THE OWNERSHIP OF WATE R IN OREGON: PUBLIC PROPERTY VS. PRIVATE COMMODITY

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I. INTRODUCTION

This article concerns the ownership of water as opposed to the right to appropriate. A right to appropriate water under state law may or may not result in actual capture of water. The ownership of water prior to appropriation and the rights and duties of the owner prior to appropriation have a profound influence on the amount of water available for appropriation. Once lawfully captured, water becomes the property of the captor subject to the police power of the state. However, what of water that is not in the liquid state? What of water that is manufactured instead of captured?

Water owned in the true sense is no longer available for appropriation. Oregon's system for apportioning water for consumptive use is a system of "prior appropriation" characterized by the words "first in time, first in right".[1] Under the system, the appropriator owns a water right with a temporal priority establishing older rights as senior and more recently established rights as junior. A water right is property in and of itself but does not constitute ownership of the water. The water is not owned by private persons until it is captured, which will be discussed below.

Prior to capture, surface water from all sources of supply is the property of the public.[2] The members of the public have certain inherent rights by reason of their status that allows use of the water. Those rights are discussed below and include the right of the use of navigable waters for trade and travel and for the

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common fishery. The rights are referred to as the jus publicum or the "public trust." There is also a right at common law to use any water that will support the use as a public highway. The conflict between these rights and the rights of appropriators is also considered.

Interestingly, research suggests that there is no individual common law right or statutory right to drinking water. Including such a right in the United Nations Declaration of Human Rights may have an impact on water law if the Declaration is considered something other than an aspirational document. Thus far, discussion of the Declaration predominantly concerns funding to make clean and safe drinking water available to people in Third World Countries. There has been little discussion of how it might apply in the Developed World. The recognition of an individual human right to an adequate quantity of safe and clean drinking water potentially could change the priorities of water apportionment. It raises certain conflicts with both common law and with the law of prior appropriation. Such an individual right to a sufficient quantity of water of a defined quality would seem to belong to the jus publicum and attach to surface water while it is in trust that is owned by the state.

Ground water is a more difficult issue. At common law, percolating ground water is owned by the owner of the surface so long as it remains in the ground. When produced it is captured.[3] How the jus publicum could attach to ground water not hydraulically linked to surface water seems conceptually difficult. Unquestionably, the police power is available to regulate the capture of ground water and to establish priority for its use. Oregon currently uses the law of prior appropriation and beneficial use to apportion ground water but does not claim to own it.[4]

II. DEVELOPMENT OF THE LAW

A. Early Common Law

One of the first attempts at a comprehensive presentation of the English Common Law was Henri de Bracton's De Legibus et

3. Ground water that is brought to the surface from a well is said to be produced. The same terminology is used for oil and gas.

4. OR. REV. STAT. § 537.525(1) (2009).

Consuetudinibus Angliae Bracton's work does not contain a systematic discussion of what would be called water law, but some concepts that became crucial are present. The most commonly cited pronouncements of Bracton are that by natural law the sea, running water and the shores of the sea are common to all.[5] Bracton goes on to say that all rivers and ports are public and may be used together with the banks for what we would now call navigation.[6] The public use is limited to the river and the banks. The ownership of the banks and the bed of the river remain with the riparian owner, and the public use of them is incident to travel.[7]

The remainder of what Bracton had to say about water must be teased from other sections of the text. He discussed the nature of servitudes and the existence of a servitude to conduct water over the land of another,[8] but he does not elaborate on the servitude except to say generally that servitudes have no existence apart from the land to which they attach and cannot be alienated.[9] Bracton's discussion of accretion and relicti[10] and of the riparian owner's title to the center of the stream will strike most lawyers as

5. 2 HENRY DE BRACTON, ON THE LAWS AND C52 258.06 g Tc 0.283m (LaD 8 >>BDn507 02 0 0 7.02 229.316n507 02

surprisingly modern. The law on these subjects today is virtually unchanged.

Two other observations of Bracton are well worth noting although he applies neither to water. First, Bracton related that at common law two circumstances must occur to abandon one's right to property. One must intend to abandon the thing and possession of it must be lost or relinquished.[11] Second, Bracton observes that one who changes the nature of a thing by joining it with another thing or substance changes its nature and acquires the new creation in place of the old.[12] He uses soldering and welding as examples.

Bracton's description of the Common Law as it applies to accretion and reliction on riparian property is very close to the law as it is understood in Oregon today.[13] What accretes slowly is gained by the riparian, and what relicts is slowly gained by the littoral owner. The discussion regarding ownership of islands differs from Oregon law as to islands in navigable waters.[14]

While early Common Law followed Roman Law in asserting that the waters of the oceans were common property of all human beings and the particular property of none, England subsequently abandoned that position. The Great Dutch Jurist Hugo Grotius published Mare Liberum in 1609[15] and De Jure Belli Ac Pacis in 1625.[16] The English Crown strongly rejected the idea claiming that the seas surrounding the British Isles belonged to England

11. BRACTON, supra note 5, at 40.

12. Id. at 45.

13. Id. at 44; See Bonnett v. Div. of State Lands, 949 P.2d 735 (Or. Ct. App. 1997); Morse Bros. Inc. v. Wallace, 714 P.2d 1095 (Or. Ct. App. 1986); Minto v. Delaney, 7 Or. 337 (1879). JO27.Tw -19.6695T1 1 Tf A Td 0.00011 Tc 0. supra note 5, at 0.0816 T018Tj 0.0004 Tc 0 0 19-PVerty1U299).

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immoveable: and therefore in this he may have a certain, substantial property, of which the law will take notice, and not of the other.[20]"

Blackstone goes on to observe that a grant of land at Common Law extends not only to the surface of the land but also to those things above and below it, including both minerals and water.[21] Blackstone's work was influential on both sides of the Atlantic.

C. The American Revolution and its Effects

The American Revolution concluded with the Treaty of Paris of 1783. The Treaty recognized the existence of the United States and of thirteen former colonies now called states, each of which was developing a divergent understanding of the Common Law as it pertained to both water and property.[22] The Treaty also ceded poorly described former British lands west of the Appalachian Mountains and North of Florida to the United States. Much of the land that was ceded by Great Britain was subject to western competing land claims of the new States. Inland navigation on rivers and lakes was a matter of critical concern, as was the availability of water to power and supply new industries taking root along the fall line that now stretches from Maine to Georgia.[23] The lands and the obligations that once belonged to the Crown belonged to the newly independent States. Each State maintained its separate sovereignty and separately succeeded by virtue of that sovereignty to the lands formerly held by the English Crown. Most of this discussion takes place in the context of title to lands under navigable waters.[24] Crown ownership of the lands under navigable waters had the potential to interfere with the public trust, which placed certain customary use rights on and in navigable

20. Id.

21. Id.

22. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 85-87 (1938).

23. The fall line of the Eastern United States is a geographic non-conformity that separates the Piedmont and the New England uplands from the seacoast and the Atlantic Coastal Plain. Most rivers flowing into the Atlantic Ocean experience a substantial drop as

waters in the inhabitants of each country by virtue of their citizenship and unrelated to the ownership of any property. Most important of these were the rights of navigation[25] and of common fishery.[26]

The states did not abandon the Common Law after their victory in the Revolutionary War.[27] Instead, each state continued with its parallel development of the Common Law of England as it was understood in that state and applied to its circumstances. The Common Law included a right to transport people and goods along a stream even if the stream was not navigable water, so long as the condition of the water w8.98 6-.

the essence of the thing it pertains to, and the dictates of men are not able to change it.[32] Natural law can be said to describe a state of affairs. When the Corpus Juris states that the air, the seas and running water are free and owned by no man, its author purports to state a fact as well as a principle of law. From the fact flows legal consequences. The consequences are based on custom that vested certain rights in the people as individuals and free persons. These ancient rights were not granted by the sovereign and more importantly could not be infringed upon by the sovereign.[33] Indeed, the history of English Common Law leading to the American Revolution contains celebrated examples of the barons or of the people attempting to preserve those rights from the infringement of the Crown or of local landowners.[34] During the

way into medieval law through Isadore of Seville and Gratian. Thomas Aquinas, perhaps the most influential medieval philosopher, adopted the Aristotelian view of natural law as a source of law. Bracton was greatly influenced by Roman law, and Cicero was a great favorite of English legal thinkers of the 16th and 17th Centuries (Aquinas being Catholic was then out of favor). Thomas Jefferson and James Madison who had a good deal of influence on the development of the common law in the United States reflect their contemporaries in being students of Bracton and of Cicero. The words, "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" that open the Declaration of Independence are a clear statement of natural law. Most modern lawyers are not schooled in philosophy and find the concept of natural law uncomfortable and difficult to understand, but it remains a basis of the common law finding recent expression in ideas like the civil disobedience, which is founded upon the belief that one may justly disobey human laws that conflict with natural law.

32. This is true at least until more modern technology evolved.

33. On this point, I agree with Professor Huffman. See James L. Huffman, A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy, 19 ENVTL. L. 527 (1989).

34. Many critics point out that the Magna Carta had little to do with rights of the common people. In fact, the document was an attempt to reduce the prerogatives of the King in relation to the barons and the church. The liberties of the common people supposed to flow from it were rather attempts to preserve the privileges of the nobles. Prohibition of fish traps and weirs (private fisheries) by grant of the King in rivers and estuaries was insisted on by the barons to allow the escape of salmon, shad, bass and other anadromous fish upstream where the barons could take them. See generally MAGNA CARTA Art. 33. Article 33 says nothing about navigation, it simply requires the removal of weirs from the Thames and the Medway and other waters except at the seacoast. Since at English common law navigable waters were confined to those waters affected by the ebb and flow of the tide, critics suggest it has more to do with the upstream escapement of fish than with navigability. The Thames River to London is tidal as is the Medway. However, the other waters covered by Article 33 are not. Allowing weirs to continue on the seacoast thus seems at odds with an attempt to preserve navigation. A weir of sufficient size to interfere with navigation in the Thames Estuary, including the Medway, seems unlikely. The Medway is a shallow embayment to the Southeast of London on the estuary of the Thames but fed by other rivers. Royal dockyards were located there. It was the scene of an English defeat at the hands of the Dutch fleet

Stuart Dynasty,[35] the Crown attempted to generate revenue by granting certain exclusive privileges of fishery to proprietors on the theory that the king as owner of the lands beneath navigable waters could dispose of them and the fisheries as he wished.[36] Had the king succeeded, our law would be quite different today. He did not succeed.[37] The result of the attempt was the division of rights in the lands under navigable waters into the jus publicum with which the sovereign could not interfere except to promote the public good and the jus privatum, which the state could treat as its own so long as the jus publicum was not adversely affected. It is the jus publicum that has become known as the public trust[38] in cases concerning the lands underlying navigable waters and the waters themselves.[39] At the conclusion of the American Revolution, both the jus publicum and the jus privatum became vested in the newly independent states.[40] The public trust at this time extended to waters affected by the ebb and flow of tide.

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under De Ruyter in 1667.) Whether correct or not, the myth that the Magna Carta was a source of rights for the people is so ingrained in our legal doctrine that it must be treated as truth, even if it is not.

35. The Dynasty spanned from 1603 to 1714. THE BRITISH MONARCHY, THE STUARTS, http://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheStuarts/TheStuarts.aspx (last visited May 20, 2011).

36. F. POLLACK & F. W. MAITLAND, THE HISTORY OF ENGLISH LAW 627 (The Lawbook Exchange ed., 2nd ed. 1952). See also James L. Huffman, Speaking of Inconvenient Truths -- A History of the Public Trust Doctrine, 18 DUKE ENVTL. L. & POL'Y F. 1, 24, (2007).

37. See FIRST CHARTER OF MASSACHSEUTTS, available at http://www.nhinet.org/ccs/docs/mass-1.htm. An echo of the Stuart attempt can be seen in the Massachusetts Charter, which purports to grant the proprietors ownership of waters, seas and fisheries.

38. The public trust was antithetical to the idea of feudal overlordship. Rights belonging to the people under the natural law from which the public trust found its way into the common law were not granted by the king.

39. I do not agree with Professor Huffman that these are property rights. They are better classified as inalienable rights, birth rights, or the rights of Englishmen. That is a class of rights recognized in the Declaration of Independence and fits more with the right to counsel, the right to be free from unreasonable searches and seizures, and the like. For a contrary view, see Huffman, supra note 33.

40. It must be remembered that in England the finances of monarchy were divided between the public fisc and the Privy Purse. The king was, at that time, still very much the head of state. The concept of the modern nation state was still a work in progress. The king held certain lands and estates as private property and was free to adventure with them as would be any other lord or proprietor. English m

In addition to the public trust, there was a Common Law right

In summary, at the time of Independence the jus publicum or public trust applied to waters affected by the ebb and flow of the tide. The right to use rivers and streams as a highway applied to streams and rivers that would support such use when the streams and rivers were in a condition that would support it. The doctrine of riparian rights and the doctrine of littoral rights defined the uses to which property owners could put water flowing across or bordering on the upland. Water that flowed in a channel belonged to the public but was subject to riparian rights. Water that did not flow and was not part of a large pond or lake belonged to the owner of the property on which it occurred.[47]

D. The Northwest Ordinance

Acting under the Articles of Confederation, the United States took a number of steps that would impact the nature of water law in the States to be formed. The Land Ordinance of 1785 included the adoption of the Rectangular Survey to provide a basis for the

acknowledged to be a change for the better, the authors in the best medieval tradition seldom admitted making the changes. They claim continuity and ancient pedigree. Major Richard Latimer in his article Myopic Federalism: The Public Trust Doctrine and Regulation of Military Activities builds a meritorious discussion of the development and application of the public trust doctrine in the United States. Major Richard Latimer, Myopic Federalism: The Public Trust Doctrine and Regulation of Military Activities, 39-85 ML

sale of land in the territories to settlers.[48] The survey system first adopted in 1785 was also known as the Cadastral Survey. Sales of land were to be based on the acreage of the land sold. The government instructed surveyors to exclude the area of navigable waters from the computation of the land sold to a settler and to meander the bank of the water body to compute the area of the land transferred to the settler.[49] The surface area of the navigable water was excluded from acreage transferred by the United States to the grantee. Water bodies that were not meandered were transferred with the grant land counted as part of the land.[50] The government under the Constitution readopted the Rectangular

The second provision of the Northwest Ordinance of 1787 stated:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.[54]

The act admitting Oregon to the Union mirrored both of these provisions.

> Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with the other States . . . That the said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said State, shall be common highways and forever free, as well as to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.[55]

The right of navigation is one of the rights included in the jus publicum and it is arguably the strongest of those rights.

E. The US Constitution

In 1789, the United States established a new government based upon the Constitution. The ordinances mentioned above

54. Id.

55. Oregon Admission Acts, 11 Stat. 383, pmbl., §2 (1859).

were among the laws passed under the Articles of Confederation that carried over under the Constitution.[56]

The Constitution and the Bill of Rights also contained provisions that are pertinent. Under Article I, Section 8, the United States was granted powers to provide for the general welfare, which included the power to regulate commerce between the United States and other nations, among the several states of the United States, and with the Indian tribes.[57] The power is generally referred to as the Commerce Clause. The Constitution gave jurisdiction over cases arising under admiralty or maritime law to the courts of the United States rather than the states.[58] Finally, the Fifth Amendment to the Constitution recited the principle that no person could be deprived of property without due process of law.[59] Both the ownership of water and the ownership of a right to appropriate water are recognized as property. However, they are different property interests. The former may be thought of as something like an expectation or a profit, which will not result in the possession of water by the appropriator unless there is sufficient water to answer his call according to its seniority.[60] The ownership of water is the right to physical possession of it as property.

The United States assumed jurisdiction over commerce between the states and between the United States and foreign nations. For the purpose of the protection of the navigation servitude that is part of the public trust, the Constitution clothed federal government with the authority to enforce that servitude on navigable waters of the United States. A navigable water of the United States is any water that is navigable in fact.[61] However Congress only has authority to regulate navigable water within interstate commerce, therefore Congress can only regulate navigable water that connects as a continuous highway with a

56. Cong. Journal, 1st Cong., 1st Sess. 50-53 (1789) (An Act for the Government of the Territory of the United States North-west of the River Ohio), available at http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=173.

57. U.S. CONST. art. I, § 8, cl. 2.

58. Id. at art. 3, §2.

59. Id. at amend. V.

60. The appropriator is like a person in line at a box office who has the right to his place in line but has no right to a ticket to the movie unless there is one to be had when his turn at the window arrives. The law recognizes the place in line as property right and will defend it.

61. The Daniel Ball, 77 U.S. 557, 563 (1870).

waterway bordering two or more states that connects with the ocean or a foreign nation.[62] The strength of the navigation portion of the public trust can be seen in conflicts between the consumptive use of water and the public trust.[63]

On May 11, 1792, Captain Robert Gray of Boston, on a trading voyage but with a letter of commission from President George Washington, steered his vessel the Columbia Rediviva into the estuary of a large and hitherto unknown river, which he named Columbia's River, after his vessel.[64] Gray's voyage was the basis for the American claim to the Oregon Country.[65] The Lewis and Clark Expedition arrived in Oregon overland in the fall of 1805 and over wintered in 1805-1806. There were no Euro-American settlers in any part of what is now the State of Oregon at that time, but they were not long in coming. Astoria was established as the first American settlement in 1810. The settlement changed hands in the War of 1812, but was returned to American control after the War.[66] The status of Oregon as a whole remained uncertain between 1818 and 1846 when Great Britain relinquished its claim of the area south of 49 degrees North Latitude to the United States in return for a similar cession by the United States of claims north of that line. During this period of Joint Occupation, considerable settlement took place. Both of the occupying sovereigns were Common Law countries. Oregon formed a provisional government in 1843. The Provisional Government adopted the Organic Laws, which were based on the Northwest Ordinance of 1787 and the laws of Iowa, leaving any matter not addressed in those laws to the common law of England. Government under these laws continued until March 3, 1849, when the government

62. Navigable waters wholly within a state are navigable waters of the state. *See* Utah Division of State Lands v. U.S., 482 U.S. 193 (1987). Lake Utah is one of two very large lakes entirely within the State of Utah and which have no outlet to any stream or river in any other state. Lake Utah's watershed is entirely within the State of Utah. Lake Utah's outlet is the Jordan River which flows into the Gi[illegible] settlement took [illegible]s wa[illegible]Nw.P <7iegon state.08 T Ment tver waw wLaws,nd whE

established by the Act to Establish the Territorial Government of Oregon,[67] commenced to function.[68] Ten years later, on February 14, 1859, Oregon became a state.[69]

F. Oregon and the Common Law

Concerning the law of Oregon at the time of statehood, the U.S. Supreme Court observed:

> The common law of England upon this subject at the time of the emigration of our ancestors is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the Constitution and laws of the United States.[70]

The common law of Oregon at this time appears to have been very close to the Common Law of England,[71] except that the body of common law in the United States applicable to navigable waters extended to inland waters determined to be navigable, in addition to the sea and waters subject to the ebb and flow of the tides.[72] The common law divided waters into three classes: navigable waters; waters subject public use; and waters that were privately owned.[73] In the first instance, the ownership of the water is in the state, as is the ownership of the bed and banks of the water body. The public trust attaches both to the waters and to the bed and banks.[74] In the second case, the state owns the water but not the bed and banks of the water body. However, the public has a right to use the water as a highway.[75] In the third case, the water is considered a part of the estate of the land, and the landowner could by an action of trespass prevent others from using the stream or

67. See Act to Establish the Territorial Government of Oregon, 9 Stat. 323 (1849).

68. Id. at 468.

69. Oregon Admission Acts, 11 Stat. 383 (1859).

70. Shively v. Bowlby, 152 U.S. 1, 14 (1894).

71. See Norwest v. Presbyterian Intercommunity Hospital, 652 P.2d 318, 320 n.4 (Or. 1982).

72. See The Propeller Genesee Chief, 53 US 443, 457 (1851).

73. Shaw v. Oswego Iron Co., 10 Or. 371, 375 (1882).

74. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

75. See Pearce v. Scotcher, 9 W.B.D. 162 (1882).

pond.[76] The state may regulate the use of the water, but ownership remains with the proprietor if the water is confined to the proprietor's land.

The common law did not allow the private ownership of flowing water that left the premises regardless of the class of the stream and irrespective of whether the water was surface water or ground water. The common law treated diffuse or percolating water as belonging to the owner of the land, whether that water was surface water or ground water.

Decisions in early Oregon cases based upon the doctrine of riparian rights recognized the right of a riparian owner whose land borders on a flowing stream to exercise certain prerogatives. These included the right to wharf out to the line of navigation, the right of access to the stream,[77] the right to divert water for domestic use and to water crops and animals, the right to impound water upon the proprietor's property so long as the flow and the quality were not impaired, and the right to the natural flow of the stream and the natural quality of the water in it.[78] Riparian rights were part and parcel of the common law. The common law also considered the waters of a flood to be a common enemy, which the land owner could defend against even if the defense caused injury to a neighbor.

G. The Modification of the Common Law and the Shift to "Prior Appropriation"

One of the more attractive features of the common law from the modern view was the right of the riparian owner to a constant and undiminished flow of water of the quality that was natural to the stream. Enforcement of the right depended not upon government action but on a private action by another riparian owner. The intent of the law was to keep the stream in its natural condition. Keeping a stream in its natural condition was not something that promoted settlement, agriculture and mining.[79]

76. *See Shaw*, 10 Or. at 375 for the classification into three kinds of waters.

77. McCarthy v. Coos Head Timber Co., 302 P.2d 238 (Or. 1956).

78. Weise v. Oregon Iron & Steel Co., 11 P. 255, 256 (Or. 1886).

79. "At common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation." Stowell v. Johnson, 26 P. 290 (Utah 1891), *quoted in In re Hood River*,

Early settlers tended to take up lands along the banks of large permanent streams in well-watered valleys and to ignore dry lands away from the river valleys. The large-scale irrigation of dry land areas and placer mining consumed large quantities of water that was not returned to the stream and generally had a negative effect on both stream flows and water quality. Irrigated agriculture, industry and the settlement that accompanied them were things that both Oregon and the United States wished to promote in the last half of the 19th Century and the early decades of the 20th

This often repeated legislative pronouncement bears some examination. Broad pronouncements are suspect, particularly when the peculiar terms used in the statement are not defined. ORS 537.110 originated in the Water Code of 1909, which applied only to the appropriation of surface water. There was no comprehensive legislation on ground water until 1955. Oregon's Water Resources Department currently interprets the law as follows:

> Under Oregon law, all water is publicly owned. With some exceptions, cities, farmers, factory owners, and other water users must obtain a permit or water right from the Water Resources Department to use water from any source— whether it is underground, or from lakes or streams. Generally speaking, landowners with water flowing past, through, or under their property do not automatically have the right to use that water without a permit from the Department.

> (1967) (footnotes omitted). According to the modern accepted doctrine, it is the use of water, and not the water itself, in which one acquires property in general.[95]

The water itself is not distinguishable from other water in the stream with which it is comingled. The water in the stream as a whole retains its status as a thing held in trust for the public. If the right is on a stream that is fully appropriated and is junior to all other rights, it is of little value, at least for the time being. If the right is senior to some other rights or the stream is not fully appropriated, it is effective to block the junior rights in times of scarcity. In that way, it may benefit those making non-consumptive uses of the water.

One is left to wonder why a State that claims to own all water from all sources of supply and is charged with the public trust makes use of certificated in-stream water rights to preserve flows for recreation and wildlife. One may also wonder about the nature of in-stream water rights. The rights are not the ownership of the water, but the right to have a certain amount of it withheld from appropriation by an appropriator junior to the holder of the in-stream water right. The holder of the in-stream water right is usually an Oregon State agency.[96] The uses that are recognized as beneficial uses for an in-stream water right include recreation, wildlife, pollution abatement and navigation.[97] The right is junior to rights already in existence at its priority date.[98] It also must give way to certain other uses such as multipurpose storage, municipal use or hydropower use.[99] The order of priorities is inconsistent with the public trust, of which the State of Oregon is trustee, and with the federal navigational servitude, which is also part of the public trust. In the Illinois Central Railroad Case,[100] the U.S. Supreme Court held that the public trust, as it pertained to navigation, permitted the State of Illinois to withdraw deeds to submerged lands issued to the company under a special act of the state legislature. While that case involved a grant of submerged

95. Sherred v. City of Baker, 125 P. 826, 830 (Or. 1912).
96. OR. REV. STAT. §537.332 (2009).
97. Id. § 537.332(5).
98. Id. §537.350.
99. Id. § 537.352.
100. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

land, a claim on water that falls something short of a property right in the water itself would seem even more suspect than a grant of submerged lands. The issue was presented squarely to the U.S. Supreme Court in United States v. Rio Grande Dam & Irrigation Co.,[101] in which the Court said:

> To hold that Congress, by these acts, meant to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable water course, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated.[102]

That case involved a scheme to impound all waters of the Rio Grande at place within the Territory of New Mexico, which it was alleged would affect navigation on the river lower down. New Mexico had adopted a system of water rights, similar to Oregon's, based on prior appropriation. The Court chose to treat the matter as if New Mexico was a state for the purposes of adopting its water allocation law.[103] The Court considered the navigational servitude to be on par with a treaty obligation and denied the company the right to impound or divert water if it would interfere with

State of Oregon has the police power right to regulate the capture and use of ground water and surface water. Following the theory of trusts, the public trust requires ownership of the resource to which the trust applies. That ownership may be a legal fiction, but it must be present for the trust to be impressed.

IV. PRIVATE OWNERSHIP OF WATER

The circumstances under which water may be privately owned have been discussed in some detail above. Common Law considers percolating ground water and diffuse surface water to be a part of an estate in land and therefore privately owned. The State of Oregon regulates the use of ground water under the police power.[105] The Ground Water Act of 1955 does not open with the same broad assertion of state ownership of the water itself that opens the Water Code of 1909. The ground water provisions speak to use and not to ownership. The statute deftly sidesteps the question of ownership stating:

"Policy. The Legislative Assembly recognizes, declares Td (P657 T)]TJ0.0004 1

the general charge not to waste it. The prior appropriation system is a poor vehicle for encouraging water conservation. The system encourages appropriators who anticipate future increases in water use to apply for the most water that can be obtained under the application with the earliest obtainable priority date. The beneficial use requirement then encourages the appropriator to use the entire allocation as the failure to do so has negative consequences. This system punishes conservation rather than rewarding it. Water conserved is lost unless a separate filing is made on the water.[108] The water may not be used on other lands or put to other uses under the existing certificate.[109]

B. Impounded Water

Water impounded in a reservoir or which is in the works of an irrigation district is captured and considered personal property.[110] An interesting dichotomy arises between municipal entities and water companies that supply water from a distribution system and irrigation companies. In the former case, the right of appropriation (water right) is held by the company or the municipal entity which diverts the water into its reservoirs and works. If the water is surface water, it is generally tested and processed. Well water may be processed, but tests often show it is not of quality fit for distribution. The customers of a water company or municipal entity do not possess water rights that are part of the water supplied. The water supplied by water companies and municipal entities is captured water and the property of the company or of the local government until sold to the customer. It becomes the property of the customer on delivery. In theory, the transaction is no different from purchasing bottled water from a grocer or from a vending machine. Prior to sale, the water belongs to the captor. After the sale, it belongs to the purchaser. Title passes from the state at the point of diversion. Once lawfully captured and segregated from other water, the water is no longer the property of the state. Irrigators aggregate the water rights of customers and distribute the water available under those rights from a common point of diversion or impoundment according to an agreed upon formula. In this case, the customer may have a possessory interest

108. See OR. REV. STAT. § 537.470 (2009).

109. Id.

110. Vaughn, 280 P. at 520.

in the water from the POD and the irrigation district is compensated for maintaining its works and supply facilities.[3]

1.Water Utilities

ORS Chapter 264, water authorities organized under ORS Chapter 450, water improvement districts under ORS Chapter 552 and county special districts supplying water under ORS Chapter 451, supplying water to customers would be a governmental function as that is the purpose for the formation of the entity.

2. Irrigators and Industrial Users

Irrigation companies are another matter. Depending upon its organic documents, the irrigation company may be the agent of its members or subscribers. Members transfer their water rights to the company, which holds them in trust.[121] Water at the point of capture legally belongs to the comp

The person who generates wastewater is the owner of it and is responsible for it. There is no common law right to discharge wastewater into a river or stream.[126] Most current technologies to make water involve either extracting water from humid air or manufacturing fresh water from salt water or brackish water. In neither case is water truly being manufactured. In the first case, it is being precipitated from atmospheric vapor by chemical or mechanical means. In the second case, the water is either distilled or filtered to rid it of dissolved salts and other compounds. In both cases, the water produced derives from a substance that is already captive, and the better view is that title is in the captor. The right of appropriation is a right that has historically applied to water that is liquid water in its natural state which would seem to exclude water vapor from sources of supply.[127] Technologies to truly manufacture water are on the horizon. It would seem that water from such processes would be privately owned.

F. Saline Water

Saline water or brackish water that is not seawater[128] would seem to require the same certificates for appropriation and use as other state water of the same ch

the sea is subject to the same rules for appropriation as similar fresh water sources and to the same principles of ownership. Captured water of this kind is personal property.

G. Seawater

Most use of seawater is non-consumptive. It is used to cool thermal power plants.

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H. Odd Questions

The water cycle in the American West begins with water vapor and clouds from whence comes precipitation. The precipitation falls upon the land in the form of dew, fog, mist, rain, frost, sleet, hail, snow and ice with most being in the form of mist or rain. The climate of Oregon decrees that the months with the most precipitation are from October to May, the coldest months of the year with the shortest days and the longest nights. The geography of Oregon conspires with the climate to cause a series of highlands to wring precipitation from winter storms in the form of snow and ice that accumulates on the highlands as snowpack, snowfields and glaciers. In some parts of the state, lakes and ponds also freeze. In the 19

all have significant case law on the subject, as does Massachusetts. Maine recognizes a right of the public to cut ice below low water on navigable rivers and great ponds.[144] No such right exists on non-navigable rivers or private ponds.[145] The riparian owner owns the bed and banks of rivers that are floatable in Maine.[146] The public has a right to use the river as a highway if it will support such use in its natural condition.[147]

I can find no cases on the ownership of snow as a resource, but the principles applicable to ice and diffuse surface water would seem to apply to snow.[155]

V. LOSS OF OWNERSHIP

The physical ownership of water may be lost by release, escape, abandonment or prescription. When water is released and rejoins surface water of the state, it again becomes state property available to the public or to appropriators. Release is often either a return flow or waste water. In those cases, the return of the water is a deliberate intentional act rendering ownership. In the case of escape, the water has unintentionally been released from confinement. The owner may recapture escaped water before it leaves the owner's premises.[156] Virtually every large water system suffers from both infiltration and escape. In the case of infiltration, water from some external unpermitted source enters the pipes, conduits or reservoirs of the water provider. Sources are typically ground water, surface water (especially in times of overflow or flood), wastewater, storm water or precipitation. For domestic water providers, infiltration is a serious problem since the water quality of the infiltrated water is unknown. In the case of escape, water leaves the system in unintended places. Virtually all Oregon water providers monitor their systems for escaped water (leaks). The escaped water is wasted water (not to be confused with wastewater) that is not applied to the beneficial use for which the appropriation resulting in capture was made. Escaped water may be recaptured before it leaves the premises of the owner and applied to the lawful uses that the owner is allowed. Possession and ownership of water are lost once water escapes the owner's premises.

An owner abandones water when intentionally relinquishing possession of it. Both intent and relinquishment are necessary. The former owner may not reclaim abandoned water.

The loss of physical possession of water by prescription or adverse possession is possible in theory, but it is difficult to

155. While ice was a valuable commodity and may be so again, snow is not. The cases about snow seem to have to do with personal injuries resulting from the failure to remove it as require by a municipal ordinance or the disposal on the land of an unwilling recipient.

156. In the case of a special district, recapture must occur before it leaves the boundaries of the district.

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the place of capture,[159] citizens do have rights to the non-consumptive use of water for recreation and for commerce. Three important rights are the right of navigation, the right of public use and the right of common fishery. These rights taken together are sometimes referred to as the *jus publicum* or the public trust. The public trust traditionally includes the right to use the water for trade or travel (navigation) and the right of public fishery (piscary).[160] In cases of conflict, the right of navigation is superior.[161] It also is the case that appropriation of water is not allowed if it would cause a negative impact on navigation below the point of diversion.[162] California reached a similar conclusion as to fish and wildlife.[163] There are some important differences between Oregon and California. Plaintiffs attempting to maintain flows for wildlife recently made more use of the National Endangered Species Act of 1973[164] than of public trust theories.[165] Interference with a non-navigable tributary that impacts navigation downstream in the river system falls under the prohibition of interfering with the public trust.[166] The case is less clear when the interference is with a non-navigable waterway. The property law of easements would seem to prevent the owner of a servient estate from interfering with the utility of the easement. However, with the right of appropriation being severed from the land, the holder of the water right is not the owner of the servient estate in the traditional sense. The State of Oregon is also not the owner of an estate in real property on a non-navigable stream. The bed and

159. Some water purchased has traveled great distances since being captured. French mineral water sold in upscale groceries is one such example.

160. Johnson v. Jeldness, 85 Or. 657, 659-661 (1917).

161. Id.; Anderson v. Columbia Contract Co., 184 P. 240, 244 (Or. 1919).

162. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

163. National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419 (1983).

164. 16 U.S.C. §§ 1531-1544 (2010).

165. Oregon is home to a threatened or endangered salmonid ESU in virtually every significant drainage basin. Since those fish are sensitive to elevated temperature, lowered oxygen levels and restricted flows, the ESA provides a better hook for those seeking to return the entire ecosystem to a more natural condition as well as a way to use the machinery of the federal government to enforce it. Using the public trust demands the use of a plaintiff's own resources.

166. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

banks belong to the riparian owners who may well be equally displeased with the diversions.[167]

This discussion raises the odd possibility that the public trust might be invoked to preserve fish stocks and a right to recreational boating, but would not be available to protect drinking water supplies.

It would be unfair to leave the impression that Oregon has done nothing to insure water to municipal suppliers. Many of those suppliers take their water from wells or from mountain streams and reservoirs upstream in watersheds.[168] In over-appropriated basins, The Water Resources Department does act to limit withdrawals and favor some drinking water suppliers[169]. This falls far short of blanket municipal preference or an individual human right to drinking water.

Iceland, Ireland, Luxembourg, Sweden, the United Kingdom and the United States abstained. No consistent pattern emerged based on geographic location. Most of the abstainers voiced process objections and not objections to the substance of the resolutions. Of the Common Law nations, those whose populations are most closely tied ethnically and culturally to the British Isles abstained. The Common Law countries whose populations are chiefly non-British indigenous peoples voted for the resolution, but among this subgroup the vote seems more related to the state of infrastructure development and the ability to fund improvements domestically than any legal doctrine or concern.

The declaration states that the right of secure access to source of clean and safe drinking water is a right that every m

is true that public drinking fountains are available in some municipalities as a convenience, but these are not suitable as a source of supply and are often turned off during the winter months. Portland at one time had the beginnings of a system of supply in the so-called Benson bubblers and companion horse watering troughs. The troughs are now gone, and the bubblers are an ornamental feature confined to a few downtown blocks. Homeless people use the bubblers, but they are not designed to be a source of supply available by right to satisfy poor people's hydration needs.

The classification of a right to drinking water as a human right would seem to call for a governmental response that places the water requirements of domestic water providers above those of other water users regardless of the seniority of the water right. Oregon's system does not do that except in cases of emergency. Finally, the sale of drinking water as a commodity is inimical to a human right to obtain it.

VIII. CONCLUSION

Contrary to urban legend, the public does not own all water in Oregon. Lawfully captured water is the property of the captor and may be sold and resold so long as the sale or resale is consistent with the conditions of appropriation and capture. Once water has been lawfully captured and has become property, the government may not deprive the property owner of it without due process of law and just compensation. The state may regulate the use of water under the police power regardless of who owns the water. Surface water in flowing streams is owned by the public, and the public has certain rights to use it for navigation, transportation and common fishery. The state has a trust obligation to protect those rights. The water appropriation scheme used by Oregon favors consumptive uses of water over non-consumptive uses, and has the potential to allow stream flows to be reduced to a point where public use rights are affected. No citizen in Oregon by reason of citizenship or humanity has a right to drinking water.

IX. W

can be applied. That being the case, I am as entitled as anyone to venture an opinion.

> liberty they cease to be mine and are again made the property of the taker.[175]

In these passages, Bracton summarized the broad outlines of the common law, stating that at common law running water belonged to no one. In the second passage, he observed that things that belonged to no one could become personal property if acquired. Acquisition requires confinement and control. In the third passage, he applied these principles to wildlife, but they are general principles of the common law and may be applied to anything that belongs to no one.[176]

To capture something one must have lawful access to it. There is the foundation of the law of riparian rights. That law was well developed even in Bracton's time.

Centuries later Blackstone states:

> It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and I cannot bring an action to recover possession of a pool or other piece of water, by the name of water only; either by calculating it's [sic]