

Why Does the State Own All the Water?

By Fr. Timothy Michell

This past November, OAWU sponsored a course on Water Rights, conducted by Justin Gericke, a lawyer from Jordan Schrader law firm. The course was excellent, although printed copies of the copyrighted video slides were not given out for reference and review, as is normally done.

The presentation began with a statement from an early State Ordinance going back to 1909, proclaiming, “all water rights belong to the State”. “Just like the air”, Justin jokingly remarked. He then went on through the various kinds and types of water permits and certifications granted by the State Water Resources Department that controls all water rights in Oregon. You can check on your State water rights by going to the Water Resources Department web site: www.ord.state.or.us. No permit is needed by water systems using 15,000 gal. or less of water a day or who have three or less service connections.

SOMETHING DOESN'T “HOLD WATER”

There is something very wrong, though, with the State's claim to own all the water rights. That is equivalent to saying the State owns all the water, which is also equivalent to saying the State owns all the rain and snow that falls in Oregon to produce the water. That, of course, is absurd, just as it is absurd to say the State owns all the “sunlight” or, as Justin jokingly said, “the air”.

His remark was humorous, because absurdity is humorous – unless it is taken seriously, as in the case of the State claiming to own all water rights. That isn't funny. The 1909 State Legislature made a befuddled effort to address the question of water ownership and assure equitable use of the vast amount of water in the “public domain”, mainly in streams and rivers not on private property, but they failed to recognize and respect the rights of private ownership of water in the “private domain”.

DISCERNING PRIVATE AND PUBLIC DOMAINS

To discern the difference between water that is in the public domain and water in the private domain, I suggest a simple rule of thumb, namely:

- 1) If water is on private property, it is in the private domain of the property owner and belongs to the property owner, as long as it remains on his or her property, or is sold, like any other property asset (timber, mining, etc.).
- 2) Water that is not on private property is in the public domain.

That seems simple and reasonable enough. If rain falls on your private property, why isn't it your rainwater, as long as it remains on your property, in your private domain? How can the State claim ownership of rain that falls on your private property? That is silly, and so is the State Ordinance claiming ownership of all water rights. Rain/water may pass from your private property to a neighbor's property before it gets to a stream or river not on private property (public domain), but as long as the water is on private property, yours or your neighbor's, it is not the public domain.

MINERAL RIGHTS

Property mineral rights offer a parallel example. They can be owned and sold separately from the property itself. However, if you own the mineral rights on your property and find gold there, you own all the gold on your property. The State does not. If you find oil on your property, however deep, it still belongs to you and not the State. The same is true of natural gas. If you discover gas beneath your property, it is yours, not the State's, because you own the mineral rights to it. In fact, strictly speaking, the laws governing property mineral rights can apply just as well to the minerals in any water in/on your property also. Both surface and ground water have a variety of minerals in them that legally belong to you, as much as any other minerals on your property. Interesting.

EMINENT DOMAIN

To sum up, then, the 1909 State Legislature made a well intentioned, but poorly conceived claim of owning all water rights in the State. As said above, that is equivalent to saying the State owns all the rain and snow that falls to produce the water, which is nonsense. It is more than nonsense though, because it violates the constitutional rights of private ownership and dominion over one's own private domain by unnecessarily exercising eminent domain over the rights of citizens. We are all familiar with the exercise of eminent domain by the

State, for instance, when the State condemns private property in order to put a public freeway through part of a housing district, for the common good of the public. Such cases of eminent domain though, are very few, very restricted, well considered as a last resort, and fairly compensated for. The State Ordinance proclaiming all water rights belong to the State, however, is a general proclamation of eminent domain by the State. It is not restricted, not well considered, and gives no fair compensation for usurping private rights. It is, therefore, grossly unfair and quite unconstitutional. Such a serious mistake should be addressed and corrected by our present State Legislature. Rights to water on one's own private property, should be as much a property right as mineral rights are, not a condescending gift of the State.