Oregon Water Law Questions and Answers

**Who owns the water?**

Oregon law provides that all water is publicly owned. With only a few exceptions, a water right is required before any person (including a city, business or other entity) may divert water from its natural course and put it to “beneficial use.”

**What is “Prior Appropriation”?**

This term refers to the general principles of water law adopted in Oregon and throughout the western United States. The doctrine of Prior Appropriation evolved in the law to promote settlement and development of the West. The basic concept is that people are encouraged to put water to “beneficial use” by taking it from a stream and applying it to the land.

The system is basically one of first come, first served. The first person to obtain a water right on any given stream will be the last person to be shut off in times of shortage. The “senior” water right holder is entitled to take all of the water needed and allowed under his/her water right before the next junior water right holder is served.

**What is a water right?**
A water right is authorization from the state to make use of water—either surface water or ground water. Since 1909, state law has required issuance of a water right before using surface water. Ground water has been subject to the permit requirements statewide since 1955. Water rights are issued by the Oregon Water Resources Department (OWRD).

What are “riparian rights”?

The doctrine of riparian water rights is another form of water law, employed largely in the Eastern states. Under this legal framework, only landowners with water flowing through their own property may lay claim to the water. This was not a practical system for use of water in the arid West, where the riparian doctrine gave way to the doctrine of Prior Appropriation, allowing people to move water to distant locations.

What is a “pre-1909 water right” or “unadjudicated water right”?

These terms refer to water uses established before the state Water Code in 1909 for surface water, and 1955 for ground water. Such uses are recognized and protected through a hybrid administrative/judicial process known as “general stream adjudication.” The adjudication process quantifies and validates water rights that were fully vested before the state began issuing water right permits and certificates. Surface water adjudications have been completed in most of Central and Eastern Oregon, but not generally in Western Oregon. A surface water adjudication process has been underway in the Klamath Basin for the past 20 years. To date, OWRD has not undertaken any adjudication of pre-1955 ground water rights.

What is a ground water “registration”?

This term relates to documents filed by landowners to register pre-1955 ground water uses that were established prior to the requirement for obtaining state-issued water rights. Under the applicable statutes, OWRD is directed to conduct an adjudication process to confirm the pre-1955 rights—similar to the adjudication of pre-1909 surface water rights. Until such ground water adjudication occurs, continued use of the pre-1955 ground water is authorized on the basis of the registration statements.

Can a ground water registration be modified?

Yes. ORS 537.610(4) allows modification of a certificate of registration for pre-1955 ground water uses. The process is similar to a “transfer” (see discussion below) to authorize changes in the location of use, type of use, or point of appropriation. The process for applying for modification of a ground water registration is described in OWRD administrative rules (Chapter 690, Division 382).

What is “beneficial use”?

Water rights are issued only for beneficial use, without waste. Each water right includes a designated type of “use” and is limited to that purpose. General categories of beneficial use include, but are not limited to: irrigation, municipal, industrial, commercial and domestic. Since 1987, the law has specifically included instream flow protection as a beneficial use. A water right holder is entitled to use as much water as is necessary, up to the maximum amount shown on the water right, to accomplish the stated beneficial use.
**What does “use it or lose it” mean?**

This phrase relates to a basic element of water law—that the right must be regularly exercised in order to remain valid. A certificated water right remains valid forever, so long as it is used. If the water right is not used for a period of five or more years, it then becomes subject to forfeiture and cancellation. The process is not automatic. The state must first prove that the water right has not been used. The law includes a presumption of forfeiture upon a showing of non-use for the five-year period. The water right holder then has an opportunity to show whether the non-use was “excused” for one of a number of reasons listed in the statutes. Excuses for non-use include, but are not limited to: economic hardship; other government regulations that prevent water use; or participation in a conservation reserve program.

**What is a “basin plan”?**

The term basin plan, or basin program, refers to a set of administrative rules that prescribe specific policies and requirements to guide OWRD in allocating water for new water rights in each of the state’s major water basins. Similar to a land use comprehensive plan, a basin plan identifies the types of new water uses that may be approved for both ground water and surface water sources. The basin plan may also include special standards or limitations for allocating water in areas of special concern, such as Ground Water Limited Areas or Critical Ground Water Areas (see below).

**What is a Critical Ground Water Area?**

This term refers to specific geographic areas designated by administrative rule (or, historically, by “order” of the Water Resources Commission) as requiring special management because of significant ground water declines or interference with surface water. Pursuant to ORS 537.735, the Water Resources Commission may, by rule, impose a wide range of restrictions on existing ground water rights, or limit issuance of new ground water rights, as needed to manage the resource.

**What is a Ground Water Limited Area?**

The term Ground Water Limited Area refers to a relatively new tool for managing ground water areas of concern because of apparent resource declines or interference problems. The designation occurs as part of a basin plan, adopted by administrative rule, and may include limitations on issuance of new ground water rights in the specified area. A Ground Water Limited Area designation is less restrictive than a Critical Ground Water Area and does not include authority to impose limitations on the use of water under existing water rights.

**What are “exempt” water uses?**

The law includes limited exceptions to the general rule that a water right is required. Exempt uses of surface water include: stock watering; certain small ponds and reservoirs that were constructed and registered with the state before January 31, 1997; firefighting; certain forest management practices; certain land management practices (such as erosion control) where the primary purpose is not to make use of the water; use of small natural springs that do not flow off the property where the spring originates; and
certain types of fish enhancement projects.

Exempt ground water uses are more significant. They include: domestic and group domestic use of up to 15,000 gallons per day (gpd); commercial and industrial uses up to 5,000 gpd; stock watering; non-commercial lawn and garden up to ½ acre; and down-hole heat exchange uses. These uses are described in ORS 537.545. Before 2009 it was not necessary for a landowner to take any steps to notify OWRD or register a well that is used only for exempt purposes; however, for wells completed after July 22, 2009, the law now requires the landowner to file information and a map with OWRD within 30 days after the new well is completed, along with a filing fee of $300.

**What is the difference between a “permit” and “certificate”?**

Water rights are issued in two stages: The first stage is the “water right permit,” which serves as the initial authorization for a water user to develop the source and begin making use of water. The second stage is the final certificate, which is issued after the water use is fully developed and put to use.

Important legal distinctions exist between the permit stage and final certificate stage. At the permit stage, the water right is viewed as personal property, held by the water user. If the permit is not developed and used correctly, it may be subject to cancellation by the state. After the water right has been fully developed and used appropriately, the permit holder is entitled to a certificate. At that stage, the water right becomes “vested” and is treated as an interest in real property. A certificated water right can last forever, and can be lost only upon a showing that the right has been forfeited due to non-use.

**What is a “permit extension”?**

Each permit, when initially approved by the Water Resources Department (WRD), includes a period of time in which to complete the process of developing the source and putting water to beneficial use. Typically, surface water rights include a five-year initial period, while ground water rights have a three-year period. Extensions of time may be granted upon a showing of “good cause.” The good cause determination is based on a number of factors, including past diligence of the permit holder.

Until several years ago, permit extensions were routinely granted by the WRD, largely because there was little or no opposition to the extension requests. In the early 1990s, however, in the face of new Endangered Species Listings and growing attention by environmental groups, the WRD was advised by the State Attorney General that the past practice of routine permit extensions was not legally sufficient. As a result, the WRD made substantial changes to the permit extension process. The current process requires a more extensive analysis of the level of diligence shown by the permit holder in developing the water right, as well as consideration of other competing needs for the water. The process also includes a careful review of potential impacts on listed species, or flows necessary for Scenic Waterway purposes. As a result of statute changes in 2005, the process also includes more stringent requirements for cities and towns seeking extension of permits for long-term development of municipal water supplies. If a permit extension is approved, new conditions may be added to address public interest concerns raised during the review process. As a result of these changes, permit holders are now strongly encouraged to avoid the permit
extension process by completing development of the water right within the authorized time frame.

**What is a “permit amendment”?**

A permit amendment is the process used to make limited changes in the basic terms of a water right permit before it is fully developed. At this stage, the permit holder may submit a written request to change the location of use within the same ownership, and to the point of diversion or appropriation, to more effectively deliver the water in developing the permit. These changes are allowed only if the WRD determines they will not result in enlargement of the permitted right, or injury to other water rights (see below). Changes in the type of use are not allowed at the permit stage.

**What is a “transfer”?**

The term “transfer” is used to describe a change in the type of use, place of use, or point of diversion for a permanent water right. The law does not allow a change in the source of water—such as from ground water to surface water, or vice versa. (However, there is a process by which the holder of a water right for the use of surface water may divert water through a shallow, hydraulically connected well.)

Transfers may be temporary—for up to five years—or permanent. A transfer application must be filed and approved before the change may be made. The standard for approving a transfer application is whether the proposed change will cause “injury” to other water rights.

A transfer is not required to document a change in ownership of the land to which a water right is appurtenant, so long as the deed does not otherwise reserve; where the deed is silent, a water right is presumed to remain appurtenant to the land. If water rights are reserved when land is sold, the owner of the water right must complete the transfer process in order to move the water right to other land or to transfer the water right instream.

**What is “injury”?**

The basic test for approving a transfer is whether the change will result in injury to another user. The term “injury” is generally defined in the rules of the Water Resources Department as preventing someone else from obtaining water to which they are legally entitled. Over time, the term has come to include a wide range of considerations. For example, enlargement of the water right by attempting to increase the total rate or duty (volume) of water allowed under the original water right would constitute “injury.” In some instances, changing the point of diversion or location of use may result in injury by changing the regime of return flows that have come to be relied upon by other water users of the same source.

Another important consideration for injury is whether the water right proposed for transfer has been regularly exercised and is not subject to forfeiture. Before approving any transfer, the Department must find that the right is valid and not subject to forfeiture for non-use.
**What is “regulation and distribution”?**

Each water right includes a priority date—one of the basic tenets of western water law and the “Prior Appropriation doctrine.” A senior water right holder is entitled to full delivery of all water allowed under the right before any junior priority dates may be served. The process for ensuring proper distribution according to water right priority dates is called “regulation and distribution.” A state watermaster is authorized to regulate junior users in order to protect senior users, when a “call” is made by the senior water right holder.

Regulation and distribution can occur only among water users of the same source of water. Therefore, as a general rule, a ground water right will not be regulated to protect a surface water right. A major exception to this rule is when the ground water use results in substantial interference due to “hydraulic connection.” This means that use of the ground water can be shown to have a direct impact on a nearby surface water source.

**What is a “futile call”?**

An important aspect of regulation and distribution is the “futile call.” A watermaster may not regulate a junior water right holder to protect a senior water right if the effort would be “futile.” This can occur when the junior use is so far removed from the senior use that the saved water would not make its way through the stream system in time, or in sufficient amounts, to benefit the senior right.

**What about ponds and reservoirs?**

A water right is required to construct a pond or reservoir—even a small one. About 20,000 small ponds and reservoirs that were in existence before 1995, and that were registered with the state by 1997, are exempt from the water right requirement. All other ponds and reservoirs require at least one water right—to authorize the storage of either surface or ground water in the pond or reservoir. When the stored water will be used for some additional purpose, such as irrigation, an additional water right is required. Storage is generally allowed only during a specified storage “season”—usually during the winter and early spring months.

**What is the process for obtaining a water right?**

The water right process includes three major steps: the application, the permit, and the certificate. The application process for a new water right permit generally takes a minimum of about one year. The process can take longer if protests are filed in objection to the application. If the application is approved, a permit is issued. The permit allows up to five years in which to develop the water source and distribution system, and make actual beneficial use of the water under the terms and conditions of the permit. The permit holder has one year after completion of development and beneficial use in which to submit a final proof survey and claim of beneficial use. These documents are needed in order to obtain the final certificate.
What is an "instream water right"?

An instream water right is intended to protect a specified amount of stream flow for public purposes related to fish and wildlife needs, recreation, or water quality. The Oregon Departments of Fish and Wildlife, Parks and Recreation, and Environmental Quality are authorized by statute to apply for instream water rights. The applications go through a review process similar to that required for all other water rights. If approved, the instream water right is held by the Water Resources Department in trust for the people of Oregon. An instream water right has a priority date, just like any other water right.

What is an instream "lease"?

An instream lease is an agreement between a water right holder and the State of Oregon to allow the water right to be used for instream purposes for a specified period of time. Leases may be issued for up to five years at a time and may be renewed. During the term of the lease, the water is used only for the instream purpose, unless the lease is set up as a "split season" agreement. Under a split season lease, the water right holder may continue to use a specified portion of the water right for its usual purpose—such as irrigation—but the remainder is used for instream purposes. The split uses may not occur concurrently, and measurement and reporting of both uses is required.

What is a "time-limited" instream transfer?

A time-limited instream transfer is essentially a lease for a specific period of time requested by the parties (i.e., a lease is limited to a term of up to five years, while a time-limited transfer may be approved for any time period specified by the parties).

Can water rights be bought and sold?

Yes—to a certain extent. Certificated water rights are vested private property, and there is nothing in state law that prohibits such transactions. However, in order to change the location of use, type of use, or point of diversion for a water right, the parties must apply for a water right transfer. The transfer will be approved if the change will not result in injury to other water rights (see above). Because of this requirement for state approval, there is no assurance that the water right sale can be completed until the transfer is approved. Despite these limitations, water right transactions occur throughout the state as a means of reallocating the resource between willing buyers and sellers.

What happens to the water rights if the land is sold?

Certificated water rights are legally appurtenant to the land. Therefore, if the land is sold, the certificated water rights are deemed to be included in the sale unless they are expressly reserved to the seller in the deed or contract of sale. If the water rights are reserved by the seller, the seller must file a transfer application with OWRD to move the water rights to a different location. This must be done within five years of the last water use in order to avoid possible forfeiture. When the land and water rights are sold, the parties should file an "ownership update" form with OWRD.
Water right "permits" (as opposed to "certificates") are treated slightly differently under the law. Because they are not yet vested, they are not legally appurtenant to the land. However, because each permit specifies a certain location of use, they are generally determined to go with the land in a real estate transaction unless the parties express a clear intent to do otherwise. If you are buying or selling land with a water right permit, it is best to include a written "assignment" of the permit to be filed with OWRD.

When buying property (especially rural land or large industrial sites), be sure to check for water rights. The information is available at the Oregon Water Resources Department. To locate OWRD records for water rights, it is helpful to have a legal description of the property, including section, range, township and tax lot number or map.

Under ORS 537.330, the seller of property with water rights is required to provide evidence to the buyer of any water rights associated with the land. Until 2005, the statute also required the seller to provide written notice of the change of ownership to WRD. Although that provision was repealed, it is advisable for the new owner of land to update OWRD records by filing an Ownership Update or Assignment form for each water right.