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Water Right Adjudications: Filing Your “Vested” Claim & Obtaining a Favorable Decreed Water Right

Laura Schroeder & Therese Ure

May 13, 2020

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Presentation Outline

- Water Codes
 - History & Pre-code Water Rights
- Adjudications
 - Initiation, claims, & evidence
- Decrees
 - Components, elements, & finalization
- Important deadlines





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Water Codes in OR & NV



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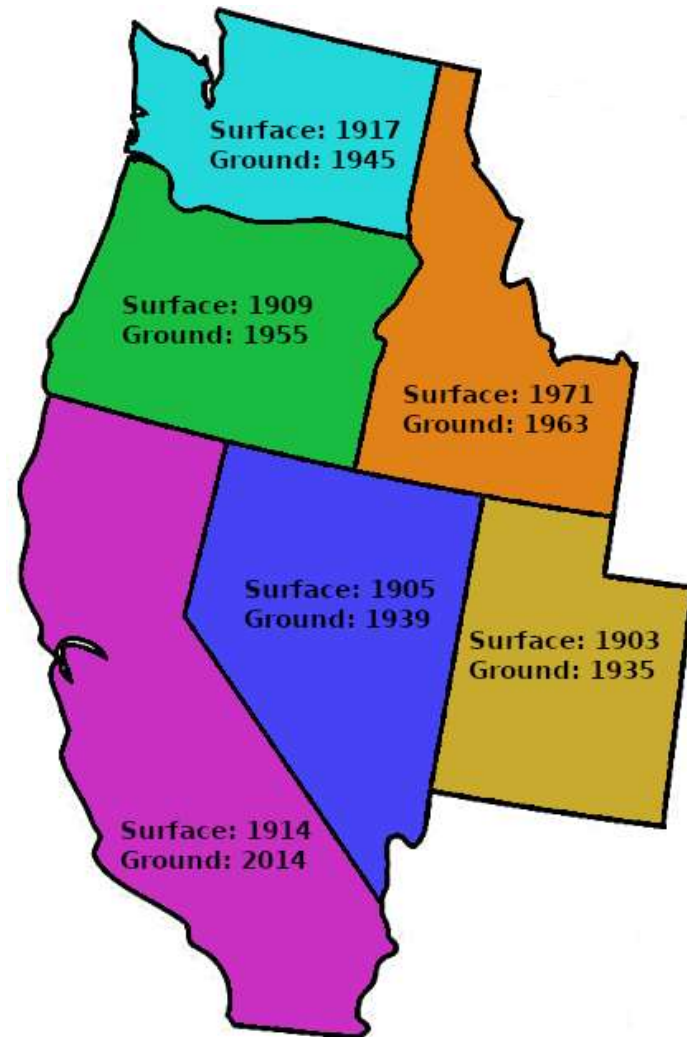
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Surface & Ground Water Codes





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Oregon Water Code History



- 1859: Oregon Statehood
- 1800s-1909: Common law riparianism & prior appropriation rights
 - See, e.g. *Williams v. Altnow*, 51 Or. 275 (1908)
- 1909: Oregon adopts surface water code
- 1955: Oregon adopts groundwater code

The constitution of Oregon contains no provisions directly relating to the diversion and use of water from public streams. No administrative machinery for distributing public waters to those entitled thereto, was available until the adoption of what is commonly called the "Water Code," on February 24, 1909.



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Oregon's 1909 Water Rights Act

- Public ownership
 - All water within state from all sources of water supply belongs to public. ORS 537.110
- Right of appropriation; vested rights protected
 - Subject to existing rights...all waters... may be appropriated for beneficial use, as provided in the Water Rights Act & not otherwise; but nothing ...shall be so construed to take away or impair vested right of any person to any water or use of any water. ORS 537.120



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Nevada Water Code History

- 1864: Nevada Statehood
 - Prior appropriation only (except 1872-1885)
 - See *Jones v. Adams*, 19 Nev. 78 (1885) (overruling *Vansickle v. Haines*, 7 Nev. 249 (1872))
- 1890s: Adjudications of common law rights
- 1903: Nevada State Engineer is created
 - Created in response to Newlands Project
- 1905: Surface Water
- 1913: Comprehensive Water Code
 - Abandonment, rotation, vested right principles
- 1939: Groundwater added to Code



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Nevada's Water Code

- Public Ownership
 - Water of all sources... within boundaries of the State whether above or beneath the surface of the ground, belongs to the public
 - NRS 533.025
- Vested Rights Protected
 - Nothing...shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by...this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913
 - NRS 533.085



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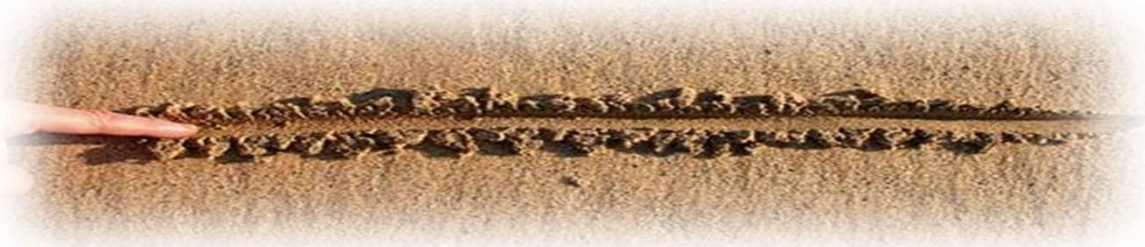
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Pre-Code vs Post-Code

- Pre-Code Water Rights (Vested):
 - Established under common law rules
 - Not necessarily recorded
 - Not enforceable
 - *Confirmed via adjudication of water rights*
- Post-Code Water Rights:
 - Established under water codes
 - State agency maintains records & enforces
 - *Obtained via permitting process*





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Adjudications (Pre-Code Process)

- **Court Directed Process w/ Agency Assistance**
 - Adjudications necessary to confirm existence of pre-code rights & place them in priority with later acquired rights of use





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OR - Initiation of Adjudication

- By water users or OWRD:
 - **ORS 539.021**
 - (1) Water Resources Director upon motion of director or, in discretion of director, upon receipt of petition from one or more appropriators of surface water from any natural watercourse shall make a determination of the relative rights of various claimants to waters of that watercourse
 - (2) If action brought in circuit court for determination of rights to use of water, the case may, in the discretion of the court, be transferred to the director for determination as provided in this chapter



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OR – Process w/ Agency Assistance

- Notification of potential vested water right holders
- Claims filed
- Field Investigations
- OWRD compiles preliminary order of determination
- Protests Filed
- OWRD conducts hearings on claims/protests
- OWRD submits determinations & proposed decree to circuit court
- Exceptions, amendments & Corrections Filed
- Decree issued by circuit court
- Appeals





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NV - Initiation of Adjudication

- Initiated by water users or State Engineer:
 - NRS 533.087
 - (1) Upon petition to State Engineer, signed by one or more water users of any stream or stream system, requesting determination of relative rights of various claimants to waters thereof, State Engineer shall. . . enter an order granting petition & shall make proper arrangements to proceed with such determination
 - (2) State Engineer shall, in the absence of such a petition requesting determination of relative rights, enter an order for determination of relative rights to the use of water of any stream selected by State Engineer. . .



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NV - Process

- Notification to potential vested users
- Vested “Proofs of Appropriation” filed
- Field Investigations
- NDWR prepares preliminary order of determination
- Objections filed
- NDWR holds objection hearings
- NDWR prepares order of determination
 - Filed with district court, akin to a complaint
- May file exceptions to order of determination, amendments & corrections
- Court prepares findings of fact, judicial decree
- *Appeals*

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA
PRELIMINARY ORDER OF DETERMINATION



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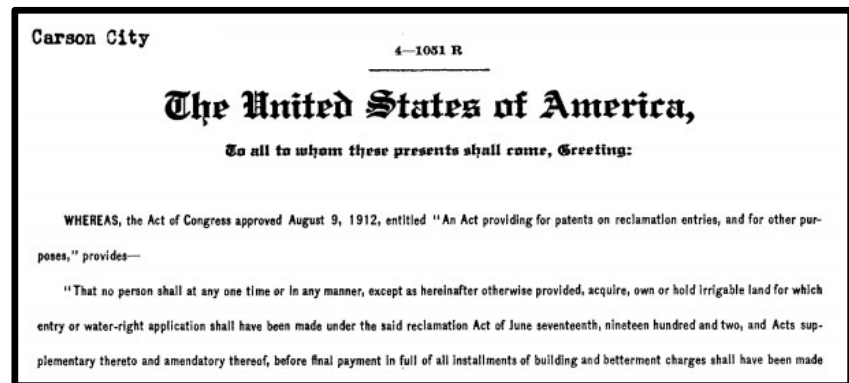
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Types of Evidence Considered

- National Archives & Records Admin.
- General Land Office records
- BLM Master Title Plats
- Tax records
- Census Reports
- Grazing Records
- Other
 - Newspapers, wills, diaries, etc



<https://www.water-law.com/water-rights-articles/nevada-water-rights/>



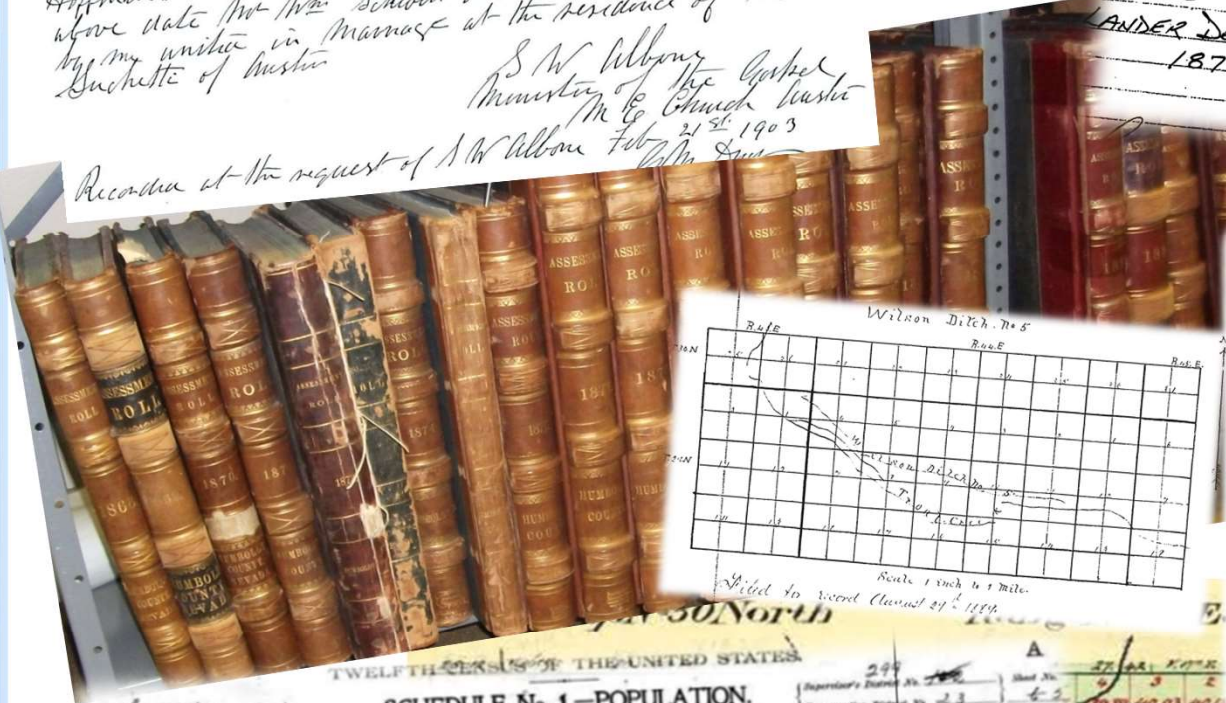
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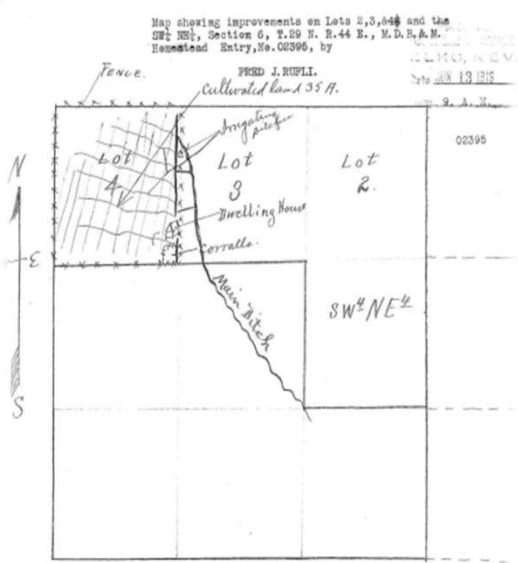
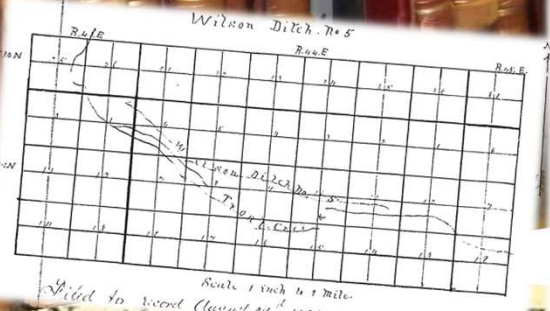
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county records

Schwinn }
 Hoffman }
 To whom it may concern
 This certifies that on
 Feb 20 1903
 above date Mr Wm Schwinn and Mrs L Hoffman were
 by my written in presence at the residence of Mr
 Buchette of Astoria
 S W Albion
 Minister of the Gospel
 M E Church Pastor
 Feb 21 1903
 Recorded at the request of S W Albion Feb 21 1903



Hughes Jas
 Expediture 3 Horrs
 1 Bag 7 Magons
 Mocheyers 300
 Access and on Ranch
 Also access grazing
 Land - House, Stable
 Enclosure
 LANDER DELINQUENT
 1878



TWELFTH CENSUS OF THE UNITED STATES

SCHEDULE No. 1.—POPULATION.

Enumerated by me on the 23 day of June, 1900, at Astoria, Oregon.

EDUCATION	SEX	RELATION	PERSONAL DESCRIPTION	SUPPORT			POPULATION	INDEX TO DISTRICT
				Male	Female	Total		
				61770	640	640	640	640
				61770	640	640	640	640
				61770	640	640	640	640

Improvements and expenditures for house, fence irrigating ditches amount to not less than \$2000.00

Fred J. Ruell.
 Sworn to and subscribed before me this 12th day of June, 1919.
 W. S. Commissioner.



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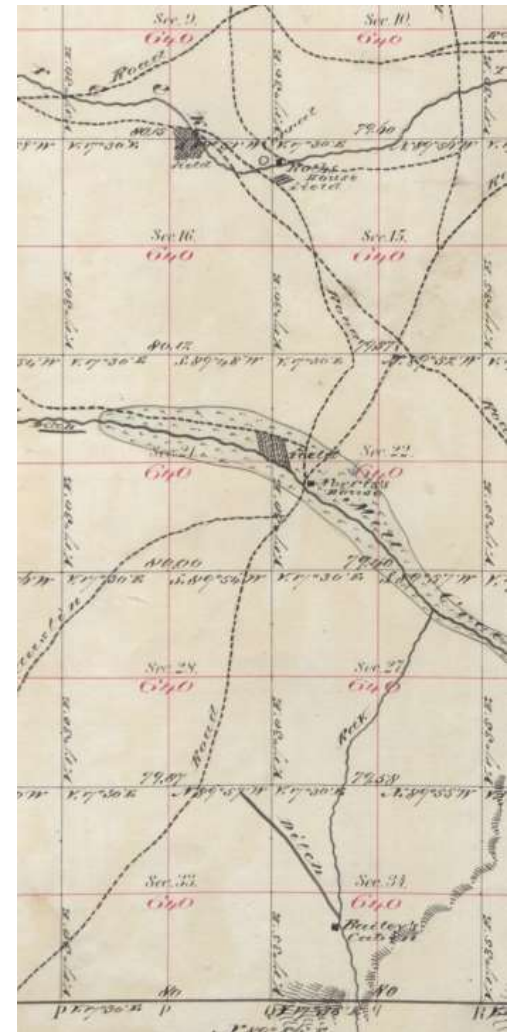
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Adjudication Issues

- Bureau of Reclamation Contracts
- Federal/Reserved Rights
- Treaties
- Public Water Reserves
- Validity:
 - Chain of (water) Title
 - Diligence & continued beneficial use
- Scope:
 - Quantification (water right elements)





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Federalism Fun Fact!

- Federal/reserved water rights do not need to be claimed (sovereign immunity)
- McCarren Amendment (1952)
 - US waives sovereign immunity for water issues
- Tribal & other Fed. Claims must be filed in state-law adjudications if noticed as McCarren proceeding





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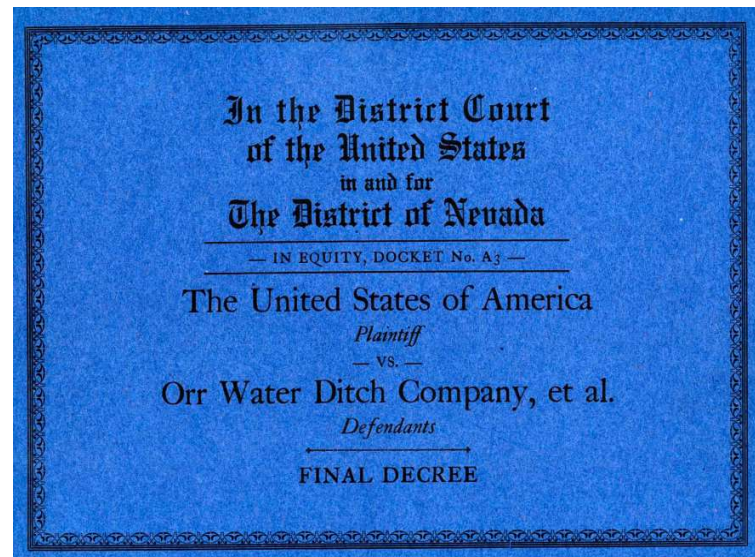
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Nevada Adjudications

- Federal Court
 - Truckee River (Orr Ditch)
 - Carson River (Alpine)
 - Walker River*
- State Court
 - Humboldt River (Bartlett)
 - Muddy River
 - Virgin River
 - Panaca Big Spring aka Meadow Valley Wash





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Adjudicated Areas in Nevada

Note Scope of Adjudications:

- Surface Water vs. Groundwater
- Adjudication Scope:
 - Stockwater included, or only irrigation?

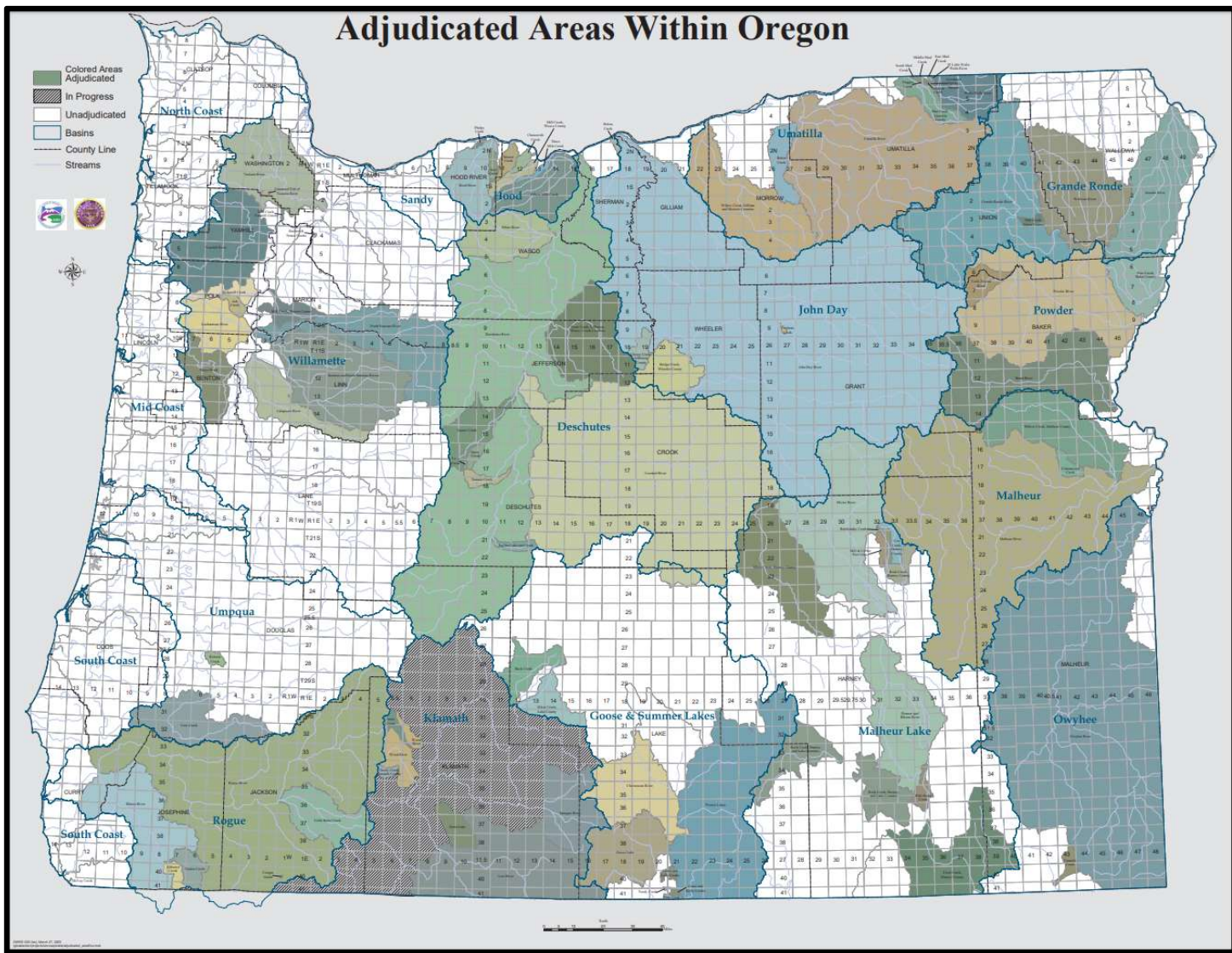




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Adjudicated Rights = Decreed Rights

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THE HUMBOLDT RIVER ADJUDICATION

Including:

THE BARTLETT DECREE
THE INTERVENING ORDERS
THE EDWARDS DECREE
THE LATER ORDERS
THE ALTERNATIVE WRIT OF PROHIBITION
IN CARPENTER v. DISTRICT COURT
and
DECISION OF THE SUPREME COURT

Compiled by GRAY MASHBURN, *Attorney-General*
and
W. T. MATHEWS, *Deputy Attorney-General*



CARSON CITY, NEVADA
STATE PRINTING OFFICE - JACK MCCARTHY, SUPERINTENDENT
1943



General Components of Decrees

- Findings of Fact
- Tabulation
- Season of use
- Incorporated agreements
- Distribution schemes

FINDINGS OF FACT.

1.

36.

That the irrigation season commences subsequent to the 1st of April of each year, and terminates before the 1st of November of each year, and the use of the waters herein involved for irrigation purposes is hereby confined to said season. That the right to the use of water for domestic and stock purposes continues throughout the year but during the irrigation season the waters diverted for irrigation purposes shall include the waters diverted for domestic and stock purposes.

Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	
Bauer, H. F. North Powder, Ore.	1892		6	Irrigation	Harrison	Wolf Creek
	1897		4	Irrigation	Center	Wolf Creek
	1887		6	Irrigation	Harrison	Wolf Creek
						16 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 3 T 6 S. R. 38 E. W. M. ✓



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Important Deadlines!

- **Nevada S.B. 270 (2017)**
 - Vested Claim Sunset Date
 - December 31, 2027
- **Oregon (ORS 539)**
 - Surface: December 31, 1992
 - Groundwater: August 3, 1958





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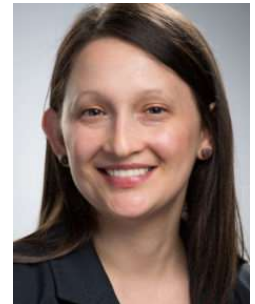
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COVID-19 Webinar Series

- Next week (May 20, 2020): “Elements of Water Right Online Research in Oregon, Nevada and Idaho” with Tara Jackson, Lisa Mae Gage, & Rachelq Harman
-
- All webinars will be available at:
 - www.water-law.com/webinars/
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- [Shipping in Pacific Northwest Halted Due to Cracked Barge Lock at Bonneville Dam](#) September 12, 2019
- [World Water Week 2019 is Here!](#) August 26, 2019
- [Final Revisions Due for Newlands Project Water Rights](#) August 8, 2019

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S.B. 98 Broadens Ability to Turn Wastewater into Renewable Natural Gas

Written October 2, 2019 by Rachel Harman

Categories: [Legislation](#), [Oregon](#), [Water law](#)

Tags: [biogas](#), [clean drinking water](#), [Clean Water Act](#), [conservation](#), [renewable natural gas](#), [rng](#), [wastewater](#), [water](#), [water law](#)



Starting September 29, 2019, natural gas providers in Oregon will have a new, renewable way of powering their customers' homes. Governor Kate Brown executed a new law at the end of July, 2019 allowing capture, treatment, and conversion of methane found in wastewater into renewable...

Wifi Through the Sewers in Anacortes

Written September 26, 2019 by Brian Fairbanks

Categories: [International](#), [Washington](#)

Tags: [international](#), [land use](#), [municipal water](#), [washington](#)



The city of Anacortes, WA, is making news by running part of its new fiber optic cable network through its water system. Brown and Caldwell's Water News for September 25, 2019, links to a report by KUOW News: "Wifi wires will run through water pipes..."



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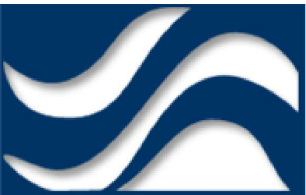
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