopardy.⁵³ Throughout the consultation process, Section 7 prohibits an action agency from becoming overly committed to a proposed action before consultation is complete.⁵⁴ This prohibition helps ensure the agency is free to adopt a reasonable and prudent alternative should the biological opinion find jeopardy.⁵⁵

⁴⁰ § 1536(a)(2) & (4).

⁴¹ 50 C.F.R. §§ 402.02 & .03.

⁴² 16 U.S.C. § 1536(a)(3).

⁴³ 50 C.F.R. § 402.14(a).

⁴⁴ § 402.12(c) & (d).

⁴⁵ §§ 402.12; 402.13.

⁴⁶ §§ 402.12(a) & (k); .13(a) & (b).

⁴⁷ § 402.14(g).

⁴⁸ 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g) & (h).

⁴⁹ §§ 402.02; .14(h)(3).

⁵⁰ Sierra Club v. Marsh, 816 F.2d 1376, 1389 (9th Cir. 1987).

⁵¹ 16 U.S.C. § 1536(g); 50 C.F.R. § 402.15.

⁵² 16 U.S.C. § 1536(b)(4).

⁵³ 50 C.F.R. § 402.14(i)(1).

⁵⁴ § 1536(d).

⁵⁵ § 1536(d); see, e.g., Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1127-28 (9th Cir. 1998).

Consultation may reinitiate for so long as the action agency retains discretionary involvement or control over the action.⁵⁶ A number of situations may prompt re-initiation, including: exceeding an incidental take statement; modifying an action beyond the boundaries considered by a biological opinion; risking jeopardy for a newly listed species or critical habitat; or encountering new information that an action is adversely affecting a listed species in a manner not addressed by the biological opinion.⁵⁷

V. COOPERATION WITH STATES

In passing the ESA, Congress noted that “a good working relationship” between the federal and state governments was essential.⁵⁸ While the federal government supplies the overarching policy, states offer facilities and personnel to help execute the law.⁵⁹ Although the ESA preempts state law, states may pass more rigorous prohibitions on taking listed species within state borders.⁶⁰ Section 9 incorporates state laws for endangered plant species.⁶¹ Section 4 listings consult existing state conservation efforts before a decision is reached.⁶² States may also share in the administration of conservation programs for listed species.⁶³ Further, states may seek an exemption for Section 7 jeopardy decisions that impact state functions.⁶⁴

VI. CITIZENS SUIT PROVISION

Besides petitioning the government to list a species, citizens may also help enforce the ESA after it applies to listed species or critical habitat.⁶⁵ Any citizen, as “private attorneys general,” may directly sue an alleged violator, or the federal government for not accomplishing its ESA obligations.⁶⁶ Citizens may also sue the federal government for decisions made while carrying out the ESA.⁶⁷

Prior Appropriation in Oregon

I. OVERVIEW OF PRIOR APPROPRIATION

⁵⁶ 50 C.F.R. § 402.16.

⁵⁷ 50 C.F.R. § 402.16.

⁵⁸ H.R. Conf. Rep. No. 93-740, *reprinted in* 1973 U.S.C.C.A.N. 3001, 3005.

⁵⁹ H.R. Conf. Rep. No. 93-740, *reprinted in* 1973 U.S.C.C.A.N. 3001, 3005; *see, e.g.*, 16 U.S.C. § 1540(e)(1) (state personnel may be used to enforce the ESA).

⁶⁰ 16 U.S.C. § 1535(f).

⁶¹ § 1538(a)(2)(B).

⁶² § 1533(b)(1)(A).

⁶³ *See* § 1535.

⁶⁴ § 1536(c)(2).

⁶⁵ § 1540(g).

⁶⁶ *Bennett v. Spear*, 520 U.S. 154, 164-65 (1999) (citing § 1540(g)).

⁶⁷ 5 U.S.C. § 704.

Oregon's system of allocating rights to surface water and groundwater is based on the prior appropriation system.⁶⁸ This system is commonly described as "first in time, first in right," because each water right issued carries a priority date, and the person with the earliest priority date has the most senior right to use water. Water rights are filled in order of priority when there is not enough water in a stream, and in cases of shortage, junior water rights holders may not receive any water at all. In Oregon, if two water rights users have the same priority date, those using water for domestic purposes get their water first, followed by those using water for agricultural purposes before those using water for manufacturing purposes.⁶⁹

II. THE APPROPRIATION PROCESS

Water rights in Oregon are administered through a permit and certification system. A person who wants to obtain a water right files a permit application with the Water Resources Department (the "Department").⁷⁰ The permit will be granted if the water use is one allowed in that basin by statute, if the water is available for use, if the use will not injure other water rights, and if the proposed use is in the public interest.⁷¹ A permit may be issued for less water than requested in the application if the Department concludes that the amount requested exceeds the amount that can be beneficially used.⁷²

A permit holder has a reasonable time, not more than five years, in which to put the water to beneficial use.⁷³ This process may include building diversion canals or installing irrigation systems. Putting a permitted water right to beneficial use "perfects" the water right. The Department conducts a survey of the water use, and determines whether the right has been perfected to its satisfaction.⁷⁴ After a water right is perfected, the Department issues a water rights certificate which gives the certificate holder an actual right to use the water under the certificate, for as long a duration as the water is used beneficially.⁷⁵

Not all uses require a permit or certificate, however.⁷⁶ Water for emergency firefighting, fish screens and bypass structures, livestock watering, and the collection of rainwater are example of some uses exempted from the permit requirements.⁷⁷ Salmon and trout enhancement projects certified by the State Department of Fish and Wildlife are also exempt.⁷⁸

III. BENEFICIAL USE AND WASTE

⁶⁸ OR. REV. STAT. § 537.120; OR. REV. STAT. 537.525.

⁶⁹ *Id.* at § 540.140.

⁷⁰ *Id.*

⁷¹ OR. REV. STAT. 537.153(1)-(2).

⁷² *Id.* at § 537.190(1).

⁷³ *Id.* at § 537.230.

⁷⁴ *Id.* at § 537.250(1); *see also* Hale v. Water Resources Dep't, 55 P.3d 497, 500 (Or. Ct. App. 2002).

⁷⁵ OR. REV. STAT. 537.250(1), (3).

⁷⁶ *Id.* at § 537.141.

⁷⁷ *Id.*

⁷⁸ *Id.* at § 537.142.

The basis, the measure, and the limit of water rights in Oregon is the “beneficial use” of the water.⁷⁹ Oregon defines beneficial use as “the reasonably efficient use of water without waste.”⁸⁰ Beneficial uses of water under Oregon law include water needed for domestic uses, municipal uses, irrigation, power development, industrial uses, mining uses, recreation, fish and wildlife uses, and water for pollution abatement.⁸¹ The Water Resources Commission (the “Commission”) may determine that other uses are beneficial by balancing the benefits of the proposed use against other existing uses, conflicting interests, and other concerns.⁸²

Additionally, to meet the requirement of beneficial use, a water user may not “waste” water.⁸³ Wasting water results in the forfeiture of the water right. A water user may waste water in two ways: (1) using the water in a manner other than the use that is permitted in the water right itself, or (2) failing to use all or part of the water right for five successive years.⁸⁴

If a water user fails to use all or part of their water right for five years, the Commission assumes that the user has wasted the water. However, there are “non-uses” allowed under Oregon law that do not amount to waste. Statutorily excused non-uses include not using water because of a financial hardship, not using water because a government action prevented it, or the water was unavailable.⁸⁵ In addition, a water user can show that they have facilities capable of receiving the full rate and duty of the water right, and were “ready, willing, and able” to use the water, but could not use it for some other reason.⁸⁶ The Oregon legislature created that exception to prevent water users from diverting unneeded water for the sole purpose of avoiding losing their water right.

Transferring Water Rights in Oregon

I. OVERVIEW OF WATER TRANSFERS

Today, virtually all of Oregon’s surface water has been appropriated.⁸⁷ If an individual water rights holder wishes to use water in a new way or on a new area of land, it is almost impossible to obtain a wholly new water right. A water rights holder’s ability to transfer the

⁷⁹ *Id.* at § 537.120; OR. REV. STAT. 540.610(1); OR. REV. STAT. 540.610(1).

⁸⁰ OR. ADMIN. R. § 690-300-0100(5).

⁸¹ OR. REV. STAT. § 536.300 (1); *see also* OR. ADMIN. R. 690-300-0010 (supplying specific definitions for each type of use).

⁸² *See Benz v. Water Resources Comm’n*, 764 P.2d 594, 597 (Or. Ct. App. 1988).

⁸³ OR. ADMIN. R. § 690-300-0100(5).

⁸⁴ OR. REV. STAT. § 540.610 (1); *see also* *Staats v. Newman*, 988 P.2d 439, 442 (Or. Ct. App., 1999).

⁸⁵ OR. REV. STAT. § 540.610(2).

⁸⁶ *Id.* at § 540.610(3).

⁸⁷ Adell Amos, *Freshwater Conservation in the Context of Energy and Climate Policy: Assessing Progress and Identifying Challenges in Oregon and the Western United States*, 12 U. Denv. Water L. Rev. 1, 28 (2008).

existing water rights can alleviate the challenges associated with changing and increasing water demands in the prior appropriative system.⁸⁸

Under a water right, use of water must conform to the place of use, point of diversion, and type of use specified in the water permit.⁸⁹ It cannot be used for any other purpose than what is specified in the water right. However, if a right holder wishes to use water for a different purpose than what her water permit allows, use the water in another location, or divert the water from a different spot, the right holder must file a transfer application with the Water Resources Department.⁹⁰

Oregon Revised Statutes chapter 540 provides the requirements and process for transferring a water right. Only certain rights may be transferred. Specifically, transfer is allowed only for those rights that have been adjudicated and received a court decree, that have a water right certificate, that have a permit, or where the Department has approved a previous a transfer for and satisfactory proof of completion has been filed with the Commission.⁹¹ A water right holder may apply for a permanent or temporary transfer; the Department will grant a temporary transfer for a period no longer than five years.⁹² Water users may also transfer all or a portion of their rights for instream uses.⁹³ These transfers may be either permanent or temporary, and they also require no injury to other water rights holders.⁹⁴

II. PERMANENT TRANSFERS

Applicants seeking permanent transfers of water rights must provide information to the Department so that it may determine compliance with Oregon prior appropriation law.⁹⁵ Among other basic information, the applicant must describe the current use of the water, the proposed use of the water, and the reasons for the change.⁹⁶ Furthermore, the applicant must provide evidence that the water has been used in a manner consistent with the water right for the past five years.⁹⁷ In other words, the applicant must show that the water right is not subject to forfeiture.

In order to approve a permanent transfer application, the Department must conclude that the proposed change will not injure other water rights. To assist in this decision, an applicant must publish in a newspaper within the area where the water rights are located, notice of the proposed change.⁹⁸ This will put the public on notice and allow other water rights holders to come forward

⁸⁸ *Id.* at 28.

⁸⁹ http://www.oregon.gov/owrd/pages/pubs/aquabook_transfers.aspx

⁹⁰ OR. REV. STAT. § 540.520(1) (2007).

⁹¹ OR. REV. STAT. § 540.505(4) (2007).

⁹² *Id.* §§ 540.520-.523; OR. ADMIN. R. 690-380-2000 (2008).

⁹³ OR. REV. STAT. § 537.348.

⁹⁴ *Id.*

⁹⁵ OR. REV. STAT. § 540.520.

⁹⁶ OR. REV. STAT. § 540.520(2).

⁹⁷ *Id.*

⁹⁸ *Id.* at § 540.520(5).

to comment and file protests against the approval of the application.⁹⁹ The Department will then have a hearing to determine whether the transfer would injure other users.¹⁰⁰ While the Department is making its decision, the water may be used according to the current water right until the transfer is approved.¹⁰¹

There are a few activities exempt from the application requirements under Oregon law. For instance, applications are not required for transfers of irrigation rights where the right holder seeks to transfer use of the water to other activities related to irrigation.¹⁰² This is allowed so long as there is no other change in use, as in increases in the amount, acreage irrigated, or season of use.¹⁰³ Additionally, industrial uses that meet certain qualifications may change the use of water without applying to the Department.¹⁰⁴

III. TEMPORARY TRANSFERS

A water rights holder may temporarily change a water right's place of use to allow a right attached to a specific parcel of land to be used on another parcel. These temporary transfers may not last longer than five years.¹⁰⁵ After the five year period concludes, the transferred water use will revert back to the original use. However, there is no statutory restriction on the amount of times the Department may re-approve applications for the same temporary transfer in successive terms.

IV. GROUNDWATER TRANSFERS

A surface water user may also transfer her point of diversion to appropriate groundwater.¹⁰⁶ However, the Department must find that: (1) the aquifer is hydraulically connected to the surface water, (2) the change will not result in enlargement or injury to existing water rights, (3) the change will affect the surface water the same as the authorized use, and (4) the proposed groundwater use is located within 500 feet of the surface water, and when the surface water is a stream, is also located within 1,000 feet upstream or downstream of the original point of diversion.¹⁰⁷

Water Measurement, Monitoring and Enforcement

I. OREGON'S WATER MEASUREMENT STRATEGY

⁹⁹ *Id.* at § 540.520(6).

¹⁰⁰ *Id.* at § 540.520(7).

¹⁰¹ OR. WATER RES. DEP'T, TRANSFERRING WATER RIGHTS,

http://www.oregon.gov/owrd/pages/pubs/aquabook_transfers.aspx (last visited October 1, 2013).

¹⁰² OR. REV. STAT. § 540.520(8).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at § 540.520(9).

¹⁰⁵ *Id.* at § 540.523.

¹⁰⁶ *Id.* at § 540.531(1) (2007).

¹⁰⁷ *Id.* at § 540.531(2)(a).

Water measurement can be an important tool for managing water resources in the Willamette Basin. In Oregon, the Water Resources Department ("Department") and the Water Resources Commission ("Commission") have authority to measure water use by conditioning new permits or by requiring measurement on existing uses.¹⁰⁸ However, only a small portion of water diversions throughout Oregon, including the Willamette Basin, are currently being measured.

Oregon's existing water measurement regulatory framework is covered under a patchwork of statutes. Under ORS 537.099(1), all governmental entities with a water right are required to measure and report their water use annually to the Department. Governmental entities include federal and state agencies, local governments, irrigation districts and water control districts.¹⁰⁹ The statute requires the report to include "the amount of water used by the governmental entity, the period of use and the categories of beneficial use to which the water is applied."¹¹⁰ Under ORS 537.211, the Department maintains the authority to condition issuance of any new water right permit. "The permit shall specify the details of the authorized use and shall set forth any terms, limitation and conditions as the department considers appropriate....," including installation of a water measurement device.¹¹¹ The Department may impose measurement conditions on a new permit if "an application discloses the probability of wasteful use or undue interference with existing wells or . . . [interferes with] existing rights to appropriate surface water."¹¹² If the Commission and Department do not include measuring requirements when they issue a permit, they still maintain the authority to require measurement.¹¹³ Under 540.310(2), the Commission may require a water ditch or canal owner to place suitable measuring devices along the ditch or canal and may require the owner to report the measurements according to a Commission-established schedule.¹¹⁴

Under ORS 540.330(1), the Commission can also require the owner or manager of a reservoir located in the flow of a natural stream to place measuring devices above and below the reservoir on each natural stream or water source that discharges into the reservoir. Finally, "in addition to any other authority of the Water Resources Commission to order installation of a measuring device, if the commission finds accurate water use information necessary because of serious water management problems created by groundwater decline, unresolved user disputes or frequent water shortages, the commission by rule may require a water right owner using any surface or ground water sources within the state to install a totalizing measuring device and to submit annual a water use report."¹¹⁵ However, before issuing such an order, the Commission

¹⁰⁸ Adell L. Amos, *Freshwater Conservation: A Review of Oregon Water Law and Policy, Phase I Report Prepared for the Nature Conservancy*, at 60 (Apr. 2009).

¹⁰⁹ ORS 537.099(2)

¹¹⁰ ORS 537.099(1)

¹¹¹ ORS 537.211

¹¹² ORS 537.629(1)

¹¹³ Adell L. Amos, *Freshwater Conservation: A Review of Oregon Water Law and Policy, Phase I Report Prepared for the Nature Conservancy*, at 60 (Apr. 2009).

¹¹⁴ *Ibid.*

¹¹⁵ ORS 540.435(1)

must hold a hearing in the affected area to determine if a major management problem exists and allow any affected person the opportunity to present alternative methods or devices that may solve the management problem.¹¹⁶

Despite measurement requirements, the Department does not require many users to report their measurements.¹¹⁷ The Department estimates there are currently 75,000 existing surface water points of diversion, about 23,000 ground water points of appropriation, approximately 24,000 reservoirs, 4,000 ground water registrations, and around 230,000 exempt groundwater.¹¹⁸ Currently, only about ten percent of these water users' permits require them to report representing nearly fifty percent of the state's water usage.¹¹⁹

In 2000, the Oregon Water Resources Commission developed a strategy for improving water measurement statewide focusing on diversions that have the greatest impact on streamflows in areas with the greatest needs for fish.¹²⁰ The Oregon Water Resources Department, in concert with the Oregon Department of Fish and Wildlife, developed a statewide inventory of significant diversions within high priority watersheds across the state with the intent is to increase measurement at these diversions.¹²¹ These high priority watersheds are known as "Priority Water Availability Basins" or "Priority WABs." The result of the effort combines an assessment from ODFW of the potential for fish restoration, and an assessment from OWRD of the potential for flow restoration.¹²² Significant diversions are defined as diversions that reside within Priority WABs and

1. Surface water diversions that are required by OWRD to measure and report through a water right condition; or
2. Surface water diversions without a measurement condition in the water right that are:
 - a. Greater than 5 cfs, or
 - b. Greater than 10 percent of the lowest monthly 50 percent exceedance flow as defined in the water availability model, and greater than 0.25 cfs.¹²³

Regarding the status of this water measurement framework in the Willamette Basin, the Department reported to the Commission on 3/9/2007 on measurement activities in priority

¹¹⁶ ORS 540.435(2)

¹¹⁷ Adell L. Amos, *Freshwater Conservation: A Review of Oregon Water Law and Policy, Phase I Report Prepared for the Nature Conservancy*, at 60 (Apr. 2009).

¹¹⁸ *Ibid.*

¹¹⁹ Oregon Water Resources Department Annual Performance Progress Report to the Oregon Legislature for Fiscal Year (2012-2013):

http://www.oregon.gov/owrd/law/docs/owrd_annual_pm_report_2013.pdf

¹²⁰ Oregon Water Resources Department Strategic Measurement Plan, 2007. p. 1.

http://www.oregon.gov/owrd/docs/reports/priority_wab_report03-2007pg1-16.pdf

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

watersheds including within the Willamette Basin.¹²⁴ In accordance with the Strategic Measurement Plan, the Department has identified 134 significant diversions within 17 priority watersheds in the Willamette Basin.¹²⁵ As of March 2007, about 44% of these significant diversions were being monitored, with 59 measurement devices in place.¹²⁶

II. WATER RIGHT MONITORING AND ENFORCEMENT

The Water Resources Department's ("Department") Field Services Division performs most water quantity monitoring and enforcement in Oregon.¹²⁷ The Department has divided the state into five field regions and 21 districts.¹²⁸ In each district, the watermaster, a Department-appointed officer, manages water use with the help of an assistant and number of water resources technicians, including well inspectors, water right inspectors, water restoration specialists and hydrotechnicians.¹²⁹ Watermaster duties are defined under ORS 540.045 and include various methods of distributing of water "in accordance with...existing water rights" as well as any other duties delegated or required by the Water Resources Director.¹³⁰

Regulation, the distribution of surface water, is the first step of enforcement of water rights.¹³¹ Watermasters and their field staff frequently measure streamflow around their district at site with instream water rights or minimum streamflow requirements. If the flow is inadequate to satisfy the instream water right or minimum flow or if other entities complain that their water right allocations are not being met, the watermaster begins an investigation.¹³² Investigations frequently involve measuring streamflow at the point of diversion of the water right not being met if the regulation was triggered by a user complaint, searching for illegal uses, and generating a list of junior users.¹³³ Based on this investigation, the watermaster decides on the appropriate action. In this stage of enforcement, actions take the form of informal requests to curtail water use, either through personal contact or letters.¹³⁴

Watermasters will first address illegal uses of water. An illegal use is any unauthorized use of water: use without a water right, in greater amounts than authorized, in violations of terms or conditions of a permit or certificate, or after having been cut off.¹³⁵ If the flow is still

¹²⁴ Oregon Water Resources Department, Strategic Measurement Plan, 2007, p. 13.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Rick Bastach, The Oregon Water Handbook: A Guide to Water and Water Management, (Corvallis: Oregon State University Press, 2006) 148.

¹²⁸ Oregon Water Resources Department, Water Rights in Oregon: An Introduction to Oregon's Water Laws, (Sept. 2011) 40-41.

¹²⁹ Bastach, 147-148; ORS 540.020(1)

¹³⁰ ORS 540.045(1).

¹³¹ Oregon Water Resources Department, *Informational Report on 2011 Field Regulation and Enforcement Activities*, Aug. 2012.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid* at 148.

¹³⁵ Bastach at 153.

inadequate to satisfy the water right, watermasters will begin to regulate junior users.¹³⁶ However, if the watermaster determines that an inadequate amount or none of the water resulting from cutting off a junior user would reach the senior user, the watermaster may disregard the complaint as a “futile call.”¹³⁷ Watermasters may also regulate illegal uses that they discover or have been told about.¹³⁸

If users do not voluntarily comply with watermaster requests, watermasters may engage in the formal enforcement process. Watermasters, as deputies of the Water Resources Director, have the authority to enter onto any private property in the performance of their duties.¹³⁹ A Watermaster may then take control of the headgates or controlworks of the diversion, and physically shut off the user, after posting a signed notice “setting forth that...[the waterworks]...has been properly regulated and is wholly under the control of watermaster.”¹⁴⁰

In 2011, watermasters and their assistants reported a total of 8,137 regulatory actions, 1,599 of which were formal written actions, on 361 stream systems.¹⁴¹ 249 actions were taken to protect instream rights, 151 to protect senior rights and 97 to stop illegal uses.¹⁴³

Protecting Non-Consumptive Uses of Water in Oregon: Instream Flow Rights and the Conserved Water Program

I. INSTREAM FLOW RIGHTS

Under the prior appropriation model, traditional water rights require that water be diverted to qualify as beneficial use. Without more, this requirement precludes water remaining in a stream to satisfy other uses such as fish flows or recreational activities. Over time, western states have recognized beneficial use without requiring a diversion. One such non-consumptive use is instream flow, a legal concept that recognizes the value of maintaining water within a stream for certain purposes. Essentially, the recognition of instream flow rights allows water to remain in a stream instead of requiring diversion and out-of-stream use.

¹³⁶ Oregon Water Resources Department, *Informational Report on 2011 Field Regulation and Enforcement Activities*, Aug. 2012.

¹³⁷ OAR 690-250-0020.

¹³⁸ Bastach, 153.

¹³⁹ ORS 540.045(1)(c); 540.045(1)(d); OAR 690-250-0050(2)

¹⁴⁰ ORS 540.045(1)(d)

¹⁴¹ Oregon Water Resources Department, *Informational Report on 2011 Field Regulation and Enforcement Activities*, Aug. 2012.

¹⁴² The Department defines “regulatory action as “any action that causes a change in use of maintenance or a field inspection that confirms that no change is needed to comply with the water right, statute or order of the Department.”

¹⁴³ Oregon Water Resources Department, *Informational Report on 2011 Field Regulation and Enforcement Activities*, Aug. 2012.

Oregon was one of the first states to recognize instream flow as beneficial use. Oregon's instream conservation laws have evolved by allowing for non-consumptive uses in favor of the public interest. In 1915, the legislature precluded appropriation for twenty-three streams and waterfalls along the highway in the Columbia River Gorge, to protect their scenic attributes.¹⁴⁴ In 1955, the legislature established the State Water Resources Board, charged with formulating a water resources program for the state that included "[t]he maintenance of minimum perennial stream flows sufficient to support aquatic life and to minimize pollution shall be fostered and encouraged if existing rights and priorities under existing laws will permit."¹⁴⁵ By adopting these minimum stream flows, the legislature expanded Oregon's ability to use an instream flow regime to support aquatic life, minimize pollution, and maintain recreational opportunities.¹⁴⁶ However, at the time, the fact that these minimum flows were merely administrative rules not recognized as full water rights severely limited their efficacy in protecting instream uses.¹⁴⁷

Finally, in 1987 the Oregon legislature passed the Instream Water Rights Act (the "Act"), codified in Chapter 537 of Oregon Revised Statutes, to protect and promote instream uses of water.¹⁴⁸ Unlike private out-of-stream applications of water like agricultural, municipal, or industrial uses, the Oregon Water Resources Department ("WRD") holds instream rights in trust, and the water remains in its natural stream for public use and benefit.¹⁴⁹ The Act specifically recognized as beneficial uses, four instream water uses for public benefit: (1) recreation; (2) pollution abatement; (3) navigation; and (4) "conservation, maintenance, and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values."¹⁵⁰ The Act further converted any prior established minimum perennial stream flow levels to actual water rights vested exclusively in the WRD and retaining their original priority date.¹⁵¹ The WRD is

¹⁴⁴ Janet C. Neuman et al., *Sometimes a Great Notion: Oregon's Instream Flow Experiments*, 36 ENVTL. L. 1124, 1132 (2006).

¹⁴⁵ *Id.* at 1139-40.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1144-1148.

¹⁴⁸ OR. REV. STAT. §§537.332-360 (2011); Oregon Water Resources Department, *Obtaining New Water Rights*, http://www.oregon.gov/owrd/pages/pubs/aquabook_newrights.aspx (last visited Sept. 25, 2013).

¹⁴⁹ OR. REV. STAT. §537.332(3); Adell L. Amos, *Freshwater Conservation: A Review of Oregon Water Law and Policy, Phase I Report Prepared for the Nature Conservancy*, at 65 (Apr. 2009).

¹⁵⁰ *Id.*; OR. REV. STAT. §§537.332(5), 350(1); *see also* OR. ADMIN R. 690-077-0000(3) (2008); OR. REV. STAT. § 537.332(3) (stating that "[i]n-stream water right" means a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream for public use."); *id.* § 536.310(1) (stating "[e]xisting rights, established duties of water, and relative priorities concerning the use of the waters of this state and the laws governing the same are to be protected and preserved subject to the principle that all of the waters within this state belong to the public for use by the people for beneficial purposes without waste" (emphasis added)); *id.* § 537.334(1) (stating "[p]ublic uses are beneficial uses." Instream flow is a public use.); *see also id.* § 540.610(2)(n) (nonuse during a time when the water right was leased as an in-stream right does not subject the right to forfeiture); OR. REV. STAT. § 537.332(5).

¹⁵¹ OR. REV. STAT. § 537.346.

the only entity that may hold instream flow rights, and these rights are held in trust for the people of Oregon.¹⁵² The WRD holds and enforces instream flow rights as any other appropriator in the line of priority, but gets to set the minimum level of instream flow.¹⁵³ Nevertheless, in a Governor-declared drought, the Act allows the WRD to give preference to human consumption and livestock watering over other uses, including instream uses.¹⁵⁴

In Oregon, the amount of water reserved as “in-stream flow” is defined as “the minimum quantity of water necessary to support the public use requested by an agency.”¹⁵⁵ 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.¹⁵⁶ Instream flows are measured in cubic feet per second along the stretch of stream or river.¹⁵⁷ Although instream flows do not ensure that certain quantities of water are always present in a stream, the WRD can require junior water rights holders to stop diverting water in order to satisfy the minimum instream levels.¹⁵⁸ Nevertheless, instream flow rights may not injure water rights holders with more senior priority dates.¹⁵⁹

Instream flows in Oregon can be achieved through new appropriation, through transfers, or through leases.¹⁶⁰ Under the Act, only state environmental agencies may apply to the WRD for new appropriations of instream flow rights.¹⁶¹ Namely, the Department of Fish and Wildlife, the Department of Environmental Quality, and the Department of Parks and Recreation can

¹⁵² *Id.* § 537.332-360.

¹⁵³ *Id.* § 537.346.

¹⁵⁴ Oregon Water Resources Department, *Obtaining New Water Rights*, http://www.oregon.gov/owrd/pages/pubs/aquabook_newrights.aspx (last visited Sept. 25, 2013).

¹⁵⁵ OR. REV. STAT. §537.332(2) (2005).

¹⁵⁶ OR. ADMIN. R. § 690-077-0015(4) (2013) (“If natural streamflow or natural lake levels are the source for meeting instream water rights, the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow. . . .”). The estimated average natural flow means “average natural flow estimates derived from watermaster distribution records, Department measurement records and application of appropriate available scientific and hydrologic technology.” OR. ADMIN. R. § 690-077-0010(10).

¹⁵⁷ OR. ADMIN. R. § 690-077-0015(7)-(8); While out of stream rights only require measurement at the point of diversion, instream water rights require measurement at several points along the affected stream. *Id.* § 690-250-0030. Instream flow rights can be measured by a point or reach, but reach is preferred. *Id.* § 690-077-0015(6)-(7).

¹⁵⁸ Or. Water Res. Dept., *Obtaining New Water Rights*, http://www.oregon.gov/owrd/pages/pubs/aquabook_newrights.aspx (last visited Sept. 25, 2013).

¹⁵⁹ OR. REV. STAT. §537.334 (West 2013); Oregon Water Resources Department, *Obtaining New Water Rights*, http://www.oregon.gov/owrd/pages/pubs/aquabook_newrights.aspx (last visited Sept. 25, 2013).

¹⁶⁰ OR. REV. STAT. § 537.336.

¹⁶¹ *Id.* §§ 537.332-360.

apply for minimum instream flow rights to support habitat, pollution abatement, and scenic and recreational values, respectively.¹⁶²

Any individual water rights holder may voluntarily convert their water rights to instream flow and must transfer it to the WRD to hold in trust for the people of Oregon.¹⁶³ Oregon's current law provides that "[a]ny person may purchase or lease all or a portion of an existing water right or accept a gift of all or a portion of an existing water right for conversion to an instream water right."¹⁶⁴ Any water right that is converted to an instream water right retains the priority date of the water right purchased.¹⁶⁵

In addition to permanent transfers, holders of water rights may lease their rights for instream use through a temporary transfer or lease.¹⁶⁶ The option of leasing water rights to instream rights can provide water rights holders a mechanism to prevent loss of their rights by forfeiture.¹⁶⁷ Water rights in Oregon are generally subject to forfeiture after five years of non-use. However, by temporarily leasing unused water rights to the WRD, water rights holders sidestep the "use or lose" appropriation model by retaining their underlying right to the water so long as they maintain their diversion capabilities.¹⁶⁸ Instream leases cannot last longer than five years (or five irrigation seasons for irrigation rights), though leases may have unlimited renewability.¹⁶⁹ The most significant limitation to the transfer water to instream uses is that the transfer must not injure other existing water rights.¹⁷⁰ The WRD will not approve a transfer unless it makes an affirmative finding that the transfer would not injure any existing rights.¹⁷¹

Oregon's State Scenic Waterways Act ("SSWA") provides an additional safeguard to instream flow of water. The SSWA mandates that "[t]he free-flowing character of these waters shall be maintained in quantities necessary for recreation, fish and wildlife uses" consistent with the statute.¹⁷² The Oregon Supreme Court decision in *Diack v. Portland* prohibited uses of water upstream from a designated State Scenic Waterway that would adversely affect the free-flowing qualities of the designated water.¹⁷³ The *Diack* decision augmented the strategic value of the

¹⁶² *Id.* 537.336; Janet Neuman et. al., *Sometimes A Great Notion: Oregon's Instream Flow Experiments*, 36 ENVTL. L. 1125, 1149 (2006).

¹⁶³ OR. REV. STAT. § 537.348.

¹⁶⁴ *Id.* § 537.348.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* § 540.523.

¹⁶⁷ *Id.* § 537.348.

¹⁶⁸ OR. ADMIN. R. 690-380-8002(4); Adel Amos, *Importance of Freshwater Conservation: in the Context of Energy and Climate Policy: Assessing Progress and Identifying Challenges In the Western United States*, 1 Water L. Rev __, 86 (____); see also Robert David Pilz, Comment, *At the Confluence: Oregon's Instream Water Rights Law in Theory and Practice*, 36 ENVTL. L. 1383, 1387 (2006).

¹⁶⁹ OR. REV. STAT. § 540.523(1).

¹⁷⁰ *Id.* § 540.530.

¹⁷¹ *Id.* § 540.530; *Kusyk v. Water Res. Dept.*, 994 P.2d 798, 799-801 (2000).

¹⁷² OR. REV. STAT. § 390.835(1).

¹⁷³ *Diack v. City of Portland*, 759 P.2d 1070, 1076 (Or. 1988).

location of State Scenic Waterway designations on a stretch of river. Prior to *Diack*, the Water Resources Commission limited its application of the SSWA to diversions proposed within a designated stretch of water.¹⁷⁴ *Diack* clarified that the Water Resources Commission must conform decisions on proposed appropriations to the scenic waterways values of the SSWA.¹⁷⁵ Furthermore, the court's decision mandated that the Water Resources Commission must consider whether each proposed diversion upstream of a scenic waterway "is necessary to" the uses specified in the SSWA.¹⁷⁶

II. CONSERVED WATER PROGRAM

Oregon's Allocation of Conserved Water Program (the "Program") permits any water user who conserves water to use a portion of the conserved water on additional lands, lease or sell the water, or dedicate the water to instream use.¹⁷⁷ By allowing water use on additional lands and for new uses of water, the Program provides water users an economic return on conservation investments.¹⁷⁸ When water right holders undertake conservation measures and apply to the Program, they must convert a portion of the conserved water into an instream right.¹⁷⁹ In exchange, the Oregon Water Resources Department (the "Department") grants the right holders greater latitude in how they use the remaining portion of conserved water.¹⁸⁰

The Oregon Legislative Assembly originally passed statutes authorizing the Program in 1987 and amended them in 1993. Statutes and administrative rules associated with Oregon's Conserved Water Program can be found in Oregon Revised Statutes section 537.455 to 537.500 and Oregon Administrative Rules 690.18. The statutes define "conservation" as "the reduction of the amount of water diverted to satisfy an existing beneficial use achieved either by improving the technology or method for diverting, transporting, applying or recovering the water or by implementing other approved conservation measures."¹⁸¹ The Conserved Water statute provides fundamental requirements and restrictions for water conserved under the Program. As a baseline requirement, any application for conserved water must be filed within five years of the date the conservation measures were implemented.¹⁸²

Similar to the instream water transfer mechanism, the Conserved Water Program creates an opportunity to voluntarily establish instream water rights from preexisting rights with no loss

¹⁷⁴ Nancy B. Murray, *Protecting Oregon's Scenic Waterways: Diack v. City of Portland*, 21 Env't. L. 133, 157 (1991).

¹⁷⁵ *Id.*

¹⁷⁶ *Diack*, 759 P.2d at 1076.

¹⁷⁷ OR. WATER RES. DEPT., ALLOCATION OF CONSERVED WATER, http://www.oregon.gov/OWRD/Pages/mgmt_conseved_water.aspx (last visited Sept. 29, 2013).

¹⁷⁸ *Id.*

¹⁷⁹ Amos, *supra* note 6, at 90.

¹⁸⁰ *Id.*

¹⁸¹ OR. WATER RES. DEPT., ALLOCATION OF CONSERVED WATER, http://www.oregon.gov/OWRD/Pages/mgmt_conseved_water.aspx (last visited Sept. 29, 2013).

¹⁸² OR. REV. STAT. § 537.465(1)(b) (DATE).

of priority.¹⁸³ Allocations of conserved water may retain the original priority date of the source water right or be assigned a priority date one minute later.¹⁸⁴ An allocation's assigned priority date is the same for both the applicant and the state.¹⁸⁵ Allocations that are not assigned to the state may be leased to instream use pending a final allocation to another use and shall not be subject to forfeiture if so leased.¹⁸⁶

The Program is administered by the Oregon Water Resources Department. When a user files an application for allocation of conserved water, the Department determines the quantity of water conserved and may reduce that quantity to "mitigate the effect of other water rights."¹⁸⁷ When any allocation of conserved water is made, the state will retain at least twenty-five percent of the conserved water.¹⁸⁸ The state then allocates seventy-five percent of the water right to the user and converts the remaining twenty-five percent into an instream right held in trust by the state. If the Department determines that the conserved water is necessary to support in-stream flow purposes, it will convert the water to an in-stream water right.¹⁸⁹ However, if either the state or federal government provides more than twenty-five percent of the financing for the conservation project and that money is not subject to repayment, the state will convert the same percentage into an instream right.¹⁹⁰

Despite this instream provision, an applicant may always voluntarily retain up to twenty-five percent of the conserved water (for example if the project is entirely publically funded).¹⁹¹ After completing the allocation of conserved water, new certificates are provided for the remaining portion of the originating right as well as new rights covering the allocated water.¹⁹² An applicant may also voluntarily convert the entire amount of conserved water to be held in trust by the state as an instream right. Furthermore, the Department may determine that additional instream flow is not necessary to support established in-river purposes, in which case that portion will revert to the public and be made available for future appropriation. A user must file an application for conserved water within five years of the date from which the conservation measures were first implemented.¹⁹³

Under the Conserved Water Program, the priority date of the new water right certificate does not change. A new water right certificate is issued with the original priority date reflecting

¹⁸³ Amos, *supra* note 6, at 90.

¹⁸⁴ OR. REV. STAT. § 537.485(1).

¹⁸⁵ *Id.* § 537.485(2).

¹⁸⁶ *Id.* § 537.490(1); *id.* § 537.500(1); Bruce Aylward, *Restoring Water Conservation Savings to Oregon Rivers: A Review of Oregon's Conserved Water Statute*, Report to National Fish & Wildlife Foundation, (July 2008).

¹⁸⁷ Amos, *supra* note 6, at 90.

¹⁸⁸ OR. REV. STAT. § 537.470(3).

¹⁸⁹ *Id.*

¹⁹⁰ Amos, *supra* note 6, at 90.

¹⁹¹ OR. REV. STAT. § 537.470(3).

¹⁹² OR. REV. STAT. § 537.470(6).

¹⁹³ Amos, *supra* note 6, at 90.

the reduced quantity of water being issued with the improved technology.¹⁹⁴ Other certificates are issued for the applicant's portion of the conserved water and for the state's instream water rights. The priority dates of these certificates are either the same as the original water right, or one minute junior. It is up to the applicant to decide which priority date they want to establish for the conserved water.¹⁹⁵

Since the Program's inception, fifty-two conservation projects have been approved by the Water Resources Department.¹⁹⁶ This has resulted in almost 122 cfs of water permanently protected instream. Recent surveys show that very few irrigators and technical irrigation experts are aware of this program or its benefits to instream flows and agricultural production.¹⁹⁷

Part III – Imagining the Future in the Willamette Basin Using Existing Legal Infrastructure

Part IV – Recommendations for Future Scenarios in the Willamette River Basin

¹⁹⁴ OR. WATER RES. DEPT., ALLOCATION OF CONSERVED WATER, http://www.oregon.gov/OWRD/Pages/mgmt_conseved_water.aspx (last visited Sept. 29, 2013).

¹⁹⁵ *Id.*

¹⁹⁶ Oregon Water Resources Department, personal communications.

¹⁹⁷ *Id.*