

Tools for Managing and Protecting Water Rights in Oregon

By David E. Filippi

Oregon, like other western states, subscribes to the prior appropriation doctrine. In recent years, however, Oregon has modified various common law principles to promote conservation and efficient use of water. These modifications provide irrigation districts and other water delivery organizations with greater flexibility in managing water rights than would have existed at common law. This article provides an introduction to four unique features of Oregon water law: (1) partial forfeiture protection, (2) changes to the authorized place of use without patron consent, (3) instream transfers and leasing, and (4) water spreading through conservation.

Partial Forfeiture Protection

At common law, “use it or lose it” was a fundamental principle. That is, a water right holder risked losing the right if the holder did not fully exercise the right each year. Under Oregon law, any portion of a water right certificate that is not exercised for a period of five consecutive years is presumed to have been forfeited. This presumption can be rebutted under certain circumstances.

In 1997, the Oregon legislature amended the state’s forfeiture statute to allow the use of less water than the entire rate and duty authorized under a water right, provided that (1) the user actually uses *some* water for the authorized use identified in the water right at least once in a five-year period; (2) the user’s facilities are otherwise capable of handling the entire rate and duty authorized by the water right; and (3) the user is otherwise ready, willing, and able to make full use of the entire rate and duty authorized under the water right. This protection removes the incentive that existed at common law for a water right holder to use the entire rate and duty authorized under the water right, regardless of whether such use was actually necessary.

Changes to the Authorized Place of Use Without Patron Consent

The cancellation of a water right within an irrigation district can adversely affect the district’s ability to efficiently deliver water and maintain a broad assessment base. To protect irrigation districts from a situation in which a district patron allows a water right to be forfeited based on five consecutive years of nonuse, the Oregon legislature enacted a statute in

1991 that allows a district to change the place of use of a water right (i.e., “transfer” the right) to other lands within the district. The owner of the property to which the water right is appurtenant need not consent.

To avoid forfeiture, a district must petition for a transfer no later than the end of the calendar year of the fifth consecutive year of nonuse. The standard five-year forfeiture provision, then, does not apply to the portion of the water right at issue pending approval of the petition.

Instream Transfers and Leasing

The Oregon legislature created a new type of water right—an instream water right—in 1987. Instream water rights are held in trust by the Oregon Water Resources Department (OWRD). These water rights differ from other water rights because neither diversion of the water from the source nor physical control over the water is required for instream water rights.

Existing water right holders may apply to transfer or lease water instream. A transfer can be either time limited (i.e., the water right reverts back to the original use after a specified period) or permanent. A lease can be for a period of five years or less, but the lease can be renewed an unlimited number of times. Instream transfers and leases carry the priority date of the original water right, and water subject to an instream transfer or lease may not be diverted by a junior user. OWRD is authorized to approve a transfer or lease application only if OWRD determines that the transfer or lease will not result in injury to other water rights or enlarge the existing water right. OWRD must modify or terminate the transfer or lease if, after approval, OWRD determines that injury or enlargement has occurred.

For irrigation districts, one benefit of this program is that it allows the district to avoid forfeiting a water right by putting it to “use” instream. In this way, the program removes the incentive that existed at common law to put a water right to consumptive use, regardless of whether such use was actually necessary. For this reason, and because conservation organizations will often compensate water users for leasing water instream, the instream lease program has grown significantly since OWRD issued the first instream leases in 1994. In 2011, a total of 443.8 cubic feet per second was leased instream statewide.

Water Spreading Through Conservation

Water spreading (i.e., expanding the use of water to additional acres through conservation) was prohibited at common law. Oregon's allocation of conserved water statute allows a water right holder who conserves water to use a portion of the conserved water on additional lands, lease or sell the conserved water, or dedicate the conserved water to instream use. The remaining portion of the conserved water is allocated to the state.

The portion of the conserved water allocated to the water right holder is 75 percent, unless more than 25 percent of the funds used to finance the conservation project comes from public sources. Where more than 25 percent of the funds comes from public sources and is not subject to repayment, the state's percentage of the conserved water is equal to the percentage of public funds used. The remaining portion of the conserved water is allocated to the water right holder.

The state's portion is used as follows:

1. If the conserved water is necessary to support instream flow purposes, OWRD issues an instream water right certificate for its portion.
2. If the conserved water is not necessary to support instream flow purposes, the conserved water reverts to the public for appropriation.

The priority of any right to use conserved water is either the same as, or one minute junior to, the priority of the water right under which the conservation measure was implemented. The water right holder elects which priority to use; however, the priority must be the same for the portion allocated to the water right holder and the portion allocated to the state.

In sum, while the prior appropriation doctrine remains the foundation of Oregon's water laws, recent statutory changes designed to promote conservation and efficiency have provided Oregon irrigation districts with options for managing the water rights they are charged with protecting.

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