AWWA PNWS Conference

"Water Right Lessons and Challenges in Washington, Oregon and Idaho"

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Water Solutions

Basic Principles of Western Water Law

- Doctrine of Prior Appropriation:
  - Right to water can be established only by putting water to beneficial use
  - First in time is first in right
- Riparian Rights Doctrine
  - Reasonable use/equal priority for riparian owners
- Codification of Prior Appropriation
  - Permitting system replaces prior appropriation and ends riparian doctrine
  - Ground water integration/exempt wells

Application Process

- Application, publication, investigation
- Protests and decisions – 4 part test
- Administrative appeals
- Development schedules – due diligence
- Certification based on beneficial use
  - Pumps and Pipes – inchoate rights
- Changes and Transfers

Attributes of a Water Right

- Quantity – instantaneous and annual limits, based on growth projections
- Place of Use/service area
- Point of Diversion/Withdrawal
- Purpose of Use
- Season of Use

Registration, Regulation and Relinquishment

- Registration of Claims (pre-Code rights)
- Use it or lose it
  - Common law abandonment – intent
  - Statutory relinquishment – exemptions
- Instream Flow Protection
  - Setting minimum flows and levels
  - Closing over-appropriated streams
  - Ground water in continuity

Municipal Uses and Growing Communities

- Growing communities doctrine
  - Differing treatment in statutes
  - Adequate for Future Demands (permit extensions and reasonable planning horizons)
- Land use integration
  - State standards vs. local planning
  - Concurrency requirements
- Water Use Efficiency/Conservation

The Washington Perspective

- Permit Exempt Wells
- Importance and Timing of Water Commitments (land use integration)
- Municipal Water Law and Appeal

Permit Exempt Wells

- No permit required for single or group domestic uses not exceeding 5,000 gallons per day. RCW 90.44.050
- Dep't of Ecology v. Campbell & Gwinn
  - Developer of 16-lot subdivision claimed exemption for one well on each of 16 lots
  - Court granted Department of Ecology declaratory relief that the subdivision was "one project" entitled to a single 5,000 gallon exempt well.

Permit Exempt Wells (cont.)

- Kittitas County Conservation v. Kittitas County
  - Whether counties must adopt regulations under GMA requiring disclosure of common ownership of multiple parcels (to avoid illegal use of multiple exempt wells)?
  - Growth Board held County required to adopt the regulation, although Ecology ultimately responsible for uses of permit exempt wells under Title 90
  - Superior Court held Growth Board lacked jurisdiction
  - On appeal to Supreme Court – stay tuned

Permit Exempt Wells (cont.)

- Ecology use of Watershed Basin Regulations to regulate uses of exempt wells
  - AGO 2009 No. 6
    - Ecology lacks authority to impose different limits on exempt withdrawals, such as single connection or in-home use only
    - Ecology's authority to withdraw waters from new appropriation applies to both permitted and permit-exempt uses
  - Kittitas County Rule and GW Exchange

Importance and Timing of Water Commitments

- Proof of adequate water supply needed at various stages of development
- JZ Knight v. City of Yelm
  - LUPA appeal of 5 prelim plat approvals for lack of proof of potable water supply
  - Superior court required prelim plat approval to be conditioned on showing available water rights for all lots before final plat approval
  - Court of Appeals reversal based on standing – no injury to plaintiff, and awarded attys fees to City
  - On appeal to Supreme Court

Municipal Water Law
Lummi Indian Nation v. Washington

- 2003 MWL governs water rights held by "municipal water suppliers":
  - Provides certainty and flexibility in the administration of municipal water rights
    - Protection of inchoate rights
    - Place of use = service area in water plans
    - Municipal Supplier defined
  - Requires municipal water suppliers to implement water use efficiency and conservation measures

Municipal Water Law
Lummi Indian Nation v. Washington

- 2006 - Consolidated Facial Constitutional Challenge:
  - “Pumps and Pipes” Provision
  - Definitions of “municipal water supply purposes” and “municipal water supplier”
  - Connection and Population Provisions
  - Place of Use Provision

Municipal Water Law
Lummi Indian Nation v. Washington

- Plaintiffs' Legal Theories
  - Separation of Powers
    - Various provision retroactively overrule Court decision in *Theodoratus* or make "legislative determinations of adjudicative facts"
  - Substantive Due Process
    - Retroactive expansion of municipal water rights to detriment of junior water rights (zero sum)
  - Procedural Due Process
    - Procedural safeguards eliminated

Municipal Water Law
Lummi Indian Nation v. Washington

- Trial Court – Summary Judgment Order
  - Definitions and Pumps and Pipes provisions violate separation of powers
  - No decision on substantive due process
  - No violation of procedural due process
- All parties appealed to Supreme Court

Municipal Water Law
Lummi Indian Nation v. Washington

- Supreme Court – Unanimous 9-0 Opinion
  - Upheld MWL against all facial constitutional challenges
  - “Not a Performing Bear” – rejected extrapolation argument that *Theodoratus* was overruled
  - Court set a high bar for challenging corrective legislation – “no set of circumstances” test
  - Substantive due process – alleged harm too speculative
  - Procedural due process – harm is indirect and other safeguards exist

Municipal Water Law
Lummi Indian Nation v. Washington

- Potential remaining issues:
  - "As applied" challenges demonstrating impact to vested rights
  - Operation of MWS definition re relinquishment – particularly for small system consolidations
  - Ecology's "Active Compliance" issue

An Oregon Perspective

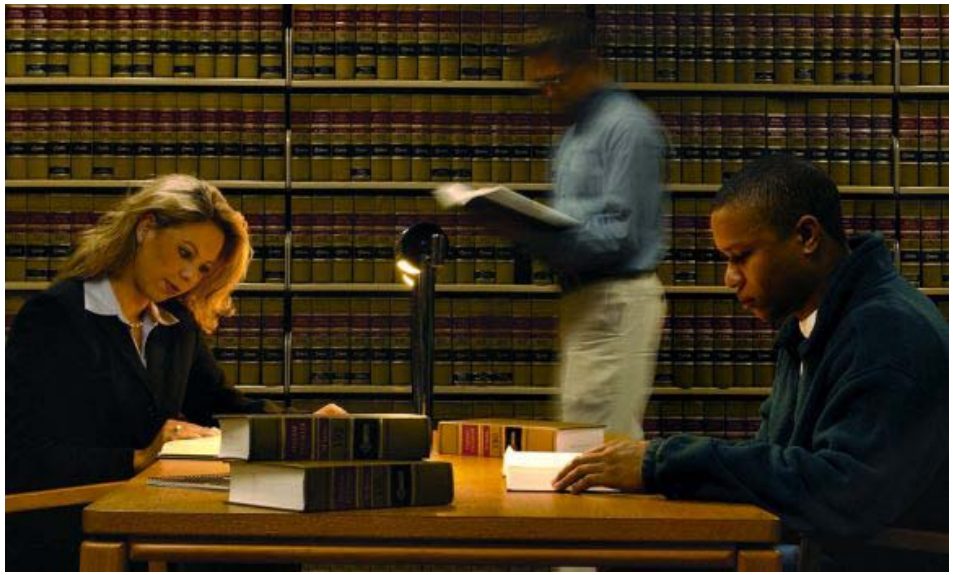
Protecting Your Water Rights

Old Way:

An Oregon Perspective

Protecting Your Water Right

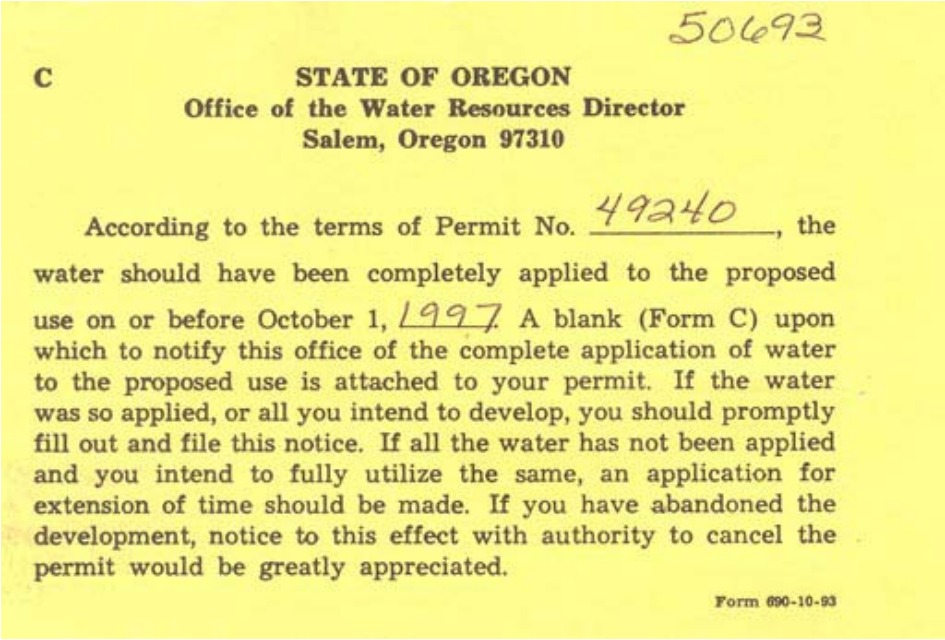
New Way:



An Oregon Perspective

Water Right Permit Extension Paperwork

Old Way:



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C

STATE OF OREGON
Office of the Water Resources Director
Salem, Oregon 97310

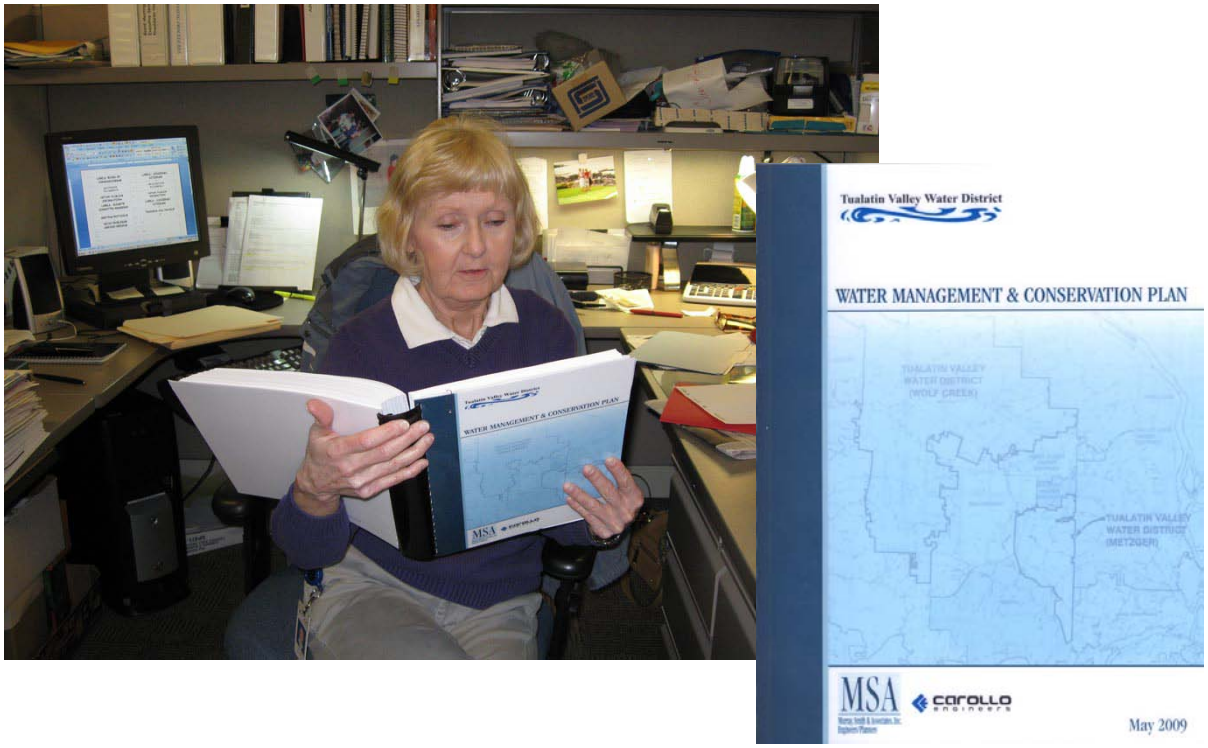
According to the terms of Permit No. 49240, the water should have been completely applied to the proposed use on or before October 1, 1997. A blank (Form C) upon which to notify this office of the complete application of water to the proposed use is attached to your permit. If the water was so applied, or all you intend to develop, you should promptly fill out and file this notice. If all the water has not been applied and you intend to fully utilize the same, an application for extension of time should be made. If you have abandoned the development, notice to this effect with authority to cancel the permit would be greatly appreciated.

Form 690-10-93

An Oregon Perspective

Water Right Permit Extension Paperwork

New Way:



Twists on the Doctrine of Prior Appropriation

- Allocating the Water
  - Given in 20 year increments
  - Water Mgmt and Conservation Plans
- Permit Extension “reopeners”
  - Flow targets driven by fish needs
  - Defacto leapfroging of priority dates
- Multi-purpose uses

Meeting Water Needs

- Duty to Serve
- Move to Storage
  - Protection of Peak Flows
- Transfers
- Cooperation

Future Challenges

- Determining how much is needed
- Public Interest
- Peak Flows
- Fish Persistence
- Reliability and Redundancy

Idaho Perspectives – Two New Considerations for Municipal Water Rights

1. Conjunctive Administration is Coming
2. Other water users provide out-of-the-box opportunities for municipalities

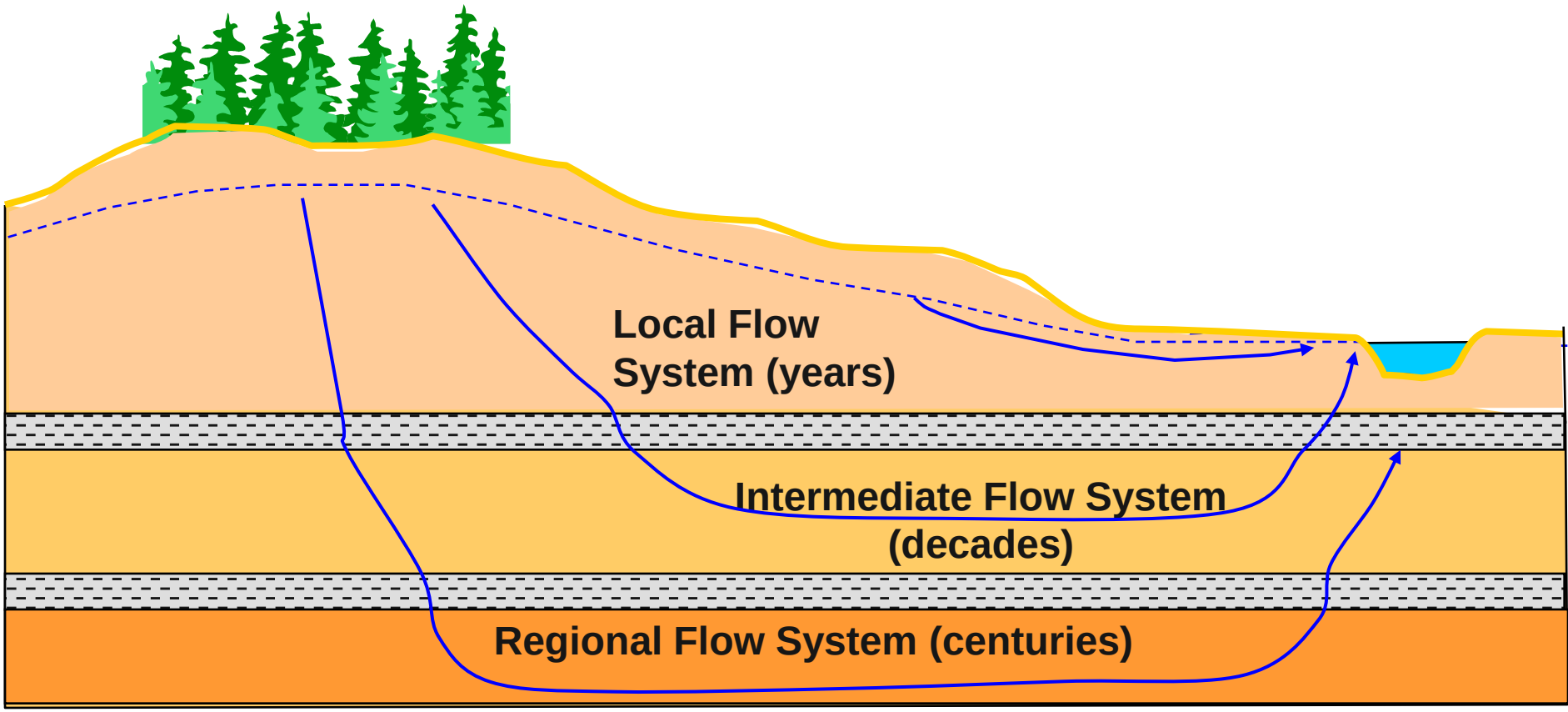
Prediction...

Relative to water delivery in many basins in Idaho...

Change

is coming
between now and 2020

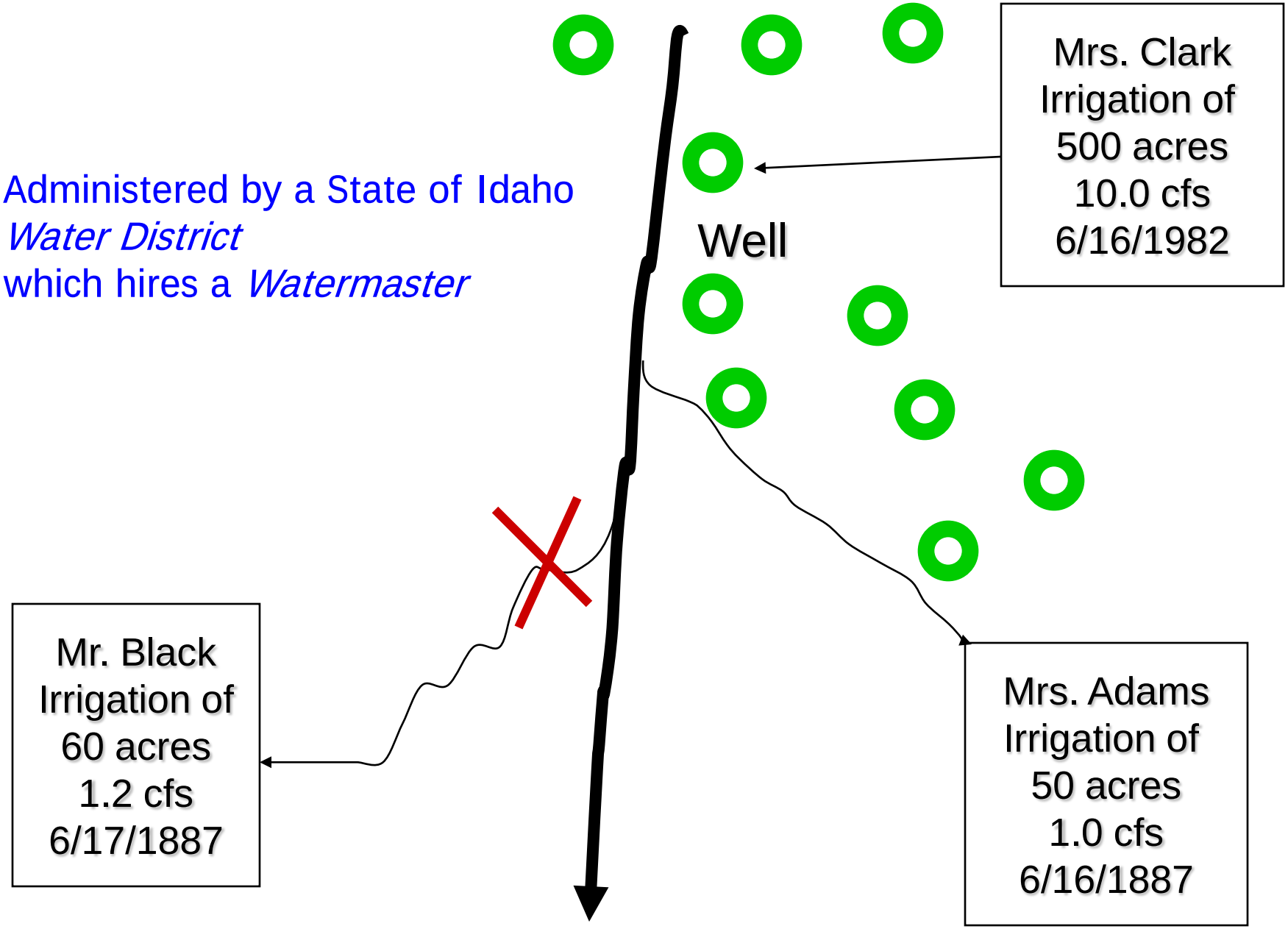
Ground Water Flow Systems



Why consider conjunctive relationships between ground water and surface water?

In Idaho the *appropriation doctrine* is used for the delivery both surface water rights and ground water rights—

"first in time is first in right"



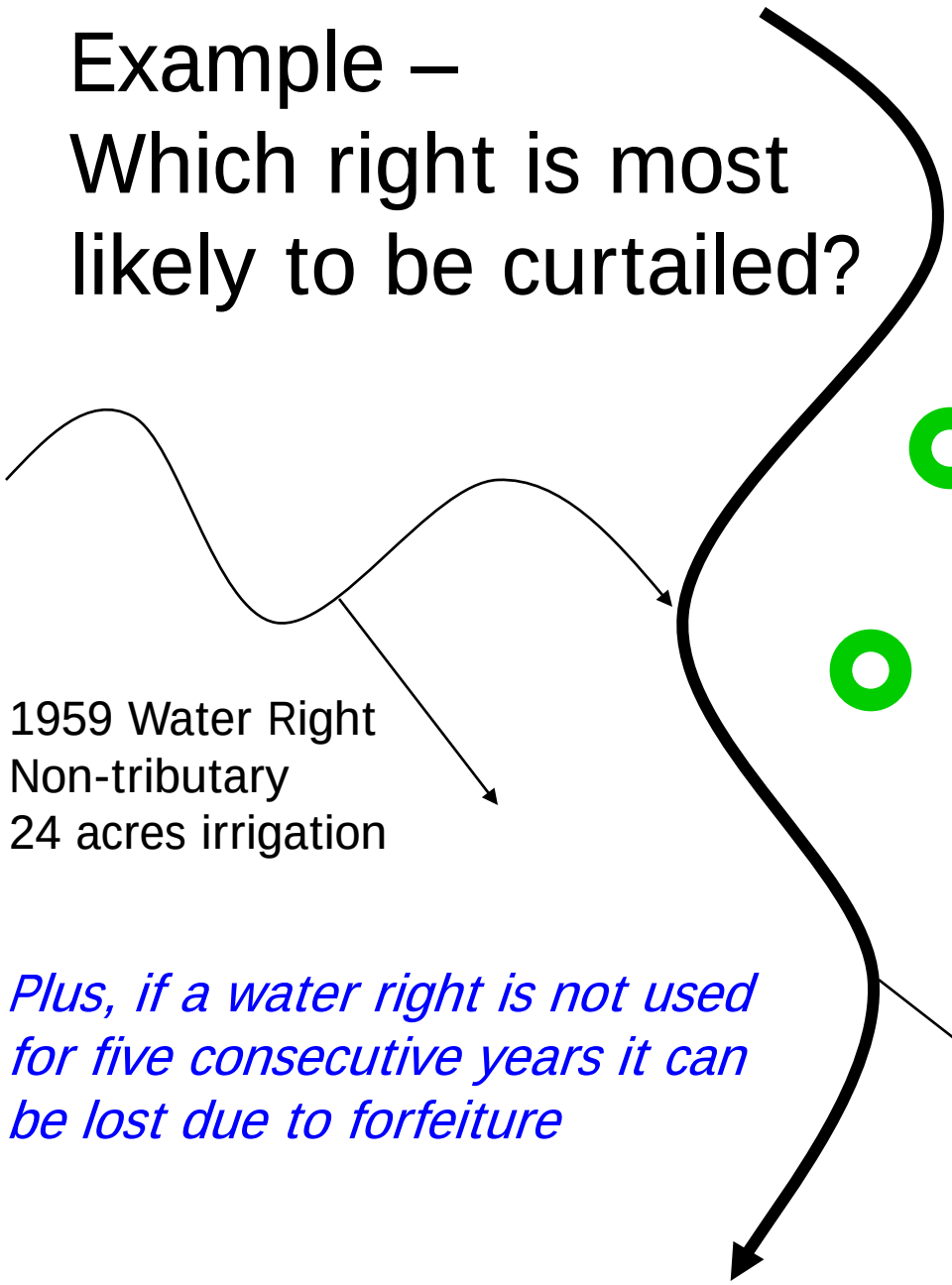
1 miner's inch = .02 cubic feet per second = 9 gallons per minute

Example – Which right is most likely to be curtailed?

Scenario 1 – during 2010

Scenario 2 – during 2014

Scenario 3 – during 2020



1954 Water Right
Ground Water
City of Ketchum, Municipal

1956 Water Right
Ground Water
½ acre lawn irrigation

1959 Water Right
Non-tributary
24 acres irrigation

1886 Water Right
Big Wood River
32 acres Irrigation

Plus, if a water right is not used for five consecutive years it can be lost due to forfeiture

Boise River Daily Flows (USGS Data)

Thinking Outside the Box to address the Phosphorus Problem in the Boise River -- Hypothesis

1. Reduction of high P drainage flows in the lower Boise River will reduce non-point source P loads
2. Installation of automation on the Treasure Valley irrigation systems will reduce drainage flows
3. Be prepared to see some P reduction options in the nutrient trading program

Automation

Thank You