



Going with the Flow: Instream Water Rights & the Future of Irrigated Ag

Presented by Elizabeth Ewens and Merissa A. Moeller

*NALC Annual Western Agricultural and
Environmental Law Conference*

Reno, Nevada – June 13, 2024



Some Historical Perspective

“The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the government ... has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent home-makers, to use and develop it for themselves and for their children and children’s children.”

Theodore Roosevelt – Annual Message to Congress – 1907

“By adding six little words to Oregon statutes ..., the Oregon Legislature can give recreation and scenic values proper standing in this state’s future management of water resources. This statutory change is overdue.”

Oregonian Editorial Staff – Jan. 19, 1987



Key Themes

- Evolving laws in response to evolving politics, economics, and social values
- Voluntary, market-based approaches vs. command-and-control approaches
- For water users, risks and benefits are context specific.
- For regulators, what are the opportunities to partner with water users and other stakeholders?



Today's Presentation

- Legal Backdrop
- Policy Backdrop
- Economic Backdrop
- Case Studies (Oregon & California)
- Looking Ahead
- Questions?



Legal Backdrop – Western Water Law 101

- Water law is **property law**.
- Prior appropriation vs. riparian rights
- Historical context:
 - Water is a public resource.
 - Water is scarce.
 - Goal is to incentivize efficient and orderly development and **use** of water.
- Groundwater



Legal Backdrop – Prior Appropriation

- Key Concepts:
 - First in time, first in right (**priority**)
 - Use it or lose it (**forfeiture**, **abandonment**, **relinquishment**)
 - No proportional reduction in use during shortage
 - Water rights can be changed (permanently or temporarily), but no **injury** or **enlargement**
- Elements of a Water Right:
 - Intent to apply water to **beneficial use**
 - **Diversion** of water from source
 - Application to beneficial use



Enter: Instream Water Rights

- Historical Context:
 - Legal evolution of the prior appropriation doctrine beginning in the 1970s;
 - Different approaches in different states (statutory, regulatory, common law evolution);
 - Oregon as one example:

*“In-stream water right” means a **water right** held in trust by the [State] for the benefit of the people of the State * * * to maintain water in-stream for public use. An in-stream water right does not require a diversion or any other means of physical control over the water.” – ORS 537.332(3).*



Legal Backdrop – Instream Water Rights

- Key Concepts and Questions:
 - First in time, first in right – what is the **priority date**?
 - “Use” it or lose it
 - No proportional reduction in use during shortage*** – **who holds and who can call?**
 - Water rights can be changed, but no **injury** or **enlargement*****
- Elements of an Instream Water Right:
 - Instream use IS a **beneficial use**
 - **Diversion** of water from source **not required**



Policy Backdrop

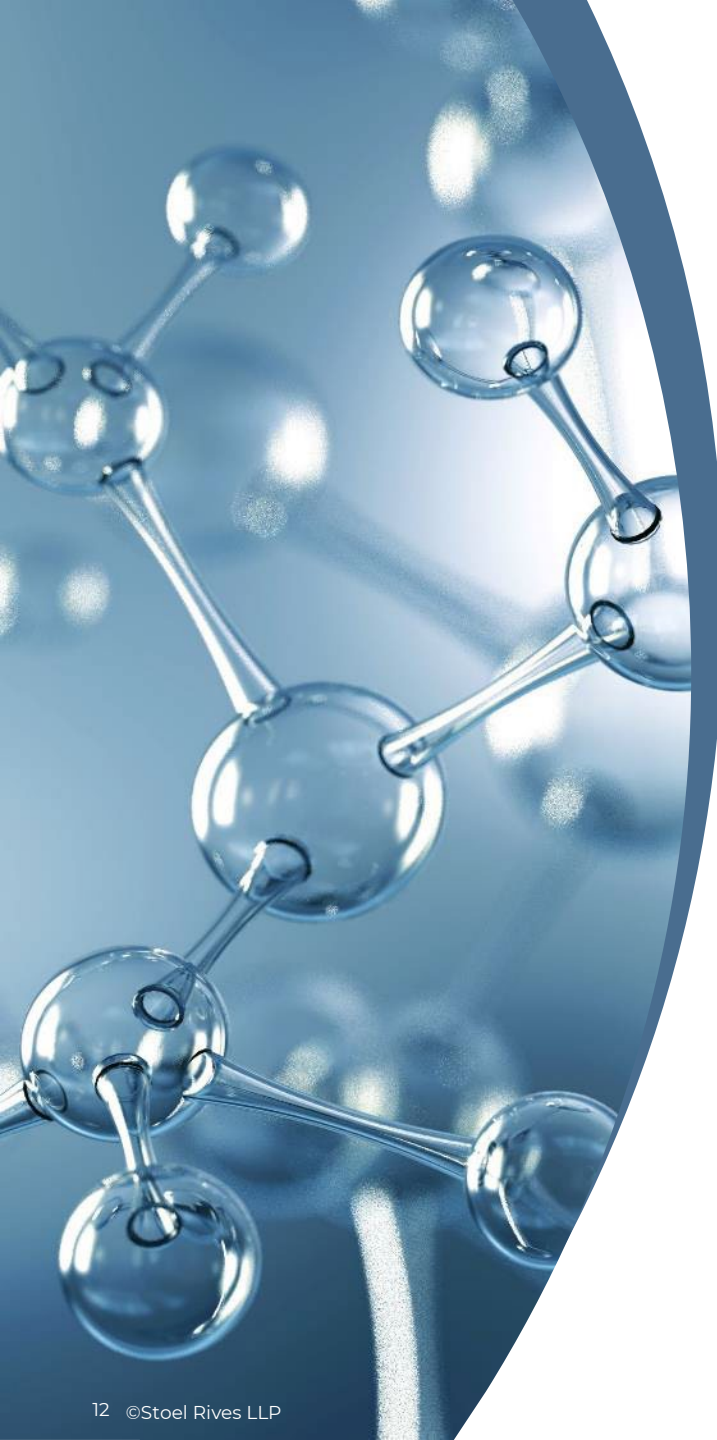
- Policy efforts to encourage use of water for natural resources while also safeguarding private water rights
- Interests in ensuring flexibility in the exercise of water rights and promoting full beneficial use of available water
- Mechanisms to protect dedicated instream flows from unlawful diversions

Economic Backdrop

- Federal, state, and private funding incentives
 - Funding to acquire instream water rights
 - Funding to modernize irrigation infrastructure
- Market incentives based on value of existing water rights
 - Instream use as protection against forfeiture
 - Private markets for water rights (instream and consumptive)

Case Study: California Instream Flow Transactions

- Instream flow dedications
 - Water Code section 1707
 - Post-1914 rights
 - Distinguished from riparian and pre-1914 rights
 - Forbearance agreements
 - Temporary versus long term changes / transfers
 - Temporary Urgency Change Petition
 - Temporary Transfer Petition
 - Long-term Change Petition
 - Split / multiple water rights
 - Conserved water



Case Study: Oregon's Conserved Water Program

- voluntary, market-based program
- allows water right holder to conserve water without risk of forfeiture and while retaining priority date
- conserved water split between state and water right holder (typically 25% / 75%)
- for conserved portion, water right holder may apply it to a new use, sell it, lease it, bank it instream, etc.
- ORS 537.455; OAR Ch. 690, Div. 18



Case Study: *East Valley Water District v. Oregon Water Resources Commission*, 328 Or App 790 (2023)

- ORS 537.153 – Public Interest Test
- ORS 537.170(8)(f) – includes consideration of “all vested and inchoate rights” to state waters “and the means necessary to protect such rights”

- Footnote 12:

“We note that for some types of water use, such as irrigation, it makes sense to consider the quantity of water that is available when determining whether a water right is protected. However, not all water uses are consumptive.”

Looking Ahead

- Intersection between instream water rights and federal laws (ESA, Reclamation authorities, etc.)?
- Scope of instream water rights compared to other types of water rights?
- Economic and political considerations will continue to drive the market for instream water rights.

Questions?

Elizabeth Ewens

California / Nevada

(916) 319-4667

elizabeth.ewens@stoel.com

Merissa A. Moeller

Oregon / Idaho

(503) 294-9455

merissa.moeller@stoel.com

Tiffany Wang

Washington

(206) 386-7563

tiffany.wang@stoel.com

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