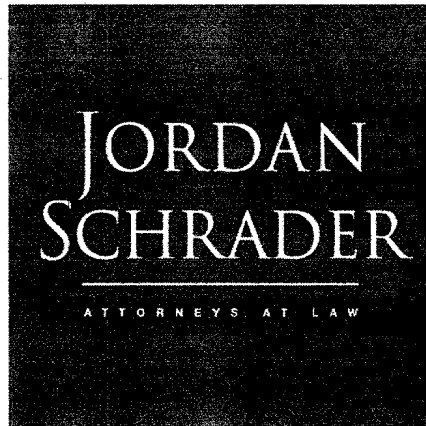


**SAND CASTLE OR MUD PIE?**  
**THE INTERSECTION OF WATER LAW**  
**AND**  
**LAND USE LAW IN OREGON**

by  
**Steven L. Shropshire**



Jordan Schrader PC  
Two Centerpointe Drive, Sixth Floor  
Lake Oswego, Oregon 97035  
503.598.5583

*Initially printed in the Oregon State Bar  
Environmental & Natural Resources Section Outlook newsletter, Vol. 5, No. 3 (Fall 2004)*

## **Introduction**

In recent years, water scarcity has increasingly affected growth and development in our state. Examples include: the Water Resources Department's (WRD) recognition that Deschutes Basin ground water supply and surface water supplies are hydrologically connected, together with the resulting implementation of new ground water mitigation rules; increasing attention to development-related ground water impacts in the Willamette Basin; and WRD's promulgation of new statewide rules requiring public water suppliers to prepare and maintain water management and conservation plans. Such developments have heightened public understanding, particularly west of the Cascades, that Oregon does not have a limitless water supply.

Oregon's legislature has addressed water and growth through two separate statutory schemes—the water code and the land use code. This article provides a brief glimpse at a developing body of law at the point where these laws intersect.

## **Water Code**

Since 1909, the State of Oregon has had a comprehensive water code governing the use of surface water in the state. A parallel ground water code was adopted in 1955. Taken as a whole, the water code establishes a regulatory scheme under which the Oregon Water Resources Department (WRD) exercises comprehensive jurisdiction over the use of the state's waters.

## **Land Use Laws**

It is, however, not exclusive jurisdiction. In 1973 the Oregon legislature passed Senate Bill 100, creating our present day land use system. The laws and regulations that have developed under that system primarily seek to regulate land in a traditional sense. But, on a secondary level, Oregon's land use laws also govern natural resources—including water. The land use laws require WRD to make decisions in a manner that complies with statewide planning goals and is compatible with comprehensive plans. ORS 197.180(1). In addition, the laws contain provisions obligating local governments to account for water resources in their land use decisions.

## **Oregon Water Resources Department State Agency Coordination Program**

Consequently, when it comes to water resources, the legislature has given concurrent jurisdiction and regulatory responsibility to both WRD and the Department of Land Conservation and Development (DLCD). To avoid an unseemly collision at this intersection of land use law and water law, the two agencies have attempted to balance their competing mandates by adopting rules under the state agency coordination program.

In 1990, the Water Resources Commission adopted administrative rules that outline WRD's State Agency Coordination Program (SAC Program). *See generally*, OAR 690, Division 5. This program acknowledges that land use and water management are related. Both statewide planning goals and state water laws require responsible government entities to take steps to protect the public interest in the waters of the state. OAR 690-005-0020(1). In recognition of this interrelationship, WRD's Division 5 rules for the SAC Program require that the WRD programs affecting land use be carried out in compliance with Statewide Planning Goals (OAR 690-005-0030) and Acknowledged Comprehensive Plans (OAR 690-005-0035).

## **Local Government Coordination on Water Resources Issues**

The effort to coordinate the regulation of the state's water resources is also carried out at the local government level. Local governments must adopt comprehensive plans that are consistent with the statewide planning goals. Many of those goals have a water resources component, including: Goal 5 – Natural Resources; Goal 6 – Air, Water & Land Quality; and Goal 11 – Public Facilities and Services.

## **Water Availability Protection Ordinances**

Local governments also have a specific statutory obligation to consider the protection of water resources when formulating their comprehensive plans. ORS 197.015(5). Most jurisdictions implement

this requirement by including water protection and availability requirements in their development codes. Occasionally these provisions are raised in challenges to local decisions by petitioners before the state Land Use Board of Appeals (LUBA).

*Cases of interest:*

- *Paddock v. Yamhill County*, LUBA No. 2003-042, *aff'd without opinion* Or. Ct. App. No. A122127 (October 8, 2003) (Yamhill County land division ordinance does not require consideration of impacts on the water supplies of adjacent properties).
- *Helvetia Community Association v. Washington County*, 31 Or. LUBA 446 (1996) (County's findings adequately responded to WRD concerns about potential ground water overdraft where the findings included a remedy—restriction to one or two acre lots—that limited development less than the challenged decision).
- *Kirkpatrick v. Jackson County*, 22 Or LUBA 3 (1991) (County's approval of a nine-lot subdivision overturned where the county failed to consider the impact of increased ground water pumping on surrounding properties).
- *Harcourt v. Marion County*, 33 Or. LUBA 400 (1997) (County's approval of rural-residential subdivision overturned where County failed to find adequate water was available to serve proposed subdivision).
- *Durig v. Washington County*, 40 Or LUBA 1 (2001) (upholding County's approval of seasonal farmworker housing construction in an EFU zone where applicant demonstrated adequate water supply existed to support the development and ground water withdrawals would not have an adverse impact on surrounding properties).

Some jurisdictions take the additional step of regulating ground water resources beyond simply requiring a finding of availability. For example, Marion County has taken the extraordinary step of adopting a Sensitive Ground Water Overlay Zone. For development proposed within the overlay zone, land division applicants must provide a hydrogeologic report. Other requirements include a notation on all deeds that the property is located within a sensitive ground water area in which water supply may be limited. This requirement also includes significant irrigation restrictions on properties located within the area of greatest sensitivity. *See* Marion County Planning Code sections 181.010 *et seq.*

### **Irrigation District/Special District Coordination on Water Resources Issues**

Special districts providing water service also must comply with the coordinated planning mandate under Oregon law. They must comply with statewide planning goals, and carry out their programs in accordance with acknowledged local plans. ORS 195.020. Further, under ORS 195.060 – 195.080, certain special districts providing urban services must enter into cooperative agreements that coordinate planning activities and development application review between all city, county and service districts providing urban services within an urban growth boundary.

### **Special District Subdivision Conflicts**

Urban development of vacant lands within a special district frequently involves converting irrigated agricultural land to an urban use. Generally, this means the irrigation water supplied by the special district is no longer needed, raising two primary issues. First, until the subdivision is excluded from the district through a formal process, the lands remain subject to assessments regardless of whether they are still receiving water. Second, such development often creates conflicts with district delivery facilities, requiring relocation or piping of those facilities. In such circumstances it is important for both the special district and the developer to communicate at the outset about the quality of materials or workmanship the district will require in the relocation of the facility, and how the district approval process works.

### **Land Use Tools for Addressing Water Concerns**

In addition to the many tools available to WRD for monitoring and regulating the state's water resources, there are several land use tools available to local governments. A sampling of these tools is listed below.

- Regulatory tools
  - Goal 5 significance designation
  - Water supply ordinances
  - Minimum lot sizes
  - Deed notification requirements
  - Hydrologic study requirements
  - Landscaping and irrigation restrictions
  
- Non-Regulatory Tools
  - Monitoring
  - Education
  - Conservation
  - Alternative supply

### **Circumstances of Note for Attorneys**

There are a number of circumstances which are likely to give rise to the complications discussed above. Attorneys should be aware of these situations because of the many pitfalls inherent to a regulatory environment where multiple local and state government entities exercise concurrent jurisdiction. Three such circumstances that have spawned a significant number of LUBA or appellate court cases are rural-residential subdivisions (referenced above), aggregate mine siting, and destination resort siting.

#### *Cases of interest:*

- *Eugene Sand and Gravel, Inc. v. Lane County*, LUBA No. 2002-068, *aff'd*. 189 Or. App. 21, 74 P.3d 1085 (2003) (County's rejection of proposed aggregate operation due in part to anticipated ground water impacts was appropriate).
- *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002) (County properly denied mining application where operation could result in risk of increased turbidity to the Molalla River).
- *Bouman v. Jackson County*, 23 Or. LUBA 628 (1992) (County properly permitted destination resort despite challenges based on inadequate legal and physical availability of water supply).
- *Wetherell v. Douglas County*, 44 Or. LUBA 745 (2003) (County's approval of a destination resort and subdivision plat requires only substantial evidence that the applicant is *not precluded* from obtaining the necessary water use permits as a matter of law).

### **Conclusion**

Water is not yet a constraining factor for growth in most urban areas in Oregon. But that day is coming. In the last decade several cities in the relatively wet Willamette Valley have enacted temporary building moratoria due to water supply shortages. In addition, several public water suppliers across the state are actively seeking to develop new water sources to serve a rapidly expanding population. Water supplies needed for development outside urban growth boundaries are already tight, and new supplies are becoming more difficult to obtain. As a result, water availability is increasingly becoming a limiting factor for new growth.

Historically water availability has been only a minor factor in most land use decisions despite the statutory requirements mentioned above. It is typically up to opponents to raise concerns on an case-by-case basis. If state and local government officials do not begin paying closer attention to these issues when faced with land use decisions, the resulting water supply crises could lead to economic, environmental and regulatory uncertainty that ultimately hurts all Oregonians.

*Steve Shropshire is a shareholder at Jordan Schrader PC, where he practices water and natural resources law. For more information contact Steve at 503.598.5583 or [steve.shropshire@jordanschrader.com](mailto:steve.shropshire@jordanschrader.com).*