

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

WILLIAM F. CLORAN†

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

† The author is a practicing attorney in the State of Oregon admitted to the bar in 1972. Mr. Cloran received his undergraduate degree with honors from the University of Portland in 1969 and his law degree from Willamette University College of Law in 1972. His practice includes representation of citizens and property owners regarding questions of access to water and the representation of domestic water providers.

1. Fort Vannoy Irrigation Dist. v. Water Res. Comm'n, 188 P.3d 277, 285 (Or. 2008).

2. OR. REV. STAT. § 537.110 (2009).

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 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 servitude⁸ to conduct water over the land of another, 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 reliction¹⁰ and of the riparian owner's title to the center of the stream will strike most lawyers as

5. 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND (George E. Woodbine ed., Samuel E. Thorne trans., 1968) available at <http://hls15.law.harvard.edu/bracton/>. The formulation is taken almost word for word from the Institutes of Justinian upon which Bracton heavily relies. The Institutes were themselves no part of the Common Law. Roman Law does not appear to have survived the Anglo-Saxon Invasion. Justinian's Code and the Institutes were not promulgated until 529 CE, at least three generations after the death of Roman civil administration in England. Justinian's Code was not a novel work. It was the product of a group of legal scholars headed by Tribonian, who used the Theodosian Code published in 438 CE as a model. Justinian's Code, properly known as Corpus Juris Civilis, became widely available in the West after its publication in the Eastern Roman Empire (Byzantine) and was one of the most influential legal treatises of the Middle Ages. At the time of Bracton, Latin was read and spoken widely by the educated classes of Europe to which he belonged. The work was not only authoritative but also accessible. At that time, Romance, also known as Old French, was the language of the English Court, the courts and the upper classes. While other parts of Bracton's work are his own and rely on some writings of earlier English jurists, his discourse on natural law and much of his discourse on property law relies heavily on the Corpus Juris Civilis.

6. *Id.* at 40.

7. *Id.*

8. *Id.* at 48. A servitude is the right of one with no possessory interest to use the lands of another without taking something from them. Bracton describes it as one parcel of land being subject to another for some purpose and states that the terminology comes from human servitude in which one is subservient to another for some purpose.

9. *Id.* at 39.

10. M. E. DUNLAP, ABRIDGEMENT OF ELEMENTARY LAW 50 (Soule, Thomas & Wentworth, 1876). Land accretes when the action of the water washes it up to a height above the normal level of the water. Land is gained by reliction or dereliction when the water that formerly covered it recedes permanently.

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 1609¹⁵ 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). John Minto was a prominent Oregon pioneer who had contentious relations with his riparian neighbors. The proclivities of the Willamette River did not help. The land in this case and several others to which Minto was a party is part of what is now Minto Brown Island Park in Salem. Prior to the placement of levies, the river changed its bed several times in this area. Minto's land was in the flood plain and valuable agricultural was subject to all of the forces that the river could bring to bear on it. The urbane Minto was beset not only by interlopers like Delaney but by his neighbor the disheveled pig farmer Brown who kept pigs on Brown's Island in the river.

14. BRACTON, *supra* note 5, at 45. Inland navigable waters did not exist in England at the time of Bracton, so this cannot be regarded as a contradiction.

15. GROTIUS, HUGO, MARE LIBERUM, SIVE DE IURE QUOD BATAVIS COMPETIT AD INDICANA COMMERCIAL DISSERTIO, Chapters 1 and 5 (1609).

16. 2 HVGONIS GROTI, DE JURE AC PACIS LIBRI TRES, *Ch. 2, paras. III, XIII and XIV* (A.C. Campbell trans., 1814).

alone.¹⁷ What influence the international assertion of English dominion over the seas had on the Common Law is not clear. It appears to have had none. Both English and American cases overall seem to follow the law as Bracton understood it.

B. *Later Common Law*

Perhaps the next most important summary of English Common Law is *Commentaries on the Laws of England*,¹⁸ published between 1765 and 1769. Blackstone takes the position that English property law considers waters to be a part of the lands they rest upon.¹⁹ Concerning this, Blackstone says:

“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] capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water. For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore if a body of water runs out of my pond into another man’s, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and

17. See 1 JOHN SELDEN, *MARE CLAUSUM*, 1-11 (1635); WILLIAM WELWOOD, *THEATRUM ORBIS TERRARUM* (1613). “That the Dominion of the British Sea, or, That Which Incompasseth the Isle of Great Britain, is, and Ever Hath Been, a Part or Appendant to the Empire of that Island.” Note, Grotius published a reply to Welwood, which seems to have triggered Selden’s work. At the time the Spanish, Portuguese, Dutch, French and English were contending over the rights of merchant ships to trade in the East Indies and the law to apply in the case of conflicts. Spain and Portugal claimed sovereignty over the seas in their respective areas based on the Treaty of Tordesillas. England claimed the British seas at least from the reign of Henry VIII, but focused on the North Sea and the English Channel. The Dutch claimed that the High Seas belonged to no nation. The Dutch position was one necessary to the colonial enterprise that they undertook and to their position as the practical successors to the Hanseatic League. Grotius opined that the territorial sea was limited to the sea that a nation could defend as a practical matter. For the complete debate see HUGO GROTIUS, *THE FREE SEA*, (David Armitage ed., Richard Hakluyt trans., 2004) available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=859&layout=html#chapter_66161.

18. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1753).

19. 2 *Id.* at 18.

immoveable: and therefore in this I 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 western the land that was ceded by Great Britain was subject to 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 they cross the fall line, which is expressed as a series of waterfalls or as small waterfalls and rapids. The falls are an obstacle to navigation inland from the sea. They have sufficient height to be useful as a source of waterpower. During the late 18th Century and early 19th Century, mill towns were established to take advantage of the power available. Some of the manufacturing cities built along the fall line in New England include Bangor, Lowell, Lawrence and Fall River. Albany, New York, is a fall line city, and so are Trenton, Philadelphia, Richmond, Fredericksburg(VA), Columbus (GA) and Atlanta.

24. See the extensive discussion in *Shively v. Bowlby*, 152 U.S. 1 (1894).

waters in the inhabitants of the country by virtue of their citizenship and unrelated to the ownership of any property. Most important of these were the rights of navigation²⁵ 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 waterway would allow it.²⁸

It is prudent to pause and to consider the state of the Common Law at the time of Independence. The Common Law defined certain rights belonging to all Englishmen by virtue of their status as Englishmen. Those rights included the rights of the shore, the right of common fishery and the right of navigation.²⁹ Those rights were traced to statements in the early Common Law discussed above, which were in turn based upon Roman law, which claimed that the rights in question were based on natural law.³⁰ Natural law had real substance as a source of law for the ancients, for medieval scholars and for jurists of the Renaissance and the Enlightenment, but it is not well understood as a source of law today. Natural law is as much philosophy as it is law.³¹ Natural law finds its basis in

25. *Johnson v. Jeldness*, 85 Or. 657, 661 (1917).

26. *See generally Thomson v. Dana*, 52 F.2d 759 (D. Or. 1931); *Hume v. Rogue River Packing Co.*, 92 P. 1065 (Or. 1907).

27. The American Revolution stands out as a war fought to preserve rights from the encroachment of the government rather than one to establish new rights and new law. What was revolutionary was the decision to establish a republican form of government divided into three branches, with the leadership of the executive branch selected by election rather than to continue with some form of hereditary monarchy. The election of members of the legislative branch and the control of that branch was not new. The original states for the most part continued something very much like their pre-existing forms of government with a written constitution supplanting a charter as the organic law and an elected governor in place of one appointed. After ten years under the Articles of Confederation, the same form was adopted for the national government in the Constitution. The Common Law continued.

28. *Weise v. Smith*, 3 Or. 445 (1869); *Shaw v. Oswego Iron Co.*, 10 Or. 371, 375-377 (1882).

29. *See Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

30. *See BLACKSTONE*, *supra* note 18, at intro § II.

31. Natural law is said to originate with Aristotle and is part of the “essence of a thing” and so it is the same everywhere. While similar thoughts can be attributed to Plato, the Stoics who influenced Roman legal thinking (Cicero, Seneca and Marcus A. for example – two lawyers and an emperor) were disciples of Aristotle. Cicero’s concept of natural law found its

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, sea 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 epic 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 trust³⁸ in cases concerning the lands under 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.

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 MASSACHUSETTS, 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 monarchs did so, sponsoring commercial ventures, fitting out privateers and investing as they saw fit. Funds gained or lost were the personal property of the monarch. Other funds flowed to the Crown as an institution without the intervention of Parliament. These were state funds but there was little Parliamentary oversight on the use of them. Funds appropriated by the Parliament were subject to oversight, and the increasing need for them and the inability of the Crown to raise them without consent led

In addition to the public trust, there was a Common Law right of public use as a highway of any freshwater river or lake that would support the use. The origin of this right was in custom and usage that was viewed as universal in England. It did not arise from the doctrines concerning public use of navigable waters in the sense of the *jus publicum*. The right did have a similar origin, but the threat to its exercise came from the owners of the upland rather than from the Crown. As a Common Law right of all citizens, the right of public use extended to the colonies. This right differed from the *jus publicum* in that other rights of the shore and the right of common fishery did not extend to rivers. In the case of lakes or ponds, the situation was murkier. The public did have the right to fish, to cut ice, to skate, to swim and to boat on great ponds in New England, but those rights seem to have been grounded on particular provisions of colonial charters and ordinances, and not on rights in the common law of England.⁴¹ The riparian property owner had no right to interfere with public use of the stream as a highway.

The common law as it pertained to water rights in all of the American colonies was property law. In the case of surface streams, lakes, ponds and the ocean shore, it was the law of riparian and littoral⁴² rights. The kind of consumptive uses of water that later gave rise to the doctrine of prior appropriation were unknown in both England and the American Colonies at the time of Independence.⁴³

toward a more modern financial model. The Crown attempted to resist the growing influence of Parliament by generating alternate revenue sources.

41. Rights that came from English common law tended to appear in some form in all of the American Colonies. The rights in the great pond laws do not appear to be uniform. Colonies that did not have great pond laws did often have either customary or statutory provisions that preserved local customs concerning access, hunting and fishing, but the non-uniformity suggests an American origin for those laws and customs as well as the great pond laws. The absence of English authority does likewise.

42. A riparian property owner owns land that borders on flowing water or that is crossed by a river large enough to be subject to public use. A littoral property owner owns land that borders on static water such as a lake or pond or that borders on the ocean.

43. Those uses were placer mining and large scale irrigated agriculture. While there was large-scale irrigated agriculture elsewhere in the world at that time and before, these uses were new in the experience of the American Colonies. *See, e.g., California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 143, 153 (1935). Industrial water needs were non-consumptive and consisted largely of small dams to support mills of various kinds that returned water to the streams close to the point of diversion in about the same volume as diverted. Municipal needs did cause designated water sources to be put aside. The water systems of Lynn, Massachusetts and Boston, Massachusetts are cases in point. No fishing, bathing, skating, or boating is permitted on the ponds of Lynn, and the surrounding land is in

The newly formed democratic states succeeded to the rights of the Crown and to its duties as well.⁴⁴ An important difference was that unlike either the Crown or colonial proprietors, the new states had no true private property or manorial interest in lands that came to them as government lands. What proprietary interests the states held were held for the benefit of the people. English law had experience that the governments of the new states could draw upon. The first of these was the traditional governmental right of a town or a shire to manage the commons. The second was the brief experience of the English under the Commonwealth (1649-1660).⁴⁵ The American Colonies of Massachusetts, Pennsylvania and Virginia drew upon this experience to designate their governments as commonwealths. Kentucky, which is closely associated with Virginia, did likewise upon admission to the Union. It may be argued that under the commonwealth form of government the state was truly the trustee of public rights and resources that were the jointly held common property of the people (past, present and future) as citizens and a body politic.⁴⁶

public ownership as the Lynnwoods Reservation. CITY OF LYNN, LYNNWOODS RESERVATION, http://www.ci.lynn.ma.us/citydepartments_lynnwoods.shtml#gpm1_3 (last visited April 22, 2011).

44. See *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 22 (1831).

45. The Commonwealth or the Protectorate was arguably a republic but it was not democratic. It is also referred to as the Puritan Commonwealth. Most historians classify it as a military dictatorship ruled in succession by Oliver Cromwell and his son Richard. See, e.g., John Witte, Jr., *Prophets, Priests, and Kings: John Milton and the Reformation of Rights and Liberties in England*, 57 EMORY L.J. 1527 (2008).

46. Professor Huffman argues that there can be no trust in a true sense because the people cannot at once be the settlor and the beneficiary of the trust under the law that applies to private trusts. See Huffman, *supra* note 33. However, the flaw in this reasoning is that the law that pertains to trusts is not so narrow as his theory implies. Public trusts are different from private trusts. There are many examples in which a party is both the settlor and a beneficiary of the trust. In the case of a trust of public lands it may be argued that the settlor of the trust was the body politic at the time that the resources were acquired (normally statehood in the case of the states) while the beneficiaries are all citizens present and future. Professor Sax is clearly pushing for an extension of the law. See Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980-1981). Be that as it may, the protest that the doctrine of the public trust as it presently exists is invalid because it has been made up by courts and scholars is unlikely to find much traction in the courts. The doctrine is well established in U.S. precedent, whatever its English antecedents may be. Bracton, Blackstone, Hale, Trebonius and other authors of digests and commentaries can all be said to have simplified and recast prior law. In fact, the very reason for their efforts was the confused state of the law as they and their sponsors found it. The effort to make some sense of it by trying to simplify and update the law by looking to the past and reconciling it with present understanding is at the heart of the development of the common law. In doing so, they and their successors did change the law to fit contemporary circumstances. It was generally

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, but 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*, 79-85 MIL. L. REV., Vol. 150, p. 79-87 (1995). Because Major Latimer is attempting to describe the law as it is rather than as he thinks it ought to be, his description of the current state of the public trust seems quite accurate.

47. While the great pond ordinances were peculiar to Massachusetts and to Maine, then a part of Massachusetts, the colonists seemed to feel themselves free to make use of any land not specifically reserved to the proprietor or the government and not in private ownership. In the British Isles there were few such lands. They were designated as wastelands and were in the nominal ownership of the Crown. In the colonies, there were great expanses of lands that were not waste but which had not yet been patented to anyone. The colonists hunted and fished on such lands not as trespassers but by claim of a right to do so until the lands were reserved, closed or taken up by an owner. The same rights are preserved as to public domain lands and certain reserved lands today. As to ponds, government surveyors are instructed to meander navigable waters and the margins of lakes and ponds of a certain size. Presently the limit is 50 acres and upward. U.S. DEPARTMENT OF INTERIOR, ET AL., MANUAL OF SURVEYING INSTRUCTIONS: FOR THE SURVEY OF PUBLIC LANDS IN THE UNITED STATES, ¶¶ 8-9 (2009). At times in the past the standard has been 25 acres. See Joe Knetsch, *History Corner: Meandering: A View of Instructions*, PROFESSIONAL SURVEYOR MAGAZINE (2004), available at <http://www.profsurv.com/magazine/article.aspx?i=1202>. Government patents contained a description of the land to the meander line of the lake or large pond. Settlers were not charged for acreage on the water side of the meander line. Title to lands beyond the meander line depended on the law of the state or the territory in which the land was situated. Oregon claims title to the beds and banks of meandered lakes. OR. REV. STAT. § 274.430 (2009). That claim is subject to dispute. *U. S. v. Oregon*, 295 US 1 (1935).

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. The surface area of the navigable water was excluded from acreage transferred by the United States to the grantee.⁴⁹ Water bodies that were not meandered were transferred with the grant being counted as part of the land.⁵⁰ The government under the Constitution readopted the Rectangular Survey, which remains the basis for the survey and transfer of federal lands in the Public Lands States today. Oregon is one of those states.⁵¹

The Northwest Ordinance of 1787 followed the Land Ordinance of 1785.⁵² The Northwest Ordinance contained two provisions of significance to the ownership of water. The first provision was that all States formed from the western lands were to be admitted to the Union on an equal footing with the original states.⁵³ The Equal Footing Doctrine assured that when a new state formed from the public lands was admitted to the Union, the property law of that newly admitted state would be its own. The doctrine also established that in the newly formed state, the state succeeded to the ownership of those lands that prior to the Revolution would have been Crown Lands. The states also succeeded to duties of the English Crown assumed by the original states. Those duties included the concept that the state held title to common or public resources not as a proprietor, but in trust for the people. This doctrine has become known as the public trust.

48. Journals of the Continental Cong., Vol. 28, 375-381 (1785), available at <http://www.in.gov/history/2478.htm>.

49. See Manual of Instructions to Surveyors (BLM 1973), Chap. 1, Instruction 1-12 "Navigable Waters."

50. *Id.* at 7-95 to 7-99.

51. BUREAU OF LAND MANAGEMENT, CADASTRAL SURVEY, <http://www.blm.gov/wo/st/en/prog/more/cadastralsurvey.html> (last visited May 07, 2011).

52. Cong. Journal, 1st Cong., 1st Sess. 50 (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=lsl&fileName=001/lsl001.db&recNum=173>.

53. *Id.*

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, pmb1., §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 promote 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 nations. The power is generally referred to as the Commerce Clause.⁵⁷ 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 overwintered 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 Great Salt Lake. The Great Salt Lake receives flows from Bear River and Weber River. None of these rivers originates outside of Utah.

63. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) (appropriation of water for irrigation cannot interfere with downstream navigation).

64. CHARLES H. CARY, *GENERAL HISTORY OF OREGON* 95 (Binfords & Mort eds., 3rd ed. 1971).

65. It is legally significant that the claim was based on discovery and the concept of *terra nullus* and not upon conquest or cession. The law of the sovereign claiming discovery applies to the discovered territory in such cases.

66. CARY, *supra* note 64, at 216.

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 the 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 in 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 rights 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*, 227 P. 1065, 1082 (Or. 1924).

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 Century. Development interests brought pressure to depart from the common law of riparian rights to appropriate water. Oregon did so. The fact that the common law gave riparian owners no property interest in flowing surface water removed major impediments to the shift to a regime based upon prior appropriation and beneficial use that the Fifth Amendment to the US Constitution and Article I, Section 18, of the Oregon Constitution might have raised.

While the common law struck a balance between consumptive⁸⁰ and non-consumptive uses of water, the new regime did not. Consumptive uses of water that reduce stream flows and degrade water quality are heavily favored in a prior appropriation scheme. In retrospect, one may question whether Oregon's move to a water law based on prior appropriation was consistent with the state's obligation as the owner of the flowing surface water under the public trust doctrine. Much recent water law concerning conservation, reservation of in-stream flows and preservation of water quality appears to be an expensive attempt to regain the balance between consumptive and non-consumptive uses inherent in the common law. Oregon judicially adopted the civil law in place of the common law in dealing with flood waters.⁸¹ It judicially recognized prior appropriation as a basis of its water law by 1901,⁸² and by statute thereafter.⁸³ The state of Oregon does

80. A consumptive use of water is one that uses up or consumes the water. Irrigation, domestic drinking water, bottled drinking water, flumes, canals and water used to create a product are examples. Non-consumptive uses of water are uses of the water in the stream or uses that return the water to the stream at or very close to the point of diversion without appreciable loss of volume or quality. Boating, bathing, swimming, fishing and most hydroelectric generation are examples of non-consumptive uses of water. See STATE OF WASHINGTON, WATER RESOURCES PROGRAM POLICY 1020 (1996), available at <http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol1020.pdf>.

81. See *Garbarino v. Van Cleave*, 330 P.2d 28 (Or. 1958).

82. *Brown v. Baker*, 39 Or. 66, 69-70 (1901).

have a way to return balance to the system of water appropriation if it does in fact own the water in surface water bodies. The State may make a declaration under the public trust doctrine or under the police power that the water available for diversion is only that water over and above water reserved for navigation and maintaining fisheries. Such a declaration would be extremely unpopular with some very powerful interest groups, but it would not result in a taking of private property since the appropriator would still have the certificated or permitted water right that could be exercised if and when sufficient water was available. Proceeding in this manner does nothing to solve the problem of users with more socially desirable consumptive beneficial uses,⁸⁴ but with junior water rights, being left without water.

Using the public trust as a vehicle to maintain in-stream flows may also result in some users high up on a tributary with senior rights being denied water, while appropriators lower down with junior rights are able to exercise them because enough water has been added to the stream from other sources to allow withdrawal at the lower point of diversion (POD).

Whatever the temptation may be to depart from the present system of water allocation, the vehicle chosen must recognize vested interests and not only be fair and equitable but appear to be fair and equitable.⁸⁵

III. STATE OWNERSHIP OF WATER

“Public ownership of waters. All water within the state from all sources of water supply belongs to the public.”⁸⁶

83. OR. REV. STAT. §§ 537.110-537.330 (2009).

84. A consumptive beneficial use is a beneficial use that removes water from the stream and does not return it at or near the place of removal. A non-consumptive beneficial use would not remove water from the stream and so would not impair the junior right.

85. It is fashionable in some quarters to decry irrigated agriculture and its effects on stream flows that are undeniable. It is also fashionable to lament dams and impoundments, which are often used to store water for irrigation. No farmer would incur the expenses involved in impounding, storing, pumping and distributing water if those expenses could be avoided and crop yields maintained. Returning streams to natural flow conditions and restoring fish is a worthwhile goal, but it must be done wisely in ways that agriculture can weather. When someone complains about farmers as a group it ought not to be done with a mouth full of food.

86. OR. REV. STAT. § 537.110 (2009).

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.⁸⁷

The interpretation by the Department ignores the words of art used in the statute. The words “from all sources of water supply” most certainly apply to rivers, lakes, streams and springs. They also apply to subterranean streams whose course can be determined.⁸⁸ Whether the public has title to percolating water is open to question.⁸⁹ The public most certainly does not have title to captured water.⁹⁰ Captured water is personal property of the person making the capture.

The claim of public ownership is confined to surface waters, especially flowing waters and subterranean streams. This is consonant with the common law and with the law of property as examined above. To the extent that it claims more, the claim is suspect. In a comprehensive examination of the validity of the Water Code of 1909, the US Circuit Court of Appeals for the Ninth

87. OREGON WATER RESOURCES DEPT., OREGON WATER LAWS, www.oregon.gov/OWRD/PUBS/aquabook_laws.shtml (last visited May 6, 2011).

88. *Hayes v. Adams*, 218 P. 933, 935-36 (Or. 1923).

89. *Taylor v. Welch*, 6 Or. 198 (1876); *See also Boyce v. Cupper*, 61 P. 642, 643-44 (Or. 1900).

90. *Vaughn v. Kolb*, 280 P. 518, 520 (Or. 1929); *Coast Laundry v. Lincoln City* 497 P.2d 1224, 1226-27 (Or. Ct. App. 1972).

Circuit determined that the law was a valid exercise of the police power rather than asserting its validity on other grounds.⁹¹

The distinction to be made is a distinction between public ownership of a resource for which the state is trustee, the resource being impressed with the public trust, and the right of the state as sovereign to promote the general welfare by regulating the use of all water under the police power. In the case of surface water, both the public trust and the police power are applicable, but I find no authority in Oregon to apply the public trust to percolating ground water and diffuse surface water.⁹² The difference becomes important because the public trust may require the trustee to consider and evaluate the long-term social policy goals and the traditional values that apply to certain uses of water. In the present environment, that may elevate the allotment of water for public uses of navigation, recreation, wildlife, and domestic use over the competing private use of the water for mining, manufacturing, and agriculture. In circumstances of scarcity, the ability to prioritize the allotment of water based on societal needs and values may better alleviate the problem than allotment based on the priority of a filing date for a right of appropriation.

The Oregon Water Resources Department correctly describes its method for apportioning water in these two paragraphs that appear on its website:

Oregon's water laws are based on the principle of prior appropriation. This means the first person to obtain a water right on a stream is the last to be shut off in times of low streamflows. In water-short times, the water right holder with the oldest date of priority can demand the water specified in their water right regardless of the needs of junior users. If there is a surplus beyond the needs of the senior right holder, the water right holder with the next oldest priority date can take as much as necessary to satisfy needs under their right and so on down the line until there is no surplus or until all rights are satisfied.

91. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F2d 555, 567 (1934).

92. Diffuse surface water is water that is on the surface of the land that is not part of a flowing stream, a lake or a pond, and which is therefore not confined by the features of the land.

The date of application for a permit to use water usually becomes the priority date of the right.

Generally, Oregon law does not provide a preference for one kind of use over another. If there is a conflict between users, the date of priority determines who may use the available water. If the rights in conflict have the same date of priority, then the law indicates domestic use and livestock watering have preference over all other uses. However, if a drought is declared by the Governor, the Department can give preference to stock watering and household consumptive purposes, regardless of the priority dates of the other users. Ground water rights for geothermal uses, such as heating or air conditioning, are always junior in priority to other uses of water unless the water is also used for another purpose, such as irrigation, or injected back into the ground water reservoir.⁹³

In a state that is challenged by climate change, increased population and the need to restore the habitat of threatened and endangered species, a first in time, first right allocation system that does not distinguish essential, socially desirable uses of water from less essential needs may be politically unsustainable. Another problem with the prior appropriation system of water allotment is that it is structurally predisposed to provide all of the water available to a consumptive beneficial use. Most beneficial uses, with the exception of hydropower generation, are consumptive uses of water that return little, if any, water in good condition to the water course from which it is drawn. Not until 1987 were in-stream flows recognized as beneficial uses for the purpose of issuing a certificate.⁹⁴ The status as to ownership of the water appropriated under an in-stream water right certificate held by the State of Oregon or one of its agencies is not the same as the status of water captured.

[W]aters of a natural stream or other natural body of water are not susceptible of absolute ownership as specific tangible property. Prior to the segregation of water from the general source, the proprietary right is usufructuary in character. 1 Clark (ed.), *Water and Water Rights* 349

93. OREGON WATER LAWS, *supra* note 88.

94. OR. REV. STAT. § 357.334 (2009).

(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 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 navigation down-stream on the river, even though the company apparently had a water right granted by the territory.¹⁰⁴

If the State of Oregon pretends to the ownership of all sources of surface waters in the State, and if the State is the trustee of the people with regard to those waters, and if the navigable waters of the State are impressed with the public trust, then the requirements of the trust trump rights of appropriation if the appropriation adversely affects either navigation or the public fishery regardless of where in the watershed that appropriation takes place. The legal ownership of the water in this context is important.

The State of Oregon does not contend that it owns percolating ground water in the same way that it owns surface water. That water is owned by the owner of the land as explained below. The

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

102. *Id.* at 703.

103. *Id.*

104. *Id.* at 692.

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 and finds that the right to reasonable control of all water within this state from all sources of water supply belongs to the public. . .”¹⁰⁶

Given the right to control the use of ground water, the ownership of the water in its natural state may be important only as it serves to protect the land from subsidence and to prevent the infiltration of contaminants. Contaminants in areas close to salt water include salt water. Industrial pollutants may contaminate ground water under the property if pressure in the aquifer holding them at bay is released or if flows of ground water are altered or reversed. It would be incorrect to say that owned ground water in places without a right to use it is of no value, but the true value of ground water is in the right to use it.

A. Principle of Capture

Captured water is owned by the captor until it is destroyed, consumed, abandoned or released. It is personal property.¹⁰⁷ The owner of the water may do as the owner wishes with it subject only to the restrictions imposed by the conditions of appropriation and

105. Ground Water Act of 1955, OR. REV. STAT. §§ 537.505-537.795 (2009).

106. OR. REV. STAT. § 337.525 (2009).

107. *Vaughn v. Kolb*, 130 Or. 506, 512 (1929).

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 is 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.

1. Water Utilities

City water systems capture water that then becomes the property of the city.¹¹¹ The supply of water to customers by the city has been classified as a proprietary function, meaning that the undertaking is corporate in nature rather than being governmental.¹¹² The water fund of the city is generally classified as an enterprise fund and its revenues are separate from the city general fund raised from taxes and used to fund its governmental operations. That being the case, one would expect that the law applicable to the sales of goods would apply to the water being sold.¹¹³ Public health protections are also applicable.¹¹⁴ It would seem under the circumstances that both the law of negligence and the law pertaining to breach of warranty would apply to the sale of impure or contaminated water. While the law of negligence applies, there is no warranty as to the quality of the water sold.¹¹⁵ This is apparently true for a private company as well.¹¹⁶ The Oregon Tort Claims Act¹¹⁷ has abandoned the governmental/proprietary function test as to tort liability.¹¹⁸ At the same time, it limits liability in tort to specific dollar amounts.¹¹⁹ The protection afforded by those limits does not apply to non-government water suppliers although both governmental and non-governmental suppliers are considered public utilities.¹²⁰ The classification of municipal water suppliers as serving a proprietary function opens a range of non-tort remedies against them that would not be available against a water provider that could claim sovereign immunity. However, in the absence of a guaranty of water quality, most of those remedies may be of little value. Interestingly, for domestic water supply districts organized under

111. See *Coast Laundry v. Lincoln City*, 497 P.2d 1224, 1226 (Or. Ct. App. 1972).

112. *Id.*

113. *Id.*

114. See OR. REV. STAT. § 448.131(1) (2009).

115. See *Coast Laundry, Inc.*, 497 P.2d at 1227.

116. *Id.*

117. OR. REV. STAT. § 30.265 (2009).

118. *Id.* § 30.265(1).

119. *Id.* §§ 30.271-72.

120. *Id.* § 30.180(6).

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 company, but the irrigators have an equitable interest in it.

C. Ground Water

So far, I have said little about title to ground water. Title to ground water prior to its capture is discussed above. Once lawfully captured, ground water is the property of the captor and may be used or resold as the captor's use right permits.

D. Water Destroyed , Altered or Comingled

Water that is captured for a consumptive use is private property at the point of capture. The captor may have the support of both the civil and the criminal law if some interloper unlawfully deprives the captor of the water. The use of the water may entirely destroy it as liquid property by using it in a way that separates its chemical components or combines it in a chemical reaction with other materials. When that occurs, the water ceases to be water in the eyes of the law. Water may also be used in a solution or in combination with other substances as an ingredient. Water as an ingredient is thought of most often in relation to foodstuffs, but it is part of many other products either as an integral part of the product or as a carrier, lubricant or disbursing agent. In some products like bottled drinking water, distilled water and industrial waters,¹²² the water maintains its integrity. In other products like paints and hydrated lubricants, the water is not recognizable as

121. Oregon Constr. Co. v. Allen Ditch Co., 69 P. 455, 457-58 (Or. 1902).

122. Examples of industrial waters are "heavy water" (D₂O or ²H₂O), distilled water and deionized water.

water. The water in all of these things is personal property and not the property of the state as sovereign. Water used in a non-consumptive manner may or may not become private property depending upon whether it is captured. Water that is appropriated for a consumptive use always becomes private property, at least for a time.

1. Drinking Water Bottling Companies and Soft Drink Manufactures

Water sold by drinking water bottling companies is a commodity and personal property. The companies are not public utilities. They may sell water at whatever price they set. Many bottlers wish to own the source of supply, which is touted as a spring or well with unique properties. Whatever the actual properties of the water, ownership of the source is part of the advertising cachet for the product. Other bottlers sell a bulk product that has been treated to remove impurities, salts and chemicals, or that which has simply been bottled for convenience. The plastic disposable personal water bottle is an emblem of the consumer culture of the late 20th and early 21st centuries. Some companies create a clear flavored beverage and market it as water in plastic bottles. These offerings are certainly a manufactured product and are probably best considered a specialty beverage rather than water in the generic sense.¹²³

Soft drink manufacturers generally add a flavoring syrup, sweeteners, carbonation and sometimes preservatives to water. The water is personal property at the time of capture and the resulting beverage is an extreme form of flavored water (as are coffee, tea and cool aid type mixes). Exceptions to this group are true fruit juices, vegetable juices, true root beers, birch beers and true ginger ales. The juices contain no water unless it is added, and the true beer and ale soft drinks are brewed, as are their alcoholic counterparts.

2. Brewers, Fermenters and Distillers

The manufacturers of brewed, fermented and distilled products may use water in their processes. Vintners generally do

123. These designer waters are generally manufactured by the same companies that manufacture or bottle carbonated soft drinks. They simply lack the coloring additives and carbonation but have the sweeteners, preservatives and flavorings like the soft drinks.

not. Distillers may use water depending on the product being produced, but may also remove water. Distilled water is then added back to the product to reach a proof.¹²⁴ Beer and ales have water added to prepare the malt for fermentation. None of these products are really water (as water is discussed in this paper), although some water may be added in the manufacturing process. The water is personal property when added, but the character of the product is different.¹²⁵

3. Other Manufactured Products

It is very difficult to think of an industrial process that does not use water in some fashion. It is often used in multiple ways. Water is used as a cleaner, a lubricant, a carrier, and as part of the product produced.

E. Manufactured Water, Waste Water and Water as a Byproduct

In addition to water that is captured and sold as a product, water that is combined with other ingredients to make a product, and water that is destroyed by chemically combining with other constituents to become new substances or waste gases, it is now becoming economically feasible to manufacture water through a variety of processes. Water in the past has been manufactured as a byproduct of combustion or of chemical reactions. The water so manufactured is generally considered a waste product to be discharged, and is not manufactured in sufficient quantity to make its use or sale by the manufacturer practical. It is discharged into the air as a vapor or into waters of the state as waste water. Air quality standards apply to the vapor discharge and water quality standards apply to the discharge of liquid effluent.

124. The distilled spirit as it comes from the still is often close to pure ethyl alcohol (190 to 200 proof). Some is marketed at that strength, but most products are cut back to the 70 to 90 proof range for aging and marketing by adding back water.

125. Water may be listed as a component on some labels. Distilling may actually yield more water than is added to the beverage but bottling uses great quantities of water as the bottles must be cleaned and sterilized before the beverage is placed in them. A great deal of water used by a bottling plant is actually used for cleaning the bottles. This is a consumptive use. Formerly, recycled beverage bottles were cleaned and reused. This is no longer the case. Recycled bottles are now scrapped and remanufactured. They still must be cleaned for the plastic or glass to be reused. Given the entire cycle, it may be that more water is used in manufacturing, cleaning and disposing of the container than ends up in the bottle.

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 seawater¹²⁸ would seem to require the same certificates for appropriation and use as other state water of the same character unless appropriation occurs on another basis.¹²⁹ Salt water or brackish that occurs inland from

126. *Kinross Copper Corp. v. State*, 988 P.2d 400, 401 (Or. Ct. App. 1999). Plaintiff proposed to develop a large mine in the Santiam River Basin above Opal Creek. The area is scenic and environmentally sensitive. One senses that a purpose of the exercise may have been to force the government to purchase a mining claim that had significant obstacles to development into a viable commercial enterprise and that otherwise would be lost. Two obstacles to development were the lack of an approved water right and the lack of an NPDES permit. Plaintiff sought to overcome its lack of a water right by using its exempt right to appropriate up to 5000 gallons per day under ORS 537.545(1)(f), but it had no ready answer for the lack of the point source discharge permit required under 33 U.S.C. §1311 and 33 U.S.C. § 1342. The Plaintiff, on reconsideration, attempted to argue that the civil law right to discharge water onto the lands where it would naturally flow allowed it to discharge waste water into a stream without a permit. The Court of Appeals was not persuaded. It held that the right to pass water from a higher to a lower property concerned natural drainage and not the discharge of waste water. *Kinross*, 988 P.2d at 400-01.

127. OR. REV. STAT. § 537.110 (2009).

128. Here are the parameters for saline water: fresh water - less than 1,000 ppm; slightly saline water - from 1,000 ppm to 3,000 ppm; moderately saline water - from 3,000 ppm to 10,000 ppm; and, highly saline water - from 10,000 ppm to 35,000 ppm. Ocean water contains about 35,000 ppm of salt. U.S. GEOLOGICAL SURVEY, SALINE WATER, <http://ga.water.usgs.gov/edu/saline.html> (last visited May 08, 2011).

129. Salt water and brackish water are frequently encountered in oil and gas wells and extracted as an undesirable byproduct of production. The water is often contaminated with

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.¹³⁰ Oregon has no thermal power plants on its coast and is not considered a consumptive or a non-consumptive user of seawater.¹³¹ Oregon has no active large-scale desalinization plants. To the extent that seawater is captured and used in Oregon, that capture and use is unregulated. The term surface water is not defined in the Water Code. Case law definitions and descriptions of surface water do not include seawater and the Oregon Water Resources Department does not treat seawater as surface water available for appropriation.¹³² In the absence of statutory law on the subject, one returns to the common law. Common law principles and the Equal Footing Doctrine discussed above are sometimes cited to assert the states, acting as trustee, own the bed of the littoral sea out to a distance of three nautical miles. Case law calls that assertion into question. In the case of *United States v. California*,¹³³ the Supreme Court of the United States held that the states did not own the bed of the territorial sea on the basis of Equal Footing even if the land was included within the boundaries of the state at the time of its admission.¹³⁴ The territorial Sea was included within the boundaries of the State of Oregon in its admission act.¹³⁵ In 1953,

hydrocarbons either in the reservoir or during extraction. It is treated as waste water. See OR. ADMIN. R. 632-010-0192 (2011).

130. SALINE WATER USE, *supra* note 129.

131. *Id.*

132. See WATER RESOURCES DEPARTMENT, OREGON SURFACE WATER RESOURCES, http://www.oregon.gov/OWRD/SW/index.shtml#Surface_Water_Data (last visited May 08, 2011).

133. U.S. v. California, 332 U.S. 19 (1947).

134. *Id.* at 29-33.

135. Oregon Admission Acts § 11 Stat. 383 (1859):

That Oregon be, and she is hereby, received into the Union on an equal footing with the other States in all respects whatever, with the following boundaries: In order that the boundaries of the State may be known and established, it is hereby ordained and declared that the State of Oregon shall be bounded as follows, to wit: *Beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast, lying west and opposite the State, including all islands within the jurisdiction of the United States, to a point due west and*

the Congress passed the Submerged Lands Act,¹³⁶ which legislatively reversed the Supreme Court's holding. The grant to the states did not include water, although it included by specific reference almost everything else imaginable. The United States specifically reserved waterpower and the use of water for power.¹³⁷ Applying the principles of the common law discussed above, Oregon would seem to be the owner of the sea water over both submerged and submersible lands. Oregon at this point has no large-scale consumptive users of seawater and the amount of water available does not seem to be limited in any practical way. The common law of littoral rights is applicable.¹³⁸ Oregon has no statutes or rules that deal with the appropriation of seawater. To the extent that seawater is appropriated for consumptive use, it becomes personal property at the time of capture. It is worthy of note that seawater can be mined for the minerals that it contains. Mining seawater is an important industry in many parts of the world but not yet in Oregon.¹³⁹ The question of what becomes of the water when seawater is mined may become important. Current methods evaporate the water and return waste brines, if any, to the source. The difficulty with this regime in the case of large-scale operations is easy to comprehend.

opposite the middle of the north ship channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla-Walla, where the forty-sixth parallel of north latitude crosses said river; thence east, on said parallel, to the middle of the main channel of the Shoshones or Snake River; thence up the middle of the main channel of said river, to the mouth of the Owyhee River; thence due south, to the parallel of latitude forty-two degrees north; thence west, along said parallel, to the place of beginning, including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State.
(emphasis added).

136. 43 U.S.C. §§ 1301-1315 (2010).

137. *Id.* § 1301.

138. These differ slightly from riparian rights.

139. The most common form of mining of seawater in the extraction of sea salt (sodium chloride), which was one of the first recorded uses of seawater in Oregon. The United States Corps of Discovery, better known as the Lewis & Clark Expedition, established a temporary salt works near the site of the City of Seaside to replenish their supply of salt before returning overland to the United States in 1806. No salt works currently operate on the Oregon Coast. The United States has vast underground deposits of salt and also extracts salt and borax from inland lakes such as the Great Salt Lake. There is no current need to mine seawater to obtain minerals for domestic use but niche industries to produce sea salt for table use are becoming more common.

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 19th century, ice was harvested from lakes and ponds and stored for use as a refrigerant. Mechanical refrigeration has made this use of natural ice obsolete. Language in the case of *Guilliams v. Beaver Lake Club*¹⁴⁰ is dicta, but suggests that Oregon might consider the right to cut ice from a lake or stream to be a public right, with the ice then belonging to the one who cut it.

Water vapor in the air, like flowing water in stream, belongs to no one until captured. When captured, it reduces the overall water vapor available to others. Oregon appears to have no law concerning the ownership of water vapor in the air or of the air itself, but an equally legitimate, common law argument can be made for public ownership of the air and water vapor as can be made for the water of a flowing stream. The state does regulate what can be released and disbursed into the air, but does not regulate the appropriation of air or of the water vapor in it. Both the police power and the Common Law seem to provide adequate support for such regulation if it were considered necessary.

Then, there is the question of the ownership of snow and ice. By common law principles discussed above, the ownership of snow and ice belongs to the person on whose land it rests with. That person is free to sever it from the land and transfer it to another as personal property.¹⁴¹ One requires no right of

140. *Guilliams v. Beaver Lake Club*, 175 P 437, 442 (Or. 1918).

141. No Oregon case addresses this directly. *Gregory v. Rosenkrans*, 39 N.W. 378 (Wis. 1888) contains a very complete discourse on the ownership of ice that would seem to apply equally to snow. See *Inhabitants of West Roxbury v. Stoddard*, 7 Allen 158 (Mass. 1863) for

appropriation to allow the snow that falls on the fields (or the rain for that matter) to moisten the land for his crops. Our law does not permit the owner of a distant parcel to file for a water right and come upon the land of the proprietor to take away snow and ice.¹⁴² The water deposited on land by natural precipitation in the form of ice or snow is recognized de facto, if not de jure, as an important source of water stored in solid form, but it does not appear to be one of the sources of supply belonging to the public until the snow melts and finds its way to a flowing stream or other watercourse or becomes a part of the ground water.

While there are no cut ice cases in Oregon jurisprudence, there are such cases in states where Oregon has looked in the past for law concerning the navigability of streams and the rights of the public in them. Maine¹⁴³, Minnesota, Missouri and Pennsylvania

ice cut from lands subject to a public trust. The great ponds of Massachusetts are public and cutting ice from them was liberty.

142. *North Powder Mill. & Mercantile Co. v. Pacific Fruit Exp. Co.*, 198 P. 893 (Or. 1921) does not concern the cutting of ice but the diversion of water into a pond used for that purpose.

143. Maine has many things in common with western Oregon but is generally cooler. The use of Maine law as persuasive authority must be tempered with the understanding that Maine was a part of Massachusetts at the time of the Revolution and did not become a separate state until 1820 as part of the Missouri Compromise. Much of Maine's understanding of the Common Law became fixed during the 168 years that it was part of Massachusetts. Massachusetts Common law concerning property was heavily influence by its 1629 colonial charter and some very early statutes including the Body of Liberties (1641) and the Statute of 1647. The state dates its assumption of jurisdiction over what were Crown Lands in England to the Charter and the Body of Liberties and not to the American Revolution some 130 years later. The development of property law in New England and in Massachusetts in particular predated the Closing of the Commons in England under the Inclosure Acts starting in 1750. Many older Massachusetts cities and towns still have vestiges of common lands that are now generally used as public parks. In certain instances, town residents have free admission to common lands while nonresidents may pay a fee or be excluded. Other vestiges of this older law include the designation of great ponds in which the public has rights and in which the state has ownership of the soil. The great ponds are determined solely by the surface area of the water body. Public rights to bath, swim, skate, fish, fowl, boat or cut ice on the great ponds are a function of public ownership of the bed of the pond, but those rights cannot be said to stem from Crown ownership of the lands or from the ponds being navigable waters. I can find no Oregon law recognizing great ponds and no evidence of the existence of true commons in Oregon. The Oregon common law of real property appears to be the property law of a later date after which English Common Law pertaining to real property had undergone considerable reform and simplification. Lumbering, fishing and waterpower for mills and factories were important economic concerns that informed the development of the Common Law in the New England States. Oregon shares that with them. One looking to New England cases for authority concerning the rights of the public must be cautious to discern the source of the right and the source of the ownership of the land under the water. Citations to cases like *Inhabitants of West Roxbury*, 7 Allen at 158 and *Guilliams*, 90 Or. at 29 must be viewed with caution.

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 Title to the ice in the river and the right to remove it follows the title to the soil.¹⁴⁸

One who has the right to cut ice may not remove so much of the ice that it reduces the flow of the river and negatively impacts a lower riparian owner's use of the stream.¹⁴⁹ Even in the riparian rights states the principle of prior appropriation applies in the case of the harvest of ice.¹⁵⁰ The taking of ice has been compared to catching fish¹⁵¹ or severing crops. The courts of most of the states that have ruled on the subject consider the ice to be personal property once cut.¹⁵² A riparian owner or a member of the public exercising a common right to remove ice may not interfere with the flow of the stream or other characteristics of it to the detriment of another with a right to use the water.¹⁵³ There is some case authority from which one might infer that removal of ice is an appropriation of water in a riparian water rights state.¹⁵⁴

Maine does appear to recognize a Common Law right in the public to cut ice when the bed of a lake or river is publicly owned regardless of the manner in which the public acquired title.

144. *McFadden v. Haynes & De Witt Ice Co.*, 29 A. 1068 (Me. 1894). The reference to low water is a vestige of the Statute of 1647, by which Massachusetts granted the lands between high water and low water to the riparian and littoral proprietors.

145. *Id.*

146. *Charles C. Wilson & Son v. Harrisburg*, 77 A. 787 (Me. 1910).

147. *Id.* The language concerning natural condition is worthy of note. As a state with its water law based upon the doctrine of riparian rights, Maine guarantees the flow of the river so that depending on its stage a floatable river ought to remain floatable at that stage and above on a permanent basis. Oregon being a prior appropriation state does not guaranty in-stream flows which leaves open to question whether the public retains the rights in a floatable stream made not floatable by withdrawals.

148. *Id.*

149. *Barrett v. Rockport Ice Co.*, 24 A. 802 (Me. 1891).

150. *Id.*

151. *Wood v. Fowler*, 26 Kan. 682 (1882).

152. *Searle v. Gardner*, 13 A. 835 (Pa. 1888); *Rockport Ice Co.*, 24 A. at 802.

153. *Rockport Ice Co.*, 24 A. at 802; *Searle*, 13 A. at 835; *Sanborn v. People's Ice Co.*, 84 N.W. 641 (Minn. 1900).

154. *Sanborn*, 84 N.W. at 641. *But see Searle*, 13 A. at 835.

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 surrendering 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 abandons 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 required by a municipal ordinance or the disposal of it 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.

conceive of circumstances in which such a loss would occur. Once captured water is seldom retained for the long periods necessary to establish prescription or adverse possession.¹⁵⁷ Water rights may be lost and water rights may be gained by adverse possession. The cases concerning this are numerous, but it is the right to capture and use the water at a point of diversion that is gained or lost, and not the captured water itself.

VI. THE RIGHT OF CITIZENS TO USE WATER GENERALLY

The right of a person to use water after having obtained a water right under ORS Chapter 537 is adequately described in a great body of literature and is not the subject of this article, except as the Water Code impacts the ownership of water as property. There can be no question that the state has the right to regulate the use of water under the police power regardless of who owns the water. It cannot appropriate water that is physically owned as personal property without payment of just compensation. The nature of water and its uses suggest that physical ownership of it, except by the public, will be transitory. It will be consumed, destroyed or liberated.

It is said that the tie between water and land has been broken in Oregon. That is true only in the sense that the tie between the ownership of riparian land and the right to appropriate water from a particular stream is broken. Virtually all uses of water for which permits are allowed tie the use of the water to a physical location where it is to be used.¹⁵⁸ For individual citizens (except construction contractors), the right to own or occupy particular real property is a prerequisite to obtaining a water right. Thus, not every citizen has the right to apply for a water right under the Oregon Water Code.

Although members of the public as citizens have no right to the individual ownership of water except as a commodity purchase from someone with a right to capture by reason of a water right in

157. The exception to this statement would be that when water is a part of an estate in land and the water remains physically present for a sufficient period of time, title to it may be gained by adverse possession. This could occur with glacial ice or permafrost or perhaps with reservoir. The cycle of evaporation and precipitation together with percolation and absorption make it very difficult to establish the prescriptive period for the water itself apart from the land calling to mind Blackstone's observation that water is a species of land discussed above. Bottled water could be adversely possessed but it seems unlikely.

158. OR. REV. STAT. § 537.140 (2009).

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 an 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 1973¹⁶⁴ 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.

VII. UNITED NATIONS DECLARATION OF A HUMAN RIGHT TO DRINKING WATER

UN Draft Resolution 19.07.2010 was adopted July 28, 2010, by the Plenary Session of the 64th General Assembly, by a vote of 122 in favor. None opposed it and 41 abstained. The operative text of the document states, “the right to safe and clean drinking water and sanitation as a universal human right which is essential for the full enjoyment of the right to life and human dignity.”¹⁷⁰ Of the major Common Law countries, South Africa, Sri Lanka, India and Pakistan voted for the resolution. The United States, the United Kingdom, Canada, Ireland, Australia and New Zealand abstained. There did not seem to be an ideological divide based on the legal system of the nations concerned. Among Atlantic nations,¹⁷¹ Norway, Finland, Belgium, France, Germany, Italy, Spain and Portugal voted for the document. Canada, Denmark,

167. See *Micelli v. Andrus*, 120 P. 737, 741 (Or. 1912) (concerning ownership). The case postdates the 1909 Water Code and does not concern a diversion, but does illustrate that the doctrine of riparian rights continues to apply in Oregon regarding ownership issues.

168. This pattern was in part the result of typhus epidemics in the 19th Century, which caused cities to seek water sources away from human habitation. The production of water was one of the three original purposes of the National Forest Reservations.

169. See OR. REV. STAT. § 538.410 (2009).

170. See Human Rights Council Res. 15, Rep. of the Human Rights Council, 15th Sess., Sept. 24, 2010, A/HRC/15/L.14 (September 24, 2010), available at <http://www.ielrc.org/content/e1010.pdf>.

171. Original NATO members plus Ireland and Spain.

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 member of the human race enjoys because of the fact of being human and that the government has an obligation to provide safe and clean drinking water to all citizens regardless of income or status. Member states of the United Nations and the United Nations as an entity have an obligation to assist in making sure that the legal, financial and technical resources are made available to ensure that human rights are enjoyed by all. Neither the United States nor Oregon want for the financial or technical resources to make clean safe drinking water available to all citizens. Yet, the individual citizen of Oregon has no right to clean safe drinking water under Oregon's prior appropriation scheme or under the common law. The landless, now popularly referred to as the homeless, do not as citizens have either a property right in water or any realistic possibility of using the Water Code of 1909 to secure a reliable supply of clean drinking water. Much has been written in recent years about food insecurity, but virtually nothing has been said of drinking water insecurity.¹⁷² In cruel irony, homeless Oregonians have a legal right by reason of citizenship to navigate the waters of the state and to participate in the common fishery, but no legal right to drinking water for personal use.

The delivery model for drinking water in Oregon is one that calls for water to be sold to a customer at a fixed location for a price. In the absence of payment, water service is discontinued. It

172. The Senator Paul Simon Water for the Poor Act of 2005, Pub. L. No. 109-211, 120 Stat. 320 (2005), signed into law by President George W. Bush, concerns itself entirely with the development of sources of clean drinking water in poor Third World nations and says nothing about providing sources of clean drinking water for citizens of the United States.

is true that public drinking fountains are available in some municipalities as a convenience, but these are not suitable as 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. WHY DID THE COMMON LAW NOT DEVELOP A RIGHT TO WATER?

The answer to this question is a matter of speculation. A number of theories can be put forward and many of them are entirely reasonable. Some theories are even charming, if that word

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

In England during the formative years of the Common Law, drinking water was available from four sources. Those sources were flowing streams and springs, lakes and ponds, wells, and captured storm water. The Common Law is very much concerned with the ownership of things. Feudal influence over time reinforced concerns with ownership already a part of the base of custom on which the Common Law was developed. In addition to various forms of private ownership, the Common Law recognized that things that could not be confined in their natural state could not be owned by a particular person while they are in that state. Borrowing from “natural law” and Roman law, Bracton said:

By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea.¹⁷³

Slightly earlier in his treatise, he observed:

There is as well a third classification of things: some are common, others are public, others are the property of the universitas; some belong to no one, others, acquired for each by a causa of some kind, belong to individual persons.¹⁷⁴

In discussing wild things, Bracton observed:

By the jus gentium or natural law the dominion of things is acquired in many ways. First by taking possession of things that are owned by no one, [and do [not] now belong to the king by the civil law, no longer being common as before,] as wild beasts, birds and fish, that is, all the creatures born on the earth, in the sea or in the heavens, that is, in the air, no matter where they may be taken. When they are captured they begin to be mine, because they are forcibly kept in my custody, and by the same token, if they escape from it and recover their natural

173. BRACTON, *supra* note 5, at 39.

174. *Id.* at 41.

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] capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet : but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water. For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain, substantial property,¹⁷⁷ of which the law will take notice, and not of the other.

Here is the heart of the common law as it applies to water located under or over the land and not flowing off the premises of

175. *Id.* at 42.

176. *Id.*

177. 2 William Blackstone, *supra* note 18, at 18.

the land owner. The water is part of the real property and belongs to the proprietor as does the land. Thus, a well and the percolating ground water that supplies it belong to the owner of the land, as does a spring if its waters do not flow from the property and a pond located wholly on the property of the proprietor. Flowing water did not belong to the adjacent landowners, but they had a right to the flow and certain rights of appropriation. There is no hint in the common law that a person could not take water from a flowing stream to drink *if the person could get to the stream lawfully*.

Feudal custom and local law recognized the rights of local people to access and to take water from streams, ponds, springs and wells, but these rights were neither uniform nor universal. They could be recognized by the courts and locally enforced, but they were not a part of the common law.

Under the common law, water either belonged to a proprietor as a part of an estate in land or belonged to no one until captured. In such a legal regime, there was no room for an individual right to drinking water, which was ascendant over the right to private property, nor was one really needed. England was generally a well-watered land with some source of water available to those who required it. Water quality was a different matter. The English addressed the quality of drinking water in a different way; they made beer. Most bacterial pollutants cannot survive the brewing process. The most common beverage was referred to as small beer. It had a much lower alcohol content than beer consumed today as a recreational beverage. Various root and herb beers were also made in which the alcohol content was negligible. In the 17th and 18th Centuries, English dietary preferences shifted to tea and to coffee. Both of those beverages were prepared by boiling water, which also dealt with the bacterial pollution problems.

There was no driving societal force to push the common law to an individual right for drinking water, and the structure of the law did not develop in a way that would lead it in that direction absent a compelling need. Rights of the kind under discussion tend to develop in economies of scarcity to justly apportion scarce resources. During the formative periods of the common law, England, Canada and the United States east of the Mississippi were lands of abundance and not of scarcity.