

Overview of Oregon's Current Water Situation

Oregon Water Roundtables Fall 2008

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Background-The Accretion of Water Law and Policy

Oregon's water law and policy system has grown gradually over the last 100 years. The Legislature has attempted to reconcile all the pieces a couple of times, but we do not have the "integrated, coordinated program for the use and control of all the water resources of this state" called for by ORS 536.300(2) (enacted in 1955). Oregon has been a leader in progressive western water law and policy. The question we now face is whether our unintegrated accretion of laws, policies and institutions is capable of meeting the challenges we face in the 21st Century.

1. 1909 Water Code. Oregon adopted the prior appropriation system of water law in 1909. Next year is the 100th Anniversary of the Act. The 1909 Code addressed the basic question of who can use the waters of the state. It is a water allocation system, giving the right to use public water to the first person who appropriated them to beneficial use. The purpose was to make water available to build farms and communities. The law only applied to surface water, not groundwater, and only to water diverted from rivers and streams, not to instream needs. Even though the Act declares that all water belongs to all the public, it allowed water to be used without charge, unlike public lands which were sold by the state at the same time.

2. 1955 Multi-Purpose Development and Planning. Oregon was one of the first states to adopt a comprehensive program of basin planning and multi-purpose water development (1955 Or. Laws chap. 707). Comprehensive studies were done of every basin in the state. Water needs were evaluated and permitted uses classified. The "basin plans" were supposed to control all water use. The law still says that other state agencies cannot exercise "any power, duty or privilege or any other activity" which would conflict with the state water resources policy" without approval by the Water Resources Commission, ORS 536.370.

The 1955 Act also required setting minimum stream flows to protect fish and wildlife, water quality and recreational uses. Oregon was one of the first, if not the first, western state to explicitly recognize the importance of leaving water instream.

The 1995 law sounds like a very powerful way to assure comprehensive, consistent water use and development. In practice, the basin plans did not result in actions. When I was on the Water Policy Review Board in the early 1980s, we worked for years on basin plans. The last significant effort was the John Day Basin Plan in the mid-1980s. When Neil Goldschmidt became Governor in 1987 he asked what it would take to implement the plan. No one could tell him because the plan did not contain

specific action strategies. In the four years I served on the Board, no other agency ever requested our approval of their actions or policies, despite the statute.

3. Environmental Laws-the 1970s. During the 1970s a series of laws were enacted by the Oregon Legislature and Congress to protect the environment. Many of these laws related directly to water. Rarely did the new laws address how they were supposed to work in conjunction with the prior appropriation system and the water planning system. But they resulted in many new state and federal agencies with programs directly related to water:

- **Scenic Waterways.** The federal Wild and Scenic Rivers Act passed in 1968. Oregon citizens passed the Scenic Waterways Act in 1970 by initiative. The program is administered by Oregon Parks and Recreation Department.
- **Water Pollution Control.** The Oregon State Sanitary Authority had existed since 1938, but it was transformed into the Department of Environmental Quality (DEQ) in 1969. DEQ administers the federal Clean Water Act (CWA) in Oregon.
- **Wetlands.** The Department of State Lands and the Corps of Engineers regulate wetlands under the CWA and Oregon's Fill and Removal Law.
- **Drinking Water.** The federal Safe Drinking Water Act passed in 1974. It is administered by the Public Health Division of the Department of Human Services.
- **Endangered Species Act.** The federal Endangered Species Act passed in 1973. It is administered by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. The Oregon ESA was enacted in 1987. It is administered by the Oregon Department of Environmental Quality.

Land Use Planning. Burgeoning laws, policies and administrative agencies engaged many new people organizations in water management. Perhaps the most significant development, however, occurred in 1973 when Oregon adopted its pioneering statewide land use planning program. Every Oregon city and county must prepare comprehensive land use plans and zoning ordinances in accordance with a set of 19 statewide goals.

All state agencies, including the Water Resources Department (WRD), must "carry out their planning duties, powers and responsibilities and take actions with respect to land use" in compliance with the statewide goals and acknowledged local land use plans. Statewide Goal 11 requires communities of 2,500 or larger to prepare public facility plans. They are to plan and develop a timely, orderly efficient arrangement of public facilities to serve as a framework for urban and rural developments. But these plans are only required for drinking water and sewers, not for agriculture or industrial water use. These plans must include a capital improvement program and budgets. The public facilities plans must match and support the designated land uses.

So how does land use planning fit with water basin plans? The bottom line is that we have two separate planning systems that relate to one another on paper, but often fail to connect in practice.

4. The 1990's —Instream Water Rights and Watershed Restoration.

Minimum streamflows in Oregon dated from 1955, but they were only administrative rules and could be waived by the WRD. Soil and Water Conservation Districts were created beginning in 1939 to “conserve and enhance soil and water resources.” In 1987 Oregon enacted a new instream water rights statute, converting minimum stream flows into water rights and authorizing establishment of new instream water rights, ORS 537.332-537.360. For the first time in Oregon, instream uses and needs were to be treated the same as out of stream diversions under the prior appropriation system. Yet this did not put water back instream—all of the instream rights tend to be junior to long established rights for irrigation, municipal and industrial purposes.

In 1987 Oregon created the Governor's Watershed Enhancement Board (“GWEB”) to fund watershed restoration projects. GWEB's goal was to enhance Oregon's waters through the management of riparian and associated upland areas of watersheds in order to improve water quality and quantity for all beneficial purposes. The board brought together top policy makers from key state and federal natural resource agencies for the first time. GWEB's modest investments generated such enthusiasm that the Legislature urged counties to form local watershed councils to assess watershed conditions, develop and implement action plans aimed at achieving “sustainable watershed health.”

In 1995 petitions were filed to list Oregon Coast Coho under the Endangered Species Act. Oregon responded to the proposed listing by building on the work of the watershed councils and Soil and Water Conservation Districts to create the Oregon Plan for Salmon and Watersheds. The Oregon Plan's mission is to “restore our native fish populations and the aquatic systems that support them to productive and sustainable levels that will provide substantial environmental, cultural, and economic benefits.” In November 1998, Oregonians passed Ballot Measure 66, providing significant funding for watershed restoration for the first time. GWEB was reconstituted to become the Oregon Watershed Enhancement Board.

Under the Oregon Plan, watershed action plans have been developed locally across the state. The Oregon Plan embodies collaborative, community-based conservation, a very different approach from the government agency driven planning undertaken in basin plans dating from the 1950s.

Today we have dozens of federal, tribal, state and local government entities engaged in water management, along with hundreds of non-government organizations representing all types of water interests. Every major study that looks at water

management concludes that a new approach is needed, an approach built on integrated watershed management.¹

Current Challenges

So we are back to the critical question we now face: is our unintegrated accretion of laws, policies and institutions capable of meeting the challenges we face in the 21st Century? The question cannot be answered without considering the nature of the challenges.

1. Water Scarcity and Increasing Demand. Oregon's currently available surface water supply is fully or often over allocated during the low flow summer and fall months. Across the state, there are more instream needs than streamflows to meet them. At the same time, pressures on groundwater are increasing, resulting in impacts to both the quantity and quality of groundwater supplies. If groundwater appropriations continue at the current pace, they could be over-allocated in the very near-term. Exacerbating the scarcity problem, Oregon's population is projected to increase by 41% by 2030, even without considering potential in-migration forced by climate change in the Southwest, and other factors throughout the US.

2. Aging Infrastructure. . Our existing water infrastructure (drinking water treatment plants, wastewater treatment plants, stormwater systems, irrigation canals and pipes, dams and levees) is in poor shape, requiring multi-billion dollar investments just to maintain it as it nears the end of its engineered life. Most natural conveyance and storage systems in Oregon have been heavily modified in order to achieve various flood control, irrigation, navigation, hydropower, recreation and water supply benefits, which may not meet future needs and values.

3. Fragmented Management. Water does not respect state and local government boundaries or land ownership boundaries. Regulatory policies for shared water systems differ among Washington, Oregon, Montana, California and Idaho. There is no agreement among Pacific Northwest states on Columbia River Basin management . The Columbia River Treaty between the U.S. and Canada must be renegotiated, renewed, or terminated by 2024 provided 10 years' notice is given (i.e., by 2014). Even with an interstate compact, management challenges continue in the Klamath Basin. Multiple federal and state agencies regulate water use and hundreds of different public and private water and wastewater systems provide myriad water services. Tribal governments hold reserved water rights and other treaty rights. The interplay among these disparate regulatory systems makes water management difficult, as evident when federal laws are enforced without regard to state water rights priorities. Reallocation of water to meet new demands is difficult and time-consuming.

¹ See e.g., Western Water Policy Review Advisory Committee, *Water in the West: The Challenge for the Next Century* (1998); National Research Council, *Envisioning the Agenda for Water Resources Research in the Twenty-first Century*(2001).

4. Inadequate Funding. Under state and federal law, all water belongs to the State of Oregon. Yet the state receives no compensation for use of its water resources. Instead, users pay various water utilities solely for capital investments, operation and maintenance costs for service delivery and nothing for use of the water itself. State water management agencies are funded either through: (1) general or lottery funds; or (2) fees. Local water utilities charge their rates to their customers. These revenues are inadequate to maintain existing infrastructure, build needed new facilities or restore functioning watersheds. It will be particularly difficult to fund restoration if Ballot Measure 66 is not reauthorized in 2014 when it is scheduled to sunset.

5. Climate Change. Projected changes in temperature and precipitation patterns, including variability, arising from global climate change pose the greatest future uncertainty and risk to Oregon's water supply. These include loss of glacial sources, reduced snowpack, increased runoff intensity, saltwater intrusion, reduced recharge, storage and flooding challenges. Existing water systems have been designed based upon historic hydrologic conditions - the "stationarity assumption." This assumption is essentially invalid, and past conditions will not augur future conditions, increasing the risk of water service disruption.

6. Loss of Aquatic Species and Communities. Past water resource development has severely impacted biodiversity, resulting in extensive listings of aquatic species as threatened or endangered and imposition of other regulatory requirements. Many people live in Oregon, or come here, to enjoy our rivers, streams, wetlands and bays, and the fish and wildlife they harbor. Healthy, functioning aquatic ecosystems provide vital environmental services in terms of water quality, reduced hazard risk, nutrient cycling and aesthetic enjoyment.

The Future

The Oregon Statewide Water Roundtables have been organized to receive input and advice from Oregonians, engaging them in how Oregon's water should be managed in the future. We want you to help us agree on and communicate a vision describing where Oregon is, where Oregon is going, and where Oregonians want to be with respect to adaptive, integrated, equitable and sustainable water management.