

Obtaining and protecting water rights

BY STEVE SHROPSHIRE

WATER IS THE LIFEBLOOD of the nursery industry. Over our many years of working with the industry, we have encountered a variety of water-related issues, including several common issues impacting water availability and use.

As part of my legal practice, I often help clients with matters relating to water law. Here are five top conundrums irrigators might frequently encounter, as well as possible solutions:

1. Obtaining a new groundwater right

The Oregon Water Resources Department (OWRD) requires an irrigator to obtain a water right before using groundwater. Once in hand, the water right protects a landowner's right to use water according to the terms and conditions of the right.

Priority and availability. Oregon allocates groundwater using the prior appropriation system. In recent years, OWRD has adopted a conjunctive management approach, treating surface water and groundwater as an interconnected system. As a result, it has become very difficult to obtain a new groundwater right during the irrigation season, because most surface streams are already fully appropri-

ated to senior water rights holders.

Well location and impact on surface water. Conjunctive management focuses on whether the proposed groundwater use will have the potential to substantially interfere (PSI) with existing surface rights. OWRD evaluates PSI at least one mile from the proposed well in all directions. For this reason, new irrigation wells generally need to be located at least one mile from any surface stream.

Mitigation options. If a new well cannot be located more than one mile from a surface stream, it may be possible to mitigate for the theoretical impact that the well will have on the stream system. Mitigation may include pumping some groundwater into the impacted surface stream, releasing previously stored water, or acquiring and retiring senior surface rights.

2. Permits — proving up

When OWRD issues a permit, it contains the essential attributes of the water right, together with terms and conditions under which the water can be used. To perfect a permit, the landowner must hire a Certified Water Rights Examiner to file a claim of beneficial use, certifying that the landowner used the water for the permitted purpose in accordance with all the terms and conditions of the permit.

It is very important to be familiar with and to use water in compliance with the permit terms and conditions, including rate, duty, authorized well locations and authorized acreage. If the terms and conditions are not met, OWRD may diminish the water right — by cutting back the rate, duty or acreage — or cancel it altogether.

3. Water right transfers

A water right permit or certificate establishes the essential characteristics of the water right. This includes the location of the point of diversion/appropriation and the location of the irrigated acreage. In order to use that water right on a different property, OWRD must approve a water right transfer.

OWRD must grant a transfer if the new proposed use will draw water from the same source as the original water right and if the change will not result in injury to existing water rights (including instream rights).

The injury analysis can be a highly technical matter. Generally speaking, if the transfer will move the water use downstream or if it will move the point of diversion/appropriation more than a short distance, injury will be an issue.

However, it may be possible to challenge both the injury determination itself

The William L. Jess Dam, a huge flood-control and hydroelectric structure, blocks the Rogue River 157 miles from its mouth. PHOTO COURTESY OF WIKIPEDIA

and the impact of that injury. Additionally, it is often possible to mitigate the injury through the use of stored water, diversion reductions or instream flow leasing.

4. Non-use and forfeiture

If an irrigator fails to use a water right for five consecutive years, it is subject to forfeiture by operation of law. Partial forfeiture is also a possibility if only some acreage has been irrigated.

In the wake of the Great Recession, forfeiture is a frequent issue for nursery properties where production was reduced or stopped for a number of years. Any party considering a property purchase involving water rights should first verify historic use.

If possible, the purchaser should obtain a sworn statement from the seller attesting that the water right was put to

full use without interruption for more than five consecutive years. The law contains several exceptions to forfeiture, including certain cases of financial hardship (receivership or bankruptcy), but these are limited and may be difficult to prove.

5. Well sharing agreements

It is not uncommon to find a single well serving two properties. In this situation, it is important to have a well sharing agreement that clarifies the nature of the relationship between the parties.

At a minimum, a well sharing agreement should address topics such as easement rights for access to the well and for the delivery system; equipment ownership; allocation of cost and responsibility for maintenance, repair and replacement of the well and pump; water allocation during periods of shortage; liability alloca-

tion; and insurance.

Be vigilant!

When water is readily available, it is easy to take it for granted. But it is important to remain vigilant to make sure that you are protecting what you have by using it correctly. As climate change, environmental regulation and population growth impact water availability, this vigilance will be important to ensure secure future water supplies. ☺

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