

Oregon Municipal Water Law

Richard M. Glick

Davis Wright Tremain LLP

PNWS-AWWA Section Conference

Tacoma, Washington

April 26, 2018



Introduction



- Water is a scarce resource
 - Most saline and freshwater not evenly distributed
 - Water is expensive to store and transport
- Growing cities create most demand, but new water rights hard to get
 - Most Oregon streams over-appropriated
 - Oldest water rights held by irrigated agriculture
 - Minimum fish flows limit or prevent new rights
 - Munis use fraction of water, but fat target

USBOR Upper Deschutes Basin Study

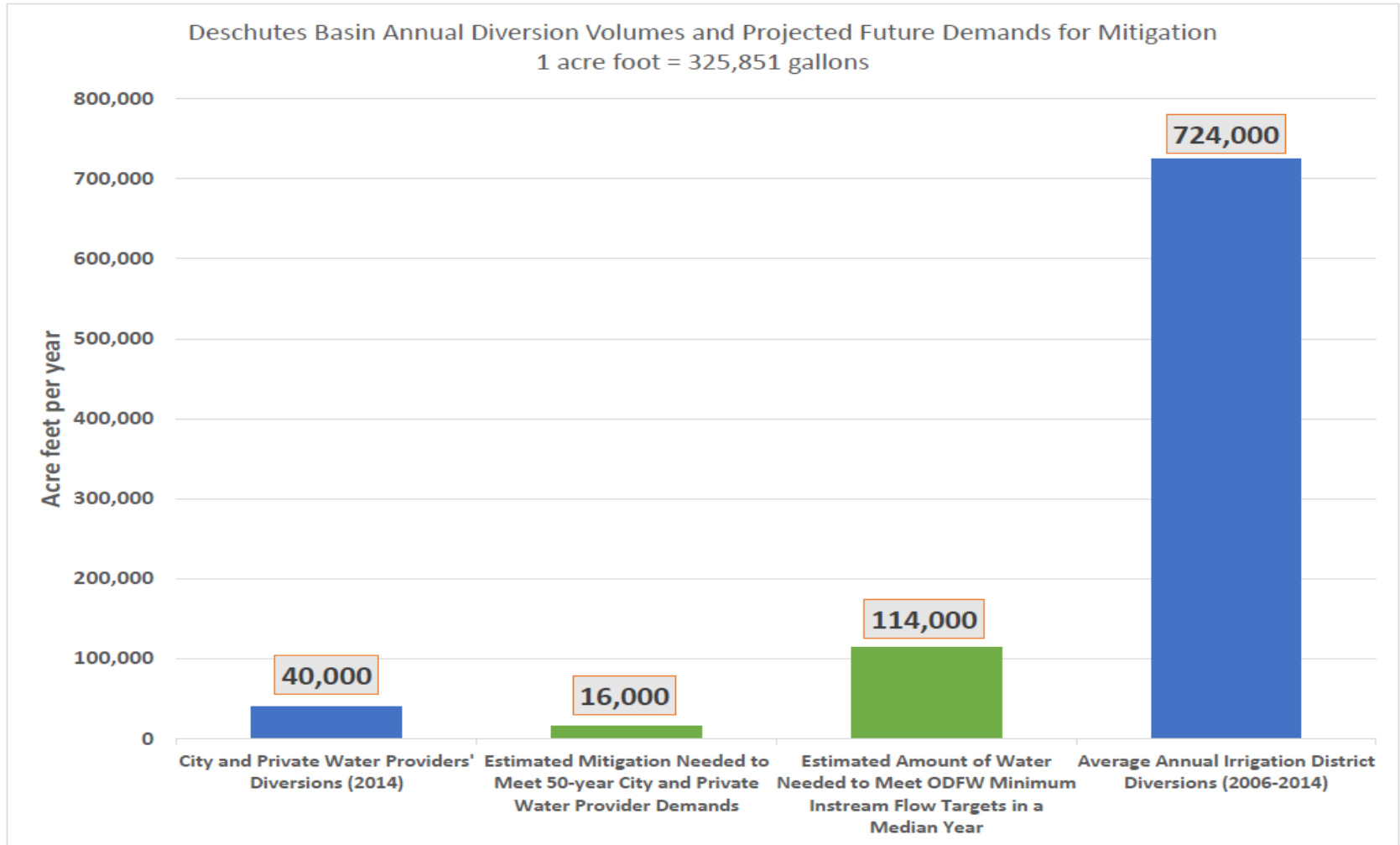
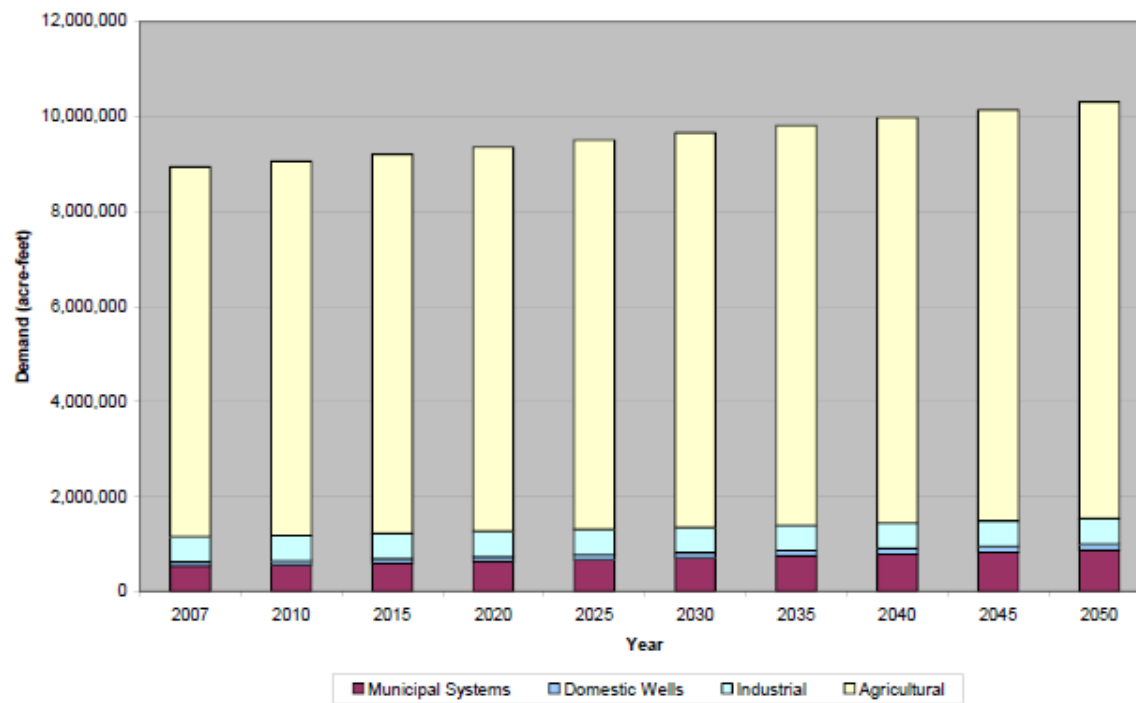


Figure ES-1. Demand Forecast by Water Use Category - Reference Forecast



Introduction

- Growing Communities Doctrine
 - Cities must supply safe and reliable water supply every day
 - Now and in future
 - Must anticipate population growth
 - Must sync water infrastructure planning with long-term, uncertain development plans
 - Oregon cities must have 20-year comprehensive plans
 - Infrastructure planning horizons much longer
 - Lock up water right, but develop over time



Introduction

- Expressions of Growing Communities Doctrine
 - No forfeiture for non-use
 - Can serve water outside city boundaries
 - Latitude in showing diligence and good cause for extensions
 - Oregon extensions legislation (2005)
- Oregon cases cast shadow

Prior Appropriation

- Oregon follows rule of prior appropriation
 - First in time, first in right
 - No sharing of shortages
 - Helped attract miners and farmers, settle the state
 - Surface and groundwater
- All western states follow prior appropriation
- Eastern states riparian rule-reasonable use
- California combines all!
- Extra credit on prior appropriation:
<https://www.energyenvironmentallaw.com/2014/01/23/square-pegs-in-round-holes/>.

Oregon Water Rights Process

- Oregon Water Rights Act of 1909
 - Codifies common law approach
 - Pre-1909 rights subject to adjudication
- Application leading to permit
 - Sets priority date
 - Proposed Final Order can be protested
 - Allows development of water works (inchoate right)
- Certificate after Claim of Beneficial Use
 - Vested right in perpetuity
 - Subject to forfeiture for nonuse—but not munis!

Transfers

- “Transfers” allow changes in point of diversion, place of use or character of use
 - For certificated rights
 - If still a permit, need permit amendment
- Test: Will other water rights holders be injured?
 - Includes instream water rights
 - Important when munis purchase water rights
 - No enlargement

Water Rights Extensions



- 1987 DOJ opinion on extensions, rulemakings put hold on extension requests
- Coos Bay – North Bend Water Board case
- HB 3038 (2005)
 - Cities are different from other water users
 - New muni construction date up to 20 years + extensions
 - Earlier extensions grandfathered
 - Diligence/good cause clarified to include water planning, not actual construction

Water Rights Extensions

- HB 3038 (cont.)
 - Water use beyond previous maximum upon approval of Water Management & Conservation Plan
 - Fish persistence condition—first extension only
 - “undeveloped portion of the permit is conditioned”
 - Based on “existing data and upon the advice” of ODFW
 - Codified as ORS 537.230



Cottage Grove Extension



- *WaterWatch v. WRD*
 - Ct. of App., 2013; rev. improvidently granted, aff'd. by S. Ct. 2014
- While WRD developed policy, munis continued development
- Measure “undeveloped portion” from date new extension granted, or previous extension?
- Does certificate moot case?

Cottage Grove Extension

- Original permit 1974, diversion 6.2 cfs by 1980
- Extensions granted every 5 years until 1999
 - Moratorium on extensions pending WRD policy
 - Most munis like CG continued development
- Treatment plant completed 2007, diversion of full 6.2 cfs by 2008
- Extension granted under HB 3038
 - WRD found no “undeveloped portion,” so no “fish persistence” conditions
 - WRD issued certificate

Cottage Grove Extension

- Court of Appeals held “undeveloped portion” relates back to last extension—1999
 - Vacated certificate as based on faulty extension
 - Remanded back to WRD
- Broad implications
 - Water rights devalued as may be subject to curtailment for fish
 - May add unbudgeted cost to water development

Bend Pipeline Case

- *Central Oregon Landwatch, WaterWatch of Oregon v. Connaughton* (9th Cir. 11/3/17)
 - City of Bend has dual source water supply: holds vested surface rights in Tumalo Creek and groundwater rights
 - Pipeline through Deschutes National Forest
 - Needed replacement, USFS Special Use Permit
 - Some urged abandonment of surface rights to protect Tumalo Falls



Bend Pipeline Case

- Case initially was about NEPA and forest planning laws
- Plaintiffs sought imposition of minimum perennial fish flows
 - Planning laws allow, but do not mandate minimum flows
 - Plaintiffs sought condition in SUP to impose junior ODFW instream water rights in Tumalo Creek
 - Would turn prior appropriation on its head
 - Instream rights intended only to limit future diversions



Alternative Approaches

- Water marketing
 - Purchase rights from farmers or other munis
 - Provides senior priority date
 - Older rights not subject to fish flow curtailments
- Pay to improve irrigation efficiency
 - Replace flood with pressurized irrigation to “create” more water
 - Pipe open irrigation ditches



Rick Glick

- (503)778-5210 tel
- rickglick@dwt.com

Davis Wright Tremaine
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201-5610