

# **The 21<sup>st</sup> Century Water Right: Will it be enough to use it or is some of it already lost?**

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# The 21<sup>st</sup> Century Water Right

- “It comes from the faucet.”
- Water Law Fundamentals
- The Changing Face of Water Rights: Changes of Use, POU and POD
- Future Considerations

# “It comes from the faucet.”

- The water and energy interface: a gallon of gas
  - 1 -2 billion gpd to prod. 800 million gallons of refined petroleum
  - 1 barrel of extracted oil can generate as much as 10 barrels of saline, brackish unusable water
  - U.S. currently generates 5 billion gallons of produced water per day (considered non-potable)
  - 2.5 to 42.5 gallons to create a gallon of gas (not incl. water related transportation costs)

# “It comes from the faucet.”

- Bottled water
  - 32 to 54 million barrels of oil to generate the energy to produce the amount of bottled water consumed in the US (2007 est. figures)
  - 1 to 2 billion gpd per 800 Million gallons of refined petroleum
  - U.S. Sales – approx. 33 billion liters / avg. = 30 gallons per person
  - Estimated that production and transportation of bottled water uses up to 2,000 more energy (which in part requires water) than that required for tap water

# “It comes from the faucet.”

- Wine Numbers (2008)
  - *75 gallons of water to produce grapes for one gallon of wine (California North Coast area) / 430 gallons to produce grapes for one gallon of wine (Central Valley production)*
  - *Approx. 6 gallons of water per gallon of wine in production process (barrel-washing and tank cleaning, etc. – some have managed to cut this in half)*
- Blue jeans – 2,000+ gallons
- Exploration on the Moon
  - "Indeed, yes, we found water. And we didn't find just a little bit, we found a significant amount[.]"
  - Approx. 24 gallons / \$79MM plus

# Water Law Fundamentals

- Ownership Cycle of Water
  - Public ownership: Waters within the state are generally recognized as belonging to the public
  - Private Ownership: triggered when the water is subject to appropriation and brought within the physical control of the user
  - Public Ownership: Water reverts to public *via* return flows
- Surface Water Rights. Early 1900's common law doctrine of prior appropriation codified in state statutes throughout the west subjecting surface water to state wide adjudication and permitting systems.

# Water Law Fundamentals

- Ground water rights. Most states during mid 1900's created additional laws to govern regulation of groundwater and relationship with surface water
  - California is the exception not the rule: no statewide regulation of groundwater (Water Code encourages decision making at the local / regional level)
- Ground Water Act of 1955 (Oregon) ORS 537.505-537.796
  - Public Policy Objectives per ORS 537.525:

The Legislative Assembly recognizes, declares and finds that the right to reasonable control of all water within this state from all sources of water supply belongs to the public, and that in order to **insure the preservation of the public welfare, safety and health** it is necessary that:

\* \* \*

# Water Law Fundamentals

(2) Rights to appropriate ground water and priority thereof be acknowledged and protected, **except when, under certain conditions, the public welfare, safety and health require otherwise.**

\* \* \*

(9) Whenever wasteful use of ground water, . . . or pollution of ground water exists or impends, controlled use of the ground water concerned be authorized and imposed under voluntary joint action by the Water Resources Commission and the ground water users concerned whenever possible, **but by the commission under the police power of the state** except as specified in ORS 537.796, **when such voluntary joint action is not taken or is ineffective.**

- Governs the use of all ground water throughout the State. ORS 537.505-537.796.
- Recognizes need for conjunctive management when hydrologic connection exists between surface and groundwater. ORS 537.505-537.795; OAR 690-009-0010 -0050.
- Evolution of ground water regulations lead states to create additional basin regulatory overlays in consideration of declining aquifers



# Water Law Fundamentals

## ■ WATER RIGHT PERMITTING

- Application Review: permits to appropriate surface water, ground water, to construct a reservoir and store water, to use reserved water or to use water stored in a reservoir
- Initial Review.
  - Is the proposed use strictly limited by statute or rule (e.g., GMA/AMA – Az.; Denver Basin Ltms - Co., CGWA/GWLA - Or.)
  - Is water available in the amounts and at the time requested
  - Factors to be considered includes injury to other water rights, avoidance of waste, threatened, endangered or sensitive species, water quality, fish or wildlife, recreation, economic development, local comprehensive land use plans, anti-speculation doctrines

# The Changing Face of Water Rights: Changes of Use, POU and POD

- Trends for Transfer of Water Rights
- Water Rights Characteristics Subject to Change
- Methods of Transfer
- Transfer Application Process
- Protecting & Losing a Water Right

# The Changing Face of Water Rights: Changes of Use, POU and POD

- TRENDS FOR TRANSFER (market driven)
  - Irrigation/other to municipal / multipurpose uses
  - Irrigation/other to instream uses
  - Evolution of water market
  - Raises variety of due diligence considerations in the acquisition and change of use of water rights in pursuit of new development

# The Changing Face of Water Rights: Changes of Use, POU and POD

- CHANGING A WATER RIGHT: Characteristics Subject to Change (Type; POU; POD; Rate of Diversion; Vol. Amnt.)
  - Place of Use
  - Orig designated according to permit/certificate
  - Title considerations – water is appurtenant to the lands upon which the water is applied to beneficial use (absent specified exception or reservation)
  - Buyer beware – Traditional title insurance NA

# The Changing Face of Water Rights: Changes of Use, POU and POD

- TRANSFERRING A WATER RIGHT: Characteristics Subject to Transfer (Cont'd)
  - Type of Use
    - Declared Beneficial uses
    - Other uses (Statutory list not exclusive)
    - Conversion to instream use (e.g., Colorado, Montana, Wash., Or.)
  - Point of Diversion
    - Changing location: surface to surface / surface to hydraulically connected groundwater /
  - Considerations: Forfeiture, Return Flows, Common Law Abandonment, Historical use (e.g., Co., Wa.)
    - Historical use exceptions (e.g., Or. – “paper” water right)

# The Changing Face of Water Rights: Changes of Use, POU and POD

- TRANSFERRING A WATER RIGHT: Methods of Transfer
  - Permit Amendments
  - Permanent Transfers
  - Temporary Transfers
  - Special District Changes/Transfers: Temporary and Permanent (increased flexibility)

# The Changing Face of Water Rights: Changes of Use, POU and POD

- TRANSFERRING A WATER RIGHT: Transfer Application Approval Process (Cont'd)
  - Judicial / Trial Court Proceeding (e.g., Colorado)
  - Administrative
    - Application & Notice
    - Agency Review (Forfeiture, etc. / Determination)
    - Publication of Decision
    - Protest & Req. for Hearing
    - Admin. Hearing (ALJ, State Engineer's office, etc.)
  - Certificate / Order / Decree
  - Proof filing / Extensions (due diligence / speculation)

# The Changing Face of Water Rights: Changes of Use, POU and POD

- Protecting and Losing a Water Right
  - Lack of Perfection (Permitted or “Inchoate” right)
  - Forfeiture (5 yrs, 10 yrs)
    - Enumerated exceptions to rebut presumption of forfeiture
  - Common Law Abandonment (intent)
  - Waste
- Cancellation process (initiated by third party or state agency)



# Future Considerations

- Clean Water Act (TMDLs – temp.)
- Endangered Species Act
  - *In re Delta Smelt Consolidated Cases*, --- F.Supp.2d ----, 2009 WL 3823934 (E.D. Cal. Nov. 13, 2009) – water districts successfully argued that the Services had failed to analyze the impact that diversions to help the smelt (per Section 7 BiOp) would have on groundwater resources, air quality, local streams and wildlife, and soil erosion, as well as job loss, fallowed land, and “significant degradation of the human environment”
  - Implicated management of CVP and CSP
  - Held that BOR agreement to follow Services’ BiOp triggered NEPA obligation
- Ecological flows / Peak flows

# Future Considerations

- Enforcement / Prior Appropriation
- Political Will and Public Policy
  - Exempt wells
  - Domestic use preference by statute: TX., KS., NE., ND., WY., CO., AZ., CA., NM., OR., UT (*until May 12, 2010 per H.B. 241*)
  - The increasing push against prior appropriation
- Seeking opportunity through proper planning
  - Location, location, location
  - Know the value of the water rights
  - Improve management through public or private partnerships