

# Overview of Western Water Law and WA/OR Water Rights

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# Overview

- Water law and other laws relating to water
- Riparian rights - Prior Appropriation
- Groundwater
- Transfers and changes
- Federal role
- Oregon and Washington
- Trends

# Why is Water Law Important?

- Geothermal developers may be required to secure a water right, especially for start-up, cooling, consumptive uses.
- Evaluation of potential impacts on other water users and streams may be part of the permitting process.
- People care about water; geothermal, not so much.

# Scarcity + Demand

- 60% of the US in drought in 2012
- USGS forecasts shortages in several regions
- Climate change: drought, reduced snowpack, changed weather patterns
- Population increase
- Irrigation and municipal demands
- Location location location

# Key Laws that Apply to Use of Water

- Water law – The right to use water; state-based
- Federal Safe Drinking Water Act (42 USC Sec. 300 (f), et seq.) – includes UIC registration
- Federal Water Pollution Control Act (33 USC Sec. 1251, et seq.) (“Clean Water Act”) – Discharges to waters of the U.S.
- Contract law – Limitations on use of federal water
- State and Tribal water quality laws

# Water Rights: Riparian and Prior Appropriation

- Riparian rights: Ancient origins; reasonable use of water by riparian landowners, subject to use by other riparians; attribute of land
- Prior appropriation: Born in 19<sup>th</sup> c. Western mining camps; competition for large amounts of water in areas with seven inches precip. (Nevada) v. 42 inches (Virginia). Resulting system grants property rights in the use of water

# Elements of a Prior Appropriation Water Right

Western water laws, with certain exceptions, require

1. Intent to apply water to a beneficial use
2. In most cases actual diversion from the source for that purpose is required
3. Putting the water to beneficial use within a reasonable time (Diligence)

# Prior Appropriation: Key Concepts

- “First in Time is First in Right”
- Public ownership; private right to use water
- Basis for granting water rights in most permitting systems = water availability, beneficial use, not detrimental to senior rights, public interest
- Waste and speculation prohibited
- Some special provisions for power generation

# Water Laws in Western States

## Pure Appropriation Law: “Colorado Doctrine”

Alaska, Arizona, Colorado, Idaho, Montana,  
Nevada, New Mexico, Utah, Wyoming

## “California Doctrine” recognizes both riparian rights and appropriations, in varying degrees

California, Kansas, Nebraska, North Dakota,  
Oklahoma, Oregon, South Dakota, Texas,  
Washington

Hawaii: Ancient customary rights, prescriptive  
rights, limited riparian rights

# Groundwater Law Theories

1. English common law: Attribute of property ownership
2. “Reasonable use”: Use reasonably necessary in connection with the land, subject to impacts on others
3. Correlative rights: Coequal rights of all landowners over a common groundwater source
4. Prior Appropriation

# Groundwater in Different States

- Texas – English common law rule upheld (*Edwards Aquifer Authority v Day*, 2012)
- Arizona – Modified capture/reasonable use (Active Management Areas)
- Washington – Hydraulic continuity affects availability
- Colorado – 2011 *San Antonio* decision focused on potential surface water impacts

# Transfers and Changes of Water Rights

- Most states with prior appropriation rights: Rights can be severed from the land and transferred or changed
- New uses of water may require acquisition and transfer of water rights
- Groundwater rights may be subject to special rules
- Property transfer v. regulatory approval

# Federal Role

- Federal statutes recognizing state laws  
Homestead Act of 1862, Mining Act of 1866  
1877 Desert Lands Act, Reclamation Act of  
1902, Geothermal Steam Act of 1970
- Interstate (Federal-State) Compacts
- Article III, Sec. 2, U.S. Constitution: US  
jurisdiction in disputes between states
- McCarran Amendment (43 USCA Sec. 666)
- “Winters Doctrine”: *Winters v U.S.*, 207 U.S.  
564 (1908)

# Indian Water Rights

- Reserved rights under *Winters*
- Tribal rights under treaties. *U.S. v. Winans*, 198 U.S. 371, 25 S.Ct. 662 (1905), right to fish at “usual and accustomed” places
- Quantification is an important current issue (“Practically Irrigable Acreage” - PIA) *Big Horn I and II*

# Washington State

- Lead agency: Department of Ecology
- Permits/certificates for surface water use, RCW 90.03 (1917); groundwater use, RCW 90.44 (1945)
- Common law claims; limited riparian rights
- Focus on protection of instream flows, fisheries, RCW 90.54, WAC 173-503, Stillaguamish

# Water and Geothermal in Washington

- Department of Natural Resources is the lead agency for geothermal project approval
- Coordination with Ecology re water issues
- Nonconsumptive use of water for geothermal projects not subject to water code (including secondary uses). RCW 78.60
- Consumptive uses require a water right

# Oregon

- Temps below 250 bottom hole temperature regulated as water ORS 537.090. Special provisions for interference between water and geothermal wells ORS 537.095, 522.255
- Lead agency: Water Resources Department
- State water code - ORS 536 – 555 (surface water code 1909; groundwater 1955)
- Common law claims; limited riparian rights; exempt uses (both states)

# Oregon: Temperature Determines Lead Agency for Use of Water

- Provisions of water code applying to “appropriation and water rights do not apply to the production of fluid from a well with a bottom hole temperature of at least 250 degrees Fahrenheit.”
- “Production of fluids from a well with a bottom hole temperature of at least 250 degrees Fahrenheit shall be regulated as a geothermal resource under the applicable sections of ORS chapter 522.”
- “If the bottom hole temperature of a well that was initially less than 250 degrees Fahrenheit increases to at least 250 degrees Fahrenheit, the State Geologist and the Water Resources Commission, after consulting with the well owner, shall determine the agency with regulatory responsibility for that specific well. “

ORS 537.090

# Oregon Explicitly Attempts to Integrate Water and Geothermal

- ORS 522.255 “Resolution of conflicts between geothermal and water uses. If interference between an existing geothermal well permitted under this chapter and an existing water appropriation permitted under ORS chapter 537 is found by either the State Geologist or the Water Resources Director, the State Geologist and the Water Resources Director shall work cooperatively to resolve the conflict and develop a cooperative management program for the area. In determining what action should be taken, they shall consider the following goals:(1)Achieving the most beneficial use of the water and heat resources;(2)Allowing all existing users of the resources to continue to use those resources to the greatest extent possible; and(3)Insuring that the public interest in efficient use of water and heat resources is protected.”

# Planning for Water Use

- Increasing demand and limited supply in an era of climate change = competition and potential conflict
- Understand the context in your state
- Allow time to acquire and transfer water rights or secure new rights
- Public and other water users' concerns about impacts on their use: Be prepared with technical support and analysis

*“Whisky’s for drinkin’ and water’s for fightin’  
over.”*

- Attributed to Mark Twain

Questions?

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